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## **Scottish Affairs Committee**

### **Enquiry into Zero Hours Contracts**

#### **Response from the Employment Lawyers Association**

**14 October 2013**

## **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 than to make observations from a legal standpoint. This response is from the ELA Scottish Steering Committee, compiled by Kathleen Morrison of Brodies LLP.

### **1 Zero hours contracts: definition**

The term ‘zero hours contract’ is not legally defined. It is often used interchangeably with terms such as ‘bank staff’ and ‘casual workers’. In each of these scenarios, the individual is not contracted to work a set number of hours and is paid only for the hours he or she actually works.

### **2 Employment status**

Zero hours staff may be either ‘workers’ or ‘employees’ depending on the circumstances. Many of the larger employment agencies engage workers on zero hours contracts, and confirm employment status in contracts. In many cases, however, employment status is unclear. Put simply, an employment relationship requires mutuality of obligation – the employer takes on specific legal obligations towards the employee and in return, an employee will usually be expected to ‘come when they are called’.

Workers have fewer statutory protections / entitlements than employees. For example, both workers and employees are entitled to whistle-blowing protection and protection from discrimination; paid annual leave and other entitlements under the Working Time Regulations 1998; and the national minimum wage. However, only employees can qualify for family-related leave (maternity, paternity, adoption and parental leave); statutory redundancy pay, and the right to claim unfair dismissal.

### **3 Continuity of employment**

Certain rights are only available to employees with a certain period of continuous employment, such as:

- 3.1 Written particulars of employment (one month);
- 3.2 Written reasons for dismissal (1 year for those employed prior to 6 April 2012; 2 years for those employed after that date);
- 3.3 Claim of unfair dismissal (usually 1 year for those employed prior to 6 April 2012; 2 years for those employed after that date);
- 3.4 Statutory redundancy payment and to paid time off to look for work when being made redundant (2 years);
- 3.5 Statutory adoption leave and pay (26 weeks);
- 3.6 Parental leave (1 year);

### 3.7 Request flexible working (26 weeks).

As indicated above, some organisations use zero hours contracts in what might be termed a ‘fair’ manner, in that they accept from the outset of the relationship that the individual is an employee, and that the individual is employed on a continuous basis, thus allowing them to accrue the necessary continuous employment to benefit from these rights.

Some organisations will construct zero hours contracts on the basis that the individual is said expressly not to be an employee and will make it clear that they are not obliged to work if asked.

An alternative scenario is that the person is an employee while working, but the contractual relationship stops when they stop working. This is a more familiar form of casual work, and the employee can only demonstrate continuity of service if any gaps of 7 days or more are for a specific agreed reason such as holiday.

## 4 How widespread are zero hours contracts in Scotland?

We have no evidence in this regard.

## 5 In which sectors or areas are zero hours contracts especially common?

We have no statistical evidence, but our understanding and experience is that they are used in higher education and further education; agriculture; hospitality; retail; tourism; construction; and the arts. The public (and private) sector also use these contracts in areas such as social care and healthcare.

The use of zero hours contracts is not necessarily limited to low-paid sectors, but can be found amongst professionals and highly skilled workers, for example, lecturers. By way of example, the Scotsman (7 September 2013) reported as follows, including details on the numbers of staff employed on zero hours contracts in Scottish universities:

- Edinburgh University: 2712 (The biggest user of zero hours contracts among UK universities – although it is reported to have signed a deal with unions to end the practice of zero hours contracts by the end of 2013. The contracts were reported to apply to around 2382 staff in teaching and research posts, and others in catering and events.)
- Royal Conservatoire of Scotland: 635
- Glasgow University: 477
- Stirling University: 412
- Napier University: 251
- Strathclyde University: 227

## **6 What are the advantages and disadvantages of these contracts for (a) employers and (b) workers?**

### **6.1 advantages for employers**

- 6.1.1 Flexibility, particularly where business is seasonal or demand is unpredictable. They can be a cost-effective way of matching resource with demand.
- 6.1.2 In many cases, zero hours staff will be deliberately engaged as 'workers' rather than 'employees' and may therefore have fewer statutory protections / entitlements as discussed above.
- 6.1.3 In many cases, even where zero hours staff are 'employees' for the duration of each separate engagement, there will be no 'umbrella' contract and, as such, they will have insufficient continuity of service (i.e. too many gaps of 7 days or more) to qualify for certain rights / protections (as discussed above).

