

The Rt Hon Greg Clark MP
Department for Business, Energy and
Industrial Strategy
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Low Pay Commission
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Dear Secretary of State,

In addition to our standard brief of recommending rates of the National Minimum Wage, our remit this year included an additional set of tasks following Matthew Taylor's Review of Modern Working Practices. These were to review the scale and nature of the issue of 'one-sided flexibility' and assess the impact of introducing a higher minimum wage for non-guaranteed hours, as well as considering alternative policy ideas.

The nature and extent of one-sided flexibility

Flexible working can benefit both workers and employers. However, the Taylor Review identified the problem of one-sided flexibility at work, particularly for low-paid workers, stating that 'Government must take steps to ensure that flexibility does not benefit the employer at the unreasonable expense of the worker, and that flexibility is genuinely a mutually beneficial arrangement'. One-sided flexibility can include unreasonable requirements around workers' availability; unpredictability making it difficult for workers to manage finances; and an overarching fear of losing future work if they raise a concern or turn hours down.

We have looked at the evidence, both qualitative and quantitative, and spoken with employers, workers and their representatives as well as policy makers in other countries. We concur with the Taylor Review's conclusion that one-sided flexibility is a problem, we also found evidence of the issues identified in the Taylor Review: the misuse by some employers of flexible working arrangements creates unpredictability, insecurity of income and a reluctance among some workers to assert basic employment rights. Various stakeholders described the effects these practices could have on workforces, from financial difficulties to impacts on mental health.

Although much of the debate on these issues has focussed around contracts where workers don't have any guaranteed hours of work, so called 'zero-hour contracts', we found the issues described above in a range of working arrangements, including zero-hours contracts, but also temporary

working and short-hours contracts (where workers do have a guaranteed minimum number of hours but frequently work beyond this). Workers on zero-hours contracts have, in theory, the right to turn down shifts and since January 2016 have had protections against demands for exclusivity from employers. Workers on guaranteed hours do not have these rights. We heard on visits from workers with short-hours contracts that some employers still enforce unreasonable expectations around availability, overtime and exclusivity.

But it is not the case that all workers in these types of contracts suffer these issues – we came across genuine examples of two-sided flexibility and industries and businesses where flexible working arrangements suited the needs of both workers and employers. We also came across examples of employers struggling to persuade their flexible workers onto more standard and stable contracts because workers wanted to maintain their flexibility. Because of this, and the fact that the problems associated with one-sided flexibility go wider than the phenomenon of zero-hours contracts, none of our recommendations are specific to certain types of contract. Instead they are focussed on employer practice more generally.

Assessing the full scale and nature of the problem is challenging. Even if assessing scale was as simple as counting the number of low-paid workers on zero-hours contracts this would be insufficient. Issues around awareness mean counting the number of people on zero-hours contracts and other flexible arrangements is difficult. Employers tend to have differing views as to whether their non-guaranteed hours contracts are ‘zero-hours’ contracts and in some cases prefer to use other terms. Further, workers can be unaware of the type of working arrangement they have. These awareness issues mean that it is challenging to establish an accurate measure of the number of people in these contracts and that there is a need for better information. We also need to understand more about workers’ views of these arrangements.

Nevertheless, the recently published Skills and Employment Survey provides a useful benchmark estimate of the scale of one-sided flexibility. It found that seven per cent of employees (1.7 million individuals) were very anxious that their working hours could change unexpectedly. Insecure hours were associated with a range of other negative phenomena: anxiety about unfair treatment, lower pay and greater anxiety about downgrading. This survey is undertaken every five years and to fully understand and address these issues we need more regular measures. We recommend that Government considers ways to specifically measure the scale of one-sided flexibility. It would be useful to collect evidence on these measures on a regular basis so we can assess the impact of any changes. In that context we note that Government is considering the recommendations from the Carnegie UK Trust and RSA’s report *Measuring Good Work*.

Addressing one-sided flexibility

To address the problems with one-sided flexibility the Taylor Review proposed a higher minimum wage for any hours that are not guaranteed, which we refer to as the premium. In a subsequent blog post and submission to our consultation, Taylor expanded on this; he called for a notice period of one week, beyond which additional hours would need to be paid at least at the premium rate.

