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BIS Consultation on Zero Hours Contracts

Response from the Employment Lawyers Association

13 March 2014

EMPLOYMENT LAWYERS ASSOCIATION RESPONSE

DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS CONSULTATION PAPER – ZERO HOURS CONTRACTS

WORKING PARTY RESPONSE

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, chaired by David Widdowson was set up by the Legislative and Policy Committee of ELA to consider and comment on the consultation on Zero Hours Contracts. Its report is set out below.

The Government has invited views on a range of questions and potential actions that might be taken in respect of the use by employers of zero hours contracts (ZHCs). These comprise two principal areas – exclusivity and transparency. We have provided responses to the questions raised under each heading below. We also offer some views on areas which are not directly addressed in the paper but which we believe merit consideration by the Government when considering its approach to ZHCs.

Summary

1. Whether legislation or guidance is to be the chosen route, a clear meaning/definition of ZHCs will be needed to ensure that there is a common understanding of what is meant.

2. The current law on restraint of trade is likely to be applicable to exclusivity clauses without the need for further legislation. In that this contains an element of uncertainty in the standard of reasonableness to the extent of any restriction, that uncertainty might be removed by legislation making such clauses unenforceable in ZHCs.

3. There are clearly many commonly held misconceptions about the nature of ZHCs by both employers and workers alike. There is therefore a clear need for guidance in this area (whether or not there is to be legislation) and a source of easily available information for employers and workers as to the nature of a ZHC relationship and the rights and obligations which the law presently provides for.

4. ZHCs currently cause difficulties in

    a. The status of ZHC workers – employees or workers?

    b. the assessment and computation of holiday pay

    c. the potentially unlawfully discriminatory impact of less favourable terms for ZHC workers

    d. the position of ZHC workers under the Part Time Workers Regulations

e. auto enrolment into a pension scheme.

Definition

As a preliminary point, the consultation paper points out that there is no legal definition of a ZHC but goes on to state that "in general terms a zero hours contract is an employment contract in which the employer does not guarantee the individual any work, *and the individual is not obliged to accept any work offered*" (our emphasis).

This may be slightly misleading as the question of status is one that gives rise to difficulties in ZHCs. We address this below but our members' knowledge and experience indicate that by no means all will be "employment contracts" (contracts of service) – indeed some employers specifically use them as a perceived means of avoiding employment status.

Secondly, as the consultation paper identifies, exclusivity is a controversial issue in ZHCs. The italicised words therefore do not apply to all ZHCs as there appears to be evidence (see the CIPD Research Report "Zero Hours: Myth and Reality" (November 2013) http://www.cipd.co.uk/binaries/6395%20Zero-Hours%20(WEB).pdf) that the terms of some do impose an obligation to accept work when offered.

The definition that the ELA Working Party has used is

"Zero hours contracts are defined as working relationships between an employer and a worker where there are no specific hours of work and payment is made only for work performed. This will cover all such relationships across the income spectrum."

Our comments below are based on this.

Legislation or guidance?

In relation to each of the specific topics identified the Government appears to be considering two options – legislation or guidance.

In relation to legislation, and following on from our points above, a key issue will be the definition of ZHCs. If our working definition above were to be used then avoidance could be achieved by employers guaranteeing a very small number of hours – perhaps even as little as one. An alternative might be to select a threshold of, say, 10 hours per week.

Essentially we would see three potential ways in which legislation might be framed:

(i) A free standing right or set of rights with a remedy in the Employment Tribunal for breach.

(ii) Declaring certain contractual provisions unenforceable – for example exclusivity clauses.

(iii) Amending section 1 of the Employment Rights Act 1996 to require certain categories of information to be included where the contract in question is a ZHC (however defined) with the current penalties for non-compliance.

As to guidance, again it will need to be made clear the contracts to which it applies, although (except in the case of a statutory Code of Practice) the need for precise definition will be less acute as it is in the nature of guidance that it is informing rather than regulating. If a statutory Code of Practice is to be considered then a sanction for non-compliance will also be needed – see our suggested legislative options above.

We would suggest that, whatever decision is taken on the legislative option, there is clearly a need for information and guidance on ZHCs. The CIPD Research Report, which comprised a survey of 232 employers, showed that 64% of employers classified their zero-hours staff as employees, with only 18% regarding them as workers. The same survey, however, showed that only 55% of employers believed that staff engaged under ZHC enjoyed the right not to be unfairly dismissed after two years' service and only 31% understood that ZHC employees had the right to statutory redundancy pay after two years' service. The corresponding figures from a survey of 456 individuals engaged under ZHCs showed that only 18% believed that they had the right not to be unfairly dismissed after two years' service and only 10% that they had the right to statutory redundancy pay. The gross disparity between these percentages indicates a considerable degree of confusion over rights. It also suggests a striking asymmetry in the understanding between employers using ZHCs and the individuals engaged under them.

Exclusivity

Question 1 – Are there circumstances in which it is justifiable to include an exclusivity clause in a zero hours contract? If you answer yes, please describe the circumstances that justify such a clause.

By "exclusivity clause" we assume is meant a clause which, whilst guaranteeing no offer of work on the part of the employer, imposes a contractual obligation on the worker not to accept work from any other employer. As a preliminary observation, clauses restricting ZHC workers from working for a competing employer or within a geographical area might not be viewed as exclusivity clauses but might in practice have the same effect.

As such, this is one of the more controversial areas and, in view of our role as described above, ELA does not offer a view as to whether these are justified in the policy sense. There are, however two areas where exclusivity may have legal consequences.

(i) It is arguable that an exclusivity clause in a ZHC operates in restraint of trade and so would not be enforceable by reason of public policy. As with post termination restrictions, however, an employer might seek nonetheless to justify the restriction by reference to

   a. a legitimate interest it seeks to protect; and

   b. the extent of the restriction being not greater than is reasonably necessary to protect that interest.

