



Law Society
of Scotland

Consultation Response

Exclusivity Clauses

February 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Department for Business, Energy and Industrial Strategy consultation on measures to extend the ban on exclusivity clauses in contracts of employment.¹ The sub-committee has the following comments to put forward for consideration.

Consultation Questions

1. Do you agree the ban of exclusivity clauses should be extended to low-income workers where the guaranteed weekly income is below the Lower Earnings Limit?

Yes.

Where exclusivity is insisted upon for the protection of a business, it is logical that there is some reciprocal benefit and that the worker is then given sufficient work to prevent the need for them to seek additional hours elsewhere. Setting a minimum weekly income would prevent tactics which could be used to circumvent the current ban, such as offering one guaranteed hour per week to allow an exclusivity clause to be insisted upon. In our view extending the ban to those on a low-income would meet the policy objective of assisting those who have had their guaranteed hours reduced, or have only been able to secure a small number of hours, to increase their income and to move between industries in an increasingly competitive job market.

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941088/exclusivity-clause-consultation-document.pdf

2. Do you think the ban of exclusivity clauses should be extended to other workers? Please expand on why.

No.

The consultation refers to the ban of exclusivity clauses being extended to low-income workers. We assume that, despite the use of the term 'worker', the specific proposal is to extend the ban to both contracts of employment or other worker's contracts where the guaranteed weekly income is less than the Lower Earnings Limit, as is included in the drafting of 27A(1) of the Employment Rights Act 1996 where the definition of a zero hours contract includes 'contracts of employment or other worker's contracts'. If this is the case, we agree this would be sufficient to meet these policy objectives.

3. Do you agree the Lower Earnings Limit is an appropriate threshold?

We have no comment to make on what the appropriate marker of a low-income worker should be, or on the appropriate amount of earnings to maintain a sufficient standard of living. Setting the threshold at an amount equating to 13.76 hours a week for someone on the National Living Wage would in principle allow those workers to take on multiple jobs to increase their income and give other businesses the opportunity to recruit these workers and offer short hours contracts.

4. The existing ban on exclusivity clauses gives zero hours employees the right not to be unfairly dismissed and workers the right not to be subjected to a detriment for failing to comply with an exclusivity clause, and to claim compensation. Should these rights also be extended to employees/workers where the guaranteed weekly income is below the Lower Earnings Limit? Please expand on why.

Yes.

This would be consistent with the redress rights in place for those on zero hour contracts, and this category of employees/workers are also at risk of dismissal and being subjected to other detriments such as not being offered additional hours as a consequence of failing to comply with an exclusivity clause.

We are not aware of any significant case law or of a high number of claims being made on the basis of the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015. It may be the case that these clauses are not widely used, or this could be attributable to a move by employers to guarantee a small number of hours as a general move away from 'zero hour' contracts or as an avoidance measure. These proposals to extend the ban would help to address this type of avoidance and bring these low-income workers within the scope of the legislation.

The scope of the existing protection appears to be narrow and restricted to breach of an express exclusivity clause. Some ambiguity remains around the scope of the existing ban, for example, whether the circumstances where an employer treats a worker detrimentally or dismisses them for suspecting that

they are about to breach an exclusivity clause if, for example, the worker is looking for other work would be covered by the Regulations.

It is also unclear whether a requirement that a worker is expected to be available to work when work is offered could fall foul of section 27A (3) of Employment Rights Act 1996. It is arguable that, in some circumstances, being available to work for one business could deter or prevent a worker from being able to work for another business, because they may not be able to accept assignments offered by both businesses at the same time. Section 27A (3) makes any provision of a zero hours contract which 'prohibits' the worker from doing work or performing service unenforceable, which would suggest 'detering' or 'preventing' that may not be sufficient to bring a claim.

5. Do you think a cap on hourly wages should be set to ensure individuals who are paid a high hourly rate for a short number of hours a week are exempted from a ban on exclusivity clauses?

Yes.

From a policy point of view, as the proposals are aimed at allowing low income workers, particularly those impacted by the pandemic, to increase their income by taking on additional work we agree that those on a high hourly rate should be exempt.

Arguably the type of work being remunerated at a higher level will afford individuals more access to confidential information and trade secrets, which is more likely to justify the use of an exclusivity clause. The other ways of protecting legitimate business interests, such as an express confidentiality clause, are less effective than restricting workers from taking on additional work with other businesses.

These individuals are likely to have more bargaining power where there is a less restrictive provision e.g. prohibiting them from doing other work 'without consent', and we are not aware of exclusivity clauses being a cause for concern for these individuals. There is more likely to be the need for employers to require these individuals to disclose their interest in another business or prevent them from working for a competitor without consent, the latter of which would not be possible if they were included in the extension of the ban.

6. What level do you think the hourly wage cap should be set at?

We do not have any comments to make.

7. If you have any alternative methods to provide a similar exemption, please expand on these below.

We do not have any comments to make.

8. How likely do you think it is that the impact of the Covid-19 pandemic will lead to greater numbers of workers having the guaranteed hours in their contracts reduced?

Very Likely.

9. How likely do you think it is that greater numbers of workers will be looking for additional work to boost their income as an impact of the Covid-19 pandemic?

Very Likely.

10. How helpful do you think extending the ban on exclusivity clauses would be for workers earning under the Lower Earnings limit? Please explain your answer.

Helpful.

As stated at 4 above, these proposals would help to address avoidance of the current ban and bring these low-income workers within the scope of the legislation. However, the scope of the existing protection appears to be narrow and restricted to breach of an express exclusivity clause. Some ambiguity remains around the scope of the existing ban.

11. How likely do you think workers are to use the ability to take on additional work to reskill and move between sectors? Please explain your answer.

Likely.

There is likely to be an increase in workers moving sectors due to the changes in the job market, such as from hospitality to retail, given that some sectors have been more adversely affected by the restrictions imposed to control the spread of the virus. This is likely to continue given the lasting changes to the work available as a result of business closures and changes in demand. As a result, it is likely that there will be a large number of workers previously working full-time now accepting contracts for a small number of hours and where additional hours in that sector are not available, re-skilling and moving to other sectors.

Questions 12-13

As these questions are specifically for employers, we do not have any comments to make.



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