Written Evidence Submitted by Usdaw (PARTS ONE AND TWO OF THE BILL) to the Employment Rights Public Bill Committee (ERB35).

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INTRODUCTION

Usdaw is the UK's fifth largest union, representing around 365,000 members across the UK. Most of our members work in the retail sector but we also have a substantial membership in the distribution, food manufacturing, pharmaceutical and home shopping sectors. Usdaw holds national agreements with four of the UK's biggest food retailers – the Co-op, Morrisons, Tesco and Sainsbury's, and we also have recognition with Asda for all stores in Northern Ireland as well as the Asda Express Stores in England, Scotland and Wales. In the non-food sector we negotiate pay with Argos, Next Distribution, Ocado and Poundland nationally, as well as Primark in Northern Ireland. We also hold a range of agreements covering food manufacturing and distribution sites at national and local level.

Usdaw is clear that the Employment Rights Bill offers a significant step forward for industrial relations across the UK economy. The provisions of the Bill will offer significantly more financial security for workers, they will help build morale in the workplace through ending the race to the bottom and they will be a key component of delivering the Government's Growth Mission.

The UK has suffered a long trend of weakening employment rights, low wage growth and poor returns for workers. As part of the UK 2018/2019 Labour Market Enforcement Strategy, David Metcalfe, the former Director of Labour Market Enforcement, highlighted the link between declining trade union membership, concerns about a lack of labour market enforcement, and a declining share of national income being shared by the workforce. It should also be noted that TUC research from April 2024 found that real terms wages were still below 2008 levels in nearly two-thirds of UK Local Authority areas. Overall, the UK has had one of the worst records among OECD nations for pay growth since the financial crisis.

This is not sustainable and there is a clear requirement for a comprehensive set of measures to reset employment relations in the UK. We are pleased to see the Government working hard to deliver such a set of measures, from the Make Work Pay document before the General Election up to the Employment Rights Bill now being published, along with commitments to further enhance the Bill in a number of areas, including those such as ensuring that agency workers are covered by the provisions of Clauses one to four.

Whilst we strongly support the overall intent of the Bill, there are a number of areas which we believe need further clarification or amendment. We are also concerned that so much of the Bill is being left to Secondary Legislation, making these positive changes much more vulnerable to being undone without consultation at later date. We believe there are various provisions, such as the twelve-week reference period for calculating a guaranteed hours contract, which can and should be included on the face of the Bill.

We understand that the Public Bill Committee for the Employment Rights Bill will play an essential role in the delivery of the Bill and are delighted to have the opportunity to submit written evidence, following up on the oral evidence which we gave during the 28 November session. Within the evidence pack, we have attempted to provide detailed evidence on the case for the measures within the Bill along with an analysis of the provisions of the Bill. We have also included relevant testimony from our members to help highlight the importance of tackling the issues which are being addressed in the Bill.

Usdaw would be pleased to provide any further information that would be of assistance to the Committee. We would be happy to have further discussions with individual members of the Bill Committee or the Clerks supporting the Committee, on the points raised in this evidence, or any other matter. If any further information is required, please contact Usdaw's Political Officer, Tom Williams, at tom.williams@usdaw.org.uk

ZERO HOURS WORKERS, ETC

GUARANTEED HOURS – OVERVIEW

Labour's *Plan to Make Work Pay* document, produced ahead of the General Election to set out what the Party would do in Government to improve workers' rights, set out the Party's policy on zero and short hours contracts. This was detailed in the following paragraph, Usdaw has added the emphasis:

"Labour will end 'one sided' flexibility and ensure **all** jobs provide a baseline level of security and predictability, banning exploitative zero hours contracts and ensuring **everyone** has the

right to have a contract that reflects the number of hours they regularly work, based on a twelve-week reference period.

“We have an ongoing commitment to protect the integrity of these policies and will put in place anti-avoidance measures where necessary. We will ensure all workers get reasonable notice of any change in shifts or working time, with compensation that is proportionate to the notice given for any shifts cancelled or curtailed.”

Clauses one to six of the Employment Rights Bill attempt to bring these provisions to life. Usdaw has concerns that the provisions in clauses one to six do not apply to all workers or ensure that everyone has the right to have a contract that reflects the number of hours they regularly work, based on a twelve-week reference period.

GUARANTEED HOURS – BACKGROUND

The experience of Usdaw members

"My partner recently had to leave a job due to zero hours contracts even though at the interview she was promised 16 hours which resulted in our kids having to leave their day (care) which they had attended for two years people don't see how this zero hours has an effect on young families that are trying to stay in work" (Male, Retail Worker, Northern Ireland)

"I was turned down for a mortgage in July as I did not have guaranteed income to meet the needs of the mortgage! At this time I was on a 20 hr contact but working between 35-40 hours but the mortgage company only take into account your contract I was turned down and ending up having to leave my rented house and go back to living at home with my mum!" (Male, Retail Worker, Northern Ireland)

"Would be happy with my overtime shift arrangement if the amount of hours I am given wasn't quite so vastly different one week to the next. Ie in last 4 weeks I have done a 35 hour week, followed by 14 hours, then 18 and 12. My average is 30 hours. Such reduction without any notice or explanation gives me a financial problem." (Female, Retail Worker, Luton)

"Working a 4-9 on a Friday for the last 4/5 months (not contracted) however, when asked for one-off been told I had to book it off as holiday but when asked to have it contracted nothing's getting sorted." (Female, Retail Worker, Shropshire)

"Work can take hours off me when they feel like it. I live in fear that my hours will go back to contracted anytime and would find it hard to live as I am living at my means now. Have asked for a full-time contract on many occasions to just be told that it is not possible." (Female, Retail Worker, Jarrow)

"It all depends, it comes in bounds of, you know, some weeks I might get work, some weeks I might not get work and then I'm supposed to pay my rent, I'm supposed to pay my council tax, I'm supposed to pay my water rates and I'm supposed to pay everything else out of that

money…but, because I'm on zero contract hours? So this is why I try to save that little bit of money up for, for a rainy day. So, you've got to, like, save that money when you are doing plenty of hours and then you pay rent and this is why I go to the food bank now and again, and of course I've got my debt management as well. The debt management is through StepChange charity. So, this is another reason why I go to the food bank as well, to help me out. I don't go to the food bank every week. I just go to the food bank, like, once a month, or once every three weeks. It's just, like, to help me out just that tiny little bit." (Female worker, two jobs on Zero Hours Contracts)

The issues that are faced

The term 'one-sided' flexibility was given prominence in Matthew Taylor's Review Into Modern Employment Practices. The review stated, *"we have heard repeatedly during the Review that there is an issue of flexibility not being reciprocated, with a requirement to be available for work at very short notice, without any guarantee that work will actually be available. This makes it very difficult for a person to manage their financial obligations, or for example secure a mortgage. This can feel unfair, especially when the reality of the working arrangement is that the individual regularly works 40 hours a week."*

The Make Work Pay document had a significant section dedicated to Ending One-Sided Flexibility.

A comprehensive response to the issue of one-sided flexibility will require a solution which:

- empowers workers to have a contract which suits them,
- applies to all workers
- tackles any possible detriment to workers and
- avoids any unintended consequences.

This provision in the Make Work Pay document is founded on the recommendation set out by the independent Low Pay Commission (LPC) following their intensive review into one-sided flexibility. The LPC recommended titling this as a 'right to switch' to a normal hours contract, rather than a right to request one, on the basis that *"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."*

It should be noted that in the year that the Low Pay Commission made this recommendation, both the Recruitment and Employment Confederation (REC), through Neil Carberry, and the Federation of Small Business (FSB), through Martin Mctague, were represented on the Commission.

It is important to note that the right to a guaranteed hours contract would not require a worker to switch to such a contract, if they preferred to retain their existing contractual arrangements. It therefore would not impact on a worker's ability to maintain a minimum number of contracted hours and work additional hours on a regular or occasional basis that are not guaranteed, if that is their genuine choice.

Analysis of the Labour Market Survey, the Government's Impact Assessment suggests that there could be up to 2.4 million workers on variable forms of contract and therefore potentially benefitting from rights in these clauses. Usdaw has recently surveyed over 7,500 workers to be able to better understand how the provisions of the Employment Rights Bill

would affect them. Our survey asked members how many hours a week they are contracted to work as well as how many they work in an average week. From the 7,500 responses, we can tell how reliant low paid workers are on hours which are not guaranteed as part of the contract and then investigate whether this has an impact on their mental health.

Our survey results have backed up previous anecdotal evidence that the issue of insecure working is disproportionately affecting younger workers. Only 45% of workers aged between 18-24 have contracts that reflect their normal working hours, whereas 70% of workers aged between 55 and 64 almost exclusively work hours which are contractually guaranteed. Looking at the other end of the scale, over half of young workers, aged between 18 and 24, are reliant on insecure hours for more than 20% of their income, this figure drops to around 1 in 5 for those workers aged between 55 and 64.

As our members reported, these hours can be removed all too easily, causing hardship for insecure workers. Due to the imbalance of power in the employment relationship, individual workers are all too frequently unable to defend their basic employment rights.

The provisions of Make Work Pay have in fact already been implemented by a whole range of employers and proven to work. The Living Wage Foundation's 'Living Hours Campaign' includes the right to a normal hours contract as a key component of accreditation. There are 185 employers across a range of sectors which have achieved accreditation as 'Living Hours' employers. Furthermore, in 2023, Usdaw reached an agreement with Tesco, the UK's largest private sector employer, for all staff to be offered a contract based on their normal working hours.

GUARANTEED HOURS – PROVISIONS OF THE BILL

Usdaw believes that the Bill, as drafted for first and second reading, provides an effective start to delivering on tackling the issues raised above and delivering on Make Work Pay. However, we do have a number of concerns which are summarised as follows:

- The 'low hours' contract provisions 27BA, 3, b) should be removed.
- The reference to 'regularity or otherwise as are specified' in 27BA, d) should be removed
- The reference to 'an excluded worker' in 27BA, e) should be removed
- Both the initial reference period and the subsequent reference period, set out in 27BA, 5) and 27BA, 6) should be defined in primary legislation as a 12 week period as set out in Make Work Pay and, for the initial reference period, in Make Work Pay – Next Steps
- The provisions as they are written are far too complex and convoluted. Usdaw has concerns that, as a result of unnecessary provisions around 'low hours' contracts, potentially excluded workers, agency workers potentially not being covered by the same provisions and potentially multiple different reference periods, the rules themselves will be too complex for workers and many employers.

On page 1 of the Bill, lines 5 to 7 amend the title of Part 2a of the Employment Rights Act 1996 from "Zero hours workers" to "Zero hours workers and similar". Make Work Pay stated that the provisions which are being brought to life in this, and subsequent, clauses, should apply to 'everyone' and ensure 'all jobs have a right…'. In light of this, we believe that Part 2A of the ERA 1996 should be amended to a broader title. Alternatively, consideration should be given as to whether the provisions of the Employment Rights Act 2025 should be added

to a separate Part of the 1996 Act, notwithstanding the fact that the definition of a zero hours contract worker lies within this section of the Act.

On page 2 of the Bill, from lines 25 to 30 under Subsection 3aii), the Bill introduces the term minimum number of hours, not exceeding a specified number of hours. In the explanatory notes document and 'Next Steps to Make Work Pay' document, both accompanying the initial publication of the Bill, this term is taken in reference to a worker being on a 'low hours' contract. Usdaw is deeply concerned that the creation of this term could create a threshold for discrimination in the workplace, a low bar for bad employers to aim for along with many unintended consequences.

It is quite clear that the introduction of this term fails to deliver on what is effectively a manifesto commitment within Make Work Pay of "ensuring **everyone** has the right to have a contract that reflects the number of hours they regularly work, based on a twelve-week reference period." For this, amongst many other reasons set out below, Usdaw believes that references to 'minimum number of hours' and other wording relating to 'low hours' contracts, need to be removed from the Bill.

The following sets of the likely implications of continuing with a 'low hours' contract type provision, however must in no way be seen as an endorsement of such a provision. Usdaw strongly believes that this provision should be removed from the draft Bill.

