Written submission from USDAW (ERB0067)

BUSINESS AND TRADE COMMITTEE

INQUIRY INTO THE EMPLOYMENT RIGHTS BILL

USDAW SUBMISSION TO CALL FOR EVIDENCE

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 many of the UK's biggest retailers, including the Co-op, Morrisons, Tesco, Sainsbury's, Asda (Northern Ireland and Express stores), Argos, and Poundland. We also hold a range of agreements covering food manufacturing and distribution sites at national and local level.

Usdaw strongly supports the aims of the Employment Rights Bill, which we believe is a crucial step in achieving the Government's Growth Mission and a seminal moment for industrial relations.

Following a lengthy period of low wage growth, alongside an increase in precarious work, the need for urgent reform of employment rights is clear. We therefore welcome the pace at which the Government has introduced this Bill, the breadth of its coverage, and the commitments made to enhance some provisions, for example by ensuring that agency workers are covered by the rights relating to guaranteed hours and shift notification. There are also areas where we believe that clarification is needed, where there are potential loopholes to address, or where the Bill could go further to achieve the Government's aim of making work pay.

While we strongly welcome the intent of the Bill, many of the details that have been left to secondary legislation would be better dealt with on the face of the Bill, to ensure that they are securely embedded into law for the long term, giving workers and business the certainty they need.

Below we set out a brief overview of Usdaw's views on various provisions of the Bill in relation to Zero Hours Contracts, Fire and Re-hire and Collective Rights. We believe that these are the areas which the Committee will be focussing on. We have data from members, experiences from Officials and views on other sections of the Bill. We would be more than happy to provide evidence on any other sections that the Committee is looking at. We also look forward to providing oral evidence in January.

We would like to note that it has been extremely difficult to keep our evidence on such a wide-ranging Bill to below 3,000 words. The issues covered in this briefing should not be viewed as a priority list or indication that these are the key issues Usdaw and our members are interested in. We would be delighted to have the opportunity to provide additional written evidence in addition to the oral evidence session.

ZERO HOURS ETC

GUARANTEED HOURS

The right to a contract that reflects a worker's normal hours was an evidence-based policy recommendation put forward by the independent Low Pay Commission (LPC) in 2018, following their intensive review into one-sided flexibility. The Government has rightly taken action to implement this recommendation, which we believe has the potential to significantly improve security at work for millions of workers.

For the Government to fulfil its manifesto commitment (as detailed in the *Plan to Make Work Pay*) to ensure "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 believe that the Bill needs further consideration, in particular:

- **The reference to "a minimum number of hours, not exceeding a specified number of hours" should be removed.** In the explanatory notes document and 'Next Steps to Make Work Pay' document, this term is taken in reference to a worker being on a 'low hours' contract, but no preferred figures have yet been indicated by the Government for these provisions. The right must apply to all workers, up to and including full-time workers to be effective.

- **The reference to regularity should be removed.** This reference creates an opportunity for bad employers to structure work to avoid the provisions and serves little to no purpose.

- **The reference to 'an excluded worker' should be removed.** This provision opens the opportunity for entire sectors, or types of employment contract, whether now or under a future Government, to be completely removed from the protections offered in the Bill. We are aware that employers are lobbying for entire sectors to be removed, including some of those with the widest use of zero and short hours contracts.

- **We completely support the inclusion of agency workers.** We have responded in detail to this issue in the relevant consultation and are clear that any exclusion would exacerbate the issue of insecure work and one-sided flexibility

- **The initial reference period and subsequent reference period should be defined as twelve weeks on the face of the Bill.** This would reflect the commitment given to the public ahead of the election within the Plan to Make Work Pay.

SHIFTS: RIGHTS TO REASONABLE NOTICE

As part of their tripartite review into one-sided flexibility, the Low Pay Commission also recommended that workers be given a right to reasonable notice of work schedule. Make Work Pay adopted this call through the wording, "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 is clear that without an effective right to reasonable notice, the provisions for compensation of cancelled and curtailed shifts won't be effective as employers will just delay giving notice. Equally, for the right to compensation to be effective, workers must get reasonable notice of shifts.

Our overriding concern throughout the Bill that too much is being left to secondary legislation applies to this section. There is not yet a definition, which is key to this section. Our recent survey of over 7,500 shows that 40% of workers receive at least 4 weeks' notice of shift patterns. The results of the survey are in the table below. If reasonable ends up being defined as anything less than four weeks, either now or under a future Government, Usdaw is concerned that this could result in a race to the bottom.