   Circumstances where those involved will have access to confidential information, particularly where the worker is in a senior position and the employer is operating in a highly competitive market, might, in our view, form the basis of such an argument, similarly long serving senior employees who may have a great deal of confidential information and who wish to move onto a ZHC so that they can "semi retire". Each case would, however, turn on its own facts and employers would need to

give thought to a number of issues including, for example, whether a blanket ban on work elsewhere was truly necessary or whether an industry specific ban might suffice.

There might also be limited circumstances whereby the only way to maintain a flexible work force is to have a guaranteed pool of labour to draw upon. Where there is a very small pool of suitably qualified or experienced individuals, such as highly skilled or technical employees, exclusivity clauses might preserve a pool of labour which would otherwise be too disparate to be accessed by employers or might be accessed by close competitors. A blanket ban on outside work might be capable of justification in these cases.

The Guide prepared by the CIPD "Zero Hours Contracts – Understanding the Law" (https://www.cipd.co.uk/hr-resources/guides/zero-hours-contracts-understanding-law.aspx) suggests that exclusivity arrangements might be justifiable because the work may come in "short frequent bursts". We would express some reservations about that. The potential problems faced by employers on those circumstances could adequately be dealt with by a series of short term contracts or another form of arrangement which would set out fixed hours. In addition the perceived problem for employers in such industries could be dealt with by imposing an obligation to accept work when offered or requiring the worker only to enter into working relationships outside where they are free to work for the primary employer when required.

(ii) There is also the issue of status. We deal with this in more detail below but, in brief, a relationship where the employer seeks to require the worker to be available exclusively to it is more likely to give rise to a contract of service, regardless of the label put on the relationship by the parties.

Question 2 - Do you think the Government should seek to ban the use of exclusivity clauses in employment contracts with no guarantee of work?

This is essentially a policy issue. As noted at (i) above the existing law on restraint of trade currently offers some regulation in this field. An outright ban would no doubt bring protests from some employers over removal of flexibility and consequent loss of jobs. If specific legislation were the chosen route then the definition of what is a qualifying ZHC would be critical as exclusivity clauses are not prohibited in normal contracts of employment/contracts for services and we would have thought it unlikely that the Government would wish to extend any ban this far.

A legislative approach might be to make any clauses of this nature unenforceable in ZHCs. The obvious issue then arises as to where the line should drawn. If exclusivity clauses are to be prohibited in ZHCs will they continue to be permissible in contracts of limited hours – say 10 hours per week? Alternatively, the government could legislate to oblige employers to pay for employees entering into zero hours contracts which contain exclusivity clauses to take legal advice (as with employee shareholders under section 205A Employment Rights Act 1996). This may deter employers from inserting these clauses save where there was a real benefit in protecting confidential information or maintaining a skilled flexible workforce. A further option might be to legislate for a presumption that any ZHC containing an exclusivity clause is a contract of employment.

Question 3 - Do you think an outright ban on exclusivity clauses in employment contracts with no guarantee of work would discourage employers from creating jobs? Are there any other unintended

consequences of Government action that should also be considered?

We can foresee a ban might discourage employers from creating jobs, particularly in the public services, business services and information, finance and transport sectors where ZHCs may be used for senior staff. A ban is unlikely to cause such an issue in sectors such as accommodation and food services or more generally where the use of ZHCs tends to be for junior or less skilled individuals. There might also be an increased use of agency workers. The question also arises as to the extent of this issue in practice. In the CIPD Research Report less than 10% of ZHC workers reported that they were prevented from working for another employer, although 17% answered that they did not know.

Question 4 - Do you think Government should provide more focused guidance on the use of exclusivity clauses, for example setting out commonly accepted circumstances when they are justified and how to ensure both parties are clear on what the clause means? If you answer yes, what information should be included?

At present there would appear to be a dearth of guidance on this issue. By way of example

- The ACAS website offers no responses to a search for "exclusivity". Its "Zero Hours Mythbusting" page refers to the fact that workers do not have to accept work when called upon, but says nothing about whether a worker may be restricted to one employer.

- Citizens Advice offers no response to a search for "exclusivity". The main page which comes up when searching "zero hours contracts" states that under a ZHC "you must be ready to work whenever you are asked" which could be taken to imply that (i) you have to accept work when offered and (ii) that you cannot have more than one employer.

- UNISON makes it clear that typically "an individual undertakes to be available for work but the employer does not undertake to provide work and only pays for the hours.

- A search for "exclusivity" brings up a statement saying that "Exclusive contracts are not the big issue".

If guidance – which could be provided through the medium of BIS or ACAS - is considered the best route in preference to legislation then this could be helpful in indicating the nature of justification in the context of restraint of trade making the point that each case will turn on its own facts but setting the general considerations that an employer should have in mind when considering exclusivity arrangements. The government could provide best practice guidance obliging employers who want to insert exclusivity clauses to provide an explanation to the person signing the contract on the impact of these. This could be added to the information required to be provided in the statement of employment terms required under section 1 of the Employment Rights Act 1996, or might be required to be subject to advice from an independent advisor, though, as noted above, both would require legislation.

Any justification beyond that – for example in terms of what the Government considers is good practice or appropriate cases – would have no further sanction where there is breach.

Guidance could be made available through the internet and show up on the first page of a Google search.

In addition, as a proportion of those on ZHCs are “hard to reach” low paid workers who may not have access to the internet, an obligation could be placed on employers to provide this information to workers who are embarking on a zero hours arrangement.

The guidance could set out:

(i) What does an exclusivity clause mean? (ie: that you cannot work for any other employer)

(ii) When should a contract contain an exclusivity clause? (ie: when necessary to protect a legitimate business interest such as the need to preserve confidential information)

(iii) What grounds can they be challenged? (ie: if there is no legitimate interest or the impact of the clause is not reasonable)

(iv) If advice is wanted on an exclusivity clause, which organisations can offer further assistance? (eg: trade unions, CAB).

Question 5 - Would a Code of Practice setting out fair and reasonable use of exclusivity clauses in zero hours contracts (a) help guide employers in their use, and (b) help individuals understand and challenge unfair practices? Please explain your response.