### **6.2 disadvantages for employers**

- 6.2.1 The employment status of zero hours workers is a question of fact, and may be uncertain (and may vary over time). Notwithstanding what is in writing, those working under zero hours contracts may be regarded by the law as employees, at least during the periods when they are working.
- 6.2.2 If an employer wants to reduce the risk of staff being found to be 'employees' rather than 'workers', the contract should be drafted so there is no obligation on the individual to accept work. Whilst this reduces the risk of employee status, it may be more difficult to manage staffing requirements.
- 6.2.3 There is a risk that employee status is found to exist not only during periods of work, but also during periods where the individual is not provided with work. For example, a casual worker engaged regularly on fixed hours over a significant period, who has not refused offers of work, may be regarded as an employee with continuity of employment measured from the outset of the relationship. The impact of continuity of service is discussed above.
- 6.2.4 The employment status of casual and zero hours workers will determine the tax treatment of any payments made to them. Significant liabilities might follow for an employer if the organisation incorrectly classifies the individuals.
- 6.2.5 There is a risk of claims under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 if part-time workers (not just employees) are treated less favourably on the ground of their part-time status, unless this can be objectively justified. However, zero hours contract workers may struggle to bring a claim due to

difficulties in finding an appropriate comparator (see eg. the decision of the ECJ in *Wippel v Peek & Cloppenburg GmbH & Co KG C-313/02*).

- 6.2.6 It is possible that the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 regulations will apply where an individual (who can be classed as an 'employee') has worked under a series of separate assignments of fixed duration. If the Regulations apply, he or she will have the right not to be treated less favourably than a comparable permanent employee in relation to terms and conditions, and the right not to be subjected to a detriment. However again, casual employees may have difficulty finding permanent comparators, and the employer may be able to objectively justify any differences in treatment.
- 6.2.7 Holiday entitlement. Employees and workers are entitled to a minimum 5.6 weeks statutory holiday in line with the Working Time Regulations 1998. This accrues pro rata to the number of hours and days worked. If zero hours workers don't have regular hours it can be difficult to calculate their holiday entitlement. Further, whilst theoretically they are entitled to take holiday during their employment, this is likely to be unrealistic given that casual work involves intermittent periods of work/non-work, with the periods of work being necessary to business requirements. Those employed on a series of discrete contracts will therefore usually be paid in lieu of holiday each time an assignment comes to an end. If, however, a worker is found to be working under an umbrella contract, holiday will continue to accrue even for periods during which he or she is not provided with work. The issue of holidays and zero hours contracts has been more problematic since the use of rolled-up holiday pay was ruled unlawful.
- 6.2.8 Restrictive covenants / confidentiality. Given that zero hours contracts are sometimes used for more senior staff, employers may wish to protect their business by imposing confidentiality restrictions / restrictive covenants. This could prove difficult. Their use could be a factor weighing in favour of a zero hours worker being found to be an employee, and being found to be employed under an 'umbrella' contract of employment thus giving continuity of service. It could also be argued that the use of restrictive covenants in a zero hours contract situation is an unreasonable restraint of trade (thus rendering these unenforceable).
- 6.2.9 Entitlement to pension. Staff on zero hours contracts are likely to be 'workers' for auto-enrolment purposes and will have to be assessed with the rest of the workforce. However, the eligibility category which applies to these workers under the auto-enrolment regime is more likely to change given the fluctuations in their earnings impacting on which eligibility category they fall into.

### 6.3 advantages for workers

6.3.1 We have no evidence, but it may be that some workers like the flexibility that a zero hours contract gives, if they are able to refuse hours as and when they wish. This may assist some workers in managing caring responsibilities, perhaps where their partner works a varying shift pattern.

6.3.2 According to a Work Foundation factsheet<sup>1</sup>, more than 80% of people on zero hours contracts are not looking for other jobs, and only 26% want to work longer hours.

### 6.4 disadvantages for workers

6.4.1 We have no evidence, but it has been reported that workers experience difficulties in managing caring responsibilities.

6.4.2 The recent BIS review highlighted that uncertainty of earnings was an issue as workers may find it hard to calculate earnings, which might lead to concerns regarding benefits entitlements. However, this may not be an issue for some, for example, if the zero hours contract is a second job (such as college lecturing) which supplements employment elsewhere.

6.4.3 Some zero hours workers are likely to be 'workers' rather than 'employees', providing them with a lower level of statutory protection (as discussed above).

6.4.4 Some zero hours workers will not benefit from statutory rights and protections which require continuity of employment (as discussed above).

6.4.5 Sickness and sick pay. Whilst contracts of employment often include generous contractual sick pay provisions, it may be the case (although we have no evidence of this) that casual and zero hours contracts only provide for statutory sick pay. 'Qualifying employees' are entitled to receive statutory sick pay, with the definition of 'employees' in this case being wider than under normal employment law, to include all those whose earnings are liable for Class 1 NICs. Casual workers will be 'qualifying employees' if they (a) are absent for four or more days in a row, including weekends and holidays – SSP is not payable for the first three days in any period of sickness; and (b) have had average weekly earnings of not less than the current lower earnings limit within the previous eight weeks. Given the conditions for receipt of statutory sick pay, it is likely that some zero hours and casual workers will not qualify during periods of sickness, for example (i) where the work pattern involves only short periods of work of perhaps 1 or 2 days; (ii) if an employer is aware of an employee's sickness, they will not 'offer' a period of work, meaning that the individual will not be 'absent'; (iii) if the previous 8 weeks has been a non-work period, they may not meet the minimum earnings criterion; (iv) it may be the case (although we have no experience of this) that

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<sup>1</sup> The Work Foundation Alliance Limited, Key facts about zero hours contracts

employers could include a clause expressly preventing sick or injured employees from accepting offers of work – although this could be difficult for employers to enforce in practice, and could be subject to challenge on grounds of disability discrimination.

