

Employment Relations Policy & Legislation Teams

Department for the Economy

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Re: The 'Good Jobs' Employment Rights Bill Consultation

Dear Team,

FSB welcomes the opportunity to respond to this consultation. We trust you will find our contributions helpful and that they will be fully considered. FSB has around 165,000 members, including 6,000 in Northern Ireland. Our member base sits across all sectors of industry.

Our mission is to help self-employed, micro, small and medium sized businesses to achieve their ambitions. This means we want to create the optimum conditions for the greatest number of businesses to start up, and to ensure those businesses thrive.

To this end, our aim is to ensure policies, regulations and laws are fit for purpose, and are implemented with balance and fairness – helping businesses and their employees and attempting to create the conditions to achieve a dynamic and growing economy.

Overall

It is important to note at the outset of our response that we have consistently raised concerns with the Department about the timing of the consultation process. It was launched on 1 July at the start of the holiday period and there has been very limited awareness of the proposals or the consultation itself amongst businesses. FSB has sought to raise awareness within the SME sector and where this has been achieved, it is clear that small businesses are concerned by the scale of the proposed or potential changes within this consultation. We have consulted with members, non-members and a range of other stakeholders during the time available, including through a range of focus groups.

The Department's sense of urgency to commence the process was attributed to the scale of proposals they are hoping to take through the legislative process before the end of the current mandate in 2027. However, we have grave concerns about the Assembly making such extensive, far-reaching changes at such pace, and would highlight at this early stage the risk of limited consideration of the compounded impact of each proposal layered on top of the next. Accordingly, we recommend an ongoing process of extensive, structured engagement, updates and 'sense-checking' of proposals as the Department begins to evaluate responses - ensuring that evidence, balance and reasonableness remain at the core.

During the early Departmental business engagement process, FSB recommended use of impact assessments to ensure evidence was gathered and shared alongside proposals. This included the use of SAMBIT – the *Small and Micro Business Impact Test* - and we are encouraged that the

Department made efforts to scope and publish a series of impact assessments which recognised that “small and micro businesses may potentially find it more difficult to adapt to and comply with any new employment rights legislation”.

However, these impact assessments are quite limited in their detail and many of the possible scenario impacts – in particular, the potential cumulative burden of multiple new regulations – remain unexamined and/or unseen. For example, specific proposals in Theme C have no published impact assessments at all, despite the large impact these proposals could have. To this end, we very much view this consultation as a starting point in the process of evolving employment law and associated workplace regulation. We would also note that in various conversations with officials during the consultation period, little or no evidence has been provided to support the premise of existing problems or abuses in specific areas of employment which would justify the case for some of the reforms being proposed.

The following sections outline some considerations for each area of the consultation.

Proposals

This section comments specifically on proposals.

Theme A – Terms of Employment

Proposal: Replacing Zero Hours Contracts with contracts that provide flexibility and protect workers rights.

We understand and support the intent behind this proposal, which is to reduce the risk of one-sided, exploitative contracts for workers who do not have guaranteed hours. We therefore understand the aspiration to ban exclusivity clauses. However, we do not judge that it is appropriate to implement a ban on all zero hours contracts, as the flexibility offered in these kinds of contracts is essential in some sectors, such as hospitality and health, where work requirements can be variable and unpredictable. Furthermore, this type of flexibility is essential for certain workers such as students, those with caring responsibilities, and older workers so removing this type of flexible contract could risk these workers having to remove themselves from the labour market entirely.

Proposal: Understanding Employment Status and addressing Bogus Self-Employment

The aim of this proposal is to provide greater certainty for workers about the nature of the terms and conditions of their work. Again, FSB understands the intent of this proposal to ensure that workers do not miss out on employment protection rights where they may be deemed to be misclassified as self-employed. However, given that employment law is devolved, but tax law is not, deviating from GB practice on this matter could introduce complexity. Additionally, self-employment is a vital status for a great number of entrepreneurs, many of whom remain with such status for life, whilst others continue to develop their business into other corporate structures. The flexibility of self-employment is a very long-standing and vital part of a great tapestry of supply chains and service provision that make up our economy, so any intervention or reform risks creating unforeseen distortions.

