EMPLOYMENT LAWYERS ASSOCIATION

DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS CONSULTATION PAPER – BANNING EXCLUSIVITY CLAUSES: TACKLING AVOIDANCE

WORKING PARTY RESPONSE

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, chaired by David Widdowson was set up by the Legislative and Policy Committee of ELA to consider and comment on the questions posed in the consultation document "Banning Exclusivity Clauses: Tackling Avoidance".

In doing so, consideration was also given to the drafting of clause 139 of the Small Business, Enterprise and Employment Bill in implementing the proposed ban on exclusivity clauses in zero hours contracts (ZHCs). As noted in our response to the Government consultation document published in December 2013, the definition of ZHCs is critical to any legislative intervention. We have some concern over the definition set out in clause 139 of the Small Business, Enterprise and Employment Bill ("Bill") as this appears only to cover a very small number of contracts which might commonly be regarded as ZHCs. The consultation document itself – see, for example pages 4 and 6 – speaks in simple terms of ZHCs as being those where no work is guaranteed. The definition used in the Bill, however, appears to be much narrower and, as a result, although there appears to be a strong policy wish to remove exclusivity clauses, the practical effect of the proposed definition may be quite limited. We have therefore added some comments on this aspect in addition to responses to the specific questions posed in the consultation document.

Clause 139

Clause 139 of defines the term "zero hours contract".

The first limb of the definition (in section 27A(1)(a)) is not sufficiently clear. It reads

> "the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker".

This wording appears to proceed on the assumption that the worker must accept the work if it is offered, the conditionality being whether the employers does in fact offer work.

Obviously, if the clause was to only apply to contracts where the worker was obliged to accept work, but the employer was not obliged to offer work, this would dramatically restrict its application. We wonder whether this is the true intention, not least because, at least on the strength of the CIPD survey "Zero Hours Contracts: Myth and Reality", the number of contracts which impose such an obligation the worker is quite small – about 15% of those employers who use such ZHCs. In addition, avoidance would simply be achieved by the employer removing this obligation from the ZHC, leaving

him free to impose exclusivity clauses. As noted above, the references in the body of the consultation document appear to contemplate any contract where no hours are guaranteed and Question 2 also suggests that limiting the coverage of the definition to this limited category may not be the policy intention – see our comments below. Further, we understand from stakeholder meetings, that this may not be the intention but that what is intended is to capture all ZHCs, including those where the worker may choose not to accept work that is offered.

This should be clarified to avoid confusion and potential litigation.

Further, the reference to "no certainty of work" in section 27A(1)(b) of the Bill ("no certainty that any such work or services will be made available") is ambiguous. Does "no certainty of work" mean "no guarantee of work" as zero hours contracts have been widely understood to mean. If an employer agrees to provide an individual with a minimum number of hours' work per year, but in any given week the individual may get no work, is that "certainty of work"? What if it is certain that some work will be offered at some stage but the probability is that in most weeks there will be no certainty at all, or that some work will be offered initially but with no guarantee of any further work thereafter?

List of consultation questions

Question 1

In your opinion, how likely or unlikely is it that employers would seek to avoid a ban on exclusivity clauses in zero hours contracts?

- **Very Likely**
- **Likely**
- **Not Likely**
- **Not sure**

Response

Although the statistical evidence (see above) suggests that only a small number of employers impose exclusivity clauses on ZHC workers, it is our view that a minority of those employers will consider these restrictions are so necessary as to justify seeking to avoid the effect of the proposed ban. This may be overt, by continuing to use such clauses, or covert, for example by withholding work from those unwilling to solely commit to them.

Question 2

If you answered 'very likely' or 'likely' to question 1, how do you think employers would avoid a ban on exclusivity clauses?

- By offering a minimal number of guaranteed hours, for instance 1 hour a week
- By restricting the work opportunities of the individual because they have not made themselves available in the past or have taken on an additional job
- Don't know
- Other

Response

The most likely route to avoidance would be offering a minimal number of guaranteed hours. Restricting work opportunities to those who the employer knows have taken up work elsewhere would operate more as a penalty rather than avoidance although would nonetheless be likely to have the same effect in practice of discouraging ZHC employees from seeking work with other employers. Please see our suggestion below as to how this might be dealt with.

Please note also that the reference to those who "have not made themselves available in the past" would not, on our reading of clause 139, fall within the scope of the ban on exclusivity clause as they would not be working under a ZHC as defined – see our comments on clause 139 above.

