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**BEIS consultation: one-sided flexibility –  
addressing unfair flexible working practices**

**Response from Employment Lawyers Association**

**10 October 2019**

## 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 in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly, in this consultation we do not address such issues. Further, given the membership of our organisation, it has not been possible to answer all questions in this consultation which were targeted directly at employer/employee representative bodies

ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

A working party chaired by Eleanor Mannion of MacRoberts LLP was set up by the Legislative and Policy Committee of ELA to respond to the above consultation document issued by BEIS. Members of the ELA working party are listed at the end of this paper.

### **Q1. If you are an employer or worker, what notice (if any), do you / your workers receive of your / their work? Does this vary by different types of work or worker?**

As a membership organisation, ELA is not in a position to answer this question.

### **Q2. How are work schedules currently organised or planned, and how are they currently recorded? Are you aware of best practice examples where work schedules are organised or recorded particularly well?**

As a membership organisation, ELA is not in a position to answer this question.

### **Q3. What would you define as 'reasonable notice' of work schedules? Does this vary between different types of work or contexts? And what working hours should be in scope?**

ELA considers that what is a 'reasonable notice' of work schedules is a difficult balance to strike between the interests of employers and employees. Some committee members are of the view that 7 days would be a reasonable period of notice whereas other members' view is that 1 month would be reasonable notice. Given the type of work usually undertaken on a flexible/ zero hours contracts, the majority of the committee considered that a notice period of more than 7 days would be unworkable in practice as it would be difficult in many sectors to plan staffing requirements with accuracy more than 1 week in advance.

We consider that what is 'reasonable notice' in the eyes of an employer may well vary between different types of work and sectors. As discussed at Question 6 below, certain sectors such as the Hospitality sector will likely argue that they should be permitted a shorter period of 'reasonable notice'. However, we are concerned that allowing such sectors greater flexibility in providing 'reasonable notice' could lead to continued detriment to employees in those sectors. Moreover, we consider that the introduction of greater protection in this area is particularly aimed at those sectors that are currently seen as the worst offenders in terms of giving reasonable notice of work schedules.

Therefore, to exclude these sectors or allow them greater flexibility may go against the reason for introducing these measures in the first place. The committee's view is that all working hours should be in scope under the new rules save for shifts that for unavoidable reasons can only be offered at short notice, so long as employees do not suffer any detriment should they refuse these short notice shifts.

**Q4. What impact (if any) would the introduction of the right to a reasonable notice of work schedules have on you (or those you represent)? How would existing practices change?**

Committee members representing employers comment that the introduction of the right to reasonable notice of work schedules will add an administrative and cost burden for employers in having to both ensure reasonable notice is given and implement a platform to ensure it is adequately recorded. Potential advantages of the introduction of the right to reasonable notice included:

- increased staff satisfaction and retention;
- encouraging a more diverse workforce and skill set by making work attractive to workers with dependents as notice will allow them to plan childcare etc; and
- improved staff planning leading to a more efficient and productive workforce.

**Q5. In your view, should the right to a reasonable notice of work schedules be something that is guaranteed from the start of someone's employment, or should an individual need to work for a certain amount of time before becoming eligible?**

- **Guaranteed from the start if someone's employment**
- **An individual needs to work for a certain amount of time before becoming eligible.**

**If so, how long?**

ELA considers that the right to reasonable notice of work schedules should be a Day 1 right. Not to do so would seem to go against the policy aims behind the introduction of reasonable notice.

Moreover, the committee commented that allowing employers a grace period before a worker is eligible for this protection, could lead to employers engaging individuals on a short-term basis and letting them go before they reach the qualifying period of time.

Again, this would seem to go against the policy aims behind the introduction of reasonable notice and the Good Work Plan overall.