Proposal: Employment Rights: Dismissal and Re-Engagement (Fire and Re-Hire)

Although there is currently no legal ban on the use of this practice in Northern Ireland, there are legal requirements that employers must fulfil in terms of timeframes relating to the notification of redundancy. Therefore, we do not see the need to legislate further on this matter, however, a statutory Code of Practice to set out the expectations of employers, such as is used in GB, could be a reasonable addition to reduce the risk of exploitative practices.

Proposal: Employment Rights: Redundancy – Offence of Failure to Notify

We support the current legislation regarding timeframes in relation to notification of redundancy. Given that that liability already exists with the employer corporately, we consider it unreasonable to introduce additional, personal liability, as this undermines the concept of 'limited liability' that is inherent in most incorporated entities. By extension, we would also be strongly opposed to disproportionate penalties which further disincentivise entrepreneurs from setting up and running businesses.

Proposal: Employment Rights: Written Statement of Particulars

It is reasonable that the right to a written statement of particulars should be extended to workers as well as employees as a day one right. Our members have highlighted to us that they generally do this already, despite it not being a legal requirement. However, we note that the consultation proposes some additional information to be added to these statements, which may not necessarily be known on day one. For example, the days of the week they are required to work, or possible variation in working hours. Accordingly, whilst supportive in principle of a right to a written statement of particulars from day one, we would strongly caution against making the requirement overly prescriptive.

Proposal: Agency Workers and Recruitment Agencies – Pay Between Assignment Contracts

The approach taken in GB to remove the Swedish Derogation loophole seems reasonable. We are aware of some FSB members in the recruitment sector in Northern Ireland who are already phasing out these kinds of contracts, so we don't foresee any additional burden being placed on businesses here, provided that an appropriate lead-in period is provided.

Proposal: Key Information Document for Agency Workers

Again, we are aware of recruitment agencies within our membership who already provide a key information document for agency workers on day one. Therefore, aligning with GB could be beneficial to workers whilst having a minimal impact on businesses here.

Proposal: Employment Agency Inspectorate Information Sharing

On face value, this seems like a reasonable, common-sense approach and feedback from members suggests that enabling these open information sharing gateways may actually reduce administrative burden on small recruitment agencies by removing the need for them to share the same information multiple times with different bodies.

Proposal: EAI Enforcement Powers: Labour Market Enforcement Undertakings and Orders

Again, on face value, this seems like a reasonable proposal and is in line with current GB regulations.

Theme B – Pay & Benefits

Proposal: Fair and Transparent Allocation of Tips, Gratuities and Service Charges

FSB agrees that tips should be passed on to employees in full and in a transparent manner. It therefore seems fair to adopt a similar approach to that in GB.

Proposal: Employment Rights: Payslips

It seems fair that the right to an itemised payslip should be extended to workers as well as employees. However, the implications of its operation, particularly on small businesses, should be tested and evaluated and smaller firms should be given adequate time to implement any changes. Furthermore, arrangements should be made so that digital payslips are deemed acceptable.

Proposal: Working Time Regulations: Holiday Pay Reference Period

Having consulted with members on this proposal, we find that this issue is more complicated than it may seem. By extending the reference period for holiday pay, we are advised that this could include additional, one-off payments such as bonuses, commission and/or overtime in the calculation which would distort the resulting holiday pay rate. Members indicated that should this proposed holiday reference period of 52 weeks be implemented, they may be forced to alter employee contracts to ensure that these types of additional payments, that sit outside of annual salaries, were not required to be included in the holiday pay calculation.

Furthermore, the issue with which small businesses were most concerned was the absence from the consultation of a proposal to create a 2 year back-stop period for holiday pay reference claims in NI. This is a major omission which has implications for all employers – public or private sector – but one where legal certainty could easily be established, as it has been in GB, and we would strongly recommend that this be adopted in the measures being taken forward by the Department.

Proposal: Working Time Regulations: Record Keeping Requirements

Employers in NI are currently required to keep records of staff working hours to comply with Working Time Regulations. In GB however, this is not required, as long as the employer is able to demonstrate adequate compliance with these regulations in other ways. We deduce that the approach taken in GB is fair and reasonable, and should be adopted here too to allow flexibility for small businesses, rather than unnecessarily increasing administrative and regulatory burdens.