Question 3

Should the Government seek to do more to deal with potential avoidance by employers of a ban on exclusivity clauses?

- **Yes**
- **No**
- **Not sure**

Response

In that the proposed legislation seeks to ban exclusivity clauses as being an unfair imposition on those workers who are engaged under ZHCs it would be desirable if the legislation were drafted so as to promote certainty and eliminate the availability of avoidance so far as is possible.

As noted above, the drafting of clause 139 appears to be limited to those contracts which impose a contractual obligation on the worker to accept work when offered. An obvious route to avoidance therefore is to draft contracts which do not impose that obligation. A broader category of ZHCs would be covered if the definition were changed.

Beyond that, we do not see that action short of legislation is likely to impact on those employers who wish to restrict their ZHC workers from working for another employer.

Question 4

If you answered 'yes to question 3, should the Government seek to do more now, or should it wait to see if there is evidence of employers avoiding the ban in practice to see whether further action is needed?

- **Do more now**
- **Wait to see if it is necessary**
- **Not sure**

Response

In the interests of legislative certainty it would be desirable to ensure the relevant clauses in the Bill are drafted as precisely and clearly as possible to achieve the policy objective. If it transpires that loopholes exist then these can be dealt with in the usual way by amending legislation although as always that is subject to parliamentary time being available. .

Question 5

If you answered 'yes' to question 3, what would be the best way for the Government to deal with a potential avoidance of a ban on exclusivity clauses?

- **A non-statutory code of practice, sharing best practice**
- **Through legislation**
- **Other (please provide details)**

Response

Leaving aside the obvious device of engaging workers on minimal guaranteed hours contracts, the most likely routes to avoidance are subjecting those ZHC workers who choose to work for other employers to various types of disadvantageous treatment, for example, discriminating by not offering hours. This could be dealt with by providing a right to ZHC workers not to be subjected to any detriment for accepting work from another employer whilst engaged on a ZHC contract. The drafting of clause 139 is absolute – there is no exception for where exclusivity is justified. Accordingly there could be no defence of objective justification for any detriment – once proved, liability would follow.

The sanction for inclusion of an exclusivity clause is limited to the clause being unenforceable. There is no penalty as such. If the above right not to be subjected to a detriment were to be included in the legislation it would require a penalty of some nature to be meaningful. That could be

- compensation on proof of loss
- a fixed sum similar to breach of the right to representation at disciplinary hearings
- a criminal sanction with a financial and/or custodial penalty

More broadly, ensuring that employers and workers are aware of employment rights in such situations, through the better availability of information and good practice guidance (as discussed during the initial consultation), could help address inadvertent avoidance. Focusing Government efforts on enforcement of rights, for example, the minimum wage and targeting particular sectors prone to bad practices, could help tackle intentional avoidance. No inspectorate is currently proposed in respect of ZHCs – if this function were to be given, for example, to HMRC as with the national minimum wage, that could provide an additional deterrent although the sanctions available to the inspecting agency would need to be addressed.

ELA is also aware that the issue of unscrupulous ZHC employers must be set against the context of other means of exploitation, such as false self-employment. The risk is that as, one exploitative practice is addressed, bad employers shift to another. Therefore, when deciding whether to do more, it is suggested the recent consultation on worker status launched by BIS should dovetail with this consultation on ZHCs, given the overlap of issues and the need for an integrated, holistic response.

Question 6

One way for employers to get around the ban on exclusivity clauses would be to provide employees with a contract for only a small number of guaranteed hours. The order making power allows the Government to address this by stipulating other parameters. If the Government were to use this power, which of the following do you think would be most effective in dealing with this kind of avoidance?

We consider that setting a pay rate threshold would be most effective. This would address the perceived unfairness caused by exclusivity clauses in preventing lower paid workers earning a living wage and would act as a strong indicator that exclusivity clauses in contracts for lower paid workers are considered inappropriate and unnecessary. Arguably the type of work being remunerated at a lower level will afford workers less access to confidential information and trade secrets (that being frequently put forward as the justification for exclusivity clauses), and in any case there are other ways of protecting such information. There will however be a potentially difficult choice to make as to where exactly the threshold should be set, and whether it should be pegged to rise e.g. with inflation.