**Q6. In your view, should Government set a single notice period for work schedules which applies across all employers, or should certain employers / sectors be allowed some degree of flexibility from a the "baseline" notice period set by Government? Which employers / sectors (if any) should be allowed some degree of flexibility?**

- **Government should set a single notice period that applies across all employers**
- **Certain employers / sectors should be allowed some degree of flexibility**

**Please explain your answer.**

As discussed at Question 3, ELA acknowledges that some sectors may argue that they should be allowed greater flexibility in terms of what is reasonable notice. However, we observed that this could allow these sectors to continue to exploit one sided flexibility and therefore, deny workers working in those sectors access to this additional protection.

One sector the committee discussed that potentially should be allowed a degree of flexibility is the emergency services, in particular, retained fire fighters.

The committee observed that a baseline notice period that employers should give as a minimum was likely to improve the position in relation to one sided flexibility but they should be encouraged to give longer notice wherever possible with a view to improving working practices overall. The idea behind this being that the baseline should be an 'absolute minimum' rather than a target.

**Q7. What would be an appropriate “baseline” notice period and degree of flexibility to you? How would this impact you, or those you represent?**

As set out at Question 3, we consider that a minimum notice period should be no less than 7 days. This is aligned to the payment period for many flexible workers and will help with forward planning in terms of anticipated income and childcare requirements.

It is also a period within which employers should be able to plan work schedule with a fairly high degree of accuracy.

**Q8. In your view, are there any instances where reasonable notice of a work schedule would not need to be given? If so, for which workers/types of work?**

In circumstances of sickness or exceptionally high/ unexpected demand, it will may not be possible for reasonable notice to be provided. ELA suggests that potential abuse of any exceptions to the right to reasonable notice could be appropriately policed with an accompanying right for a worker not to be subject to any detriment should he or she decline work offered at short notice. The committee considered which workers/types of work were most likely to be affected. Sectors where there is a significant and unpredictable fluctuation in demand such as the hospitality industry were identified as being least likely to be able to comply with the right to reasonable notice. Often work schedules for zero hours staff are dictated by bookings. If a booking is made at short notice, additional staff will be required and reasonable notice may not be practicable.

Also sectors subject to high staff turnover and poor attendance may struggle to meet the requirement for reasonable notice when seeking to cover shifts at short notice. ELA comments that staff turnover and absence issues may improve with the implementation of the Good Work Plan making it easier in the long term for employers to accurately predict staffing levels sufficiently in advance to provide reasonable notice in the majority of cases.

**Q.9 How do you think a reasonable notice of work schedule would be recorded?**

ELA suggests that the most likely way of achieving this is with the support of technology. Staff portals, scheduling apps, online HR systems and centralised text/email alerts are likely to be the only

effective medium to ensure that staff are notified sufficiently in advance of their work schedule to meet the reasonable notice obligation. Such applications will also provide the employer with a record that the obligation has been met should there be a dispute or compliance audit. Traditional methods of notification, such as work rotas displayed on a notice board, were considered by the committee to be insufficient in a modern workplace. It is feasible that a zero hour's worker may not attend their place of work on a sufficiently regular basis for the notice board to provide reasonable or effective notice. Consideration would need to be given as to how any staff without access to a smartphone or computer would be notified and records kept.

**Q.10 What impact, if any, would the requirement of recording work schedules have on you (or those you represent) and how you organise work?**

ELA suggests that with any increase in administrative requirements there is usually an increase in cost for the employer. Acquisition and implementation of work scheduling software is likely to require investment - at least in the short term. Increased staffing resource in HR/ administration may also be needed to plan effective work schedules in advance, notify staff and record that notice has been provided. There will be a cost associated with this unless such duties can be absorbed by the existing team. In the longer term, better advance planning of staffing needs due to the requirement to organise work and keep appropriate records that reasonable notice has been given could improve business efficiency and reduce unnecessary costs incurred by poor or reactive resource planning.

