



## Zero-Hours Contracts

*In this edition of the HR Bulletin Darren looks at the differences between Zero Hour Contracts and genuine casual contracts... and remembering that for all the legal speak, its about treating people consistently and being explicitly clear about expectations right from the beginning.*

Whenever I think of zero-hours contracts I think of Sir Humphrey Appleby in Yes Prime Minister describing 'politician's logic': 'Something must be done. This is something. Therefore we must do it'. I think a very similar line of reasoning lay behind the new rules on zero-hours contracts introduced by the Small Business Enterprise and Employment Act 2015. The Act outlawed the use of 'exclusivity' clauses in zero hours contracts. As a result, any term in an employee's or worker's zero-hours contract that prohibits him or her from working for another employer is void.

### Tackling the 'abuse'

This is an almost entirely cosmetic change that makes practically no difference in the real world. There is very little evidence that such clauses are widely used in practice – and even if they were, most zero-hours workers would be in no real position to challenge them. The new rules did, however, allow the Government to claim that they had 'tackled the abuse' of zero-hours contracts.

One consequence of the new law however is that we now have a definition of a zero-hours contracts contained in s.27A of the Employment Rights Act 1996 – inserted by the 2015 Act.

This says that a zero-hours contract is one in which 'there is no certainty' that the employer will provide 'any' work to the worker. I don't want to get too technical about this, but that drafting is rubbish. All an employer needs to do to get around this definition is guarantee some minimal amount of work – one hour a month perhaps – and the contract will not count as a zero-hours contract. The Coalition Government said that they would introduce regulations setting minimum thresholds of pay and work to stop employers from doing this but so far there has been no sign of the new Government following through on that. Perhaps they have decided that no employer would bother trying to get around the new law simply because it is so weak.

As a further step the Government has just published<sup>1</sup> a guidance document on the use of zero-hours contracts designed to discourage abuse. It has absolutely no legal force and really is nothing more than a well-meaning leaflet. It suggests that the use of zero hours contracts 'might not be appropriate' for employees who are going to 'work regular hours over a continuous period of time' and reminds employers that individuals working under zero-hours

<sup>1</sup> <https://www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers>

contracts 'are entitled to employment rights' either as an employee or a worker.

## Employment Rights

There, of course, is the rub. Just what employment rights are individuals working under a zero hours contract entitled to? This is an important question for local government because many councils will employ people on these contracts – even if the phrase 'zero-hours' is seldom used. The fact is that there really isn't much of a difference between a zero hours contract and a casual contract. Both involve the claim that there is no obligation on the employer to provide work. The question is whether that claim stands up to scrutiny.

Many local authorities will employ people on a casual contract where the volume of work required is difficult to predict. Usually the flexibility benefits both sides. The employer may not, on paper, be obliged to offer work, but in practice the employee has a great deal of control over his or her working pattern.

## Is labelling helpful?

Labels can be deceptive. If a casual contract genuinely has no guarantee of any work then it will also be a zero-hours contract. If it does guarantee some work then you have to ask just how 'casual' it is. Labelling something as 'casual' doesn't get you very far in legal terms. It certainly doesn't resolve the central question of what legal status individuals enjoy and what employment rights they have. Are they employees with a right not to be unfairly dismissed or are they just workers with rights under the Working Time Regulations (paid annual leave), the Equality Act and entitlement to the National Minimum Wage? In some cases where the relationship between 'employer' and individual is one where the individual is genuinely running an independent business, they might be neither.

It is odd that one of the most difficult problems in employment law is figuring out exactly to whom it applies. You can easily fill a textbook describing the tortuous case law that has tried to draw a distinction between workers,

employees and what are sometimes known as the 'genuinely self-employed'.

## Government Guidance

The Government guidance on zero-hours contracts suggests that employers should make it clear to individuals just what their status is and what employment rights they will enjoy. If only it were that easy. The employer cannot simply decide to engage someone as an employee or as a worker. What matters is the nature of the contract, not the label that you put on it. If you make a four-legged wooden structure with a flat surface used for putting things on, then you have made a table. You can call it a sofa if you like, but a table it will remain. If the contract that you create has all the features of a contract of employment then that is what it will be. You can label a contract 'casual' but ultimately a Tribunal will have to decide whether there is some obligation to provide work and some obligation to accept it. If it appears that over the years a pattern of work has emerged and become an implied obligation then it is highly likely that the tribunal will find that there is an employment relationship. Describing someone as a casual worker will not cut much ice if that no longer reflects the reality of the situation.

One recent trend in employment has been the rise of the 'gig' economy where individuals sell their labour in small units to a variety of employers, often through an online marketplace. Here the issue is whether the individual falls outside of employment law altogether by being in business on their own account. Is the 'employer' in reality a 'customer'? Local Government services may not - yet - have adopted an Uber model, but there are plenty of freelance individuals providing their services to local authorities – out of school activities for example – where it is not clear whether they are entitled to any employment rights at all.

We need new case law to help us fit these recent trends into our employment law system and here again it seems that Uber will be leading the way.