There does not yet appear to be a publicly available figure for what is expected to be defined as a 'low hours' contract. However, if the figure is any lower than many full-time hours contracts, indeed lower than 48 hours per week, it is likely to significantly distort the Labour Market and cause unintended consequences. Primarily, if the figure is set at a level that is particularly low, it will have a negligible impact on tackling the issues raised above. A 'low hours' contact provision of, for example, four hours per week would simply result in a replacement of zero hours contracts with four hours contracts. Furthermore, it could result in employers who typically offer, for example, eight-hour contracts, choosing to offer four-hour contracts as such a contract would be seen as a legally acceptable, indeed a legally endorsed, floor for a contract.

In our latest survey of over 7,500 members, only eight members reported working four hours or fewer in the average week. Therefore, any such provision of 'low-hours' if set around four hours per week would effectively be meaningless, not to mention a complete failure to implement the commitments made in Make Work Pay, which the public voted on.

Any halfway house of a low hours provision that falls somewhere between an incredibly low number and a standard definition of full-time such as 48 hours a week, would create a variety of 'cliff-edge' scenarios and unintended consequences. For example, if the low hours threshold is set at 20 hours, this would mean that anyone on a contact greater than 20 hours would not have a statutory right to increase their contractual hours irrespective of how many hours they undertook during a relevant reference period. However, an individual employed on a contract of 19 hours per week would have the right.

Therefore, in this scenario, this is likely to create an incentive for employers to only offer overtime to those workers already contracted to greater than 20 hours per week, meaning that those on lower hours contracts would miss out on overtime. As a result, a low hours provision at around or below 20 hours per week could actually perpetuate low hours and low earnings for many workers. The same could be said for anything up to 48 hours per week. Usdaw's latest survey of 7,500 members shows that 27% of women are contracted to fewer than 18 hours whereas on 13% of men are on this type of short hours contract. Furthermore, 21% of disabled workers are likely to have such a contract as opposed to 11% of non-disabled workers.

Equally, based on the above hypothetical figures, it would be harder for individuals who require lower hours contracts to find employment. If, for example, a women needed a

contact of 16 hours for childcare purposes, an employer offering such a term would be aware that if that worker worked 30 hours per week over a relevant reference period, they would have a statutory entitlement to a contract of 30 hours per week. However, if they employed someone on a 20 hour per week contract, that worker would not become entitled to a contract that reflects their normal hours, irrespective of how many hours they work. This would create a disincentive for the employer to offer the woman with childcare employment and create a barrier to employment for the individual.

Individuals may end up believing they have to commit to a certain number of hours, end up stretching themselves beyond what they are capable of committing themselves to and then fail to attend shifts at the last minute. This situation is potentially bad for employers and employees.

Usdaw's latest survey of 7,500 members shows that 27% of women are contracted to fewer than 18 hours whereas on 13% of men are on this type of short hours contract. Furthermore, 21% of disabled workers are likely to have such a contract as opposed to 11% of non-disabled workers. Any provisions which create cliff-edge scenarios at an arbitrary point below 48 hours per week will have a disproportionate and negative impact on groups which are already disadvantaged in the workplace.

Our overall position is that the 'low-hours' provisions must be removed from the Bill, something which would improve the overall effectiveness of the Bill and make the legislation simpler to understand. If the provisions remain in the Bill, anything lower than a 48 hour definition would be detrimental to many of the workers that the Bill is aiming to support. Unless the provisions can be deleted, we call on the Bill Committee to insert a 48 hour provision on to the face of the Bill a S27BA.3.a.ii

On page 2 of the Bill, from lines 37 to 39 under Subsection 3d), the Bill states that the reference period hours should satisfy such conditions as the number, regularity or otherwise as are specified. Usdaw has significant concerns that 'regularity or otherwise' could provide significant scope for employers to avoid their responsibilities under the Bill. If irregularity is seen as a way to ensure that the provisions of the Bill do not apply, bad employers would be encouraged to increase the irregularity of their shift patterns to avoid having obligations under these provisions.

For example, if regularity is defined as days of the week, it would be easy for an employer to schedule seven different workers to rotate an evening overtime shift so that one worker completes the shift each day, working a different day each week for seven weeks, with a different schedule to complete the seven weeks for the following period of weeks. Equally, if regularity was deemed as the same set of hours but on different days, employers could simply swap workers across morning, afternoon, twilight and even night shifts.

In Tesco for example, where provisions for a normal hours contract are already in place, workers will work a regular number of hours but the actual hours and days they work can vary on a weekly basis. This reflects different trading patterns experienced by the employer and this flexibility is very much in the company's benefit. However, if offering flexibility were likely to remove an individual's right to benefit from the guaranteed hours contract provisions, individuals may be less likely to offer the required flexibility. At the same time, employers are more likely to look to make use of irregular hours creating additional unrest within the workplace.

The Plan to Make Work Pay was unequivocally clear that the contract people are offered should be based on the number of hours they regularly work. This is dealt within 27BA, 3, d, by the word 'number.' The words 'regularity or otherwise' are superfluous in delivering Make Work Pay and merely create potential issues. The wording in Make Work Pay acknowledges the number of hours people work, not the actual hours people work. This ensures that

people have financial security as a result of being entitled to a guaranteed level of pay but does not create additional hurdles about those hours having to be worked at regular times or days.

*"ensuring **everyone** has the right to have a contract that reflects the number of hours they regularly work, based on a twelve-week reference period."*

On page 3 of the Bill, from lines 1 to 3 under Subsection 3e), in addition to the potential exclusion of agency workers, who will be covered by similar provisions currently out to consultation, the Bill also creates an exclusion for an as yet undefined 'excluded worker'. There is no justification or explanation for the excluded worker provision either within the Bill, the explanatory notes or the Next Steps to Make Work Pay document. Part 10 of this provision, on lines 35 and 36 of page 3 of the Bill states that an "excluded worker" means a worker who is of a specified description. This is entirely unclear and will not result in effective legislation or stable employment provisions.

As a result of the reference to excluded worker, any industry, set of contractual arrangements or other group of workers could be excluded from these provisions simply through the passing of a Statutory Instrument There have been reports that entire industries are already lobbying for all workers within a sector to be classified as 'excluded workers'.

Ending one-sided flexibility was a key commitment in Labour's Make Work Pay document and subsequently their offer to the Nation as part of the election. The document stated,

"We are committed to Securonomics, which will give working people security in their day-to-day lives – this involves banning exploitative zero hours contracts and ending fire and rehire. The inclusion of the excluded worker provision contradicts this commitment to Securonomics."

The Bill provides no justification for excluding workers from the relevant provisions nor does it attempt to define who an excluded worker would be. As a result of the risks involved in such a provision, we believe that reference to excluded worker as part of 27BA, 3, e) and 27BA, 10) should be deleted.

We believe that there may be some scope in looking at specific and limited situations which could be excluded from the calculations. Within the Republic of Ireland provisions for tackling this issue, there is a potential exclusion where, "average hours worked were affected by a temporary situation that no longer exists." The RoI provisions in this area are unlikely to be able to slot wholly or perfectly into the GB legal and industrial framework or unlikely to be able to slot wholly or perfectly into the provisions devised in this Chapter of the Bill.

However, subject to safeguards of a requirement for them to be agreed through collective agreement with an independent trade union, there may be greater suitability in looking at an incredibly tightly defined set of circumstances which could potentially be excluded from the calculation, rather than having whole groups of workers excluded from the provisions. Such collective agreements could work to ensure that employers can offer permanent workers hours of an entirely and genuinely temporary nature without affecting the reference period hours.

Usdaw fully supports the Bill's intent to ensure that agency workers are covered by equal provisions to directly employed workers.

We have considerable and relevant experience of exemptions for agencies and agency workers through the so called 'Swedish Derogation' provisions of the Agency Workers Regulations. Prior to implementation, this derogation was justified on the basis of being a

provision to ensure that highly paid and specialised agency employees would not have their contractual provisions, and strong ability to negotiate their own terms, negatively impacted by the Regulations. As a safeguard, provisions were put in place so that the agency would continue to pay workers who utilised the derogation between assignments. However, in practice, contracts were devised within the sector which, as a method of circumvent the provisions, employed agency workers on contracts of 336 hours per year. This meant that individuals did not qualify for equal pay provisions however, once they had worked 336 hours, would not be deemed as being in-between assignments for the rest of the year.

The Taylor Review into Modern Employment Practices found examples of unlawful behaviour in the agency sector, recruitment agencies structuring short-term assignments to avoid their liability and other abuses of 'pay between assignments' contracts.

It is clear from this experience that there are significant market factors within the agency sector which drag down conditions offered to workers, particularly those in traditionally low paying sectors. Eventually, following significant lobbying and a clear recommendation from the Taylor Review into Modern Employment Practices, the so called 'Swedish Derogation' was repealed.

The experience from the so called 'Swedish Derogation' demonstrates that the agency sector requires significant Government intervention to deliver effective outcomes for workers. Beyond the removal of the Swedish Derogation, there has been very little, if any, other intervention to fix a market that resulted in such failure. It is clear that the need for Government intervention remains.

Compared to workers in general, agency workers are at greater risk of low pay, poor working conditions and poor job security – the conditions that the government recognises have been holding our economy back. The Resolution Foundation calculated the agency worker pay penalty as £400 a year, and found widespread experiences of poor and sometimes unlawful practices. This pay penalty is likely to be worse for agency workers on zero hours contracts (ZHCs), as median hourly pay for ZHC workers is so low.

For many employers, agency workers are used in much the same way as directly employed zero hours workers to allow them to adjust employment at short notice. The Taylor Review found that *"too many employers and businesses are relying on zero hours, short-hours or agency contracts, when they could be more forward thinking in their scheduling*." This suggests that some of the anticipated impacts of right to reasonable notice and compensation, including greater investment in workforce planning, would be undermined if agency workers were not covered as some employers would increase their use of agency workers to maintain one-sided flexibility. This risks significantly undermining the policy intent of this measure.

Whilst there may be complications in agreeing who is liable for the additional costs of ensuring that agency workers are covered by the provisions for guaranteed hours, as well as the provisions for notice of shifts and compensation for varied shifts, these complications should not result in losses to the workforce. As such, we fully support the intention of this, and relevant subsequent clauses, to include agency workers in scope of the provisions of clauses 1 to 6 and will be responding directly to the relevant consultation.

On page 3 of the Bill, from lines 8 to 20 under subsections 4 & 5), the Bill refers to the initial reference period and subsequent reference period for calculating an individual's working hours. Within Make Work Pay the reference period was clearly set out as 12 weeks. In the Next Steps to Make Work Pay document, the initial reference period was also set out as 12 weeks. As an initial point, as 12 weeks is entirely clear for the initial reference period, Usdaw sees no reason why this should not be set out in primary legislation within the Bill. We believe that the Bill should be amended as such.

A 12-week reference period is important in order to make the right to a guaranteed hours contract work. If the reference period is too long, it undermines the right. If it is too short it could make the right impractical and subject to factors such as seasonal variations in workload.

There is a long-established provision of defining an average week over a 12-week reference period within the Employment Rights Act 1996, this is found in Section 221, subsection 3 of the 1996 Act. It is therefore something workers and employers are already used to, the right can be enacted relatively quickly whilst offering the ability to smooth of temporary variations in working hours. There was significant discussion and debate on this point ahead of the Make Work Pay document, and the earlier National Policy Forum document, being published. Following this debate, it was considered that 12 weeks is the most relevant reference period.

The move for holiday pay reference periods to increase from 12 weeks to 52 weeks has made it much more difficult for workers to understand what their average should be. Furthermore, the expansion in this situation has clear provisions to ensure that a calculation can be completed in the first 12 weeks. Expanding beyond 12 weeks for the purposes of guaranteed hours would not enable a calculation during the early stages of employment, again going in breach of the commitments of Make Work Pay.