Much will depend on the nature of such a Code – is it to have statutory force or not? If statutory a framework will be required to provide an enforceable right in the case of breach. If non-statutory, a Code along the lines of those set out by ACAS on the subject would help employers understand when to use exclusivity clauses in ZHCs. Even in situations where there is no exclusivity clause, individuals do not seem to be aware that they are entitled to work for others. There seems to be a sense that a zero hours contract means being always available for work with a single employer.

Even if exclusivity clauses are not expressly set out in a contract, individuals may still be pressured to accept work or penalised for not doing so. Pressure can be brought to bear indirectly not to have multiple employers. Such pressure results from an inequality of bargaining position, rather than a deficit in contracts of employment or regulation. A Code of Practice would go some way towards addressing what may be perceived to be an undesirable practice, perhaps by making it clear that individuals should be able to refuse work, for example, on two occasions in any period of one month, before any action or detriment is taken in respect of them.

Question 6 - Do you think existing guidance and common law provision are sufficient to allow individuals to challenge exclusivity clauses and therefore no specific action from the Government is required?

We would suggest that there appears to be little understanding of the rights and obligations applicable to ZHC workers, in particular on the operation of exclusivity clauses. There are a number of specific areas which are relevant here:

(i) Employment status: having an exclusivity clause in a contract may make it more likely that parties are found to be in an employment relationship – see our section on status below.

(ii) Discrimination law: Where for example, a contract contains an exclusivity clause it could be harder to justify the use of zero hours contracts as a proportionate means of meeting the legitimate aim of workforce flexibility – see our section on indirect discrimination below

(iii) Restraint of trade: see above.

(iv) If there were guidance on exclusivity clauses ZHCs then it is possible that an employee with more than 2 years service could bring a claim for constructive unfair dismissal if the employer failed to comply with the guidance.

The practical issue which arises here is that, as noted above, many of those workers who are engaged on ZHCs are not well equipped to bring legal claims and, without at least an improvement in the level of guidance available, there is always the possibility of abuse. As to legislation, see our comments above.

Transparency

Question 7 – If you sought employment information, advice, or guidance on zero hours contracts before, (a) where did you receive it from, (b) how helpful was it to you in terms of explaining your position in regard to zero hours contracts and (c) how could it have been improved?

The usual sources we would go to for such advice that are publicly available would be ACAS and government websites such as direct.gov and businesslink (now www.gov.uk). As professionals in employment law, we would also consider less standard publicly available websites such as those of unions and the CIPD, and subscription database websites such as Lexis Nexis, Practical Law, Westlaw, XpertHR and Croners.

ACAS produces a basic guidance page on ZHCs http://www.acas.org.uk/index.aspx?articleid=4468. This is based on the premise that there is no obligation to offer or accept any work (not universally true in our experience) and also that most individuals engaged on a zero hours contract will have worker status and therefore some employment rights, including entitlement to annual leave, the national minimum wage and pay for work-related travel. It outlines the principles of such contracts and explains when they might benefit both parties and the usual status individuals will have.

Guidance on the basic premise of a ZHC and minimum rights are therefore available. However, there is little by way of best practice guidance for employers or accessible guidance for individuals as to how they might assess if they have employment status and associated enhanced rights, or how to enforce these. As noted above, the results from the CIPD Research Report suggest that there is a low level of understanding of ZHCs and their status and effect among employers and workers alike.

The Gov.UK website provides a short explanatory paragraph for employers explaining that a zero hours contract means they do not have to give work and workers do not have to take work offered, but does not provide any further guidance on appropriate use, rights of individuals or best practice guidance. https://www.gov.uk/contract-types-and-employer-responsibilities/zero-hour-contracts

The key union websites do not publish guidance on zero-hours contracts, but generally view them as a negative thing.

As noted above the CIPD have published a guide in November 2013 This is designed to help employers ensure that they are using zero-hours contracts responsibly and understand the legal issues surrounding them. It also includes information and key points for individuals to help them understand their employment status and rights.

The document sets out helpful information for understanding employment status and associated rights and considerations as to what form of contract and/or status may be appropriate in any given circumstance. It is quite lengthy but seeks to simplify the technical issues and does address difficult areas. We would query how accessible or easy to understand this would be for some employers and workers.

The CIPD Guidance does go further than existing law in certain areas, for example suggesting best practice guidance on issuing a contract to a zero hours workers and the terms that this should contain, setting out the mechanisms for notification of work and the cancellation of this and addressing in what circumstances the CIPD considers exclusivity to be appropriate.

The CIPD Guidance therefore addresses the majority of the issues identified by the government in its consultation paper and offers what it sees as best practice guidance in the areas of exclusivity and transparency. However, views on these issues gathered through this consultation need to be considered and a decision taken on the agreed position before the CIPD guidance or its content could simply be adopted.

Question 8 - Would the additional information, advice and guidance suggested in the first option (first bullet point, para 41), help individuals and business understand their rights and obligations? If not, what other information should Government provide?

The information, advice and guidance suggested in the first option may help individuals and business understand their rights and obligations depending on the detail of the proposed content. The consultation document is not explicit about the level of detail proposed. We consider that a certain level of detail would be needed in order to assist both employers and individuals understand their rights and obligations; however this would need to be carefully drafted given the complexity of some of the legal issues in this area, such as employment status.

The information, advice and guidance should include:

(a) an explanation of the status of ZHC workers (as to which see our detailed comments below), distinguishing between employees and workers, including detailing the differing rights and entitlements that each enjoys (as, for example, is contained in the CIPD Guide);

(b) reiterating that ZHC workers are protected by equality, whistleblowing, national minimum wage and working time legislation;

(c) advice on when the use of ZHCs may or may not be appropriate e.g. that they are generally used where there is a fluctuating demand for labour, whereas if an employee will regularly be working a set number of hours over a week or month, a standard part-time or full-time employment contract would normally be more appropriate;

(d) highlighting to individuals that entering into a ZHC means that they are not guaranteed any set working hours or potentially any hours at all in a given week; also that work can be cancelled on

short notice (in line with the findings that many employees do not know they are on a ZHC or what this means);

(e) warning contracting parties that they should regularly review their contracts given that courts and tribunals look beyond written contracts to the employment relationship, so a document which is phrased as being a ZHC might not be in fact so if what happens in practice differs; and

(f) guidance for employers operating ZHCs in relation to difficult issues such as holiday pay, pensions and auto-enrolment and issues of part-time or indirect discrimination (as to each of which see our detailed comments below

With reference to model clauses on ZHCs, we consider these are likely to be of limited use as parties would first need to understand the issue of employment status and associated rights in order to choose the correct options. Further, parties can only place limited reliance on the contractual terms they choose, given the consequences of (e) above. It also raises the expectation of certainty of outcome whilst not delivering it, meaning employees and employers may follow such clauses but still not be complying with the law that actually applies in their situations.