Consideration may also be given to the proposal made in our response to the original consultation document on ZHCs earlier in the year in relation to the doctrine of restraint of trade. It is our view that the law relating to restraint of trade would be likely to be effective to render such clauses void in ZHCs save in limited cases where the employer could show that this was a reasonable means of protecting a legitimate interest - for example, senior employees who are in possession of confidential information. This might be used to discourage avoidance by means of minimal guaranteed hours contracts by providing for a rebuttable presumption that exclusivity clauses in contracts involving hours of, say, 10 hours a week or less are in restraint of trade.

Question 7

Stipulating other parameters in this way would mean banning exclusivity clauses in a wider group of contracts, not just technical Zero Hours Contracts. Would this create inflexibilities for employers or discourage them from creating jobs?

On the assumption that the proposal to ban exclusivity clauses is intended, as noted in our response to Question 6 above, to prevent unfairness by prohibiting exclusivity clauses for lower paid workers, we consider it unlikely that any such provision would create inflexibility or have the effect of discouraging employers from creating jobs. On the contrary, it may be that some employers may have to engage a wider pool of workers if they cannot rely exclusively on any one particular individual. The argument that restrictions of this nature operate as a discouragement to the creation of jobs is not easy to follow – if employers need additional workers they will hire them rather than pass up business opportunities.

Question 8

Employers who use zero hours and other flexible hours contracts can choose which workers they offer work to (as long as this does not constitute discrimination). Therefore employers could get round the ban by providing no work (or fewer opportunities) simply because an individual chooses to work for other employers.

Should there be consequences for employers who restrict work opportunities to individuals simply because they have taken work elsewhere?

If the intention is to provide for an effective ban of the use of exclusivity clauses then attempts to avoid the effects of such a ban would need to have sanctions attached otherwise the legislation will not meet the policy objective. As noted above, providing for a right not to be subjected to a detriment would be a means by which protection could be strengthened.

Question 9

If you answered yes to question 8, what should these sanctions be?

If the means selected is the detriment right suggested above then the sanction could be civil penalties or redress to ET allowing individuals to make a complaint. Criminal penalties, whilst stronger in nature (and so having a greater deterrence to avoidance), require different standards of proof which may be difficult to meet where an employer's intention is central to the issue to be decided, often requiring inferences to be drawn from the surrounding facts

An additional sanction that could be considered is a similar "class" award relief as is presently awarded where, for example, there is a breach of the consultation obligations under the Transfer of Undertakings (Protection of Employment) Regulations 2006 -. compensation will be ordered to be paid to "such descriptions of affected employees as may be specified", which reflects the class of employees in respect of whom there has been a failure to comply with the proposed new law (ie all those ZHC workers of a particular employer whose contracts include an exclusivity clause).

In addition it should be noted that, using the right to request flexible working arrangements, there is no reason why workers engaged on ZHCs could not request their employer to increase (rather than reduce) their working hours, and in this way achieve the outcome sought without incurring the costs of applying to the Employment Tribunals.

Question 10

The Government is legislating to render the use of exclusivity clauses unenforceable in zero hours contracts. This is covered in section 27A of clause 139. Are there any negative consequences as a result of the wording used?

Please see our response to Clause 139 above.

Question 11: If you answered yes, are the negative consequences for the employer or the individual?

The negative consequences could be for both the employer and the individual. In particular, if the wording in section 27A(3) is not amended and it is unlawful for employers to require workers to obtain prior consent before carrying out work elsewhere, even for legitimate business reasons, employers may choose not to use zero hours contracts since they would not be able to assess potential conflicts of interest and other risks where workers carry out work elsewhere. This could be to the disadvantage of both employers and those individuals (e.g. those working at a senior level) who prefer to enter into zero hours contracts due to the flexibility that such working arrangements provide, i.e. the possibility of being offered work but with no obligation to accept.

Members of the Working Party

Tim Adkin – 42 Bedford Row

Ann Bevitt – Morrison and Foerster

Raj Chahal – Trowers and Hamlins

Catharine Cooksley – Burges Salmon

Clare Fowler – Howells LLP

Kathryn Lloyd – Freshfields Bruckhaus Deringer

Ken Morrison – Kingston University

Gemma Murray – Slater Gordon

Clare Primett – NHS Wales

Michael Reed – Free Representation Unit

Tamsin Wallace – Eversheds

Tim Wetherell - UNISON

David Widdowson – Abbiss Cadres (Chair)

Jim Wright - DWF