In terms of a subsequent reference period, Usdaw does not want to see a situation whereby employers 'game the system' by giving workers a low number of hours over the first 12 weeks of employment, to manufacture a low reference period, before subsequently increasing the number of hours of work. Therefore, we believe that the subsequent reference period should also be set on a 12 week reference period as a rolling reference period. This could be achieved through a relevant amendment to the end of subsection 6.

Furthermore, we would continue to have our current concerns that a longer reference period makes it more difficult for workers to know what their average would be.

Overall, within Section 27BA, there is a need for future provisions to define at least, 'minimum number of hours', 'reference period hours', 'regularity or otherwise as are specified', 'excluded worker', 'agency worker', 'each subsequent reference period' and 'specified day'. This is a significant amount of work for future regulations and leaves large areas of the provisions vulnerable to future amendment through secondary legislation. Workers will base their lives on their ability to rely on the provisions set out in this chapter of the Bill. It is less than satisfactory that those provisions will be open to significant amendment without proper debate, scrutiny or oversight.

Furthermore, the whole provisions are unnecessarily complicated as a result of the 'low hours' provisions as well as the potential for different reference periods. They could also be further complicated as a result of the current provisions for 'excluded workers'. For these provisions to work, there is a clear need for simplicity which will not only ensure that workers are in the best possible position to make use of them but also that employers have certainty over their decisions. Removing the provisions as detailed above would be a significant step towards delivering this simplicity.

On page 9 of the Bill, from lines 38 to 44, under section 27BE, 6) There is a provision for a worker and employer to agree a later date for a guaranteed hours contract to take effect. There remains a significant imbalance of power between the worker and the employer, particularly in the initial stages of employment. We are not sure of the circumstances in which a worker wants a contract based on the hours they have been working over the previous twelve weeks but wants to delay the start of this contract. However, it is possible for an employer to insert a clause into the initial contract, or potentially into the guaranteed

hours offer under 27BB, that requires a guaranteed hours contract not to take effect for a period of, for example, two years.

Similar provisions, which may be to a worker's detriment, are already commonly seen in areas such as opting out of the maximum 48 hour working week under the Working Time Directive. In these circumstances, an opt-out to the 48 hour provisions is contained within the body of the contract and presented as a fundamental part of the contract, therefore workers feel compelled to sign. This could happen with an agreement to delay the implementation of a guaranteed hours contract.

SHIFTS: RIGHTS TO REASONABLE NOTICE

OVERVIEW

Labour's *Plan to Make Work Pay* made clear commitments around ensuring reasonable notice for shifts, changes to shifts and changes to working time.

"We will ensure all workers get reasonable notice of any change in shifts or working time, with compensation that is proportionate to the notice given for any shifts cancelled or curtailed."

This commitment is brought to life within Chapters 3 and 4 of the Employment Rights Bill.

Within the Employment Rights Bill, Chapter 3, Shift: Rights to Reasonable Notice, and Chapter 4, Right to Payment for Cancelled, Moved or Curtailed Shifts, go hand in hand. Without compensation for changes to published shift patterns, the patterns will be too easily changeable and therefore potentially meaningless. At the same time, without a requirement for reasonable notice of shift, there would be a temptation not to publish shift patterns in good time so as to avoid compensation for any changes.

BACKGROUND

Experience of Usdaw Members

"My food retail job has trouble getting rotas up on time, we're supposed to have 3 weeks' rotas at any one time, but this very rarely happens, and they're subject to change at very short notice. Just last week a note was put up on Wednesday or Thursday telling us to check this week's hours as they have changed (running from Sunday-Saturday), giving 2-3 days' notice. I regularly work 36-39 hours, on an 18 hour contract, and have worked full-time for over 4 years, but the store manager won't increase my contract to reflect this. I'm looking for a second job to make up for this, but high availability is expected of us, making getting a second job difficult as I can be rota'd any time and can't plan around this." (Male, Retail Worker, Prudhoe)

"We do have 3 weeks in advance but normal (with) 2 (weeks left) the rotas then changed due to saving hours which at the present time the shop is tuning in less staff than we opened 3 years ago." (Female, Retail Worker, Blaydon)

"I am a shift leader in express and often don't know what I'm working till 2 weeks before. As a working mum with a childminder to pay this is a big problem." (Anonymous, Retail Worker, Northern Ireland)

"'Can you come in tomorrow?', sort of thing, and you'd have to, almost, drop everything else and, in there, you did feel a pressure to take those shifts, because there was almost a sense of, if you don't take the shifts, they're not going to offer it to you the next time so, if you want

it, you're going to have to make sure you drop everything else, and take it at that point when it was available." (Female, two jobs on Zero Hours Contracts)

"We are asked to do overtime at the drop of a hat. If you refuse they don't offer you anymore. They also change your shifts and put you in when they have no cover. This is done at short notice. If you don't do them management are funny with you feel bullied into it." (Female, Retail Worker, Nottingham)

"The management expect you to do extra hours at the drop of a hat, it says in our handbook time a & half but will only pay normal time." I think this is so wrong. (Male, Retail Worker, Norwich)

"On paper it looks like our rota is up 6 weeks in advance but in practise it can change radically with very little notice." (Female, Retail Worker, Caernarfon)

"Not getting rota in advance then having them changed at such short notice without consultation seriously effects life/work balance. Short notice of shifts and changes interferes greatly on family life issues such as appointments, etc." (Female, Retail Worker, Ilkeston)

"Normally get about 2 days' notice for my overtime shifts without being asked to do them, they normally just put them in the rota and expect me to do them or just message me telling me to do them without asking – and I've asked about 5 times to re-do my contracted shifts and availability to reduce my contracted weekly shifts and it hasn't been done" (Male, Retail Worker, Crewe)

"My employer gives me less than 24 hours' notice if he needs me to start earlier or finish later. I had less than a week's notice he would be away for a week, and I was responsible for every aspect of the pharmacy apart from dispensing prescriptions. I was given 3 days' notice that my weekly hours would be reduced by 3 hours a week. Workers have bills to pay, commitments outside of work, it's not fair that employers can manipulate us to suit their needs." (Male, Pharmacy Worker, Huntingdon)

"Manager change Rota when he feels like it no 48 hours notice give to the staff and he change the Rota again so staff are getting mix up with their rota." (Female Retail Worker, Oldbury)

"Just fed up of them changing my hours and not asking you, finding out when I go in to work have to check my rota on a daily basis." (Female, Retail Worker, Sheffield)

"It can get to Thursday or Friday and next week's rota hasn't been finalised. Rota is changed without given any notice, sometimes changing up to 4 times in the week. Too many people are changing the rotas, including team leaders." (Male, Retail Worker, Gateshead)

"Hours fluctuate wildly. Often the rota goes up 1 or 2 days before it starts and hours get cut to 'punish' staff who complain about anything at all. There seems like there are favourites for giving hours, both how many and when all you get is 'your contract is for flexible hours' if you say anything. Our hours changed last week to overnight with no consultation on things like being sent home in the middle of the night, rest breaks, or anything. We are pushed around without warning or explanation to suit management and settle scores." (Female, Retail Worker)

"Although I know roughly my rota and off days, I only know the day before what my official start hour will be. Also, I don't know how many hours of work I will have on each day until we receive a message or are told by supervisors that all agency staff needs to go home. However, I have also noticed that we can receive messages to say all overtime for the day has been approved and later a message for all agency staff to go home early. The problem with the not knowing for definite how many hours per day I will be working means

that I do not have a reliable set amount of income on a weekly basis which can cause financial issues at times." (Female, Warehouse Worker, Edinburgh)

"They [management] said to me, "Oh you can stay until ten [pm]?" I can't just suddenly rearrange my life to give you another two hours because the line manager messed up when they did the rotas." (Female, two jobs – PT retail and PT cleaning on a weekend)"

The issues that are faced

There is a clear need to ensure that workers are aware of their shift patterns so that they can plan their lives and budget their finances. Make Work Pay quoted from Matthew Taylor's Review of Modern Employment Practices in stating that, "workers being able to work when they want is a good thing, but not knowing whether you have work from one day to the next is not.

Usdaw has recently asked our members how much notice they get of their shift patterns. The following table is based on 7,234 responses to the question. This table shows that four-in-ten members receive at least four weeks' notice. This clearly demonstrates the ability of employers, even in sectors with fluctuating trade such as retail, to plan ahead for shift patterns. Unfortunately, at the same time, almost a quarter of workers are getting one week or less notice of shift patterns, something which makes it incredibly difficult for them to run their lives.

How much notice do you normally get of your rota pattern?	%age	n
4 weeks	40.83%	2,954
3 weeks	20.09%	1,453
2 weeks	15.50%	1,121
1 week	11.58%	838
less than one week	12.00%	868

Breaking these figures down by gender shows that 28% of women receive one week's notice or less of their shift pattern compared to 21% of men. There also appears to be a significant racial factor in individuals getting notification of shift patterns with over a third of Black workers getting one week or less notice of shifts compared to 22% of white workers. It should be noted that only around 500 Black workers completed this survey question. This could be explained by TUC figures showing that the number of Black and ethnic minority (BME) workers in insecure work more than doubled from 2011 to 2022 (from 360,200 to 836,300).

This evidence clearly suggests that tackling one-sided flexibility, as committed to with Make Work Pay, including by providing reasonable notice of shift patterns, will support efforts to tackle racial inequalities in the Labour Market.

SHIFTS: RIGHTS TO REASONABLE NOTICE – PROVISIONS OF THE BILL

On page 13 of the Bill, lines 25, Regulations 27BI, subsection 4 talks about notice needing to be given a specified amount of time before the shift is due to start. Usdaw would prefer that that specified time is detailed in the Bill and detailed in such a way as to drive up standards across the labour market. As noted above, over 40% of workers receive notification of their shifts at least four weeks in advance. This is sampled from workers in

industries such as retail, warehousing and manufacturing where shifts will vary. There are very few traditional nine to five workers who would have completed the survey yet who make up a large part of the economy.

Usdaw is concerned that if the 'specified amount of time' referred to in subsection 4 ends up being less than four weeks, this could drive down terms and conditions in sectors which already offer four weeks or more. A comparable situation happened when 15-minute break periods were introduced under the Working Time Regulations. Whilst some workers saw improvements to break provisions, many who have previously had 20-minute breaks had their break entitlement cut to 15 minutes.

As noted above, we believe that four week notice periods should be contained within the Bill.

On page 13 of the Bill, lines 27 to 33, Regulations 27BI, 5a) and 5b) sets out a provision for workers earning above a specified amount or for workers with at least a certain number of contractual hours, to be excluded from the right to notice of shifts. The purpose and rationale for this provision is not explained at any point in any of the relevant documents, nor is it in line with the commitments offered in Make Work Pay, which stated,

"We will ensure all workers get reasonable notice of any change in shifts or working time…"

For workers to get reasonable notice of any change in shifts or working time, they need to first have reasonable notice of the shifts or working time themselves.

Furthermore, if this threshold, either on hours or pay, is set on a low basis, unscrupulous employers would have the opportunity to game the system by employing people at that threshold so that hours can be varied significantly.

Usdaw believes that Subsection 5 should be removed as part of a plan to ensure that the Bill delivers on the promises made within Make Work Pay.

On page 13 of the Bill, lines 41 and 42, Regulations 27BI, Subsection 7, refers to notice of shift meaning how many hours are to be worked and from what time on which day. This would not wholly cover split shift scenarios where there was a mandatory gap in working hours between the start and the end of the full shift. We believe that the wording should be revised to include such scenarios.

On page 14 of the Bill, lines 6 to 8, Regulation 27BJ, Subsection 1 part c), states that shifts are only entitled to compensation in instances, "where the shift is one that the employer has requested (rather than required) the worker to work, the worker has agreed to work it." In nearly all Usdaw workplaces, notice of shifts is simply given to workers, set around patterns of worker availability. The worker does not agree to a rota pattern each week when they receive the notification, the employer simply requires the worker to work that shift. There are various contractual provisions which implement terms such as 'compulsory overtime'. For example, within a major retailer, pickers in parts of the distribution operation can be required to work an extra 3.75 hours per day with 2 hours' notice.