In terms of how BIS communicates the above, an obvious place is www.gov.uk and www.acas.org, but BIS may also wish to liaise with the CAB and other free advice charities to disseminate this to the general public.

Question 9 – Further to your answer to question 5, would a broader employer-led Code of Practice covering all best practice on zero hours contract encourage more transparency?

The key issues identified from the Government's information gathering exercise in relation to transparency appear to be that:

(a) Individuals are not always aware that they are engaged on a zero hours contract and that there is a possibility they may be offered no work.

(b) Employers do not always make it clear when advertising/interviewing/engaging individuals that they will be engaged on a zero hours basis and what this means.

(c) Individuals do not always understand their employment status (employee, worker, self-employed) and associated rights.

(d) Some employers do not understand the employment status and associated rights of their workforce and therefore fail to fulfil their obligations.

(e) Some employers may seek to abuse ZHCs and deliberately fail to provide individuals engaged in this way the rights to which they are entitled.

(f) One of the key issues is a lack of guidance or best practice when it comes to notifying individuals of the work available and, more importantly, when this is withdrawn and whether any financial compensation should be paid if this is on short notice.

(g) Some employers are considered to "penalise" individuals who turn down work by ceasing to offer future work.

The CIPD Research Report endorses this.

There is some limited guidance currently available to the public in respect of what a ZHC means, likely worker status and associated rights, but this is fairly minimal. In addition, there appears to be no published guidance over the "best practice" issues (as opposed to strict legal obligations) save for the CIPD Guidance issued in November 2013.

Given the limited amount and nature of the information currently available, further guidance would be helpful to increase transparency. This might be provided in the form of a Code of Practice but a decision would be needed, as noted above, as to whether this is to be statutory or non-statutory.

The main concerns identified in respect of transparency are those of understanding employment status and the rights and obligations associated with this. Therefore, a source of information covering these that is easily accessible and understandable for both employers and individuals could solve the majority of such issues.

The potential advantage of a Code of Practice as opposed to providing this information in other ways would be that this is a recognised way of introducing new "best practice" principles across industry. This could allow the wider issues identified to be addressed, without the need for legislation, although this could equally lead to criticism from employer-bodies of introducing more "red tape" through the back door.

It is not clear to us who would draft or have input into an "employer-led" Code of Practice or why this is thought to be a desirable route to follow. The majority of the identified concerns relate to further protecting rights of the individuals engaged on ZHCs. There is, therefore, concern that any employer-drafted Code might not be, or might be seen not to be, balanced.

It would be more usual practice for such a Code to be drawn up by ACAS, which has recognised and respected procedures for producing balanced advice, or on a governmental basis through BIS. Alternatively, there would need to be equal input from appropriate employee bodies.

There is some information currently available about employment status and rights. However, some employers either do not understand it and/or do not follow it, either though ignorance of the law, poor management practices or wilfully not complying with their obligations. In addition, individuals fail to enforce the rights they currently have, again, either through ignorance or lack of funds or will, perhaps fearing it will affect their future employability.

A voluntary Code may mean more publicly available information on rights and obligations under ZHCs and how best to operate these. This may well assist those employers who want to treat their workforce fairly and whose current "failings" are due to a lack of understanding of rights. However, this would be unlikely to address those employers whose failings are due to poor management practices or wilful non-compliance and there remains the issue of sanction in the event of breach.

As for individuals, the benefit of a Code would be likely to depend on their awareness of the existence of the Code, accessibility and how easy to understand this is. Given the general current lack of litigation to enforce rights, there is a question mark over whether a voluntary Code would increase this at all. Further, if the Code is voluntary, individuals may feel there is little point in seeking to enforce their rights through discussion with their employer, as the employer can simply ignore it and those who currently perceive that their employers penalise "trouble-makers" are unlikely to raise any issues even if they have a greater awareness of their rights.

We consider that a truly voluntary Code of Practice is unlikely to lead to adverse consequences; however, this may equally bring about little change in the perceived issues there are regarding transparency.

Should a statutory Code be introduced, we consider it likely that employers would look to reduce their use of ZHCs, which is unlikely to benefit those currently engaged in this way. Likely solutions would be the increased use of their current workforce for overtime, or increasing the use of agency staff. As noted above, there is also the issue of the sanction in the event of non-compliance or breach.

Question 10 - Do you think that model clauses for zero hours contracts would assist employers in drawing up zero hours contracts, and support employers and individuals to better understanding their employment rights and obligations?

We have considerable reservations as to the efficacy of these.

Model clauses would not necessarily support employers and individuals to better understand their employment rights and obligations, as employers may misplace reliance on them. Model clauses will only work if the employment relationship in practice is as set out in those model clauses. As identified in the response to question 8, model clauses will not be particularly useful if the clauses do not reflect the true status of the parties and risk giving the parties the impression that the legal position they choose for the written contract is certain, when this can change over time. It will not help transparency if the clauses say one thing but the work practice is entirely different.

If for example the model clauses are couched in terms of being a worker but in fact that worker could be deemed by a tribunal to be an employee then model clauses will not help – particularly if an employee later had to prove to a tribunal that what is stated in the contract is not the case. As we are aware, a court can disregard the written terms in an employment contract if they do not accurately reflect the true agreement of the parties (*Autoclenz Ltd v Belcher and Others*). With the introduction of fees and the fact that most ZHC workers are not guaranteed to earn high wages, any referral to a tribunal for a declaration as to status could also be cost prohibitive.