We undertook a broad consultation on the potential impact of this idea, speaking to employers, workers, representatives of both and international policy makers. Employers told us that the higher rate would inevitably raise the cost of flexibility, potentially negatively affecting working hours amongst a group who, the evidence tells us, are more likely to already be underemployed. Some employers allow their workers discretion over the hours they work and to swap shifts with one another. Employers told us that this discretion would need to be reduced or removed entirely to prevent gaming of the premium – a move that would be against the direction of travel for greater flexibility for many workplaces and, in their view, against workers' wishes.

Employers were sceptical as to the enforcement potential of the premium. Their view was that collecting the necessary information to prove an hour of work is guaranteed and has sufficient notice places a significant burden on business. Many employers told us they would put systems in place to respond to the premium, but that more unscrupulous employers would game these requirements by obfuscating around the necessary compliance information for HMRC or by simply shifting to a self-employment model and avoiding it altogether. While only a minority of employers suggested they would make more use of self-employment it was Commissioners' view that these are likely to be the employers we need to influence the most.

While worker representatives were keen on a deterrent against one-sided flexibility, there were still some strong concerns. Some unions were worried that the premium could legitimise poor working practices, with employers reasoning that the premium essentially 'buys' maximum flexibility so they need not worry about notice of shifts or variability of hours. Others warned that a high premium that made up a significant part of a worker's earnings could potentially 'trap' them in precarious work. In this situation workers wanting to move into more stable work would need to forego the premium and therefore their earnings would fall.

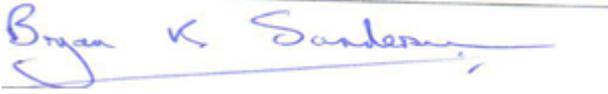
In our work, we found evidence of positive examples of flexibility, and so it is important that any measures preserve genuine two-way flexibility. We found widespread support for the idea that workers should have better notice of their working schedules, more security of income, and the confidence to assert their rights. The goal of the premium proposal was to address these concerns but in the Commission's view it does not do so effectively. We didn't hear unqualified backing for

the premium from any of the stakeholders we spoke to. We therefore recommend an alternative package of measures.

- **A right to switch to a contract which reflects your normal hours** – Taylor’s Review recommended a right to request a more stable and predictable contract. Government has since consulted on such a measure based on the right to request flexible working. However, Commissioners are of the view that a stronger framework is appropriate, as the issue is not about a worker requesting a change to the amount of work they do, but rather the proper recognition of their normal hours. Workers already worried about raising issues in the workplace, because of fears of employer retaliation, are less likely to raise a ‘request’ – so the right needs to be stronger than this. An employer would need to objectively justify any refusal according to conditions clearly defined in legislation. These would include the reference period for determining normal working hours, a qualifying period, and the specific circumstances in which an employer would not be required to offer a contract guaranteeing normal hours worked. We have given examples of these specific circumstances in our report but recommend that the Government consult widely on these qualifying conditions. This right should be enforced through Employment Tribunals, and Government should also consult on appropriate penalties for non-compliance.
- **A right to reasonable notice of work schedule** – Employers of flexible workers need to be encouraged to undertake more and better planning. We came across a range of examples of poor business practices whereby planning was simply not considered. By contrast other employers work hard to plan ahead and give notice of forthcoming requirements and find that this benefits both the worker and the business. We consider that every individual should have a right to reasonable ‘recordable’ notice of their working shifts. We recognise the difficulty of setting a single fixed period across industries and forms of work and recommend that the Government provides guidance in this area. There would also need to be effective enforcement and appropriate remedies.
- **Compensation for shift cancellation or curtailment without reasonable notice** – The practice of cancelling shifts at the last minute, sometimes on arrival at work or partway through a shift, was thought unfair by both employers and workers in our consultations but we found it was not uncommon. For this reason, we recommend that where shifts are cancelled without reasonable notice workers should be compensated. Compensation could be tied to the actual value of the cancelled shift; the minimum-wage value of the cancelled shift; or a simple multiple of the minimum wage rate. Commissioners’ view was that there are advantages and disadvantages to each of these options and we suggest the Government consult on how best to make this work.

- **Information to workers** – Government has accepted and consulted on Taylor’s recommendations around individuals’ right to a written statement of terms from employers which we found strong support for and strongly agree with. We recommend that this statement includes the rights we are proposing here.

Yours sincerely,

A handwritten signature in blue ink that reads "Bryan K Sanderson". The signature is written in a cursive style and is positioned above a horizontal line.

Bryan Sanderson
Chair, Low Pay Commission