It appears that limb c of subsection 1 will, perhaps inadvertently, remove the right to compensation for cancelled or changed shifts from the vast majority of workers in typically low paying industries such as retail. We are unclear as to why compensation would only be paid for shifts cancelled or curtailed where the individual has agreed to the shift rather than

where the employer has created a set of provisions which enables them to require the shift be worked.

Furthermore, an employer may be able to require an individual to work, for example 20 hours per week spread across five days on separate windows of availability. Under the provisions of limb c), because the employer has flexibility on when it can require the individual to work these shifts, they can cancel, change or curtail shift patterns without a need for compensation. This is likely to lead to a greater requirement from employers for flexibility within contractual arrangements.

On page 14 of the Bill, lines 11 to 13, Regulation 27BJ, Subsection 2 part b) We are pleased that this term covers changes to one or more of the day on which or the time at which the shift is to start or end. This covers a concern that bad employers may schedule a shift for shorter than potentially necessary but create compulsory overtime provisions which would extend the shift with little or no notice, thereby avoiding the need to pay compensation.

On page 14 of the Bill, lines 34 to 37, Regulation 27Bk, Subsection 1 creates a provision for the exclusion of agency workers. Regulation 5 of the Agency Workers Regulations 2010 states that,

“Subject to Regulation 7 *(qualifying periods)*, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer.”

Subsection 1 here is potentially in breach of Regulation 5 of the AWR 2010. Furthermore, there is no justification for agency workers to be treated separately on these provisions and therefore Usdaw believes that the subsection should be removed.

On page 14 of the Bill, lines 38 to 41, Regulation 27Bk, Subsection 2 removes the requirement to provide notice if the worker suggests working a shift, or a longer shift, and the employer agrees to the suggestion. On the face of it, this appears to be a significant loophole where bad employers could conspire situations where the worker has nominally suggested working a shift, or working a longer shift, but in fact was given little or no choice over the matter.

Usdaw believes that clarity is needed over how this process would be followed and what safeguards would be put in place to avoid coercion into working additional or longer shifts.

RIGHT TO PAYMENT FOR CANCELLED, MOVED AND CURTAILED SHIFTS

OVERVIEW

Labour's *Plan to Make Work Pay* stated that "We will ensure all workers get reasonable notice of any change in shifts or working time, with compensation that is proportionate to the notice given for any shifts cancelled or curtailed."

The compensation element of this commitment is dealt with in Clause 3 of the Bill.

BACKGROUND

The Experience of Usdaw Members

"When I applied for this post I was told it was full-time working but we get sent home which is a short fall in hours and wages which can be a struggle for people on low incomes." (Male, Warehouse Worker, Middlesbrough)

"We often finish our work early so get sent home losing hours pay!" (Anonymous, Retail Worker, Dorchester)

"If towards the end of a shift, all the work I done, the supervisor tells me to go home, so I lose anything from 30 mins to 15 mins from my contracted hours, this happens weekly, and reflects in my wage." (Female, Retail Worker, Leeds)

"I have previously worked for a large high street fashion retailer. They would often cancel shifts, sometimes on the same day or would send you home early if the shop was quiet. I was always covering for staff absence or if people left the company. I could not get an increase of my 16 hour contract. On the odd occasion I also got less than 16 hours. I just felt used by them. I think it will only get worse in the retail sector." (Male, Retail Worker, Liverpool)

"I have a 20 hour contract but often work 40 plus hours. They know that they can rely on me working extra but when it's not busy we are sent home." (Male, Retail Worker, Glasgow)

"I can be asked to work extra hours at very short notice and then penalised for refusing. Hours can be reduced without notice, ie sent home early without pay and shifts cancelled with less than 1 hour's notice." (Male, Retail Worker, Stockton-on-Tees)

"Agency working at my site are very unhappy in the way they are treated, these guys would come into work and have probably spent up-to £6 just to getting to work and find that they are sent home after 1hr. This is totally unfair as they should be employed for the whole shift if they have started on that day. Agencies should be held to account as many people have rent to pay and families to feed." (Male, Warehouse Worker, Derby)

The issues that are faced

Usdaw, and our members, has significant experience of hours of work being cancelled by the employer at short notice. In our most recent survey of 7,500 members, 17% of members reported that, in the last six months, they have had a shift cancelled or cut short with less than one week's notice. As can be seen from a wide variety of issues around one-sided flexibility, this issue is more likely to impact younger workers. 23% of 16 to 24 year olds have had a shift cancelled or cut short, a figure which drops to 15% for 55 to 64 year olds. Over

recent surveys, a significant number of members provided quotes and information about the issue, a range of which have been reproduced below.

In Usdaw's experience, the issue of hours being cancelled at the last minute, or even during a shift, is closely linked to the issue of short-hours contracts. Individuals are typically offered what is termed overtime, which is in effect their normal hours of work which the employer will not guarantee as part of the contract. When there is a risk of an overspend on staffing budgets, or even a manager unilaterally decides to 'punish' a worker, these so-called overtime hours will be removed

Usdaw believes that the effective delivery of a right to a contract based on the number of hours an individual normally works will significantly help to address this issue.

PROVISIONS OF THE BILL

On page 17 of the Bill, lines 17 to 27, Regulation 27BO, Subsection 2 creates a provision limiting the range of workers who would be entitled to compensation for cancelled, moved or curtailed shifts. The provision does not appear to cover overtime shifts, or hours worked over the guaranteed hours provisions created earlier in the Bill, if the guaranteed hours are at set days and times or in accordance with a pattern of set days and times. Usdaw's research shows that around one-in-five workers are reliant on overtime for more than a quarter of their regular hours.

These are highly insecure workers, experiencing the negative affects of one-sided flexibility. Make Work Pay was clear that all workers would benefit from these rights and there appears to be no justification for excluded significant parts of the workforce. Make Work Pay stated:

"We will ensure all workers get reasonable notice of any change in shifts or working time, with compensation that is proportionate to the notice given for any shifts cancelled or curtailed."

Usdaw believes that Subsection 2 should be removed as part of a plan to ensure that the Bill delivers on the promises made within Make Work Pay.

On page 17 of the Bill, lines 36 to 40, Regulation 27BO, Subsection 4 in conjunction with Subsection 3 attempts to deal with part of the issue raised above in relation to subsection 2.To do this, subsection 4 creates a definition of an irregular shift, "An "irregular shift", for the purposes of subsection (3), is a shift starting or ending on a day, or at a time, other than a day or time that is provided for by the contract as mentioned in that subsection (including where part of the shift corresponds to what is provided for by the contract).

Usdaw has significant experience of contracts which can require individuals to work on, for example, and five days from seven or any four days from seven, with variable start and finish times. In these types of contracts, all days and times are provided for by the contract meaning that, under the definition in subsection 4, there would be no irregular shifts.

FLEXIBLE WORKING

OVERVIEW

Labour's Plan to Make Work Pay stated "We'll help ensure workers can benefit from flexible working, including opportunities for flexi-time contracts and hours that better accommodate school terms where they are not currently available, by making flexible working the default from day one for all workers, except where it is not reasonably feasible." It further stated that Labour would "adapt and build on" recent changes by the Conservative Government to the flexible working framework.

This commitment is dealt with in Clause 7 of the Employment Rights Bill.

Usdaw welcomes the additional requirement the Bill imposes on employers to justify the reasonableness of a refusal to agree to a flexible working request. However, the Bill retains a request-based framework, along with a list of business reasons for refusal. We therefore believe that further change is needed to fulfil the Government's aim of making flexible working the default.

We also believe that the penalties for unreasonably refusing flexible working requests need to be increased, in order to strengthen the right. These are currently capped at eight weeks' pay, at a maximum of £700 per week. Our view is that this is not a sufficiently high level to act as a deterrent to employers, especially large employers, from refusing requests unreasonably or failing to follow a reasonable procedure.

FLEXIBLE WORKING – BACKGROUND

The majority of Usdaw's members work in retail, a sector which is widely assumed to provide opportunities for flexible working to fit around people's lives, particularly caring responsibilities. However, the experiences of Usdaw members suggest that this is often not the case, and that making a flexible working request can be a daunting prospect, especially for workers who are low-paid and in precarious work.

Flexible working has clear benefits, not just to workers, but to employers too. These can include staff retention, productivity and absence reduction due to improved employer wellbeing.

Flexible working is a key driver of workforce participation, particularly for women. Research by the Fawcett Society has shown that 40% of women who are currently not working said that if flexible working was available to them, it would enable them to do paid work.

A survey of Usdaw members with caring responsibilities carried out in October 2024 found that just over half (53%) were aware of the right to request flexible working hours. Of those who were aware of the right, only 50% had used it. 28% of workers with caring responsibilities described their employer's flexible working arrangements to help parents and carers as "poor" or "very poor".

Some examples of the experiences that members have shared are listed below:

"My employer isn't very supportive - They say the right things but when requests are made, it's always denied and most of the time an explanation isn't provided just 'doesn't meet business needs'."

"As a carer for a terminally ill husband who tires very easily I believe I should be able to refuse extra night duties that I have recently been given, but my manager says I have to do them."

“At the present time I'm working reduced hours due to my caring responsibilities. My employer is trying to permanently reduce my contract to my current hours. There seems to be little in the way of "care" for me. I need my wages but also don't really have time to work. I'm also not well myself but I feel under constant pressure to work more both from my employer andthe government and society at large. Caring 24/7 & trying to hold down a job is extremely difficult & I feel undervalued by everyone. I need proper financial support not more pressure & stress.”

“Single mum with no help from anyone & no family - only me. Can't get extra hours as overtimes only offered to those who can start at 5/6am or stay until after 11pm. I’ve been told to my face I’m not flexible enough.”

“Daughter is autistic and non-verbal. However, it is not something I like to "advertise" although my Line Manager is aware, the HR Department is not and I value his compassion as a Leader. Whilst the organisation does cater for Diversity, Equality, and Inclusion, those are corporate ideals and deliverables, but in my scenario, does not cut much mustard, when my daughter, on occasion, may have a sporadic and unplanned tantrum. She can only be calmed without causing physical damage to herself in a controlled environment - a Sound Room which we have built at home, but which requires parenting supervision 24/7. Balancing that requirement with the sporadic timing of both full-time working parents can get challenging.”

PROVISIONS OF THE BILL

On page 24-25 of the Bill, Clause 7, subsection 3 requires that an employer can only refuse an application for flexible working when it is reasonable to do so, under the grounds set out in subsection (1ZA).

Usdaw welcomes the addition of the requirement of reasonableness in the employer’s decision. This could have a positive impact in encouraging employers to consider requests more carefully, if they know that they will have to justify their decision as reasonable. Currently, reasonableness only relates to the procedural aspects of the flexible working framework, as employers are required to deal with requests in a reasonable manner. Requiring the decision itself to be reasonable is therefore a positive step forward.

However, while the eight business reasons to refuse a request remain in place unchanged, there is still very broad scope for businesses to refuse. In order to make flexible working a genuine default right, the business reasons need to be addressed and consideration given to a much more narrow criteria for refusing a request.

On page 25 of the Bill, Clause 7, subsection 4, requires that the grounds for refusal must be included in the written response, along with why the employer considers its refusal to be reasonable. Any measures that improve transparency and holding employers to account are welcome. However, in practice, many employers already state the reasons for refusal in their response to a request, and therefore this may have limited practical impact.

On page 25 of the Bill, Clause 7, subsection 5 provides for regulations to be made by the Secretary of State to set out the steps required to comply. Usdaw believes that the procedural elements of the current flexible working procedures need to be tightened, and our preference would be that this is done on the face of the Bill rather than through regulations. We would call on the Government to consider the following procedural and enforcement improvements:

- Abolish the restriction on the number of applications an employee can make in a 12-month period
- Extend the right to all workers and not restrict it to employees

- Introduce the ‘advertising duty’ i.e. outline the flexible working options available when advertising jobs.
- Reintroduce the right to a written decision, a right of appeal and the right to be accompanied to meetings.
- Reintroduce the power of Employment Tribunals to make wider recommendations where an employer has found to have discriminated.
- Increase the level of penalties for non-compliance.

