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Scrutiny Unit
House of Commons
London
SW1A OAA

I am writing on behalf of the CBI in response to Employment Rights Bill Committee's call for written evidence.

The CBI speaks on behalf of 170,000 businesses of all sizes and sectors, across every region and nation of the UK. This includes over 1,100 corporate members and nearly 150 trade associations. CBI corporate members alone employ over 2.3 million private sector workers. This submission reflects the views of employers from across the CBI's membership.

Businesses support the government's aims to improve labour standards and drive forward growth. As currently drafted, the Bill will however fail on both counts. Businesses have been somewhat reassured by the engagement with the government since the election on the question of how to make protection of reasonable probation periods meaningful. But there was not time for the same engagement on other areas before the Bill was published. Businesses are concerned it will significantly impact hiring and reduce pay by removing labour market flexibility and increasing non-wage costs. The Bill could be amended so that an effective landing zone is found, but it will require significant revision in some areas.

The CBI recommends the Committee consider amendments that:

- Require businesses to have a fair process in place for probation dismissals whilst limiting their exposure to tribunal claims.
- Change the *right to be offered* a guaranteed hours contract to *a right to claim* one, with a reference period of 52-weeks.
- Ensure the right to notice of shift cancellation applies only when an employer *requires* that the employee works and does not preclude a firms' ability to concurrently test the availability of multiple members of staff to cover a short-notice absence.
- Retain key elements of the IR framework like a minimum support threshold for statutory recognition.
- Retain the 'at one establishment' rule for collective consultation.
- Remove provisions on dismissal and re-engagement from the Bill unless situations like P&O Ferries can be clearly separated from routine changes to contracts.
- Retain a one-day waiting period for statutory sick pay

Flatlining productivity and business investment are at the heart of the labour market's problems…

Between 2003-23 productivity grew on average by 0.72% a year compared with 2.12% in the preceding 20 years since 1982[1]. Mirroring this business investment over the last 20 years increased on average by 1.94% each year, compared to 4.5% over the period 1982-2002[2]. With productivity being the driver of sustainable pay increases, this has meant not only a squeeze on growth, but a squeeze on living standards and on the tax receipts needed to fund public services.

Whilst there are several reasons for the UK's poor record on business investment, the deteriorating performance of the labour market itself has been a contributor. The CBI's Employment Trends Survey (ETS) shows that 52% of businesses now see labour costs as a threat to competitiveness and 62% believe the labour market will become a less attractive place to invest over the next 5-years[3].

A combination of employment cost increases have driven the labour market's competitive decline. Labour shortages over the pandemic exaggerated recruitment challenges and followed a series of regulatory changes and tax rises including the rollout of automatic enrolment, the apprenticeship levy, and the increases in the National Living Wage (NLW) that were needed to bring it to 2/3rds of median income.

Whilst on their own merits some of these policies have been a success, the burden of incorporating them has frequently come at the expense of the very investment needed to drive productivity and growth. Some cost pressure can be helpful as an incentive to adapt, but the recent experience is that costs rising too quickly has forced businesses to focus on achieving short-term budgets through reduced investment, to the detriment of long-term growth.

Many of these changes have also been redistributive rather than value-creating, with the NLW especially compressing the wage distribution in the lower half of the labour market[4] and reducing pay differentials and progression opportunities rather than boosting productivity[5]. While such measures can help to achieve some short-term relief to social policy objectives, they aren't a sufficient answer to broad based concerns about long-term living standards.

…and demographics mean the UK will be unable to rely on increasing labour supply to grow

The Learning & Work Institute predict there will be 1.4m more retirees by 2040 than those entering the labour market[6]. The Health Foundation project that there will be 500,000 more working-age people living with major illness by 2030[7]. Whilst the labour market may be

1 ONS, Labour productivity time series data set, November 2024
2 ONS, Gross Fixed Capital Formation: Business Investment: CVM SA: % change latest year on previous year & Business investment headline data pre-1997 datasets, 2024
3 CBI, Employment Trends Survey, 2024
4 Low Pay Commission, The National Minimum Wage in 2024 and forecast National Living Wage in 2024, available here
5 Eduin Latimer; Low Pay Commission. "The impact of the National Living Wage on productivity", 2022.
6 Learning & Work Institute, Missing Workers, 2023
7 The Health Foundation, What we know about the UK's working-age health challenge, 2023

softening for now, the squeeze on labour supply is therefore likely to remain a long-term trend.

This is why the Bill's objective to deliver a lasting increase in living standards will be measured by its impact on investment

Delivering the Bill in a way that both limits imposing higher costs on an already high-cost labour market and drives-up the productivity growth needed to afford higher pay and labour standards is essential.

