Chambers position on the Employment (Miscellaneous Provisions) Bill 2017 October 2018

Introduction

The Chambers network is supportive of employment regulation that works for the benefit of both employers and employees. However, as it currently stands, the Employment (Miscellaneous Provisions) Bill 2017 is one-sided and fails to consider the practical implications of the Bill, which stand to negatively affect SMEs and micro-businesses in particular.

92.6 % of businesses in Ireland are micro-enterprises[1]. This Bill poses a serious threat to such businesses and leaves good employers at risk of prosecution for minor administrative failings, at the very point at which they are seeking to create jobs in the Irish economy.

SMEs are not experts in employment law and should not have to be, however this Bill may result in the unintended consequence of criminal conviction with no mal-intent.

We propose a series of changes to the Bill that would improve its enforceability and make it work for both employees and small businesses.

1. Terms of Employment & Confusing Timeframes

This Bill sets out that an employer must issue specific main terms of employment within five days of an employee's start date. If an employer fails to issue the core terms within five days of commencement of employment, the employee can pursue a claim before the Workplace Relations Commission. After one month an employee is entitled to receive the remainder of their terms of employment[2] and then becomes entitled to lodge a claim against their employer for failure to provide the core terms within the first five days of employment.

The Bill specifies that a person guilty of failing to provide core terms within the first 5 days shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or to both. If enacted as currently drafted, this Bill would make criminals out of employers seeking to create jobs for what is essentially an administrative failing.

Under current legislation an employer must issue an employee a statement of the main terms of employment within two months of commencing work.

This Bill introduces new and confusing timelines for employers to navigate at a point when they are creating new jobs, and also perhaps launching a new business. The introduction of a criminal offence here is unwarranted and unnecessary, particularly without any provision for exceptional circumstances that may arise in a business which would lead to terms of employment being provided after this 5 day window.

[1] Businesses with less than ten employees

[2] as per section 2(1)(b) of the Terms of Employment (Information) Act 1994

Recommendation: Chambers recommends an amendment to the Bill that would introduce a range of defences for an employer in circumstances where they have, due to unforeseen circumstances or without malintent, not met the requirements of section 7 of the Employment (Miscellaneous Provisions) Bill 2017.

It is therefore submitted that the following amendments to the Employment (Miscellaneous Provisions) Bill 2017 be introduced: by the insertion of the following subsection after subsection (1B):

- "(1C) It shall be a defence to any proceedings taken against any employer for a breach of any of the provisions of this Act in relation to an employee if such employer shows to the satisfaction of the court or adjudicating body before which such proceedings are brought that any act occasioning such breach was due to exceptional circumstances or an emergency, the consequences of which could not have been avoided despite the exercise of all due care, or otherwise to the occurrence of unusual and unforeseeable circumstances beyond the employer's control, it would not be practicable for the employer to comply with the provision concerned."

- By the amendment of section 7(2)(d) of the Terms of Employment (Information) Act 1994 by the insertion of "and taking into account any detriment suffered by the employee," after "having regard to all the circumstances"

2. Banded Hours

The banded hours provision of the Bill, taking into account the amendments from Committee Stage, would mean that where the average number of hours an employee works per week (over a 12 month reference period) is more than the contracted hours, the employee is entitled upon request to be moved to a higher band of hours. The employer then has just 4 weeks from the date of the request to place the employee in that band of hour, or to refuse the request as per the condition laid out in the Bill.

During Committee Stage, the bands of hours outlined in the Bill were narrowed further, and the reference period for reviewing an employee's average hours reduced from 18 months to 12 months. Such that:

BANDS OF WEEKLY WORKING HOURS

Band	From	To
A	3 hours or more	less than 6 hours
B	6 hours or more	less than 11 hours
C	11 hours or more	less than 16 hours
D	16 hours or more	less than 21 hours
E	21 hours or more	less than 26 hours
F	26 hours or more	less than 31 hours
G	31 hours or more	less than 36 hours
H	36 hours and over	

".

Chambers proposed bands:

Band	From	To
A	1 Hour	Less than 5 Hours
B	5 Hours	Less than 10 Hours
C	10 Hours	Less than 15 Hours
D	15 Hours	Less than 25 Hours
E	25 Hours	Less than 35 Hours
F	35 Hours Plus	

Our view is that the narrowing of the bands stands to negatively impact both businesses and employees. The new bands are too narrow for businesses, particularly SMEs, to manage and may incentivise an overall reduction in hours offered to employees and business' operating hours.

These bands will mean that businesses become reluctant in offering additional hours to employees in the interest of avoiding a dispute over bands and potentially facing legal action. This will have the effect of employers prioritising risk mitigation over growth as they attempt to comply with unreasonable employment legislation.

The Bill does not consider the flexibility which is often of benefit to employees as well. For example, an employer may alternate extra hours available between two or more staff so that each of them receives a similar increase on top of their contracted hours. Under this Bill, the first employee to request an increase in their banded hours would receive a disproportionate number of the extra hours available for a period of 12 months.

Recommendations:

Chambers recommends the bands be restored to the bands contained in the original version of the Bill.

It is therefore submitted that the following amendments to the Employment (Miscellaneous Provisions) Bill 2017 be introduced: by the insertion of the following subsection after subsection (18):

"The Act of 1997 is amended by the insertion of the following section after section 18:

18A.(1)Where an employee's contract of employment or statement of terms of employment does not reflect the number of hours worked per week by an employee over a reference period, the employee shall be entitled to be placed in a band of weekly working hours specified in the Table to this section."

Band	From	To
A	1 Hour	Less than 5 Hours
B	5 Hours	Less than 10 Hours
C	10 Hours	Less than 15 Hours
D	15 Hours	Less than 25 Hours
E	25 Hours	Less than 35 Hours
F	35 Hours Plus	

In addition, we recommend that the legislation be revised to include an exemption or defence for employers who must reduce working hours in order to reflect business circumstances or hardships.

3. Employment Status

The Bill has been amended to state that "It shall be an offence for an employer to incorrectly designate an employee as self-employed". The Bill specifies that a person guilty of incorrectly designating an employee as self-employed shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or to both.

To determine self-employment status, the Bill utilises the same test applied by the Scope section of the Revenue Commissioners for determining employment status. The Scope test does not place a strong enough emphasis on the "mutuality of obligation" filter test which has been recognised by

the High Court in multiple occasions (Min for Agriculture –v- Barry, McKayed –v- Forbidden City, etc.). As such, the Scope test is inconsistent with employment law jurisprudence. Utilising the Scope test without due cognisance of High Court case law is fraught with difficulty.

Furthermore, the Bill outlines what would “normally” indicate an employment relationship. As such, it is not definitive. There hundreds of different pieces of employment legislation with various definitions of what amounts to an employment relationship. Therefore, if this Bill does not set out a clear definition, and repeal definitions set out in previous legislation, it creates further confusion a on employment status and in unenforceable.

Recommendation:

Section 20, introducing an offense to designate an employee as self-employed, should be removed entirely from the Bill.

Conclusion

I would like to thank you for taking the time to consider these issues and for engaging with us on this matter. The Chambers network hopes to see the amendments and changes to the Bill we are proposing adopted in the Seanad and would greatly appreciate your support on this important issue for Irish business. This Bill is wholly disproportionate and adds another complex layer to the employment regulation landscape, which will be most acutely felt by micro-businesses and SMEs.