It is worth noting that many employers who Usdaw deals with have retained elements of the flexible working procedures which were removed from statutory provisions by the previous government. This would indicate that these procedures were not burdensome and that employers found them to be helpful in supporting their staff and managers through the process. The following are examples taken from four large retailers’ flexible working request procedures:

Employer A - Give colleagues a right of appeal within 14 days and for the appeal to be heard by a manager different to the one that made the original decision. There are also options to trial the change requested and / or to make a fixed term request for up to two years after which there offer the right to revert back to your original role / job / working pattern or similar alternative if your original role/working pattern no longer exists.

Employer B - A right of appeal (timeframe not specifically set out but must be within two months of the request being received). Distinction between a request for flexible working and request for changes to working hours / patterns submitted by disabled workers confirming that managers should deal with the latter as a request for a reasonable adjustment.

Employer C - Offer a right of appeal and the opportunity to work a trial period.

Employer D - Offer the opportunity to meet with the manager once a request has been received to discuss the request. Option of a trail period. Offer a right of appeal and importantly the right to be represented at the appeal stage.

While our members’ experiences indicate that these procedural elements alone do not guarantee that a request will be properly considered, they are important safeguards for workers which, alongside a full review of the reasons for refusal, could go some way towards strengthening the rights set out in the Bill.

STATUTORY SICK PAY - OVERVIEW

On Sick Pay, Labour's Plan to Make Work Pay committed to:

"The pandemic exposed just how precarious work and life is for those on acute low incomes, with many forced to choose between their health and financial hardship. It is simply unacceptable that the safety net of sick pay should not be available to those who need it most, and so a Labour government would strengthen statutory sick pay, remove the lower earnings limit to make it available to all workers and remove the waiting period. We will ensure the new system provides fair earnings replacement for people earning below the current rate of statutory sick pay."

Usdaw welcomes that the Government are delivering on their commitment to removing the three waiting days and the lower earnings limit. However, these were just two methods of strengthening statutory sick pay. We continue to call on the Government to increase the rate of sick pay to ensure that it is something that people can live on.

STATUTORY SICK PAY – BACKGROUND

The experience of Usdaw members

Usdaw members responding to our most recent cost of living survey [5]shared details with us about how eligibility for SSP and the low level of payments impacts on their lives, work and health:

I'm currently working with ill health as I can't afford to take time off because I've run out of sick pay. The current state of my health means that given my conditions I should probably be able to afford retirement but unfortunately financially it's impossible. The current rates of sickness benefit from the government couldn't pay our gas and electricity let alone pay the mortgage and have enough money to live on. (male , retail worker, 61)

I have health conditions which are now unbearable because I tried to work so much now off work sick and income is half so wont eating much this month and not had heating on for 2 winters now. (female, 42, retail worker)

I do not get sick pay, therefore I cannot afford to be off ill. Recently I went into work after being nebulised by my g.p. who diagnosed me with pneumonia. I struggled at work but had to go in as one day off I'll means I would miss a day's pay. (Male, retail worker, 54)

I've been off work sick with cancer awaiting treatment for 5 months so far and my wages are about to go down to statutory sick pay and wonder how people survive paying their bills (female, retail worker, 54)

Currently working with ill health as I've ran out of sick pay . Having had pneumonia I used 5 weeks of my six week sickness pay not being fully recovered had to go back to work . (female, retail worker, 64)

I am struggling to balance out my bills due to bereavement to leave sickness leave and SSP I am now behind on payments that causes undue stress all because the cost of living (Female, retail worker, 40)

The rate of Statutory Sick Pay

Issues with the rate of SSP are well documented, it is one of the lowest rates in the OECD and falls well short of providing workers with an income to meet even the basics of food, fuel and rent when they are off sick.

A full time worker (36.9 hours) on the NLW of £11.44 currently receives only 28% of their salary when they are off work ill. The recent budget announcement will actually see this proportion decrease to 26% from April 2025. As earnings rise, SSP makes up an even smaller portion of wages.

The retail sector is one of the lowest paid sectors in the UK. In our most recent survey 72% of members earn below the Real Living Wage. For many workers in low paid and insecure work, Statutory Sick Pay (SSP) will be the only form of financial support they receive when they are off work ill.

While there are company sick pay policies that go beyond statutory entitlement, it's the lowest paid workers who are most likely to be missing out.

Three quarters (73%) of Usdaw members cannot afford to take time off work when they are ill.

This rises to 77% for women, 77% for disabled workers, and 80% for disabled women.

Worries about getting ill are also a major concern for low paid workers when considering their future financial security and this has been exacerbated by the cost of living crisis and continuing high prices for basic essentials:

- 61% are worried about how they will make ends meet if they get ill.
- Disabled workers are particularly worried. With this number rising to 71% for disabled workers, and 74% for disabled women.

Members feel they have no other option but to go into work when they are not well enough to be there because they are ineligible to receive any sick pay or the statutory rate simply isn't high enough to live off. As illuminated by the pandemic, this not only affects their own health but potentially impacts that of those around them including other colleagues and customers.

Supporting employees to be able to take time off to properly recover when they are ill is not only good for workers but also good for business. Presenteeism in the UK has around tripled since 2010, with the latest CIPD Health and Wellbeing at work survey showing 63% of people observing it in the workplace last year. The cost of presenteeism grew by £25 billion last year far outweighing those of illness-related absenteeism or disability.

Linking SSP to a worker's usual pay is the Union's preferred model to properly support workers during a period of sickness. Usdaw continue to call for all workers receive a level of pay equivalent to their *'normal weekly wage'* for the full 28 weeks. This reflects the huge issues Usdaw members face receiving adequate support when they are sick.

Usdaw has negotiated sick pay schemes that are notably more generous than statutory entitlement in many workplaces, therefore raising the statutory floor in terms of payment, may not prove as big a jump particularly for larger employers.

Government must take action via an amendment to the bill or consultation into improving the rate of SSP for all workers.

STATUTORY SICK PAY – PROVISIONS OF THE BILL

Removal of Three Day Waiting and Extension of SSP below the LEL

As stated Usdaw welcome the commitments in the bill that extend sick pay to workers during their first three days of absence and those who currently earn below the lower earnings limit.

Three quarters of Usdaw members currently receive no payment for the first three days they are off work ill. [10] And the exclusion of the lowest paid workers from Statutory Sick Pay via the LEL leaves some of the most financially vulnerable workers without support when they are ill.

As women, disabled, Black and young workers are more likely to be employed in low paid and low hours work and more likely to be missing out on sick pay, these groups of workers are set to positively benefit from the extension of sick pay.

In responses to the Health is Everyone's Business consultation the majority of respondents, 75%, which included small and large employers, agreed that SSP should be extended to employees earning below the LEL. Respondents felt that by extending SSP to those earning below the LEL, employers would be better incentivised to reduce sickness absence for all of their employees.

The additional cost of the changes outlined in the Bill, particularly to larger employers, is minimal. One large employer modelled the additional cost at less than 1% of annual profit.

Proposed Replacement Rate for employees earning below the rate of SSP

Make Work Pay promised a "fair replacement rate for workers earning below the rate of SSP".

The Bill as written will apply the replacement rate to workers earning above SSP, due to the principle of paying the lower of 'SSP and % of wages whichever is lower'.

This leaves a group of workers between the LEL and the proposed % rate who the DWP recognise as 'notional losers'. Usdaw believes it is unacceptable for anyone to be worse off and undermines the intention of the bill to 'strengthen sick pay'.

This proposal would have an unnecessary detrimental impact for some of the lowest-paid workers who stand to lose £100s and potentially £1000s from their current entitlement depending on the replacement rate. As the losses pile up for longer term absence this will inevitably impact workers with serious long term health conditions who require time away from work.

Gains from the removal of three waiting are not enough to set off potential losses.

For example, take a worker who works 3 days a week, earning £123 p/w who currently qualifies for the full flat rate of £116.75.

At a replacement rate of 60% they would receive 26% less SSP entitlement after 4 weeks absence, 38% less after 8 weeks and lose over half (52%) of their current entitlement if they were off for 26 weeks.

Given the commitment to strengthen statutory sick pay, any proposal that leaves low paid workers with less support undermines this intention, and should be immediately rectified with an amendment to the Bill.

It is our view that any replacement rate should only apply to “workers earning below the rate of SSP” as outlined in Make Work Pay, and no worker should be left with less than their current entitlement.

Usdaw believes the lowest paid workers earning below the rate of SSP should receive 100% of their usual pay when off sick.

These workers are not only more likely to struggle to meet basic payments, but much less likely to have savings to fall back on and much more at risk of falling into hardship due to periods of ill health.

This could be achieved by amending the principle to ‘SSP and usual wages whichever is lower’.

Many workers already receive 100% of their usual pay through company sick pay schemes while they are off sick and we therefore reject concerns that paying workers their usual rate of pay would be detrimental to absence levels or prolong absence. To the contrary, evidence shows that where workers feel properly supported with appropriate sick pay policies, employers benefit from increased engagement and productivity.

If the Government are committed to a percentage of total earnings, the rate should be set no lower than 95% of earnings. This reflects the current difference between workers earning the Lower Earnings Limit of £123 and the rate of SSP (£116.75) they receive. This percentage rate is the only rate that ensures workers below the rate of SSP receive a “fair earnings replacement”.

ENTITLEMENTS TO LEAVE

PARENTAL LEAVE – OVERVIEW

Labour's *Plan to Make Work Pay* stated "As part of our mission to reduce the impact of parental income on a child's opportunities, we will ensure that parental leave is a day one right."

This commitment is delivered in Clause 11 of the Bill, by removing the Secretary of State's power to define a qualifying period for parental leave. We welcome the removal of this qualifying period which would allow more people to access parental leave. However, low take-up will continue to be an issue when this leave is unpaid.

PARENTAL LEAVE – BACKGROUND

Employees with a year or more's service are currently entitled to a maximum of 18 weeks unpaid parental leave (before their child's 18th birthday). Most employers allow a maximum of four weeks per year but some employers allow more flexibility.

Examples of situations where employees might want to use parental leave include to:

- providing care when usual childcare arrangements are disrupted and the time off can be planned in advance
- covering school holidays
- caring for a sick child
- going to school open days or events with a child
- Settling a child into new childcare arrangements

Take-up of parental leave is very low, particularly for low-paid workers, because it is unpaid. Most of our members try to manage situations like those listed above with a combination of annual leave, shift working, and a patchwork of informal childcare arrangements including relatives and friends. Unfortunately, these arrangements are not always sufficient and can be very stressful to organise. This situation contributes to low-paid workers, particularly women, being forced to cut hours or leave the workforce completely.

PARENTAL LEAVE – PROVISIONS OF THE BILL

Clause 11 removes the Secretary of State's power to define a qualifying period for parental leave. As stated above, we welcome this removal of the qualifying period. However, we call on the Government to consider introducing a right to paid time off for parental leave. The right is currently out of the reach of low-paid workers, who also have limited control over where and when they work, meaning that they have even greater need for parental leave to deal with the challenges of bringing up children. This impacts disproportionately on women and their participation in the labour market.

We recognise that the Government has committed to a wider review of family leave provisions and believe that this must include consideration of rights around paid time off for parental leave.

PATERNITY LEAVE – OVERVIEW

Currently, to qualify for paternity leave, someone needs to be employed for at least 26 weeks by the end of the 15th week before the due date, or by the time they are matched with a child for adoption. People who have taken shared parental leave cannot then take paternity leave.

We are therefore pleased to see that Clause 11 of this Bill removes the qualifying period and also that Clause 13 removes the current restriction on taking paternity leave after shared parental leave.

However, we believe that there needs to be further consideration given by the Government to the length of paternity leave, as two weeks is insufficient for someone to support their partner post-birth and spend time bonding with and caring for their baby. The level of statutory paternity pay is too low, and dependent on length of service, average earnings and employment status. We believe that paid paternity leave should also be available to all workers and not just employees.

