# Part Time Workers

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**Seminar given by Richard Grogan on 21st March 2022 at the UCD Sutherland School of Law.**

Please note that these are seminar notes only and before acting or refraining from acting on anything in these notes advice from a solicitor should be obtained. These notes do not purport to be legal advice.

**Banded Hours Contacts.**

These were introduced in the Employment (Miscellaneous) Provisions Act, 2018 which updated the Organisation of Working Time Act. This entitles employees to banded hours in certain circumstances.

Where an employee is working, they have an entitlement to have to work for the following 12 months averaged within a range of hours calculated during the previous 12 months.

There are of course certain sectors where it is clear that employees' contracts do not reflect the hours actually worked. This can occur primarily in areas where there are seasonal variations. This can occur for example in the Hospitality Industry or any industry involved with the Tourism Industry.

**So, what are the bands?**

The Bands are.

3-6 hours.
6-11 hours.
11-16 hours
16-21 hours.
21-26 hours.
26-31 hours.
31-36 hours.
36 hours and above.

So how does this operate in practice.

As set out above, as it is averaged on a 12-month period of time, an employee must have 12 months service before they can make an application. Where the employee puts in such a request, the employer has 4 weeks from the date of request to place the employee on a band. The employer then determines which band applies. In those circumstances the employee is then guaranteed the minimum hours for the next 12-month period. Let me explain. Take a situation where an employee has a contract which says that they will work 15 hours per week. However, in the 12 months prior to them putting in a request they have worked 22 hours on average per week. In those circumstances the employee can be asked to be put on the E rate of 21-26 hours.

That sounds fairly simple. The difficulty on it is that for example if the employee was working 25 hours per week on average, the employer can put the employee on the E category. That means the employer only has to provide an average of 21 hours per week.

This is not 21 hours every week. It is 21 hours averaged over the following 12 months, so the employee could be asked to work, for

example, 40 hours in certain weeks and in other weeks be asked to work simply 1 hour. This is a defect in the legislation as it means that employees have a difficulty in managing their payroll.

There have been difficulties in relation to this and the Labour Court gave a ruling recently in the case of an Employee -v- Aer Lingus Ireland Limited. In this case, the employer calculated the entitlement on the bases of hours actually worked. Therefore, time off for annual leave during the 12 months reference period was excluded. The employer divided the number of hours by the number of weeks being 52 weeks. The employee contended that the annual leave should be included when calculating the weekly average.

The Labour Court considered the legislation and held that annual leave is not hours worked and should be excluded form the hours used to determine the average weekly hours. The Labour Court held that it was appropriate to deduct the number of weeks where no hours were worked, in this case 4 weeks of annual leave and to use the remaining number of weeks as the number which the hours will be divided by effectively in this case 48.

This is a practical approach taken by the Labour Court. The difficulty with the legislation of course is that there is an argument that the legislation refers to hours worked. Therefore, at some stage there will be a challenge to this decision by the Labour Court. In reality the decision of the Labour Court makes absolute sense but the question will be whether this is actually in line with the legislation.

There are other practical issues in relation to Banded Hours Contract. The issue in relation to this is firstly the delay in getting cases on in the WRC. There is no difficulty in having appeals to the Labour Court as they deal with matters very quickly but there is a significant backlog in the WRC. The second issue of course is the issue of compensation and where an employer does not give the appropriate band, the cost of an employee bringing a claim is one that they are going to have to fund themselves. Therefore, unless they are represented by a Union it is likely that they can end up having an employer who is legally represented and they will not be in a position to afford legal representation. The next issue is then the issue of the effective date and the effective date is when a determination by the WRC or Labour Court is given.

A further issue with the legislation is that this guaranteed period is for a period of 12 months. The issue then is after 12 months can the employer simply revert the employee to their original contract and does the employee then have to go through another application to the WRC, which will take some considerable time to get their average banded hours. That is most definitely a difficulty with the legislation.