**Q.11 If the Government were to introduce the right to a reasonable notice of work schedule, what would be most useful for employers within the statutory guidance?**

ELA suggests that the following would be of assistances to employers:

- A preamble highlighting the benefits of ensuring workers are provided with reasonable notice
- Clarity on the baseline for reasonable notice
- Clarity on the circumstances where reasonable notice does not apply
- Clarity on the consequences of failing to provide reasonable notice – clear information about any penalties
- Clarity on the rights of workers who decline work offered whether provided with or without reasonable notice
- Examples of good and bad practice

**Q.12 What would an appropriate penalty be in the event of non-compliance (when workers are given reasonable notice of their work schedule, and / or if it is not recorded correctly?)**

ELA considers that any penalty should be proportionate to the worker's earnings and readily quantifiable. The committee felt that a fixed sum or compensation capped at a week's pay as defined under sections 221 to 229 of the ERA 1996 may be appropriate to give certainty to both employer and employee and to expedite the disposal of any ET claims. The committee felt that the calculation of the penalty needed to be straightforward and avoid any complicated assessment that could act as a barrier or require further judicial resource. The amount of the penalty will need to be sufficient to serve as a deterrent and to make it worthwhile for the worker to pursue without being unduly punitive. With regard to non-compliance with record keeping obligations, the committee considered whether this should mirror the sanctions applicable for non-compliance with the similar

duty imposed by NMW legislation. It was felt that this was perhaps disproportionate and queried who would enforce the non-compliance. “Naming and shaming” was also considered as a potential penalty akin to the sanctions for non-compliance with gender pay gap reporting. This could have commercial implications for employers if considered on tender applications, for example, particularly for service providers to the public sector.

**Q13. Are shifts or hours of work cancelled at short notice? Why? Are reasons provided to workers? Are these hours then replaced?**

- **Yes – shifts or hours of work are cancelled at short notice**
- **No – shifts or hours of work are NOT cancelled at short notice Please explain your answer.**

ELA is not in a position to answer this question as it is a membership organisation.

**Q14. How often are shifts or hours of work cancelled at short notice? Why?**

ELA is not in a position to answer this question as it is a membership organisation.

**Q15. What notice, if any, is provided before the shift or hours of work are cancelled? Does this vary at all?**

ELA is not in a position to answer this question as it is a membership organisation.

**Q16. Do you/workers receive compensation if shifts or hours of work are cancelled? If so, what compensation is provided?**

- **Yes – I / workers receive compensation if shifts or hours of work are cancelled**
- **No – I / workers DO NOT receive compensation if shifts or hours of work are cancelled**

**Please explain your answer.**

ELA is not in a position to answer this question as it is a membership organisation.

**Q17. Does this compensation vary by different types of work/worker? If so, how does this vary?**

- **Yes – compensation varies**
- **No – compensation DOES NOT vary**

**Please explain your answer**

ELA is not in a position to answer this question as it is a membership organisation.

**Q18. Are you aware of any best practice examples from other areas of industry where workers receive compensation for shifts or hours of work which are cancelled?**

ELA is not in a position to answer this question as it is a membership organisation.

**Q19- What impacts, both positive and negative, would this proposed policy have on you (or those you represent) (if any)?**

In respect of employers, from a negative perspective this is likely to be an increased financial burden and also an increased administrative burden. Positive impacts may include better employee

organisation and allocation of employee resources, and improved workforce stability and general wellbeing.

In respect of workers, from a negative perspective, if there is breach redress may only be available via the Tribunal (the proposal for enforcement isn't clear), which comes at a financial, emotional and time cost.

From a positive perspective, this is likely to provide an increased certainty on expected working patterns and wages. In the event of default the worker would have a right that they could enforce and receive compensation for.

Consideration needs to be given to enforcement, too. We would want to avoid placing an additional burden on the ET, where wait times are already considerable.

**Q20- Noting the three proposed options put forward by the LPC, if compensation were introduced for shifts or hours which are cancelled at short notice, what would you consider to be a 'fair' amount of compensation?**

- **The value of the shift in question**
- **The worker's appropriate NMW rate multiplied by their scheduled number of hours that have been cancelled**
- **A multiple of the worker's appropriate NMW rate. If so, what multiple?**
- **Other. If so, please specify**

Should compensation be set at the value of the shift in question, or the number of scheduled hours that have been cancelled, there is a risk of hours not being properly scheduled to minimise compensation that may be payable and workers having hours under allocated, leading to shifts being extended on the day.