Proposal: Working Time Regulations: Right to Disconnect

FSB is supportive of the right of workers to disconnect, recognising the positive impact that it can have on employees' mental health. However, we would question whether this needs to be addressed through legislation. In most cases, the right to disconnect can be achieved through company policy, or perhaps a code of practice such as that in place in ROI. Furthermore, if

legislation were to be introduced, it could complicate certain flexible contracts where workers need to be contactable, occasionally at short notice, to cover unpredictable work. The same is true for certain workers who work with colleagues or clients in different time zones. We therefore deem it sensible to proceed with a code of practice, rather than stringent regulation, as a one-size-fits-all approach risks creating legal jeopardy for businesses whose needs are different.

Theme C – Voice & Representation

Proposal: Workplace Access

FSB would not support an increase in workplace access rights for trade union officials. Currently, officials have access to workplaces in certain circumstances, for example to support an employee in discipline/grievance meetings. Additionally, a code of practice exists which provides information on trade union access to workplaces during periods when a union is seeking to be recognised by an employer, recommending a “common-sense approach”. We feel that this reflects an appropriate right of access to workplaces and that there is no need nor benefit to extending it.

Proposal: Collective Bargaining: Recognition

We would not support the proposal to reduce the threshold for statutory recognition of trade unions. Member feedback states that this would put smaller businesses under unfair and unnecessary pressure by trade unions, with some indicating that if this regulation were to be introduced, they would be forced to consider restructuring their businesses to obviate the risk of external interference. This would be counterproductive given the aim of this consultation is good job creation, rather than disincentivising business growth. Furthermore, the current threshold in GB is also 21, so it seems unwise to deviate from this.

Proposal: Collective Bargaining: Introduction of Collective Sectorial Bargaining

As with the above proposal on the recognition threshold, we would not support the introduction of collective sectorial bargaining. The aim of this proposal, as set out in the consultation, would be to set minimum sectoral standards on matters such as pay but, to an extent, this is already covered in Real and National Living Wage legislation, and businesses with 21 or more employees can have a recognised Trade Union for similar purposes. Furthermore, sectoral bargaining could lead to disaggregation in wage structures and put smaller and more remote businesses under severe and unacceptable financial pressure.

Proposal: Balloting and Notice

While we recognise the right to industrial action, we feel strongly that the period of notice required to be given to employers should not be reduced from the current timeframe of seven days. Rather, we would argue that this notice period should be increased to allow businesses time to prepare, given the huge impact that industrial action can have, very often well beyond the employer who is the direct subject of the action. It is also important to note that secondary impacts on other businesses in the supply chain and the wider economy can be more easily mitigated with increased notice, leading to reduced negative impacts for employees in those firms. This would also provide more time for negotiated resolution whilst the threat of strike action remains potent.

Proposal: Electronic Balloting

Our main concern regarding this proposal is how secure electronic balloting would work in practice. For example, who would be responsible for the cost of this new technology and how would it be adjudicated? Moreover, the time and cost associated with the postal voting system ensures that proposed industrial action is fully considered and votes are not requested without due cause and sound evidence. This has always operated as a valuable 'check and balance'. Currently in NI and GB, electronic voting is not in place due to potential flaws such as hacking, and we are not convinced that legislating to adopt it as a means of confirming support or otherwise for industrial action that has the very real potential to affect large numbers of businesses and their employees is appropriate nor sustained by evidence.

Proposal: Protections for Representatives

Trade union officials already have rights set out in law to paid time off when negotiating pay, terms and conditions, helping union members in disciplinary or grievance cases, and discussing other issues affecting trade union members. This combined with the lack of proposals in this consultation to address poor trade union behaviour leads us to the conclusion that to increase already existing protections for trade union officials would give them an unnecessary and unfair advantage over small employers and, as such, should not be taken forward.

Proposal: Protections for Employees Taking Part in Industrial Action

Similar to the proposal on increased protections for trade union officials, we would not support an increase in protections for employees taking part in industrial action beyond the 12-week protection period that already exists, in line with that in GB. While we agree that this protection period should rightfully be in place, to increase it would put employers at a disadvantage, and this should be avoided.

Proposal: Facilitating Productive Workplace Relationships

We recognise that implementing a code of practice regarding expected behaviours between trade unions and employers could be beneficial for both parties and seems a fair and reasonable way to proceed as opposed to introducing burdensome legislation. This code of practice should be based on the common interest of increasing business productivity and profitability, as exemplified in New Zealand, and should be incentive-based in the first instance.