You might wonder when I am dealing with part-time workers why I would start with an issue of Banded Hours Contracts. The reason for this is the issue of Banded Hours Contracts in theory was supposed to be the huge protection for employees. In reality because of the lack of legal aid, the complexity of the legislation and the delays in having cases processed there is an argument that there is no significant protection for employees.

**Part time workers.**

Employees in this category are protected by the Protection of Employees (Part-Time Work) Act 2001. The interesting aspect of this legislation is that an employee includes a person of any age who is entered into and works under any Contract of Employment.

The legislation does not specifically set out who is a part-time worker by reference to any stated hours of work. A full-time employee in the legislation is defined as an employee who is not a part time employee in Section 2. A part-time employee is defined as meaning an employee whose normal hours of work are less than the normal hours of work of who is a comparable employee in relation to him or her. The issue that sometimes comes up is what is the category of the relevant part-time employee. An issue which we regularly come across is employees who contact us saying that they are being paid less than a full-time employee or who have lesser Terms and Conditions. It then transpires that they are an agency worker. Where the individual is an agency worker, they're comparable employee in relation to him or her is another agency worker. I will deal with the issue of an agency worker separately.

The reference period is a period of not less than 7 days, no more than 12 months. In looking at the issue it is the normal hours of work worked by an employee in the period.

In looking at the issue of course it is important that the employee bringing a claim can show;

> That both the employee concerned and the comparator perform the same work under the same or similar terms and their jobs are interchangeable in relation to the work.
> The work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each are of a small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and;
> The work performed by the relevant employee is equal or greater in value to the work performed by the other employee concerned having regard to such matters as skill, physical or mental

requirements responsibility and working conditions. This is set out in Subsection 3 of Section 2 of the Legislation. In ***Dundalk Town Council -v- Teather PTD 3/2011*** it is clear that subsection 3 was drafted similarly to Section 7 of the Employment Equality Act 1998. Unlike the position under that Act however in the absence of a comparative full-time employee in the employment where the part time employee is employed the comparator may be drawn for the same industry or sector of employment. In Teather the Labour Court had to consider whether a full-time firefighter was in a comparable employment to a retained part-time firefighter. The Court held that the core duties of both full-time and part-time firefighters were to fight fires and deal with other emergencies. In this regards their work was the same and both categories were fully interchangeable. The full-time comparators performed additional functions precisely because they were engaged full time and might be occupied during periods during which there were no fires to be fought. The Labour Court accepted that if this was to be accepted as preventing and finding of like work between full and part-time employees the protection afforded by the Act and the Directive upon which it is based would be deprived of its effectiveness.

As I stated, agency workers can only compare themselves to comparable employees who are also agency workers.

One of the difficulties with agency workers is that in Ireland we have what is called the Swedish Derogation. This is a method by which any competent Employment Law Solicitor can draft contracts in such a way that an agency worker will not be able to obtain the equivalent conditions of employment as a full-time employee. Therefore, where you have a part-time agency work equally, they must compare themselves not with full-time workers in the organisation who are directly employed but rather with other agency workers.

The basis of the legislation set out in Section 9 is that a part-time employee shall not in respect of his or her conditions of employment be treated in a less favourable manner that a comparable full-time employee.

This Section gives effect to Clause 4 of the Framework Agreement. Subsection 2 however provides that a part-time employee may in respect of certain conditions be treated less favourably than a full-time employee if that treatment can be justified on objective grounds. That must be based on considerations other than the

status of the employee as a part-time employee and the treatment must be for the purposes of achieving a legitimate objective of the employer and must be necessary for that purpose. In ***Catholic University School -v- Dooley 2011 4I.R. 517*** it was confirmed that cost can never be justified for unequal treatment. However, when you look at a case of ***Curry -v- Boxmore Plastics Limited PTD5/2003*** the Labour Court held that a condition of employment whereby part-time employees do not receive overtime until they have completed the standard hours of work under which a comparable full-time employee would be entitled to claim overtime is not unfavourable treatment and is thus not discriminatory. What does that mean in practice? In practice it may well be that a full-time employee may not receive often overtime payments until they have completed the standard hours which may be 37.5 or 40 hours per week. A part time worker who would be working say 20 hours a week who is asked to do overtime of 10 hours a week would not be entitled to any enhanced overtime payment as they would not have reached the same hours of work as a comparable full-time employee.