Model clauses may be more effective and useful on an industry specific basis. Responses to a survey by the Universities and Colleges Employers' Association, for example, produced positive responses to the idea of model or template clauses to be used across the sector.

If you answer yes, what should the key considerations be in producing model clauses?

Whilst we have not answered a definitive yes to the above question, the following should be considerations when drafting to ensure many of the issues that zero hours workers face are tackled:

- Exclusivity – whether the employee is to be prevented from working for another employer. If this is a concern then consider appropriately worded restraints and /or confidentiality clauses.

- Transparency – make it clear in model clauses that there is no guarantee of work (or that work is guaranteed, but only on a limited basis, as appropriate) and whether any offer of work must be accepted or any conditions or consequences in the event of non-acceptance.

- Minimum Notice – as a matter of good practice set out a minimum notice period by which an employee should be notified that work is available and/or a clause potentially allowing employee the right to

refuse to work up to “x” times if notice is short - this will help ameliorate any discrimination elements of arranging childcare etc.

- Payment - consider payment of “x” hours work as a minimum if workers turn up and then are not required.
- Status – consider two sets of model clauses – one for employees and one for workers, with guidance on how status is determined and what this means.
- Holiday – how this is to be calculated.

Question 11 – Do you think that existing employment law, combined with greater transparency over the terms of zero hours contracts, is the best way of ensuring individuals on zero hours contracts are making informed choices about the right contract for them to be on?

At present, the status of ZHC workers is not specifically addressed by legislation. Further legislation would be required if

- Exclusivity clauses are to be banned
- Sanctions are required for employers who unjustifiably use exclusivity clauses or who act in breach of a statutory Code of Practice.
- Information as to the nature and effect of ZHCs is required as part of the section 1 statement.

Whether or not legislation is to be considered, we agree that additional guidance would be beneficial in improving transparency for individuals on ZHCs. In reality, there may not always be the bargaining power for ZHC workers to make a choice about the type of contract they are engaged under, however, increased guidance will assist individuals in better understanding the implications of a ZHC and in understanding their employment rights.

Question 12 - Further to your answer to Question 11, do you think there is more employers can do to inform individuals on zero hours contracts what their rights and terms are?

The findings of the various investigations the Government have carried out prior to the consultation and the CIPD Research Report suggest that there is more that many employers can do to increase ZHC workers' awareness of their rights and terms. For example, findings suggest that some workers are not expressly told at the point of recruitment that the appointment is zero-hours, and that many workers do not understand the implications of zero hours contracts.

However, unless there is at least guidance on the need for employers to inform individuals of their rights and terms (whether through new legislation or an endorsed Code of Practice), it is likely that well-meaning, proactive employers will continue to be open about ZHCs and to provide necessary information, whereas less proactive or well-meaning employers will continue to provide limited information only.

Ensuring that guidance and information is publically available for individuals, and for employers who are asked for information or who choose to provide information, will increase awareness and transparency of rights and terms generally.

Question 13 – Are there any unintended consequences of introducing any of these options? Please explain your response.

We have identified these in our answers to each of the questions above.

Questions 14-41

In view of the nature of our role, ELA does not have any observations to make on these Questions.

We have however identified some particular issues which the Government may wish to consider when addressing the issue of whether it wishes to take any steps – whether legislative or otherwise – in relation to ZHCs.

Employment Status

Zero hours & Status

There appears to be a degree of confusion among employers and employees as to the effect of a ZHC on an individual's status (whether employer, worker or self-employed) and their rights generally under ZHCs.

The ACAS basic guidance is based on the premise that most individuals engaged under ZHCs will have worker status. There is no reason in law, however, why a ZHC cannot be a contract of employment. A contract stating that there may be times when no work is available, where the employee is required to do the work when it is available will not negate an employment relationship: *Wilson v Circular Distributors Ltd* [2006] IRLR 38, EAT, see also *Pulse Healthcare Ltd v Carewatch Care Services Ltd & Others* [UKEAT/0123/12/BA].

The question of the status of an individual is determined by a multiple test which considers the legal questions mutuality of obligation, personal service and control as described in Annex 2 of the Consultation document. A fairly wide ranging factual enquiry is required if this matter is disputed in a court or employment tribunal proceedings, particularly in 'borderline' cases. In some cases it is difficult, even for experienced legal advisors to advise on an individual's status with a degree of certainty.

'Exclusivity' under a ZHC, i.e. the requirement by an employer that the individual engaged under a ZHC is not able to work for others is factor which may in many cases point to mutuality of obligation, making it more likely that the individual is an employee.

It follows that there is a potential unintended consequence in restricting the use of exclusivity clauses. Lack of exclusivity means that the relationship is less likely to be categorised as one of employee. An individual thus categorised as a worker (or in some cases as self employed) will enjoy fewer statutory rights.

If Government is minded to discourage exclusivity clauses or practices but take action short of a ban, one option would be to establish a presumption (rebuttable in certain cases) that such exclusivity clauses or practices indicates that the status of the individual is an employee rather than a worker. The advantage in

most cases for the individual would be to gain the benefit of greater statutory protection as an employee in exchange for the loss of the ability to work for other employers.

Part-Time Workers Regulations

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) implemented the Part-time Workers Directive 97/81/EC with the objective of establishing equal treatment between part-time and comparable full-time workers. In particular, regulation 5 prohibits less favourable treatment, among other things, in relation to contract terms on the ground of part-time status, unless the treatment is justified on objective grounds. Regulation 5 states as follows:

> 5 (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—
>
> (a) as regards the terms of his contract; or .
>
> (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
>
> (2) The right conferred by paragraph (1) applies only if—
>
> (a) the treatment is on the ground that the worker is a part-time worker, and
>
> (b) the treatment is not justified on objective grounds.
>
> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate. [...] [emphasis added]

PTWR and ZHCs

a. Comparators

The House of Lords' decision in *Matthews & ors v Kent and Medway Towns Fire Authority & ors* [2006] UKHL8 established that comparison could be made between part-time and full-time workers for the purposes of the PTWR regardless of whether full-time staff were working 'on demand' or not.