It appears that a further amount of compensation should also be payable in the event of compensation not being paid within a certain time period, for example within 14 days. This would hopefully avoid placing an additional burden on the ET as employers would be incentivised to pay workers directly and swiftly. If the monies are not paid within the same pay packet as the cancelled shift this will inevitably cause a detriment for the worker still, as no certainty of income would exist still.

We suggest a sliding scale whereby if the shift is cancelled within, say, 48 hours of it starting, a % of the shift value should be paid. If the shift is cancelled with less than 24 hours of it starting, a higher % of the shift value should be paid. Shift value could also be subject to a de minimis level, to avoid under scheduling, perhaps equivalent to days annual leave calculation

**Q21.If compensation were introduced, what should be the cut-off point at which employers have to give their workers notice of a cancelled shift or hours (after which workers would become eligible for compensation)?**

This is quite difficult to assess as it will dependant on a number of factors and both employer and employee stakeholders will have a different view on what this cut-off point should be. However, we are aware that referring to reasonable notice, without providing a guide on what is reasonable, is likely to result in litigation on the concept of reasonableness.

In the Committee's view, it was clear that a cancellation at the time the shift was due to start or after the shift started would be eligible for compensation. The question of whether 24 hours' notice was a suitable cut-off point was debated. In contrast to providing reasonable notice of a work schedule, where increased need for staffing at the last minute may occur due to business demand or staff sickness/availability, it is expected that employer should have a fuller picture of the staff required for a particular shift so that cancellation is not a regular feature. A balance needs to be struck to ensure that the intention of this policy and legislation is complied with so that employers are not complying with their obligations to give reasonable notice of work schedules and then then cancelling shifts 24 hours beforehand, knowing that it will not incur a financial penalty.

**Q22.If Government were to implement a policy where the notice period for cancelling shifts or hours of work was longer than the amount of time you suggest above, what impact (if any) would this have on you (or those you represent)?**

ELA is not in a position to answer this question as it is a membership organisation.

**23.Should all types of employer, across all sectors, be expected to pay compensation?**

- **Yes – all employers should be expected to pay compensation**
- **No – NOT all employers should be expected to pay compensation**

**Please explain your answer.**

Yes. There is a concern that if exceptions are introduced, this will lead to a tiered system of rights for workers and employees who will have more/less beneficial employment rights depending on the sector in which they work. It may also lead to increased litigation as employers argue that they fall within an excepted sector. Without knowing the detail of the sector division, it is also possible that employers will exploit this and seek to establish themselves as carrying on business in a particular sector so as to avoid liability.

**24.Which workers, if any, should be exempt from receiving compensation?**

Despite our answer to Question 23, the Committee agreed that if an exception were to apply, it should only be to the emergency services including ambulance, paramedics, fire fighters and police given the practicalities of their jobs.

**25.In your view, should workers become eligible for compensation from the start of their employment, or should they become eligible after a certain amount of time?**

Further to our answer to Question 5, ELA is of the view that this should be a Day 1 right, reiterating the reasons for this as set out in our answer to Question 5.

**26.How should a policy to provide compensation for short notice shift cancellations be designed to best target workers who experience one-sided flexibility?**

As with any policies of this kind, a wide publication of the policy will assist in ensuring those who will benefit from the increased rights are aware of them. This should both in the traditional media and across social media platforms to capture the age groups who make up the majority of flexible/zero-



hours workers. It should be easy to read and comprehend and avoid overly technical detail or formulas.

**Q27. What could employers/employer representatives do to share best practice and drive change through their workforce?**

ELA is not in a position to answer this question as it is a membership organisation.

**ELA Working Party**

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