

ZERO-HOURS CONTRACTS: FLEXIBLE SOLUTION OR UNFAIR EXPLOITATION?

EMPLOYMENT

Rarely can a relatively obscure employment law concept have grabbed the front pages so firmly - scarcely a day passes without another article on the thorny world of zero-hours contracts. Many businesses operate with a group of "bank", "freelance", "casual" or "supply" staff to cope with variations in workload or demand, but opinion is sharply divided on whether these arrangements are exploitative or simply a flexible staffing solution. This briefing is not the forum for a political debate on the rights and wrongs of using zero-hour contracts - the Government has announced it intends to have a public consultation on the issue so we shall leave that debate for another day. What is important from an employment law perspective is to understand what a zero-hours contract actually does, and whether such an arrangement has any significant advantages or disadvantages.

WHAT IS A ZERO-HOURS CONTRACT?

The label is not a term of art, and the law does not recognise a zero-hours contract as in anyway different from a "standard" employment contract. Nonetheless, it is different in many respects. Most obviously, the employer is not normally required to offer any work at all under the contract, and is only required to pay a salary as and when work is carried out. This latter feature is similar to the "piece-work" arrangements still common in many industries, such as textiles.

The lack of any obligation to offer work is, however, not normally balanced by a freedom on the part of the worker to decline work when it is offered. Indeed, some contracts are structured so that the worker must always accept work when offered, effectively reducing the ability of the worker to accept alternative work from other employers. It is these elements - exclusivity to one company and the lack of any guaranteed minimum number of hours - that have sparked allegations that the use of zero-hours contracts is an abuse of the dominant bargaining position that companies are usually perceived to hold opposite their workers. That may be accurate in some cases, although workers on zero-hours contracts may also derive advantages from the flexibility of the structure: they may need occasional work to supplement another income, or need short-term work to fit around other commitments.

DOES A ZERO-HOURS CONTRACT MAKE SOMEONE AN EMPLOYEE OR A WORKER?

The key point to note when considering whether or not to use zero-hours contracts is that the status of the individual may remain unclear; he/she may be an employee, or a worker,

or neither of those. The distinction matters, because rights to the national minimum wage, working time limits, maternity and paternity leave, and the ability to bring some employment tribunal claims depend on the precise status the individual holds. Unfortunately, this is not always an easy point to resolve with any certainty, and the tribunals have sometimes shown a marked willingness to treat those on zero-hours contracts as permanent employees where, for instance, the pattern of hours worked has remained unchanged over a significant period.¹ This lends zero-hours contracts a degree of risk, which should always be borne in mind when contemplating the use of these structures.

WHAT OTHER RISKS ARE THERE?

Because zero-hours contracts are atypical, a number of other standard employment concepts are not always easily applicable to them. The most important are:

- ◆ holiday entitlements and holiday pay can be difficult to calculate as the pattern of work is not normally regular;
- ◆ the status of a casual worker between assignments can be hard to determine. As this is often a significant factor in deciding employee/worker status, this is a vital point to consider at the outset of the relationship; and
- ◆ whether a casual worker should be auto-enrolled in a pension scheme is often a tricky question and may depend on the individual's earnings across all their assignments.

HOW CAN THOSE RISKS BE DEALT WITH?

As with many employment law issues, the key to engaging people on zero-hours contracts successfully is to have clear and well-drafted documents which precisely and accurately set out the parties' rights and obligations. Armed with such a suite of documents, managers and HR departments can take a sensible view of zero-hours contracts and use them if the needs of the business make this the most appropriate option - provided, of course, they are prepared for potential controversy over their use!

¹ For good examples of this, see the case of *Pulse Healthcare v Carewatch Care Services & ors* [2012] UKEAT 0123/12 and the very recent case of *Borner v Cardinal Security Ltd* [2013] UKEAT 0416/12.

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