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

We are also concerned with the provisions which could mean that workers who earn more than a specified amount or are contracted to more than a specified number of hours, could be excluded from the provisions. This could end up as a significant loophole.

Usdaw has provided further details on a range of concerns to these provisions to the relevant Public Bill Committee. We would be happy to forward these comments to the Business and Trade Committee.

In summary, we believe that Sections 27BI (4), 27BI (5a) and (5b), 27BI (7), 27BJ(1c), 27BJ(2b), 27BK (1) and 27BK (2), need to be reviewed to ensure that the commitment from Make Work Pay is delivered.

RIGHT TO PAYMENT FOR CANCELLED, MOVED AND CURTAILED SHIFTS

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.

Usdaw has significant concerns that the provisions of the Bill would not cover what is deemed to be an overtime shift in instances where an individual has some guaranteed hours. Once a commitment is made to work a shift, the commitment should apply to the individual and the worker. We believe that there may be a need to re-look at 27BO (2). Section 27BO (4) does attempt to resolve this, however only for shifts at days or times not mentioned in the contract. Many workers, particularly in industries such as distribution, are on contracts requiring work on any day or time of the week, commonly referred to as 5 over 7 contracts. These workers should be covered.

DISMISSAL FOR FAILING TO AGREE TO VARIATION OF CONTRACT ETC.

Usdaw has provided evidence, within the relevant DBT consultation, on the provisions of the Bill aimed at tackling Fire and Re-hire. If the Committee does not have copy of this response, we would be more than happy to forward a copy on.

Usdaw, unfortunately like so many other unions, has extensive experience of Fire and Re-hire. Whilst we were successful at challenging Tesco's attempt to utilise the provision at the Supreme Court, this case was very much an outlier and, if anything, demonstrated the need for alternative routes to tackle company's abusing this provision.

We believe that the provisions of the Bill provide a good framework to addressing the issue however are concerned around the wording of S.104I(4). In particular, these concerns relate to the options of, 'eliminate, prevent, significantly reduce or significantly mitigate' and the word 'likely'. The four options potentially give employers too much room to defend Fire and Re-hire as well as the word 'significantly' being subjective. We are also concerned that the word 'likely' here is subjective and needs to be clearly defined. We would argue that such a definition should convalesce around, "significantly higher degree of likelihood than more likely than not".

RIGHTS OF TRADE UNIONS TO ACCESS WORKPLACES

Usdaw welcomes the initial steps of the Bill to create a system for trade unions to be able to access workplaces. This builds upon various commitments in Make Work Pay, including, "...underpinned by rights for trade unions to access workplaces, in a regulated and responsible manner, for recruitment and organising purposes." However, we do have concerns that the main thrust of the provisions in the Bill, as currently written, provides an opportunity for unions to be able to enter discussions with employers over an agreement to enter workplaces. Unions can already contact employers to seek an agreement to enter workplaces and such a system is not delivering a right of access in unorganised workplaces.

We believe that, to ensure access arrangements deliver a sea change in industrial relations, there should be a default level of access, outlined within the Bill.

We have responded to the DBT consultation on a Modern Industrial Relations Framework. Within this consultation response, we have raised queries regarding the enforcement of provisions. There are also some broader concerns on the proposed provisions which we have detailed below.

- **Independent Unions:** As written the scope of the right applies to 'listed unions'. This wording would include staff association bodies that are often used by employers as an argument against the presence of an independent union. These bodies lack independence which can make them ineffective at raising issues and at worst they can be used by unscrupulous employers as a box ticking exercise to push through management decisions that negatively impact staff. We have concerns that employers will use the presence of these bodies to continue to thwart access for independent unions. Usdaw's view is the right should be restricted to independent trade unions with a Certificate of Independence issued by the Certification Officer.

- **A robust, default right of access:** In order to effect timely access of unions to workplaces and limit the ability of the employer to delay or frustrate reaching access agreements we believe there is a role for a robust default right of access that sets out minimum terms on which a union is able to access the notified workplace. The terms of which should be consulted upon.

- **Digital Right of Access:** There is no mention in the Bill as written regarding a digital right of access. Digital communication is now an everyday feature of most workers lives, with employers using email and communication platforms to meet or share rotas, updates and training information. In addition, many Usdaw organised workplaces offer remote working, with some operating on an entirely remote basis. This omission must be rectified in the bill to provide a route to reach workers digitally. We echo the TUC in supporting a broad right of digital access to be included in primary legislation, with more detailed provisions (around addressing privacy, sharing of information etc.) to be consulted on in secondary legislation.