More widely, we believe that the Government's promised review of the parental leave system must consider improving maternity pay and leave provisions, to better support working families and women's participation in the workforce.

PATERNITY LEAVE – BACKGROUND

TUC research found that over half of families struggle when dads or partners take paternity leave and one in five do not take the leave they are entitled to, mostly for financial reasons.

In a survey of fathers and partners who applied for the Union's paternity grant we found that a fifth took less than two weeks paternity leave because they weren't entitled to statutory paternity pay.

Almost all respondents (an overwhelming 95%) said that they didn't feel that they got to spend enough time with their baby or child in its first year.

As noted by the TUC in their Employment Rights Bill briefing at Second Reading, supporting families to share caring responsibilities more equitably would also help to tackle the gender pay gap: women are five times more likely to be out of the labour market due to caring responsibilities.

PATERNITY LEAVE – PROVISIONS OF THE BILL

On Page 27, Clause 11 removes the Secretary of State's power to make regulations on the qualifying period for unpaid parental leave. Usdaw welcomes this but calls on the Govenment to consider introducing paid leave and measures to ensure it can be used more flexibly to support working families.

On Page 27, Clause 12 removes the qualifying period for paternity leave. Usdaw welcomes this but calls on the Government to consider further improvements to paternity leave and pay, to improve take-up and better support families.

On Page 28, Clause 13 removes the restrictions on employees taking paternity leave and pay following shared parental leave and pay. We welcome this removal of a current anomaly in the parental leave provisions.

BEREAVEMENT LEAVE – OVERVIEW

The Plan to Make Work pay stated that “Going through the loss of a loved one can be one of the hardest things a person must go through. While the vast majority of employers give their workers the time off that they need, the law remains outdated and ill-defined. Labour will clarify the law and entitlement, introducing the right to bereavement leave for all workers.”

This commitment is brought to life in Clause 14 of the Bill.

BEREAVEMENT LEAVE - BACKGROUND

- Bereavement is something that is likely to affect every worker in the UK at some point in their life.
- One in five of our members who had a Bereavement of a close relative reported that they had not received any payment. This is almost certainly including members working for companies that have paid Bereavement policies, meaning that they are not applying their policies consistently.
- When paid Bereavement isn’t available our survey indicates members end up using sick pay and can end up signed off through the GPs.
- Our results are likely to be weighted in favour of better conditions, the situation in none unionised workplaces is likely to be worse.
- The Regulations around the relationships that will count for bereavement leave needs to recognise the emotional impact of bereavement, not just the need to handle logistics after the death of a dependant.
- Bereavement leave needs to be paid for all workers at the full rate to address the additional of financial stressors as well as focusing companies that already have paid Bereavement policy to apply it in a consistent way.

A period of bereavement can be one of the most stressful periods of a person’s life. The mental strain of bereavement can influence a person’s ability to function properly in their everyday life including their workplace. A suitable period of bereavement leave can allow a person to properly grieve and begin to process their loss in a healthy way without other pressures interfering.

Bereavement is an issue likely to affect everyone at some point in their life, in a recent survey of over 7,500 of our members, 48.87% of people said that they had taken time off because of a bereavement of a close relative.

The loss of a loved one is already a traumatic event and financial worries due to missing earnings can only add to this stress. When asked, a third of members had not received paid bereavement leave after the loss of a close relative. The survey sample was heavily skewed towards individuals in unionised workplaces and as such, those with paid bereavement leave are likely to be overrepresented in the results.

Often if paid bereavement leave isn’t available people go off sick, with the absence classed as “stress” or “depression”. This means the employer is often paying company sick pay rather than having paid bereavement pay. Over half of members who didn’t have access to paid bereavement leave had to take unpaid bereavement leave. In 15% of the cases members went off work sick in relation to the bereavement, with 6% taking longer periods of time off sick after been signed off from work with a fit note.

A further 10% of members answered “other” to how their bereavement was handled. Some examples they gave of what happened to them were:

- The leave totally denied by manager.
- Had to leave their job because the company wouldn't grant enough bereavement leave to handle complex affairs.
- Was told to book a holiday.
- Was given a shift swap and made to come back to work after the funeral on the same day.
- Threatened with the sack if they took time off.
- No bereavement leave offered because the relative was an in law.

Again, these are examples that are coming out of workplaces that are unionised and often have paid bereavement policies which some managers are just not applying properly. The situation is likely to be much bleaker in non-unionised environments.

If there was legislation for paid time off for bereavement, this leave would be treated with the same consistency as annual leave within companies. This would reduce sickness absence whilst at the same time providing employees with the support they need. Further improvements around bereavement leave in legislation would help to improve workers' lives and give them a space to grieve and process their loss properly before returning to the workplace.

Bereavement Leave – Current Bill Provisions

Usdaw is suggesting the following improvements to the Bereavement sections of the Employment Rights Bill:

- A complete and inclusive list of circumstances where bereavement leave would apply is included within the primary legislation.
- The entitlement to bereavement leave is introduced as a paid right and that individuals are entitled to full pay for both parental bereavement leave and regular bereavement pay.

The current changes to Bereavement leave within the Employment Rights Bill entitle a 'bereaved person' to *at least* one week's leave. The length of bereavement leave, as well as the definition of a 'bereaved person' is to be defined within later regulations; a 'bereaved person' will be defined by reference to the employee's relationship with the person who has died.

Usdaw believes that the relationships covered by this provision should mirror the provisions of a close relative as defined by the Social Fund Maternity and Funeral Expenses (General) Regulations 2005. Broadly speaking, this would ensure individuals get access to bereavement leave following the death of a Parent, Parent-in-law, Son, Son-in-law, Daughter, Daughter-in-law, Step-parent, Step-son, Step-son-in-law, Step-daughter, Step-daughter-in-law, Brother, Brother-in-law, Sister and Sister-in-law

The current Bill provisions make no mention of pay for the additional bereavement leave entitlement. Usdaw believes that no one should lose out financially as a result of a bereavement of a close family and therefore, bereavement leave should be paid at full pay, the same rate as annual holiday leave. As a first step towards this, it would be relatively straightforward to extend the current provisions for pay within the "Parental Bereavement Leave and Pay Act to encompass the additional bereavement leave provisions within the Employment Rights Bill. This would entitle individuals to a statutory minimum rate of either £184.03 a week or 90% of average weekly earnings (whichever is lower).

PROTECTION FROM HARASSMENT

Content Note – this section includes descriptions of workers' experience of sexual harassment, including sexual assault.

OVERVIEW

Labour's Plan to Make Work Pay document stated that "Labour will require employers to create and maintain workplaces and working conditions free from harassment, including by third parties. And Labour would properly tackle sexual harassment at work. One in two of all women have been sexually harassed at work; this must change. Labour will strengthen the legal duty for employers to take all reasonable steps to stop sexual harassment before it starts."

It also stated that "Labour will strengthen protections for whistleblowers, including by updating protections for women who report sexual harassment at work."

These commitments are brought to life in Clauses 15 – 18 of the Bill.

Usdaw strongly welcomes these provisions, particularly the extension in the Bill of the preventative duty which came into effect in the Worker Protection (Amendment of Equality Act) Act 2023, by requiring employers to take "all" reasonable steps instead of just reasonable steps to prevent sexual harassment, and the extension of protection to cover harassment by third parties.

We would welcome confirmation from the Government of what steps it intends to take to monitor the effectiveness of these new duties in changing workplace cultures and preventing harassment.

BACKGROUND

A number of factors heighten the risk of Usdaw members being exposed to sexual harassment at work. Women make up the majority of employees in the retail sector and the majority of Usdaw's members. Women also remain concentrated in lower paid jobs at the bottom of grading structures, often on low hours and insecure contracts.

The majority of Usdaw members also work in public-facing roles. The 'customer is always right' approach taken by managers can mean there is a reluctance to challenge the behaviour of customers.

Pressures and competition in the sector to increase footfall and improve customer experience can add to this issue. Together with the low status and low value society attaches to retail jobs, this makes women working in the sector particularly vulnerable to sexual harassment.

Our members have previously shared experiences of how hard it can be to get colleagues or managers to take sexual harassment seriously. Comments like 'he doesn't mean anything by it', 'that's just his way' or 'can't you take a joke' are common. This kind of ongoing 'banter' makes women feel undervalued, demoralised and isolated. Women highlighted the damaging 'drip-drip' effect of being exposed to banter and jokes day in, day out.

One member told us:

"When I first started working in my store we had to wear jackets that said we werehappy to help. On several occasions customers asked me how far I would go to help them – one man asked would I help in the bedroom."

A case study recorded by the TUC involving one of our members, Bec, a retail worker from the Midlands, is outlined below:

Bec was sexually assaulted by a customer while at work. She told the TUC: “I was stacking the shelves at work and suddenly felt someone grab my breasts from behind. I froze as he slowly ran his hands down my body. I turned round and saw it was a regular customer who I had spoken to before. He was just standing there looking at me like he hadn’t done anything wrong.

“After he moved on, I immediately went to tell my supervisor what had happened. She asked me if the man had “grabbed my boobs” which made me realise this had happened before to other staff in the shop.

“I was pretty shaken, but I tried to carry on with my day. But the incident kept going round in my head – why hadn’t I said something, done something? I had always assumed if something like this happened to me, I would shout out. But I didn’t, I just let it happen.

“The next day I asked my manager for advice about what to do and he told me to report it to the police, which I did. The police took my statement, and the customer was questioned, but he disappeared before the case got to court.

“Eventually the police tracked him down and told me he was going to plead ‘not guilty’, so they asked me if I would give evidence in court. I told them I would as I didn’t want him to get away with what he had done to me – and I didn’t want him to abuse any other women.

“I was very nervous about giving evidence but thankfully while I was waiting to, the CPS told me he had changed his plea to ‘guilty’ so I didn’t have to, and he was put on the sex offenders register for three years.

Bec wasn’t surprised by the results of the TUC poll that found 3 in 5 women had experienced sexual harassment, verbal abuse or bullying at work.

Bec herself has experienced harassment at work on numerous occasions. She said: “A lot of customers seem to think it’s acceptable to be over familiar with you. It happens all the time that they stand close to you, touch you, or put an arm round you.

Bec thinks things need to change. She told the TUC: “Nine times out of 10 you brush off the behaviour – because otherwise you would be complaining all the time. But it’s not right, and I worry about the younger staff who are only 16 or 17. This treatment traumatises them. Customers need to know that – however kindly intended – touching staff isn’t appropriate and we shouldn’t have to put up with this.

“Things need to change. At the moment, we do that by speaking up. I would encourage everyone to report harassment they experience. But it would be great if the law changed to keep workers safe from third party harassment.”

In retail and other sectors, harassment from third parties is common, with data from the House of Commons Library, using the Government’s own survey, indicating that 1.5 million people experience sexual harassment from a third party each year.

The extent to which women who work in client facing roles are unprotected by current laws was highlighted in the highly publicised President’s Club scandal – the women who faced violations of their dignity in that case would not have had recourse to the law as it currently stands.

We also believe that the preventative duty should be extended beyond sexual harassment to all forms of harassment related to a protected characteristic.

Additionally, the Government should reintroduce the statutory discrimination questionnaire which enables an individual who suspects they have been discriminated against to seek information from their employer.

PROVISIONS OF THE BILL

On Page 30 of the Bill, Clause 15 requires employers to take all reasonable steps to prevent sexual harassment. We welcome this requirement, which will strengthen the preventative duty. Employers are familiar with the legal concept of "reasonableness", which by definition is not limited. If a step is reasonable, an employer must take it, it is not then they do not have to. We cannot therefore see any reason why extending "reasonable steps" to "all reasonable steps" would be problematic or burdensome for employers, and we believe it would be an important signal from the Government of the importance of creating truly preventative workplace cultures.

We believe that the Government should consider extending the preventative duty to all protected characteristics covered by harassment.

