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**Department for Business Innovation and Skills Consultation  
Devolving Powers to Regulate Sunday Trading**

**Response from the Employment Lawyers Association**

**16 September 2015**

## **Employment Lawyers Association Response**

### **Department for Business Innovation and Skills Consultation Devolving Powers to Regulate Sunday Trading**

#### **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 Paul Statham was set up by the Legislative and Policy Committee of ELA to consider and comment on the consultation document on ballot thresholds in important public services. Its report is set out below.

All of the questions in the consultation paper ask for responses on matters of policy. Given ELA's role as an organisation of employment lawyers we have not commented on these but have restricted our response to the employment law implications if the Government decide to proceed and devolve decisions about Sunday trading rules to metro mayors and/or local authorities. We note in paragraph 1.13 of the consultation paper it is stated

“Again, we are not proposing to make any changes to this protection other than that which might be required to ensure the same level of protection applies following any amendment to the current Sunday trading restrictions”

ELA's response proceeds on that basis and therefore only responds to Question 1 and Question 4.

#### **Question 1: Should local areas have the power to extend trading hours on Sunday?**

On the basis the Government decides to give local areas the power to extend trading hours on a Sunday, ELA thinks the employment law implications can be broken down into 4 main areas;-

- (a) maintaining the same level of protection for shop workers as they currently enjoy under the Employment Rights Act;
- (b) the need to change terms and conditions of employment or contracts of employment of shop workers;

(c) the Equality Act implications of any extension of working hours on a Sunday;

(d) working time implications

**(a) maintaining the same level of protection for shop workers**

The sub-committee were split over what the promise in paragraph 1.13 of the consultation paper means. Some members of the committee noted the history of the legislation and the fact that the current legislation was very much a compromise due to the competing views of various interest groups in 1994. Therefore the law is restricted to stores with a relevant floor space in excess of 280 square metres. Hours are limited to a continuous 6 hour period between 10 am and 6 pm. Shop workers who started their employment before 26th August 1994 cannot be required to work on Sunday. All other shop workers (except those only employed to work on Sunday) can give an opting out notice which is effective after 3 months and each worker must receive an explanatory note as to the right to give notice to opt out of Sunday working within 2 months of becoming a shop worker.

If local areas are given a complete discretion to change shopping hours this means workers who have got used to regular Sunday hours and plan family or caring commitments (or religious attendance) around these regular hours may be required to change them causing disruption. The local area discretion could cause further disruption as different local authorities or even different stores in the same local authority may have different hours. If you are an Area Manager for several stores you may have to work different hours depending on the store preventing any planning of family, caring or religious commitments if you wish to continue working on Sundays.

The original legislation was a compromise. It is therefore arguable that any new legislation should maintain that compromise so existing staff can opt out of working different hours to their current hours on a Sunday and all existing staff are reminded in writing by their employer of their right to opt out of hours that are different to their existing hours on Sunday (whatever discretion may be given to the employer in the contract of employment).

On the other hand some members of the sub-committee felt that if the current protections for shop workers under the Employment Rights Act 1996 are mirrored in any subsequent legislation (other than any changes required to ensure the same level of protection applies following an amendment to the current Sunday trading restrictions), this should be sufficient given the right of opt out available to all workers (with the exception of those only employed to work on a Sunday) which should provide them with sufficient protection from any changes in law regarding Sunday working. To offer shop workers who work on Sunday the right to work their same hours as currently, went beyond the original compromise of the Sunday trading laws.

It was further noted that in Scotland there are no equivalent restrictions on Sunday opening (and large shops open for much longer than in England and Wales), but the legislation protecting shop workers is essentially identical, and appears to work – there have been no reported cases on it. Likewise members of the sub-committee are not aware of any problems when Sunday trading laws were extended temporarily whilst the Olympics and Para-Olympics took place.

**(b) the need to change terms and conditions of employment or contracts of employment of shop workers**

ELA notes that many current terms and conditions of employment or contracts of employment of shop workers in large retail stores do not provide for flexibility in the hours that shop workers can be required to work on Sundays as there was no business need to do so beyond the 2 hour flexible period in the window of 6 continual hours between 10.00 am and 6.00 pm. As such, if local area discretion extends working hours and the employer decides to open the store for those longer hours that may involve the employer in having to change the terms and conditions as to working hours of existing employees.

If consent of the employees to the changes cannot be agreed then the employer has limited options. It will either have to rely on discretion in a contract or staff handbook (if such a discretion exists) as occurred in *Bateman and Others v ASDA Stores UKEAT/0221/09/ZT*. However, the Bateman case has been criticized and is limited to its own particular facts so employers should be cautious when relying on it. Alternatively the employer may consider offering financial incentives to induce employees to accept the new terms and conditions but this may backfire if the employee accepts the payment in return for agreeing to amended hours then decides to opt out of Sunday working. The employer would end up having paid a premium and then losing that employee for Sunday working altogether. Finally the employer could take the extreme option of terminating the employees' contracts on notice and offering to re-engage them on new terms - after going through a proper consultation process.