- **Exclusion of access for industrial action:** The Bill in its current form specifically excludes organising for industrial action from the purposes of access (70ZA). Usdaw believes this is an unnecessary exclusion as the line between other organising and organising in advance of industrial action is not always clear. Employers could potentially use the exclusion of industrial action to limit access to workplaces or revoke access agreements, saying that unions have breached this clause, when in fact unions are dealing with difficult situations or negotiations as part of the course of collective bargaining.

- **Safeguards around Union Recognition:** The right of access should not apply to workplaces / forces where another independent union (or multiple independent unions) hold an existing recognition agreement. Usdaw is clear that the right of access should be a precursor to achieving recognition. As S.35 of Schedule A1 TULRCA prohibits a union for submitting a claim for recognition there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of any workers falling within the relevant bargaining unit, any provision for access to be agreed in such circumstances would merely create a destabilising impact without an end goal. The same should be true where there is already an application for recognition under Schedule A1.

TRADE UNION RECOGNITION

Within Make Work Pay, there were various statements which accepted the need and benefits of improving trade union recognition including:

"Stronger trade unions and collective bargaining will be key to tackling problems of insecurity, inequality, discrimination, enforcement and low pay."

"The required percentage" should be defined on the face of the Bill as 2% or 500 members whichever is lower. The current 10% threshold for the Central Arbitration Committee (CAC) to consider a claim for statutory recognition is too high in many large businesses. Usdaw has, over a period of many years, undertaken organising campaigns in many large, multi-site retailers. Due to the number of workplace locations, and high rates of staff turnover, it has proved to be impossible to recruit enough members so that we are confident of maintaining greater than 10% membership throughout the period of any statutory recognition claim. Usdaw supports a policy of reducing the threshold to initiate a statutory recognition claim to 2% or 500 members, whichever is lower. The 2% threshold reflects the corresponding threshold for Information and Consultation of Employees structures.

The CAC should be required to automatically grant recognition to a union once membership has reached 50% of the bargaining unit. This would require additional amendments to Schedule A1, specifically removing sub-paragraphs 3, 4 and 5. These paragraphs currently encourage an employer to argue that either they would not accept the legitimacy of 50% of relevant employees joining a union or to try to convince the CAC of doubts over whether a significant number of members would not want the union to negotiate on their behalf. Both are incredibly low bars and create incentives to damage the relationship between an employer and a union rather than foster effective working relationships.

The three-year lockout period should be reduced to a maximum of six months. This could be achieved through additional amendments to Schedule A1, paragraph 39(1) and (2a). An amendment to 39(1) could delay the event that triggers the potential lockout period. Currently, the CAC accepts a claim, and triggers the subsequent potential lockout period, prior to the bargaining unit being determined. Where there is uncertainty over the bargaining unit, unions end up withdrawing for fear that a decision would leave them unable to successfully complete the process.

An amendment to (2a) could shorten the lockout period to six months. This 3-year lockout period is disproportionate and excessive and does not reflect the fragmented and ever-changing nature of modern workplaces. Many workplaces have turnover rates, and in practice most of those balloted could have left the workplace six months after the ballot. Furthermore, where results are close, a three-year restriction on the ability of workers to achieve collective bargaining is excessive.

INDUSTRIAL ACTION BALLOTS

Usdaw supports the provisions contained within the first publication of the Bill in this area which, in the main, repeal relevant sections of the 2016 Trade Union Act. However, we do have concerns that simply repealing these provisions will lead to a revertion to the previous provisions whereby trade unions were required to take industrial action within 28 days of a ballot result. This often led to industrial action taking place in instances where negotiations were heading towards a resolution and therefore being counterproductive to ongoing discussions. We believe that the Government should ensure this does not happen.

We also support the provisions in the Bill under Clause 56 on Electronic Balloting, however, believe they can go further. Trade Unions are required to run statutory ballots, via post, for elections of General Secretaries and seats on National Executive Councils. Unions are one of the only, if not the only, section of civil society required to conduct ballots in this manner. We believe that the scope of Clause 56 should be extended to allow for electronic balloting for all ballots trade unions are required to undertake.

Also, as noted in our relevant response to the DBT consultation, we strongly believe that the Government should look again at the requirement to inform every employer of action. In practice, this requirement can lead to workers employed by complex business structures losing their right to strike. We also believe that the process of serving notice of action should be significantly simplified.