The brief facts in *Matthews* were that around 12,000 fire fighters brought claims alleging that they has been less favourably treated than full-timers as different terms and conditions were applied to them, in particular:

- excluded from the Firemen's Pension Scheme;
- they were denied increased pay for extra responsibilities; and
- their sick pay was calculated on a less favourable basis.

After a lengthy court battle the fire fighters' union succeeded in the House of Lords and the matter was remitted to the Employment Tribunal where it was decided that the part-time workers could compare themselves to full-time staff, which made launching such claims easier thereinafter.

Crucially the House of Lords in *Matthews* distinguished the European Court of Justice's decision in *Wippel v Peek & Cloppenburg Gmbh & Co Kg [2005] IRLR 211* where it was ruled that a part-time worker with no guaranteed hours who worked as required could not bring a claim under the Part-time Workers Directive where there were no full-time employees working 'on demand'. In essence *Matthews* meant that for the purposes of finding full-time comparators provided they were doing the same or broadly similar work as part-timers and both were under a contract of employment that would suffice, in spite of the differences between the actual terms of the contracts.

b. Reason for treatment

Provided a worker can find a comparator to bring a successful claim under the PTWR it still requires part-timers to establish they are treated less-favourably 'only' if the treatment is on the ground of being a part-time worker (See *Sharma and ors v Manchester City Council [2008] IRLR 336*).

Notably, law firm Leigh Day have lodged a claim in the Employment Tribunal on behalf former part-time workers at retailer Sports Direct. From its 23,000 staff about 20,000 workers are employed on ZHCs. The Claimants allege that they have been treated less favourably when compared to full-time staff as they do not receive paid sick leave, holidays and bonuses on the ground that they are part-time workers.

Conclusion

Anecdotally, many workers on ZHCs in reality are part-time workers, as, among other things, they are mistakenly informed by the wording of employment contracts or their employers about their employment status. Therefore, as workers become better informed it is likely claims will be lodged by 'casuals' who will argue they are being treated less favourably when compared to full-time staff of the same employer (eg *Sports Direct* case referred to above).

Holidays

By virtue of the Working Time Regulations 1998 (WTR), workers on ZHCs are entitled to paid leave under the Regulations in the same as any other workers. The basic right is to 5.6 weeks' annual holiday. Part of this statutory entitlement is additional leave (1.6 weeks) provided for by UK law, not EU law.

(i) The problems

a. <u>Should holiday accrue to workers on zero hours contracts even when they are not working?</u>

The European Court of Justice has suggested that they do not, however, it does not appear to have been addressed in UK case law and the position remains uncertain. In *Heimann and another v Kaiser*, the ECJ considered whether the Working Time Directive precludes a national law under which workers accrue annual leave entitlement at a reduced rate during a period of "zero hours short-time working". It held that leave could be calculated pro-rata during such a period but that leave should not accrue when workers were not working.

The ECJ drew a distinction between workers on sick leave and those on ZHCs. In respect of workers on sick leave, the right to paid annual leave conferred by the Directive must not be made subject to a condition

that the worker has worked during the relevant reference period (see, for example, *Schultz-Hoff v Deutsche Rentenversicherung Bund* [2009] IRLR 214 (ECJ)). However, it was considered that the case law regarding the relationship between paid annual leave and sickness absence could not be applied directly to a worker on zero hours since when not working "the workers…were free to rest or devote themselves to recreational and leisure activities, which they would not have been if they had been unable to work because of ill health."

b. How to manage holiday entitlement when working hours are unknown?

If it is accepted that workers on ZHCs should not be entitled to accrue holiday in respect of time spent not working, then there remains the practical difficulty of calculating holiday pay that is due and how and when to pay it. However, the level of holiday pay due is usually clear as it is calculated according to section 224 ERA 1996 (i.e. where there are no normal working hours, a week's pay is calculated as an average of all the sums earned in the previous 12 working weeks).

In theory, the position of ZHC workers is akin to part time workers, in that the starting point is that their holiday entitlement should be reduced pro-rata in accordance with the hours worked (see *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] IRLR 631).

c. Are workers discouraged from taking holiday entitlement because work will be passed to others?
(See further below)

B. Possible solutions:

Should holiday accrue to workers on zero hours contracts even when they are not working?

One approach would be to treat ZHC workers in the same way as on-call workers so that holiday continues to accrue to workers on ZHCs even when they are not working. It would fall to be considered as a cost of employing workers on zero hours contracts. The position of on-call workers arises from case law. If the wish is to treat ZHC workers in the same way, legislation would probably be required.

How to manage holiday entitlement when working hours are unknown?

Whatever approach is taken by an employer to address this problem, their administrative systems must be sufficiently robust and detailed to track irregular and unpredictable holiday accrual and holiday pay.

The position could be dealt with by "rolled up" holiday pay: ie: a higher hourly rate paid to workers on zero hours contracts to include an amount for holiday pay. ECJ has ruled in Robinson-Steele that this is contrary to the purpose of the Working Time Directive since it discouraged workers from taking leave. However, this case does not necessarily leave workers with any effective remedy since money already received may in certain circumstances be off set against any claim for holiday pay.

This approach also raises the issue of health and safety - workers need to take a holiday break. Also most rolled-up holiday pay systems average holiday pay out over the leave year while WTR calculates holiday pay on the average pay over the 12 working weeks before the taking of holiday or the termination of employment. Therefore, if a ZHC worker takes holiday immediately after a period during which they have worked longer and earned more than usual, their holiday pay under the WTR will be greater than if they take holiday after a shorter period of work.

An alternative is on-going accrual - holiday accrues on the basis of hours worked and can be taken when the worker chooses. A commonly used contractual term is that holiday will accrue at the rate of 12.07% of the hours worked, which is calculated as follows: 5.6 weeks divided by 46.4 weeks (which is 52 weeks less 5.6 weeks). This has the possible issue that it may be contrary to Regulation 15 WTR since this provides that, after the first year of employment, workers should not have to accrue holiday before taking it. This might be addressed by simply requiring ZHC workers to notify the employer whenever they wish to take holiday, and basing the level of pay entitlement on the preceding reference period. A reasonably sophisticated HR records system should be able to monitor holidays taken and accrued over the course of a year so that at any time a ZHC worker will be clear as to the remainder of their entitlement in any holiday year.