Given that enforcement of the preventative duty will be through the Equality and Human Rights Commission, it will be important to ensure that the EHRC is properly resourced and has a clear plan for strategic enforcement. This will require significant investment, particularly as there is not a free-standing right to bring a claim against an employer for a breach of the statutory duty. We believe that the Government should consider introducing a free-standing right in the future.

On Page 30 of the Bill, Clause 16 provides than an employer must not permit a third party to harass an employee, unless it is shown that the employer has taken all reasonable steps to prevent this. This is an important element of the Bill, particularly for public-facing workers such as those in retail. We welcome that the protection extends to all protected characteristics covered by harassment and that it is a specific, stand-alone protection. This gives an important message about the seriousness of the issue and the need for employers to protect their employees.

On Page 30 of the Bill, Clause 17 enables the Secretary of State to specify in regulations the steps that are to be regarded as reasonable, and lists steps that may be specified including assessments, plan, reporting processes, and complaint handling. We believe that this is a good starting point for listing reasonable steps and that it is important that employers have clear guidance on what reasonable steps would include. It will be important that workers are properly consulted through their unions on the introduction of this guidance, to ensure that it reflects the scale and complexity of the issue it is seeking to address.

On Page 31 of the Bill, Clause 18 adds disclosures relating to sexual harassment to the list of relevant failures in relation to protected disclosures. We wholeheartedly welcome this addition, which will give much-needed protection to those who take extremely brave steps to call out sexual harassment in the workplace and the cultures that enable it to happen.

DISMISSAL

RIGHT NOT TO BE UNFAIRLY DISMISSED: REMOVAL OF THE QUALIFYING PERIOD – OVERVIEW

Labour's Make Work Pay document stated:

"The rate at which people move jobs has been declining, posing risks to productivity, because the lengthy wait for basic rights means the risk of moving jobs falls to heavily on the individual. This is a problem for workers, because those who switch jobs get pay rises on average four times higher than those who do not. It's also a problem for businesses because they may not be able to hire the best possible candidate. Labour's changes will address this, with genuine two-sided flexibility that works both ways – giving workers the security to change jobs.

"Our New Deal will include basic individual rights from day one for all workers, ending the current arbitrary system that leaves workers waiting up to two years to access basic rights of protection against unfair dismissal, parental leave and sick pay.

"This will not prevent fair dismissal, which includes dismissal for reasons of capability, conduct or redundancy, or probationary periods with fair and transparent rules and processes. We will ensure employers can operate probationary periods to assess new hires. However, the changes will help to ensure that newly hired workers are not fired without reason or cause and will help drive up standards in workplaces."

RIGHT NOT TO BE UNFAIRLY DISMISSED: REMOVAL OF THE QUALIFYING PERIOD – BACKGROUND

With a few exceptions like whistleblowing dismissals, and discriminatory dismissals, an employee cannot currently claim unfair dismissal until they have two years of service. Approximately 8.5m workers, who currently have less than two years' service with their employer, don't currently have protection from unfair dismissal. The qualifying period was doubled by the Conservatives, having previously been 12 months.

Young employees and Black and minority ethnic employees are particularly likely to have short service. Over half of employees aged under 30 (56 per cent) have been with their current employer for less than two years. Some 42 per cent of BME employees have been with their current employer for less than two years, compared to 28 per cent of white employees.

Those working in hospitality, care, customer services and "elementary" occupations (this includes jobs such as cleaners and security staff) are also particularly likely to have service of less than two years.

This means that in many situations employers can lawfully sack a worker, just by giving them their statutory/contractual notice pay and telling them not to come back to work.

Being dismissed on spurious conduct or capability grounds, without a fair investigation can have devastating consequences for an employee. It can destroy the individual's morale and confidence and hinder their future employment prospects – as well as delivering an immediate hit to their living standards

As recognised in Make Work Pay, the two-year qualifying period deters employees from moving from one employer to another due to the loss of employment protection. And workers

have been increasingly reticent to change jobs. In 2019, the rate of job mobility was 2.4 per cent, 25 per cent lower than in 2000, according to Resolution Foundation research.

Removing this existing barrier to labour market mobility would help workers find new jobs, progress and learn new skills and will foster economic change as workers move to new, growing sectors. On average, from 1975 to the present day, individuals who moved jobs enjoyed typical pay growth four percentage points higher than individuals who stayed in the same job.

Reform should also lead to better workplace relations. It should encourage employers and workers to engage in difficult conversations and effective performance management.

RIGHT NOT TO BE UNFAIRLY DISMISSED: REMOVAL OF THE QUALIFYING PERIOD – PROVISIONS OF THE BILL

The key provisions of the Bill in relation to this element are contained within Schedule 2. Usdaw is satisfied with the provisions to remove the qualifying period for protection against unfair dismissal.

However, also contained within Schedule 2 is the creation of an 'initial period of employment'. According to the Next Steps to Make Work Pay documents, this is being introduced as a period, "during which there will be a lighter-touch process for employers to follow to dismiss an employee who is not right for the job."

At the moment, for a dismissal to be deemed as fair, an employer must; have a reason to consider dismissing an employee, investigate the reason, hold a hearing with the employee and provide an opportunity to appeal the decision. Usdaw is concerned that any process which is 'lighter-touch' than this could create an opportunity for dismissals to take effect which are unfair. As such, we believe that any dismissal should:

- relate to the employee's performance, i.e. conduct or capability;
- require evidence to be documented and reviewed;
- give the employee a right of appeal;
- importantly, provide the right to be accompanied by a trade union rep.

DISMISSAL DURING PREGNANCY AND FOLLOWING A PERIOD OF STATUTORY FAMILY LEAVE

OVERVIEW

The Plan to Make Work Pay stated that "Labour is committed to strengthening protections for pregnant women by making it unlawful to dismiss a woman who is pregnant for six months after her return, except in specific circumstances. This will give new mothers certainty that the law is on their side."

Progress towards this commitment is made by providing powers in Clauses 20 and 21 of the Bill for the Secretary of State to make provisions in regulations.

BACKGROUND

Pregnancy discrimination at work and in the labour market remains widespread, ranging from being denied paid time off for ante natal appointments to inadequate rest breaks and lack of a proper risk assessments. In the worst cases, women still lose their jobs when their employer finds out they are pregnant, or when they are on maternity leave. Although a dismissal due to pregnancy is automatically unfair and therefore unlawful, it can be difficult to prove that this was the reason for dismissal.

The TUC estimates that 54,000 women a year (one in nine mothers) are forced out of the labour market due to pregnancy and maternity discrimination. 77% of pregnant women and new mothers have experienced discrimination or negative experiences during pregnancy, maternity and on their return from maternity leave.

PROVISIONS OF THE BILL

On Page 31 of the Bill, Clause 20 extends the power in Section 49D of the Employment Rights Act 1996 to provide for regulations to protect women during or after a protected period of pregnancy from dismissal, not just redundancy. We welcome the Government's intention to extend these protections but believe that this should be included on the face of the Bill, rather than in regulations.

On Page 32 of the Bill, Clause 21 extends the powers in the Employment Rights Acts to make provisions in regulations on dismissals during statutory family leave, to include a period after such leave. We welcome the Government's intention to extend these protections, however we believe that this should be included on the face of the Bill, rather than in regulations.

DISMISSAL FOR FAILING TO AGREE TO A VARIATION OF CONTRACT - OVERVIEW

Labour's Plan to Make Work Pay set out a clear plan to end fire and rehire.

"Labour will end the scourges of 'fire and rehire' and 'fire and replace' that leave working people at the mercy of bullying threats. We will reform the law to provide effective remedies

against abuse and replace the inadequate statutory code brought in by the Government, with a strengthened code of practice.

"Ending fire and rehire means workers can be safe in the knowledge that terms and conditions negotiated in good faith can't be ripped up under threat of dismissal. Workers will be able to plan and save for the future with security in their pay and terms. Good employers will also know that they will not be undercut by competitors who only engage staff under threat of the sack."

This commitment is covered within Clause 22 of the Employment Rights Bill**.**

DISMISSAL FOR FAILING TO AGREE TO A VARIATION OF CONTRACT – BACKGROUND

The provisions of fire and rehire have gained significant media interest in recent years as a result of high profile cases such as P&O Ferries along with numerous cases that occurred during the Coronavirus pandemic.

Usdaw, like many of our sister unions, has extensive experience of employers utilising fire and rehire practices to cut terms and conditions. This has occurred in major companies such as Tesco and Morrisons as well as other employers such as BCM Fareva. However, it is clearly not just an issue of where the threat of fire and rehire reaches a point of the formal process being utilised. Frequently, during discussions with employers, the company will make clear that if the union, or individual members, do not voluntarily accept a reduction in their terms and conditions, the employer will simply instigate a fire and rehire process. Our officials can recount numerous instances of this happening during negotiations. Looking at the issue on an individual basis, almost a third of Usdaw members have been asked to change their contracted hours to support the business' needs in the last 12 months. However, 1 in 5 of these members felt forced into agreeing to a change, having been threatened with fire and rehire by their employer.

Usdaw has successfully pursued a legal case against Tesco, requiring them to stop plans to fire and rehire a small group of workers who enjoyed red circled provisions. This case showed the value of interim relief sanctions, in this occurrence delivered through the Civil Courts, however this case was very much determined on particular facts and is currently unlikely to apply to other cases. The case did however prove that such a measure can be an effective safeguard in preventing abuses of fire and rehire provisions in cases where it is likely that the employer has acted in breach of s.1041 of the ERA.

Usdaw supports the proposals outlined in a recent consultation paper to introduce interim relief to employees who are bringing an unfair dismissal claim under the new right which will be introduced by the Employment Rights Bill. As was seen in the P&O case, an employer can currently calculate the likely cost of non-compliance with regulations and implement dismissals well ahead of any response being available through the courts. Interim relief would help to ensure that, in cases where success is likely, workers can keep their jobs, or continue to be paid on their existing contracts, until the case reaches court.

As noted in the consultation paper, interim relief is already a remedy for certain types of unfair dismissal claim under sections 128-132 of the Employment Rights Act 1996 and sections 161 – 166 of the Trade Union and Labour Relations (Consolidation) Act 1992. If claims for interim relief are allowed under s189 TULRCA for a failure to properly consult, such provisions would need to be created in such a way as to allow a trade, or other appropriate representatives, to bring a collective claim, whilst not negating the ability of individual employees to elect to take the redundancy. This structure would need to provide

for individuals to be able to continue with the claim for a protective award but with an ability not to be covered by the interim relief application if they so choose.

Usdaw also supports the provisions, outlined within the Next Steps to Make Work Pay document, to increase the level of the protective award. We believe that, as is already recognised through case law, the level of a protective award needs to be punitive rather than compensatory. We are concerned that, even doubling the current maximum award could continue to result in a situation where employers are able to calculate their liability as a result of not consulting and in some cases determine that it is easier just to pay a fine. As such, we are calling for an unlimited award.

However, we do recognise that there is a risk that if the cap is removed without a clear floor of the level of award which should be made, there is a risk that tribunals may make lower awards than at present. If this were to happen, it would increase the chances of bad employers choosing to accept the cost of a protective award rather than offer adequate compensation. As such, we believe that this strategy is only likely to be effective if tribunals are given guidance on the minimum levels for uncapped protective awards.

DISMISSAL FOR FAILING TO AGREE TO A VARIATION OF CONTRACT – PROVISIONS OF THE BILL

On page 3 of the Bill, lines 13 to 19, Section 104I, Subsection 4a, the Bill creates a defence for fire and rehire in certain instances. Usdaw believes that it would be much more effective to deliver an outright ban of fire and rehire and as such would prefer to see this provision removed.