Proposal: Information and Consultation: Definitions

We understand the intent behind this proposal to ensure that employees who work in large, multi-site businesses are not put at a disadvantage by struggling to meet ICE thresholds at individual worksites. However, FSB would recommend an exemption from this proposal for small and micro businesses to minimise the risk of a very small number of employees, rather than the majority, proceeding with an undertaking against their employer.

Proposal: Information and Consultation: Thresholds

Given that there is already an exemption for small and micro businesses, defined by Government as those businesses with fewer than 50 employees, we therefore judge that lowering the percentage from 10% to 2% will have minimal impact, subject to the 15-employee minimum remaining in place, as is the case in GB.

Proposal: Transfer of Undertakings Regulations

In order to simplify the process by which employers can consult with their employees on matters which may affect them, it seems sensible to adopt a similar approach to that in GB, which sees an exemption to the information and consultation aspect of TUPE for small and micro businesses, or any size of business that is transferring fewer than 10 employees.

Proposal: Public Interest Disclosure (whistleblowing): Annual Duty to Report

We understand the aim of this proposal is to allow for greater scrutiny and transparency of prescribed persons to ensure best practice standards. At the time of writing, we judge that this proposal is unlikely to have a significant effect on SMEs.

Theme D – Work-Life Balance

Proposal: Flexible Working

As this right to a statutory request already exists in NI we see that making the changes to fall in line with GB to two requests per 12 months would have minimal effect. However, it may be prudent to facilitate a probation period before enacting the right to request flexible working, as opposed to it being a day one right. The purpose of this would be to ensure the employee has an adequate opportunity to learn about the business and their role within it, so as to be clear about how their role might be delivered with flexibility, and also to facilitate the building of mutual trust between the employer, the employee and other colleagues.

Proposal: Carer's Leave

FSB understands that the intent behind this proposed legislation is to support employees in balancing their caring responsibilities with their work commitments. However, given the cumulative burden on SMEs in the last few years – such as with energy prices, less rates relief and now potentially having to accommodate multiple changes to employment law - we see it as unreasonable for employers also to be required to 'foot the bill' for carer's leave and do not believe that the employer should be required to provide paid leave in these circumstances.

We see the potential value that carer's leave carries in keeping those with caring responsibilities in the labour market, however, without Barnett consequential from GB, the Executive has to decide whether the potential disruption arising from facilitating the leave should be further compounded by making the employer pay for it. In the case of the public sector, this would be a new cost for which there seems to be no budget; in the case of the private sector, it risks turning a supportive initiative of flexibility towards an employee with certain demands upon them outside work, into a new, unwelcome and unfunded overhead for the business.

Proposal: Neonatal Care Leave and Pay

We see it as reasonable to copy across the same rules for this statutory leave as those which have been adopted in GB.

Proposal: Protection from Redundancy - Pregnancy and Family Leave

We see it as reasonable to follow GB to ensure protection from redundancy is inclusive of all family leave not just maternity. However, employers highlighted a potential unintended consequence with this proposal; should redundancies have to be made in a company, it places other employees who do not fall within this protection at increased risk of a form of unfair discrimination, in that it would only be those employees who were not benefitting from family leave who would be at risk of redundancy. Great care would need to be taken to enact any such extension of protection in a way that avoids creating a potential new legal jeopardy for employers.

Proposal: Paternity Leave

We support the proposed changes to how and when paternity leave is taken as it provides more flexibility for both the employer and employee. This may bring about an administrative burden, but we judge that this will be offset for small employers given there will be no additional cost for them due to their right to recover 103% of statutory paternity payments from the Government.

Conclusion

SMEs in NI employ more people than all large businesses and the entire public sector, combined. Therefore, an Employment Rights Bill can only be successful in its design and implementation if small businesses are at the core of its creation. If legislation is designed that is unbalanced, it risks working against the intended objective of good jobs. The Department should ensure this is a key consideration if it is to meet the aims of a competitive economy and increase the number of 'good jobs'.

We would also reiterate our concern that a great many businesses are unaware of the proposed consultation so would urge that input made after the formal closing date of the consultation is also afforded the same weight. We are also aware that a number of public sector employers feel unable to voice their own concerns – as employers – because they are funded by the Executive that is bringing forward proposals for reform. This risks the process being only partially informed and vital information and opinion being absent from the development of legislation.

We trust that this feedback is helpful. Please do not hesitate to contact us if you have any queries and we look forward to continuing engagement on this issue.

Yours faithfully,

Team FSB

For further information please contact: Roger.Pollen@fsb.org.uk