Businesses however believe that the costs entailed by the Bill are far higher than the government currently expects, and that the positive impact on productivity will be much lower, with reforms to zero-hour contracts, restructuring and industrial relations causing particular concern. When the CBI surveyed members ahead of the Bill's publication, 26% said they believed they could afford the higher costs they expect from the package without there being unintended consequences for growth, investment, jobs or discretionary benefits[3] – and anecdotal evidence suggests concerns have increased since the Budget.

New probation rules can only avoid a chill on hiring if there is effective protection against weak tribunal claims

It is important to businesses that they treat their people fairly, not least because they are competing to attract workers. Businesses agree a fair process is needed when somebody is being dismissed, including during probation. If designed well, the Bill could lead to some improved recruitment and performance management practices.

Businesses are not worried about being found to have treated workers unfairly, because they are committed to treating them well. It is the cost of proving that they have done the right thing that is the big worry with a day one right to unfair dismissal that could impact hiring intentions, especially with 9m more people potentially entitled to launch a claim as a result of this change[8]. While the median award for unfair dismissal is £6,746, the direct and indirect costs of defending a claim are often tens of thousands of pounds.

- **Recommendation**: Amend s.98(2) ERA 1996 to add: (e) relates to the failure to pass a trial period of employment during the initial employment period. This will make dismissal as part of the initial period of employment a fair reason for dismissal.

As drafted the right to be offered guaranteed hours will raise costs and undermine growth…

There are two key issues with this reform:

1) The Bill discourages businesses from offering voluntary overtime by making it more expensive and riskier whenever employees work additional hours. This will impact

[8] DBT, Impact Assessment, Day 1 unfair dismissal rights, 2024

firms' ability to meet fluctuating customer demands and to grow, as well as making it harder to offer flexibility to those workers who want it.

The government has attempted to respond to business concerns about overtime by enabling firms to offer just a fixed-term contract where they deem it 'reasonable'. The multitude of circumstances in which it would be *reasonable* to make such an offer are however so varied that it will take years to establish a reliable body of case law on its use through the already stretched Tribunal. This is therefore a complicated fix of uncertain value and high familiarisation costs. A 52-week reference period would be a simpler, more effective solution for seasonal work. The Bill also needs to be more careful not to disrupt established good practice for managing flexibility fairly like annualised hours contracts and industries like theatre where norms are already established between employers and unions.

2) A *right to be offered,* rather than a *right to claim* or *request* means a significantly higher administrative burden on business than is necessary to achieve the policy objective.

Only a small proportion of those who will receive offers of new contracts will want to. This is the experience of businesses who already have processes for evaluating the suitability of their employees' contracts, and the ONS finds that most workers on a zero hours contract don't want more hours[9]. This makes the cost of preparing unwanted contract offers difficult to justify. The administrative burden of this is made worse by the fact that the Bill also does not allow employers the ability to make offers in bulk. The reference period for calculating the terms of the offer is different for every new employee depending on their first day of employment, meaning that employers will be required to make offers to different employees at different times.

- **Recommendation**: Amend s.1 to read "Right to claim guaranteed hours". Amend s.1(4) to insert the following words at the beginning of s.27BA(1*): 'If claimed by a worker'*. This will change the right to be offered a guaranteed hours contract to a right to claim one. Existing powers can be used to implement a 52-week reference period.

…**and while business supports notice of shifts and a corresponding compensation regime, there are concerns about how this reform has been brought forward**

The Bill states that an employer must give a worker reasonable notice of a shift whether they *request* or *require* them to work and give compensation where a shift is withdrawn at short notice.

Where staff are required to work it is right that the employer should give notice if they can. But not all circumstances can be planned for and in unforeseen circumstances – like short-term sickness absence - it should be possible to ask staff to work extra hours voluntarily with no notice at all.

[9] ONS, *EMP17: People in Employment on Zero Hours Contracts*

The Bill seems to misunderstand what good practice looks like in situations like this. Employers will often test the availability of multiple members of staff concurrently so that they can find someone willing and available quickly enough. Making them liable for compensation if multiple workers express an interest in the overtime discourages them from offering these hours to their employees before turning to agency workers.