Changing terms and conditions can be damaging to morale in the workplace (particularly the "terminate and re-engage" approach) and so affect productivity. Also, as above, there would always be the risk that disgruntled employees would decide to opt out of Sunday working altogether in any event – it would not be possible to remove the opt out as part of a contractual change exercise. ELA notes that USDAW, the shop workers union have declared their opposition to the proposed changes in Sunday trading laws. No doubt they will be advising their members on how best to oppose the changes if employees do not wish to work different hours on a Sunday.

ELA further notes section 101 and section 45 of the Employment Rights Act 1996, which protect shop workers from dismissal and detriment because they are a protected shop worker or an opted out shop worker. ELA anticipates that when an employer wishes to change the terms and conditions of shop workers who work on Sundays so as to extend their hours of work, some shop workers will give notice to opt out of Sunday working altogether in order to put pressure on the employer to make concessions so they can remain working on their existing hours or obtain an increase in pay or a buy out of their existing terms. If the employer was to dismiss employees who had opted out with a view to offering them new terms and conditions, the employees could argue that they had been automatically unfairly dismissed contrary to section 101 of the Employment Rights Act 1996. Also, if the employer offered a buy-out of existing terms, those who did not accept may try and argue they had suffered a detriment contrary to section 45 of the Employment Right Act 1996

**(c) the Equality Act implications of any extension of working hours on a Sunday.**

ELA draws attention to the provisions of the Equality Act 2010 (EqA 2010).

Whilst the EqA 2010 post-dates the Sunday Trading Act 1994, the desire to protect the freedom of religious beliefs and one's right to practice those beliefs no doubt contributed to the compromise position in the existing legislation.

In devolving powers to regulate Sunday trading, ELA believes that there is a risk that workers who observe Sunday as the Sabbath may be subject to religious discrimination. Although the potential for religious discrimination exists with the current legislation, devolution will enable local authorities to permit retailers to extend their trading hours beyond the current six continual hours within the eight hour 10am to 6pm trading window. Consequently, workers who currently organise their worship before 10am or after 6pm may no longer be able to do so.

If, under the devolved regime, employers implement a policy to require all employees to be available to work on a Sunday, this could amount to indirect religious discrimination. Outside of the retail context, the Court of Appeal found in the case of *Mba v the Mayor and Burgesses of the London Borough of Merton [2013] EWCA Civ 1562* that it was not indirect religious discrimination to require a Christian care worker, who worked at a care home for residential children with special needs, to work on Sundays. Notwithstanding the decision in the *Mba* case, it is ELA's view that large retail businesses may be unable to objectively justify such a requirement for shop workers, as large retailers will usually have a sizeable pool of workers to draw upon whose religious beliefs do not inhibit them from working extended hours on a Sunday.

ELA has already commented above on retaining the protection for workers to opt-out of Sunday working. Nevertheless, workers who opt-out on religious grounds, in theory, could still be contractually required to work on Sundays during the three month notice period before their opt-out takes effect. In ELA's view, it may be appropriate to consider whether a shorter notification period is needed to better protect workers, although it is recognised that this needs to be balanced with the business needs of retailers.

Finally, whilst there is an obvious focus on the impact of the proposals and the potential for discrimination on the grounds of religion or belief, it should not be overlooked that the EqA 2010 also protects other categories of characteristic that may be relevant here. In particular, in extending Sunday working hours it is not improbable that an employer might determine that the additional hours should be covered by part-time, over full-time workers. There may also be a rise in claims for indirect sex discrimination by female workers required to work additional hours on a Sunday and who cannot because of caring responsibilities.

#### **(d) the Working Time implications of any extension of working hours on a Sunday**

Longer working hours also have Working Time implications as workers must have a 20 minute break every 6 hours, 11 hours' continuous rest and a weekly 24 hour rest period. The current 6 hour restriction on working hours means employers do not need plan for covering breaks, but this will change if Sunday trading hours are extended.

#### **Question 2 : If the power is devolved, who do you think should be given the power to change Sunday trading rules?**

This is a policy issue which it is inappropriate for ELA to answer.

**Question 3: How would you be impacted by local changes to Sunday trading rules?**

This is a question it is not appropriate for ELA to answer.

**Question 4: Where did you hear about this consultation**

ELA were approached directly by David Thorneloe Deputy Director, Legal B – Labour Market at BIS.

**Members of the Working Party**

**Chair: Paul Statham, Your Employment Settlement Service (YESS)**

**Rebecca Reid, Smith Partnership**

**Robert Thomas, Charles Russell Speechlys LLP**

**William Addis, Keystone Law**