A further approach may be to estimate the hours to be worked over the year and then adjust the final pay according to the hours actually worked.

This can be difficult to manage in practice given unpredictable hours and may leave either party dissatisfied (due to over- or under-estimation).

Are workers discouraged from taking holiday entitlement because work will be passed to others?

Any threat of reducing hours as a way of discouraging workers from taking leave is likely to be an unlawful detriment under s45A Employment Rights Act 1996 and could potentially give grounds for a claim for compensation under Regulation 30 WTR. In practice, some ZHC workers may be unaware of their rights or reluctant to enforce them.

Refusing work when offered

Some publicity was given to ZHC workers following publication of the CIPD press release on the numbers of workers in the UK on ZHCs suggesting that, if work was ever refused when offered, that would mean that they would be penalised in future by being offered no or less work. The position revees in their Research Report suggests that this may not be a widespread problem with overall only 15% of respondents saying they were contractually obliged to accept work although 20% said they felt they would be penalised if they did not accept work when offered.

Apart from the provisions of the WTR above there is no legislation covering this. That might be remedied, if the Government were to feel the problem is sufficiently serious, by legislating for a freestanding right not to be subjected to a detriment for refusing work as a ZHC worker. That might meet with opposition from employers as interfering with the flexibility offered by ZHCs. Clearly a ZHC worker who refused work every time it was offered could not expect to remain engaged for very long. A solution, if legislation is seen as the way forward in this respect might be to introduce a standard of reasonableness with guidance published to assist employers, workers and Tribunals in deciding whether any detriment was unreasonably imposed.

Indirect Discrimination

ZHC workers do not enjoy any specific protection from discrimination. From a survey of the case law reported on Lexis Nexis, Westlaw and the Equal Opportunities Review, however, indirect sex discrimination and breach of the part time workers regulations appears as the most common complaints brought by ZHC workers. Eleven such cases appear reported in the last few years.

The test for indirect discrimination is as follows:

An indirect discrimination claim must point to a provision, criterion or practice (PCP) applied by the employer. This phrase is fairly wide: an employer's action can be challenged in an indirect discrimination context even where there is no formal policy in place. Indirect discrimination is group based: the PCP must put persons who share a protected characteristic at a particular disadvantage. To establish a group disadvantage, a pool for comparison will usually need to be identified, containing both persons who are disadvantaged and persons who are not. The PCP that puts members of the protected group at a "particular disadvantage" must also put (or would put) the claimant at that disadvantage. An employer will avoid liability for indirect discrimination if it can demonstrate that the PCP is objectively justified: that is, that the PCP is a proportionate means of achieving a legitimate aim.

Indirect Sex Discrimination

(*Sections 11 and 19, Equality Act 2010*.)

The prohibition on indirect discrimination means that an employer must not have selection criteria, policies, employment rules or any other practices that are ostensibly neutral (in other words they apply to everyone regardless of sex) but have the effect of disadvantaging employees or job applicants of one sex, unless the employer can show that they are justified.

Indirect discrimination is unlawful whether it is intentional or not. However, an employer that indirectly discriminates unintentionally may not have to pay compensation. This may be a good argument to have Guidance on Zero Hours contracts or model zero hours clauses so that any indirect discrimination is not unintentional but brought to the employer's attention.

Age Discrimination

Section 5 of the Equaity Act 2010 provides that persons will share the protected characteristic of age when they are of the same "age group". An age group is defined widely as "a group of persons defined by reference to age, whether by reference to a particular age or a range of ages". This definition gives a claimant a good deal of choice when identifying the age group that has allegedly been disadvantaged by a PCP.

Arguments might be made in respect of indirect age discrimination involving ZHCs (e.g. a 40 year old (or the over 40's) are far more likely than a 16 year old to have childcare responsibilities or to have dependants more generally such that unpredictable hours or requirement to work at short notice are more problematic)

This is however slightly less clear cut than indirect sex discrimination. It is less likely further that ZHCs would give rise to indirect race discrimination claims other than in very fact specific circumstances.

Disparity of Effect

Are ZHCs likely to create a disparity of effect for the purposes of section 19 EqA 2010?

It would seem that the case-law on flexible working and shift working applies by analogy to ZHC situations.

There is an interesting ET case, reported in the Equal Opportunities Review, Watson v Paperbox Stores Ltd (case no 1701689/10), a decision by Employment Judge Richardson in Plymouth. Whilst he had no evidence before him of the ratio of female to male workers at the employer he nevertheless observed that, as women are usually the primary carers for small children (in this case Miss Watson was a single mother to two small children), the PCP of requiring workers to work at short notice (less than a day) was indirectly discriminatory on the basis of sex and that this degree of flexibility was not a proportionate means of achieving a legitimate aim. Whilst it is only a first instance decision, it certainly confirms that the way ZHC workers are treated day to day will more than likely lead to a form of indirect discrimination.

The preponderance of EAT and Court of Appeal authority historically in cases involving allegations of indirect sex discrimination arising out of childcare responsibilities was to assume disparate impact:

- in *London Underground Ltd v Edwards (No.2)* 1999 ICR 494, CA, the Court of Appeal held that in determining whether a shift system was indirectly discriminatory, it was legitimate for an employment tribunal to take into account the fact that women were far more likely than men to be lone parents with childcare responsibilities.
- in *Blackburn v Chief Constable of West Midlands Police* 2008 ICR 505, EAT, Mr Justice Elias (President of the EAT) referred to the 'common knowledge' that women have greater childcare responsibilities than men.

On the other side of the line however:

- in *Roche and Temperley v Heard* 2004 IRLR 763, EAT, the EAT held that an employment tribunal had not been entitled to conclude that women have the greater responsibility for childcare in our society and that as a consequence a considerably larger proportion of women than men are unable to commit themselves to full-time working. The EAT suggested that it was not appropriate to make such a generalisation in relation to men and women solicitors, or men and women working in high-powered and highly paid jobs in the City.