- 6.4.6 Notice pay. Zero hours workers are unlikely to be entitled to notice, or pay in lieu of notice. Particularly where there is no obligation to offer / accept work, a contract is likely to narrate that the parties may terminate the contract at any time without notice, or that the employer may remove the individual's name from its bank of workers (perhaps if the individual fails to accept an assignment on a particular number of occasions).
- 6.4.7 Discipline and grievance. The ACAS Code of Practice on Disciplinary and Grievance Procedures only applies to employees, and not to workers. Where, therefore, zero hours workers are not employees, employers will not need to follow the Code, or internal disciplinary and grievance procedures.
- 6.4.8 TUPE. Whether those on zero hours contracts transfer under TUPE depends on a number of factors. The definition of 'employee' in TUPE is wider than in other areas of employment law and employees or workers on zero hours contracts could be 'employed' for the purposes of TUPE, depending on their circumstances. Whether they would transfer on a TUPE transfer, however, would depend on factors such as whether they are 'assigned to the organised grouping of resources or employees' and whether they were employed 'immediately before' the transfer.
- 6.4.9 Entitlement to pension. As noted above, staff on zero hours contracts are likely to be 'workers' for auto-enrolment purposes and will have to be assessed with the rest of the workforce. However, the eligibility category which applies to these workers under the auto-enrolment regime is more likely to change given the fluctuations in their earnings impacting on which eligibility category they fall into.

**7 What is the practical effect of zero hours contracts on the workers who are contracted, and on other employees?**

No evidence to comment on this.

**8 Are zero hours contracts affecting workers in Scotland disproportionately, for instance because of distances travelled or patterns of employment?**

No evidence to comment on this.

**9 Are zero hours contracts replacing agency work? What is the difference between them for the worker?**

Zero hours workers are engaged directly by the employer and not through a third party agency. We are aware, anecdotally, that some employers are shifting from the use of agency workers to

directly engaged zero hours workers. This may be more attractive to employers in light of the Agency Workers Regulations 2010, and avoids the employer paying agency fees.

The Agency Workers Regulations 2010 introduced rights for agency workers including the right to the same pay and other 'basic working conditions' as equivalent permanent staff after a 12-week qualifying period; and access to collective facilities and information about employment vacancies from start of the engagement.

The employment rights and protections available to agency workers (as with zero hours workers) will depend on their employment status – an agency worker may be an employee or a worker of either the employment business or the client (or neither). If an agency worker is an employee or worker of either the employment business or client, they will have all the usual rights of an employee or worker against that party.

**10 Are people who are on zero hours contracts, and employers who use them, aware of their obligations and their rights.**

We have no evidence beyond the recent BIS review which reported that some individuals were unaware that they might not be offered work regularly under their contract.

**11 What support is available to people negatively affected by zero hours contracts?**

Individuals can contact ACAS; Citizens Advice Bureau; a solicitor; or employment consultant in the same manner as others with concerns regarding their employment rights.

**12 Under a zero hours contract, a worker should be able to turn down work; is this possible for workers to do in practice?**

Not all zero hours contracts will be drafted so that the worker is entitled to turn down work. Some will oblige the worker to accept work when offered, or will only provide limited scope for refusal (such as a set number of consecutive occasions, or a set number of occasions per year) with provision for termination of the relationship if the limit is exceeded. Where a worker is obliged to accept work, this will be a factor weighing in favour of employee (rather than worker) status, as discussed above.

We note that the recent BIS review found that people perceived they would be penalised if they did not take hours offered, even if they were offered the hours at very short notice and it did not suit them to work. The review highlighted that this could lead to a climate of fear that a person is less likely to be offered regular work in future if he or she fails to accept the hours on offer. We have no statistical evidence, however, we consider that, where a contract allows a worker to turn down work, whether he or she actually feels able to do this in practice is likely to vary greatly between sectors, employers and even between different workers (depending for example on their level of seniority / experience / relationship with the employer).



**13 Any other issues**

We are aware that the recent BIS review highlighted one area of concern as being the use of exclusivity clauses i.e. contractual provisions that stop workers from working for another company even although they are only contracted on a zero hours basis. We have no experience of these in practice and consider that they may be unenforceable under current law as an unreasonable restraint of trade.

11 October 2013