A legal challenge has now been mounted by a number of Uber drivers claiming that they should be treated as workers with the entitlement to paid annual leave and the minimum wage. The issue is likely to be argued out in front of a variety of increasingly senior judges over the coming months and years and it will be interesting to see the result. Will employment law be able to keep up with these changes in the nature of the labour market?

### WME Perspective

As Darren set's out in this Bulletin article, the distinction afforded by labelling an engagement as a **“zero hours contract”** and a “casual contract” is of little significance in practice within the current legislative provisions, with neither requiring any obligation on the employer to provide work. The many questions we had about entitlement to last year's infamous ‘non consolidated lump sum payments’ brought the question of employment status and the existence of a contract, or umbrella contract, into a sharp light and most employers ‘played it safe’ and paid out (despite our suggestion this was not always necessary in every circumstance).

Our advice for many years has been to advise local authorities to be clear as is possible when recruiting genuine ‘casual workers’ using documentation which emphasises the absence of mutuality of obligation and that there is no employment contract. More importantly, to then behave in a way which is consistent with such an expression and not abuse such a relationship with the development of regular work patterns which integrate individuals into the core workforce, leaving employment tribunals with only one conclusion.

We also recognise the ‘status’ dilemma about the genuinely self employed and the need to define and deploy that relationship in a way which is consistent with the legal (and PAYE) definitions, which these days is probably more of an issue in terms of risk and liabilities. So, the real issue, “it's not what you call it but what you do with it” that matters and more importantly perhaps, treating everyone who works for an organisation with respect, fairness and equity will remove the cause rather than examine the symptom?

For a good attempt to distinguish between a casual worker and a zero hours contract see; <http://www.cipd.co.uk/hr-inform/employment-law/employees-and-workers/casual-workers/default.aspx>

In the SPOTLIGHT



## New Aspire Micro-Site Launched

**Michelle Harte, Senior HR Business Partner**

The media response to the Autumn statement and Spending review may have been more positive than expected, but this week MJ Headline of 'Dark Days' sits ahead of an article that sets out the facts of a 24% reduction over 5 years, despite the 2% ring-fenced social care council tax precept. So does this make it a good time or a bad time to work in HR in Local Government?

Well I guess it depends upon your take on it really. These difficult times call for greater scrutiny of the public purse... yes... and diminishing resources ..yes ... but arguably this is the time where there is a demand for the most creative and innovative amongst us to flourish; for talent to be nurtured; for flatter organisational structures and embedded partnerships and for roles and responsibilities to be broadened to meet the challenges of a very unpredictable climate.

From listening to colleagues across the region, we're very aware of the acute pressure being placed on HR Leaders and their diminishing teams in dealing with the organisation wide impact of austerity. However, we would argue that an integral part of delivering 'more for less' has to be ensuring we get the best out of our available talent and that applies as much to HR as it does for the rest of the organisation.

How often do we take the break and ask ourselves what we need rather than focusing on developing others? What are the consequences of putting our own development on the back burner?

We hope by now you will all be aware of our *Aspire* HR & OD business partnering programme, which has grown in popularity and now being rolled out nationally. We embarked on this journey over 2 years ago and working with our partners at the LGA and CIPD we have been clear in our ambition to collectively strengthen capacity across the sector. As momentum has grown to now cover 6 regions, we have just launched a bespoke microsite containing all relevant information about *Aspire*, including a home for the collective research projects undertaken by our *Aspire* delegates and details of our new *HRBP360* tool. The site provides prospective delegates and their sponsors with all the necessary information about the programme. Our ambition is for the site to evolve to become a national networking hub for the increasing alumni and their peers. There are also be some great photos, videos and delegate feedback - it is not all work and can be fun too!

So, don't put your (or your teams) development on the back burner – visit <http://aspirehrbp.org.uk/>



## Five words to ruin a job interview

This is a question to definitely try with your teams. In a bored moment someone obviously took to twitter and started the hashtag [#FiveWordsToRuinAJobInterview](#), the aim being to find the ultimate sentence (maximum 5 words) that would kill all prospects of getting a job (and the response was huge with even celebrities joining in). Here are some of the more funnier responses but drop us a line at [hr@wmemployers.org.uk](mailto:hr@wmemployers.org.uk) if you think you can do better!

## This is our top 15

1. Where do my cats sit?
2. \*Puts on tinfoil hat. Looks around suspiciously.\* 'I think they're watching us.'
3. I Killed a Man Once
4. Can I date my co-workers?"
5. "Coffee?" "No thanks. Jack Daniels?"
6. There's no drug test, right?
7. In five years? Dead, probably.
8. They hired YOU, didn't they?
9. Can't start Monday. Court date.
10. Please don't Google my name
11. What exactly is a strength?
12. What's with all the questions?
13. Am I allowed a wand?"
14. What's your policy on nudity?
15. Things need changing around here

Having seen the film 'Steve Jobs' at the weekend, number 15 might have actually got the job with him ... as long as you didn't mention the Apple II