At the same time if you look at the case of ***Abbot Ireland Limited -v- SIPTU PTD3/2004*** the Union claimed that part-time workers were entitled to rest breaks on a pro-rata basis with full-time employees and that part-time employees working between 4pm and midnight were entitled to a shift premium on a pro-rata basis with comparable full-time employees. Both of these were successful in the Labour Court. If you then look at the issue of bonuses in the case of ***SIPTU -v- Nolan and O'Connor PTD2 and 3/2007*** the Labour Court found that the Union's practice of taking account for the quantum of hours worked by its administrative staff when calculating an annual bonus intended to value service delivered to members was justified on objective grounds. When it comes to expenses for example in the case of ***Ennis -v- Department of Justice, Equality ad Law Reform PTD1/2004*** the Labour Court upheld a complaint that paying part time wardens who worked 50% of the hours of full-time wardens only 50% of the travel allowance constituted a contravention of this Section.

When it comes to benefits the Labour Court in the case of ***Department of Education and Science -v- Gallagher PTD7/2004*** is one where the Labour Court recognised that a pro-rata principal was not of universal application and the Court felt that certain benefits were limited to those which by their nature or appropriately dependant on the number of hours worked by the employee.

**Holidays and Public Holiday's.**

It is generally thought that part-time employees I calculating their annual leave will be on the basis of 8%. When you look at the Organisation of Working Time Act where an employee works in excess for 1360 in a leave year being effectively just a little less than 27 hours a week that would be the position. Where however, the employee works 1360 hours or more in a leave year then they would be entitled to the full 4 weeks.

When it comes to public holidays the calculation of the entitlement of public holidays will be on the basis of has the employee worked 40 hours or more in the period of 5 weeks prior to relevant public holiday.

**Casual Employees.**

Section 11 of the Act provides that a part-time employee who works on a casual basis may be treated less favourably than a comparable full-time employee if objective grounds exist to justify less favourable tre4atment the definition of objective grounds is set out in Section 12.

In looking at the issue of objective grounds and the review of obstacles to the performance of the part-time worker it is always useful to look at the Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) (Declaration) Order 2006 SI no 8 of 2006.

**What happens where there is penalisation of an employee by an employer**?

The legislation is Section 15 sets out the circumstances where penalisation can occur. For example, an employer shall not penalise an employee for invoking any right to be treated in respect of conditions of employment in a manner provided by the Act or apposing by lawful means any act which is unlawful under the Act. It also includes refusing to agree to a request by an employer to transfer him or her from working full time to performing part-time work or part-time to performing full-time work. These are just

some of the examples. Where a claim is brought to the WRC compensation of up to two years renumeration can be awarded along with a requirement of an employer to comply with the relevant provisions.

**Conclusion.**

The issue in relation to part-time working is that the groups who are normally covered by such provisions are for example students, particularly women or non-Irish Nationals. All of these are invariably individuals who are vulnerable. What is interesting in relation to the legislation around this is the lack of litigation around the issue of part-time workers. That does say something about both the legislation itself and the knowledge individuals have of their rights. However, as I said at the start, because of the provisions relating to agency workers particularly non-Irish Nationals and women, can find themselves more so than students, in a position that they are employed through an agency and provided the contracts are properly drafted if I can call it that, and it is not that difficult for a competent employment lawyer to draft these in such a way as to negate the provisions of the legislation.