- in *Hacking and Paterson and anor v Wilson* EATS 0054/09, the EAT in Scotland found that society had changed dramatically and that it was not inevitable that women would be disproportionately adversely affected by a refusal to grant flexible working. This decision has been criticised by commentators (see e.g. IDS Discrimination Handbook).

Notwithstanding the *Roche* and *Hacking* decisions, as a matter of practical experience most Tribunals appear still to be sympathetic to the suggestion that women are disproportionately likely to have primary care of children and do not require statistical evidence of this.

Whether a particular ZHC has this disparate effect will depend on the circumstances. Where a ZHC is being used together with a practice of giving very short notice of the requirement to work, as in the *Watson v Paperbox* case, a female claimant is very likely to be able to establish indirect sex discrimination, subject to the employer's justification defence discussed below. On the other hand where ZHCs are being used by an employer simply to avoid there being a guaranteed number of hours and in practice hours are fairly regular and predictable it is less clear that there is a disparate effect.

Justification

An employer may justify indirect discrimination under section 19(2)(d) EqA 2010. This is potentially the most interesting area for the ZHC consultation.

In the *Watson v Paperbox Stores Ltd* case, the tribunal accepted that flexibility could be a legitimate aim but it was not achieved by proportionate means in circumstances where there had been no discussions with the claimant about available options.

Employers in many sectors have to contend with fluctuation in demand for their goods and services. Establishing "flexibility" as a 'legitimate aim' is likely in most cases to be a relatively low hurdle for the employer to get over, as is suggested by the Watson judgment.
'Proportionate means' is more likely to be a contested area and will of course depend more on the facts of each case. It would seem likely that an employer would need to adduce cogent evidence of need where very short notice is given of the requirement to work. This would be particularly so in an 'exclusive' arrangement whereby an employee/worker is uncertain from day-to-day whether or not they are going to be required to work and they are precluded from working for any other employer.

Recommendation

ELA recommend that guidance on this aspect be produced to employers as part of a Code of Practice. Employment Tribunals might then wish to use this guidance to consider the 'proportionate means' element of the justification defence. Guidance might include reference to

(1) Consultation - is it possible to find a way of working which ameliorates the effect on those with child care responsibilities, i.e. consultation on the options

(2) Short notice - is it really necessary to have workers waiting until the day before to find out whether or not they are working rather than having a rota which is available in advance? Is there a genuine need for short notice for all workers?

(3) Irregular hours - might it be possible to offer regular 'core hours' to workers who express a preference for this, with potential additional hours or overtime to cater for fluctuation in demand for the employers services?

Pensions Auto enrolment

1. Are individuals on ZHCs "jobholders" and therefore impacted at all?

Given the wide definition of “jobholder” it is likely that ZHC workers will potentially be subject to the auto-enrolment legislation.

2 If so, is a ZHC worker an eligible job-holder, non-eligible jobholder or entitled worker and is there an increased likelihood of zero hours' workers changing eligibility categories.

Due to having potentially widely fluctuating earnings, zero hours workers are more likely than others to change eligibility categories for the purposes of the auto-enrolment duties and therefore an employer's obligations to them could frequently change.

This will affect both whether or not contributions should be made and also what information must be provided to zero hours workers as they change category - a potentially significant administrative burden for employers and confusing for workers, as well as adding to the uncertainty over their level of earnings due to whether or not contributions will be deducted.

3 Does the ZHC worker have different pay dates to the relevant pay reference period?

Zero hours workers may be paid on a different basis to the employer's normal pay cycle (eg weekly rather than monthly) making it more difficult to assess their earnings over the relevant pay reference period and therefore which category they fall into.

4 What if their hours drop below the earnings trigger once they are auto-enrolled?

Once a zero hours worker has been auto-enrolled, it is possible that, in the following pay reference periods, their earnings drop below the earnings trigger. As a consequence, for that period, any deductions made to reflect employee contributions into the pension scheme will not be mandated by statute. If there is no contractual basis on which employers are entitled to deduct such pension contributions, then employers may face unlawful deductions claims.

5 Can employers have suitable monitoring and/or payroll systems in place?

An employer therefore needs to monitor earnings to ensure that, as soon as the worker has earnings above the earnings trigger in a pay reference period, the obligation to automatically enrol them will arise. Equally when earnings fall, contributions will most probably need to cease.

An alternative would be to use a sophisticated payroll system that will ensure deductions are only made in a month where the worker reaches the earnings trigger.

There is also the obligation on an employer to provide information to different types of job holders to consider when there are changes in category. Again, there are automated letter generation systems that can be used, but cost might be prohibitive for smaller employers.

6 Do short-term members affect the options for the majority of the workforce?

A high volume of short-term members paying low levels of contributions may affect the variety of vehicles providers will make available to employers. In addition, it could result in an increase in the annual management charge payable by all members of a scheme.

7 The use of postponement notices

This could benefit employers with high staff turnover and/or one-off or particular spikes in labour demand and/or earnings by enabling them to defer the duty to auto-enrol for up to three months.

By contrast, there is potential for this to be abused to avoid auto-enrolment for some zero hours workers. This is mitigated by the individual's right to opt in to the scheme during the postponement period and that postponement notices may not be used consecutively.

8 What are the likely implications for those engaged on ZHCs?

The uncertainty and potential changeability of status will affect the uncertainty over an individual's level of earnings.

There are concerns that a large number of lower paid workers - for whom auto-enrolment has been designed - will opt-out of the scheme because they cannot afford to have pension contributions taken out of their income. This may be even more likely where income levels are uncertain.

9 What are the likely implications for employers using ZHC workers?

The administrative burden and/or cost of systems to deal with assessing eligibility and ensuring contributions are made/not made and the relevant information required to be given as people change category could encourage employers to reduce the use of zero hours contracts and create more permanent roles. However, there is also the risk that employers would simply rely on existing permanent staff to take on more hours/overtime to avoid the burden.

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