> **Recommendation**: Amend s.1(4) as follows: delete from s.27BI(1) the words: '*Requests or'.* This ensures the requirement to give notice applies only when an employer requires that the employee works and allows them to make short-notice voluntary overtime offers to multiple workers concurrently.
>
> **Recommendation:** In s.27BO(10) insert at the end of the section: *"But does not include enquiries as to the availability of one or more workers to work a shift."*

An independent review can ensure the principles of accountability, proportionality and freedom of association support a modern industrial relations framework

Within its consultation on industrial relations reforms the government has rightly identified collaboration, proportionality and accountability as key principles upon which to base its framework. These are however missing from the reforms in the Bill, which only remove accountability mechanisms on trade unions. Autonomy of worker choice and freedom of association are also serious omissions.

These principles underpin businesses' trust in unions as effective vehicles for employee engagement. They also provide key safeguards against unreasonable behaviour. Like other businesses, most unions have good intentions and conduct themselves well, but not all do. Employment law exists to protect workers in any situation where an employer might abuse their power and trade union legislation needs to be calibrated similarly. Achieving an industrial relations reset will require a change in approach by some trade unions as well as by some employers. 92% of employers believe it is important that there are mechanisms that ensure trade unions are accountable to the people they represent[3].

Rushing through industrial relations reforms without securing the support of employers risks the kind of unbalanced settlement that so motivated the government to remove the Trade Union Act. An independent review could help to build a consensus that will increase the change of making a lasting change.

Businesses are especially concerned about changes to statutory recognition and industrial action thresholds

The Bill removes the 40% support threshold for recognition. It also includes a power that allows for the lowering of the threshold of union membership required to trigger a vote for recognition to as little as 2% of the workforce – in a business with 50 employees, that is only one person.

These thresholds matter for all the principles the government wants to base its new framework on. A support threshold is important to ensuring that recognition is always the result of a positive choice rather than apathy. Without a mandate from staff, unions that

receive recognition in this way will also be incapable of providing effective employee engagement.

- **Recommendation:** Delete s.47(3) removing proposed revisions to paragraphs 29(3), (5), (6) and (7) of Schedule A1 of the TULRCA 1992. This will retain the 40% support threshold for statutory recognition ballots.

The Bill removes the 50% turnout threshold for industrial action ballots that let businesses know that their staff genuinely want to strike and care enough about the issue. Knowing that it is their staff and not only union leadership that care about a dispute is critical to supporting business decisions. It is also central to ensuring that reasonableness prevails – overly calibrating to the views of a vocal minority can disengage the workforce as a whole.

Before the turnout threshold was introduced it was commonplace for industrial action to take place on issues that were disproportionate to the disruption to the business, workforce and the public they created. In 2008, 600,000 council workers were called to strike for 48 hours over pay on a ballot turnout of 27%[10]. In contrast, industrial action in 2023 was avoided despite being recommended by the Royal College of Nursing due to a turnout of 43%, proving that there was a divergence in the positions of staff and union representatives[11].

Businesses recognise that a turnout threshold creates a perverse disincentive for those opposed to the strike to not participate in the ballot rather than to have their say. This situation would be improved by a lower support threshold replacing the turnout threshold and is an aspect of reform an independent commission could be asked to assess.

- **Recommendation.** Delete s.54(2)(a)(i) and (ii) *and* insert a new sub-section after s.226(4) creating a power for the Secretary of State to make regulations deleting ss.226(2)(a)(iia) and substituting in an additional support threshold requirement. After section 226(4) insert: *226(5):*
    - *The Secretary of State may by regulations delete s.226(2)(a)(iia) and replace it with an additional requirement in s.226(2)(a)(iii).*
    - *The additional requirement shall be inserted by the words "and the specified percentage of those entitled to vote in the ballot."*
    - *The specified percentage means the percentage set out by the Secretary of State in regulations which shall be a percentage:*
        i. No greater than [40%] and
        ii. No less than [20%].

The impact of reducing the notice period for industrial action from 14 to 7 days could also be significant. Businesses accept that disruption is the objective of industrial action, but the capacity to cause disruption should be proportionate and leave enough time for the dispute to be resolved.

[10] David Hencke and Mark Milner, The Guardian, *600,000 public sector workers threaten to strike, Jun 2008, available here.*
[11] Nick Triggle, BBC, England nurse strikes end as vote turnout too low, June 2023, available here.

Companies now rely on countless other businesses at home and abroad in their increasingly complex supply chains. A 7-day timeframe therefore hands some unions veto power in a dispute, and that undermines an effective balancing of interests.

- **Recommendation:** Delete s.57 removing proposed amendment to s.234A(4)(b) TULRCA 1992. This will retain the notice period for industrial action at 14-days.

For sectoral bargaining to be legitimate and effective, worker consent is key. The Adult Social Care Negotiating Body will however be established without a vote of the workforce in that sector to say they want to be represented in that way. That means the union imposed on that sector will have no direct link with the workers it represents, and little incentive or ability to account for their views.