If the Government are not minded to change their position on an outright ban of fire and rehire, we believe that there needs to be significant focus to protect the integrity of the provisions as outlined, including safeguarding against the potential misuse of s. 1041(4 ERA). For this point, we agree with a consultation submission from Thompsons Solicitors, specifically stating,

“However, if there is no outright ban, then the focus inevitably shifts to the exception under s.104I(4 ERA), which allows an employer to avoid a finding of automatic unfair dismissal in circumstances where it dismisses to vary terms and conditions of employment. As drafted, the employer must show that the dismissal was to eliminate, prevent, significantly reduce or significantly mitigate the effect of any financial difficulties, which at the time of the dismissal were affecting, or was likely in the immediate future to affect, the employer’s ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business.

Whilst this may superficially appear to be a stringent test for an employer to meet, we have concerns about the use of the word “likely” and precisely how it is intended that it would be construed. Section B12 of the Equality Act 2010 Guidance4 provides that “likely” should be interpreted as something that “could well happen”. In our view, an employer only being required to demonstrate something “could well happen” to impact its ability to operate as a going concern is insufficiently robust to address unscrupulous fire and rehire tactics. All manner of things “could well happen” to affect the ability of an organisation to continue as a going concern in the current uncertain economic climate, but that is an insufficient basis to justify dismissing a workforce and re-engaging them on less favourable terms and conditions if the Government is seriously committed to ending the abuse of fire and rehire tactics. If there is to be no ban on fire and rehire, then the obligation of an employer should be to demonstrate that any variation is necessary to ensure its survival and therefore, the wording “*or was likely in the immediate future to affect*” should be removed from s.104I(4) ERA.

We also consider that where an employer seeks to avail itself of this defence, it should be required under the provision to submit a report from its independent auditors that its financial circumstances are such that if the changes to terms were not made, it would affect the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business.

"If the current wording does remain, then we consider it imperative that guidance is provided as to how the term "likely" should be interpreted and that the test is significantly more robust than the one referenced above. For example, the interim relief test requires an employer to show that there is a "significantly higher degree of likelihood than more likely than not" that they will succeed at a substantive hearing. We consider that the test should not be this stringent if interim relief is introduced as a remedy for a potential breach of s.104I ERA (as we believe it should be), but in the context of legislating against fire and rehire, it is imperative an employer must meet a robust requirement like this one for the purposes of s104I (4) ERA."

PROCEDURE FOR HANDLING REDUNDANCIES - OVERVIEW

Labour's Make Work Pay document, produced ahead of the General Election to set out what the Party would do in Government to improve workers' rights, set out the Party's policy to tackle a long-standing issue on collective redundancies. This was detailed in the following paragraph:

"Labour will also strengthen redundancy rights and protections, for example, by ensuring the right to redundancy consultation is determined by the number of people impacted across the business rather than in one workplace."

PROCEDURE FOR HANDLING REDUNDANCIES - BACKGROUND

Under current legislation, there is no obligation to consult if the number of redundancies in any given workplace is less than 20, even where this is part of a centrally driven restructure in which the overall number of redundancies is substantial. This is particularly an issue to the retail sector where there are national chains, no store autonomy, centrally determined strategies and the total redundancies in a restructuring exercise may run to hundreds of dismissals but the numbers in any given store is less than 20.

The current legislation, Section 188 of the Trade Union Labour Relations Consolidation Act 1992 states, "Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less…" The concept of an establishment is not defined within the legislation. Instead, Tribunals have interpreted it to mean a geographical establishment rather than an establishment of the whole company or decision-making process. This interpretation leaves significant numbers of workers at risk losing entitlement to redundancy consultation.

Employers who operate fair employment practices recognise the absurdity of this and enter meaningful consultations to ensure that the exercise is conducted smoothly and value the contribution that the Union brings to managing such change effectively.

However in our experience, some employers take advantage of this omission in the law to try to avoid consultation on redundancies when making redundancies at a number of different outlets where the total redundancies amount to more than 20. This is clearly unfair.

This provision also interacts with entitlement to a protective award in instances where there has been a failure to consult. For instance, in Woolworths 27,000 employees were made

redundant in a single redundancy exercise following the company being placed in Administration and the closure of the business.

In that example approximately 24,000 employees were entitled to a Protective Award. These being staff employed in the Distribution Depots and the 600 stores with 20 or more employees. In 200 stores, where fewer than 20 employees were employed, approximately 3,000 employees were not entitled to anything, notwithstanding the fact that their circumstances were exactly the same as the successful Claimants in every respect save for the size of the store. Thus an absurd postcode lottery created substantial and inexplicable injustice.

Almost 30,000 employees were made redundant from Woolworths at the same time and for the same reason, so the suggestion that 3,000 of them did not constitute a collective redundancy did not make sense.

The Woolworth example illustrates the absurd situation created by the, in our view, misguided interpretation of the original EU Directive on Collective Redundancies and Dismissals.

Following the Woolworths example, Usdaw has faced the same issue across a number of examples of employers falling into administration. This has included major brands such as Ethel Austin, Comet, Topshop and Mothercare.

In short, it is wrong in situations where there is a single source decision, which results in one redundancy exercise, relating to a number of different workplaces, which results in substantial numbers of redundancies to waive the obligation to consult and to exclude from entitlement workers from a particular workplace, where the number happens to fall below 20.

PROCEDURE FOR HANDLING REDUNDANCIES - PROVISIONS OF THE BILL

Usdaw fully supports the provisions of Clause 23 to tackle the issues that the Union has faced in, most notably, Woolworths, but also other redundancy situations such as those in Ethel Austin, Comet, Topshop and Mothercare.

We believe that additional measures could be included within the Bill, including amending S.188 (1Aa) TULRCA to increase consultation for large scale redundancies to 90 days and to amend S.188 (1Ab) to increased consultation for smaller scale redundancies to 60 days.

We are aware that during the oral evidence sessions, some witnesses stated that the provisions within the Bill would require employers to consult with people not affected by a redundancy situation. Having reviewed S.188, S.193 and S.198A of TULRCA, together with the amendments listed under Clause 23 of the Employment Rights Bill, we do not believe this to be the case.

The provisions of Clause 23 do not alter the second half of S.188 part 1 which states, “the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.” Therefore, while more employees will benefit from collective consultation during redundancies, i.e. those with fewer than 20 workers in their workplace, the provisions of S.188 are clear that collective consultation only needs to take place on behalf of those affected by the proposed dismissals or those who may be affected by measures taken in connection with those dismissals.

If an employer is closing two sites with 20 employees at each site at the moment, they will have to conduct collective consultation for all workers affected. The proposals in Clause 23

would mean that if an employer is closing two sites with 19 employees at each site, they would also have to conduct collective consultation for all workers affected.

In neither situation, would an employer have to conduct collective consultation on behalf of anyone not impacted by the proposals.

DUTIES OF EMPLOYERS RELATING TO EQUALITY

OVERVIEW

The Plan to Make Work Pay stated that “Labour will require large employers with more than 250 employees to produce Menopause Action Plans, setting out how they will support employees through the menopause, much like gender pay gap action plans. In addition, we will publish guidance, including for small employers, on measures to consider relating to uniform and temperature, flexible working and recording menopause-related leave and absence.”

It also stated that “Large firms will be required to develop, publish and implement action plans to close their gender pay gaps, and we will ensure outsourced workers are included in their gender pay gap and pay ratio reporting.”

These commitments are dealt with in Clause 26: Equality Action Plans, and Clause 27: Provision of information relating to outsourced workers.

We welcome these provisions but believe that they could be strengthened by requiring employers to consult with worker representatives before publishing action plans, and during their implementation.

BACKGROUND

Since the introduction of gender pay gap reporting in 2017, awareness of gender pay gaps have increased, but the pay gap remains high at 14%. A report by Diversity in Retail found that the gender pay gap in the retail sector closed slightly from 13.9% in 2022 to 12.7% in 2023, but stated that “the focus needs to move beyond reporting numbers to understanding the underlying inequalities and devising action plans to address these issues.”

At current rates, the gender pay gap will not be fully closed for another 20 years. Usdaw believes that the requirement to publish gender pay gap action plans for larger firms will be an important milestone in efforts to promote gender equality. It is a logical next step from gender pay gap reporting, which has become embedded and accepted by businesses, with high compliance rates.

Women make up over half of the UK workforce and over half of Usdaw’s members. One in three women in the UK, around 13 million, are estimated to be going through or have reached menopause.

Women in their 50s are the fastest growing group in the workforce and staying in work longer than before. As such, there is an increasing need for employers to do more to support women experiencing menopausal symptoms.

The menopause can all too often be a trigger for women leaving the workforce due to their experience of sexist and ageist attitudes, not receiving the right support, a lack of access to reasonable adjustments and unsupportive/punitive absence policies. Many women are left feeling like they have no other option than to give up their jobs or take early retirement.

The Women and Equalities Committee published a report *Menopause and the workplace in July 2022* which warned that the impact of menopause was causing the UK economy to *"haemorrhage talent".*

There are clear barriers to menopause age women remaining in work and Usdaw are calling for more robust measures that require and compel, not just encourage, employers to act.

- Last year a survey found one in 10 women left their jobs due to menopausal symptoms.
- ONS Labour Market Statistics (Feb 2023) showed a third (31.7%) of women aged 50-64 were economically inactive.

The CIPD reported three out of five working women between the ages of 45 and 55 with menopause symptoms say it has a negative impact on them at work. Nearly a third of women (30%) surveyed said they had taken sick leave because of their symptoms, but only a quarter of them felt able to tell their manager the real reason for their absence.

A report by ITV, in conjunction with Wellbeing of Women, found that a quarter of those surveyed had considered leaving their jobs because of the menopause.

While in opposition, Labour highlighted the findings from the survey of more than 4,000 menopausal women aged 45-55 which found that 14% of women had reduced their hours at work, 14% had gone part-time, and 8% had not applied for promotion.

Action to support menopausal women to remain in work is also of benefit to employers. Not only do more inclusive workplaces benefit from attracting and retaining female talent, expertise and experience, but employers committed to properly supporting their employees during menopause benefit from reduced costs in terms of absence and turnover. Oxford Economics suggested that if a woman earning £25,000 a year leaves her job due to problematic menopause symptoms, it will cost her employer over £30,500 to replace her.

Usdaw welcomes and supports the introduction of menopause action plans, which will firmly establish the menopause as an occupational health issue, help to normalise conversations about the menopause in the workplace and better enable women to access the adjustments they need to remain in work. We await more detailed proposals on how this will be enacted in regulations, and we also look forward to the introduction of ethnicity and disability pay gap reporting through the Equality (Race and Disability) Bill.

There remain significant concerns about the quality and consistency of data collected by employers, and the lack of meaningful consultation with employee representatives even amongst those who already publish a narrative or action plan alongside their gender pay gap information. We are also aware that very few employers utilise the positive action measures permitted in the Equality Act including the provision that allows them to appoint or promote a candidate from an under-represented group where there are two candidates of equal merit.

Given the above, employers should also be required to initiate meaningful dialogue with employees and their representatives before drawing up and publishing action plans.

When the Draft Equality (Race and Disability Bill) is published it will be essential that employers are required to adopt a standard method of monitoring and to report progress against the same set of classifications otherwise it will be impossible for employees, trade unions and others to understand how different companies are performing against those in the wider economy and their sector.

EQUALITY ACTION PLANS - PROVISIONS OF THE BILL

On page 38 of the Bill, Clause 26 inserts a new subsection into the Equality Act 2010, to introduce powers for regulations to require large employers to equality action plans on

matters relating to gender equality, to include addressing the gender pay gap and supporting employees through the menopause. Usdaw supports these measures, but we ask the Government to consider reducing the threshold of large employers, which is currently set at 250. We believe that the requirement to publish an action plan is not an onerous one, and that a firm employing 50 or more people should come under these regulations.

Furthermore, we believe that the addition of a requirement to consult with employer representatives ahead of publication of an Equality Action Plan, and on a regular basis to discuss progress, would be a positive addition to the regulations, which should be provided for in the Bill.

On page 27 of the Bill, Clause 27 allows for regulations to require employers to publish information about service providers they contract with for outsourced services. We welcome this addition to gender pay gap reporting provisions, which should create more transparency and help to prevent employers from hiding behind outsourcing to avoid gender pay gap accountability.

December 2024.