- **Recommendation**: Amend s.29(1) to include: *'following an industry wide vote in favour of its establishment'.* Inset under s29(2) '*provision about how the Negotiating Body is elected'*. This will require that the Adult Social Care Negotiating Body can only be established after a meaningful vote of the workforce.

A right for unions to enter an employer's property is a reform seeking to address a problem that has not been well-evidenced. The Bill contains multiple steps that seek to raise workers' awareness of trade unions. It requires that staff are provided with a written statement outlining their right to join a union. Combined with the prominence of trade unions in public life, the vast majority of employees will have some awareness of trade unions. The proposed right of access will be a significantly more complicated measure to deliver. It is difficult to be confident at this stage that there is a practicable version of this policy because so many details are to be left unresolved until after the Bill has passed. For example, on what basis will the CAC determine disputed cases, and will they have the capacity and capability to make well-informed decisions? How should a business handle competing requests from rival trade unions? To what extent can a business balance the right of access against other legal requirements such as health and safety precautions and protection against 3rd party harassment?

- **Recommendation:** Delete s.46 removing s.70ZA-70ZL changes to the TULRCA 1992. This will remove the right of access provisions from the Bill until they have been considered by an independent commission.

Measures to curb dismissal and re-engagement and expand collective consultation threaten businesses' ability to restructure

The Bill removes the requirement that thresholds for collective consultation be calculated with reference to the numbers of redundancies being proposed 'at one establishment'. This change risks losing 'local voice' and will also be difficult for employers to comply with given the complex structure of many businesses. It risks forcing large firms into perpetual collective consultation for unrelated redundancies where no collective conversation can be meaningful.

- **Recommendation**: Delete s.23. This will retain the 'at one establishment' test.

Reforms to dismissal and re-engagement have far broader implications than outlined in *Make Work Pay,* and could affect the confidence of businesses to invest in the UK. The Bill makes a dismissal for a failure to agree to *any* variation of contract an automatic unfair dismissal, regardless of how reasonable the nature of the proposed change. This will make it very difficult (and in some instances impossible) for employers to make essential changes including everyday changes to terms like those required because of a regulatory change, an office move, or minor role changes.

Businesses make every effort to change employment contracts through consultation and with consent. Most changes receive consent, but the Bill creates a perverse incentive for workers to object to reasonable changes that they would previously have accepted.

The Bill also makes it harder to change contractual terms than to make a worker redundant, so while the intent is that imposing changes to contract should be a step to consider in order to avoid redundancies, the reality may become the opposite, with redundancies becoming the only alternative where employees refuse to agree to a change in contractual terms.

- **Recommendation**: Delete s22 to remove reforms to dismissal and re-engagement until they can be brought forward in a way that allows situations like that exemplified by P&O Ferries to be separated from routine changes to contracts.

Removing waiting days for Statutory Sick Pay will drive up absence more than productivity

With inactivity due to ill health rising, businesses are being increasingly proactive about health and wellbeing where they can afford to do so. They have long supported the removal of the Lower Earnings Limit (LEL) for Statutory Sick Pay (SSP). It makes considerably less sense now that SSP is an employment right instead of a contributory benefit.

Ensuring finite resources can be devoted to those that need them most however means striking a balance between fair minimum standards, firms' capacity to respond to the specific needs of their workforce, and investment in the future. Removing waiting days for SSP allows for fraudulent absences to eat into employers already stretched employment budgets, and so does not strike this balance effectively. One CBI member has noted that in France, where their sick pay is provided from the first day, they have seen a threefold increase in absence compared to their other facilities. Almost three in four (74%) businesses believe that the three-day period staff must wait before accessing SSP should be retained as a disincentive against fraudulent sickness absence[3].

CBI members have emphasised the importance of a waiting period of some level, over specifically the existing 3-day period. Some have found that occupational sick pay policies paid from the second day strike a better balance.

- **Recommendation:** Remove 8(3)(a), 8(4),8(5) & 8(7). Amend 8(3)(b) to define the period as consisting of at least two consecutive days. Amend 8(6) to update s155 of the Act to shorten the number of waiting days to 1 day.

Maintaining an open, positive approach is vital to improving the Bill

The government deserves credit for its business engagement to date, but the scale of change and the speed at which it has been brought forward means not all unintended consequences have been accounted for.

The CBI hopes the government will continue to work with businesses in these areas and will continue to try deliver its reforms in a way that means they achieve their aims whilst also support growth.