

Zero hours: the prospect of work is tempting but is it a fair deal?

Parliament must consider how to respond to both the prevalence and reported vices of zero-hours contracts, while balancing business needs with proper protection for workers, says **Patrick Green QC**



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There are 1.4 million zero-hours contracts in the UK, according to figures from the Office for National Statistics revealed last week.

Some people doubt whether this is employment at all, given the often onerous obligations and restrictions on the so-called employees, contrasted with the lack of any real obligations on the so-called employers.

It seems like a startling increase in these controversial contracts. Even if zero hours suit some employees, they typically leave them completely vulnerable to abuse, and unable to secure a reasonably fair deal because of a total loss of bargaining power.

By contrast, the employer's bargaining power is enhanced, resulting in an absurd imbalance of power. Even though this is clearly not always abused (and a significant number of employees on zero-hours contracts report that it suits them well), the inherent imbalance in these contracts seems extraordinarily difficult to justify as striking a fair balance between the legitimate interests of employers and the reasonable expectations of employees.

Many zero-hours contracts are far worse for the employees than the 'self-employed' contracts which they appear to have replaced. At least under those self-employed contracts, both the company and the individual could refuse to offer or perform particular work.

Under many zero-hours contracts, the employee is bound to work whenever such work is offered by the employer (sometimes without any proper notice), but has no guarantee of being offered any

work at all; and, even worse, exclusivity clauses prevent employees working elsewhere, even when they are offered no hours.

The effect of widespread zero-hours contracts has been to leave some of the most vulnerable workers least protected, in some ways much more open to exploitation than under self-employed contracts.

The well-intentioned decision of the Court of Appeal in *Autoclenz Ltd v Belcher*, upheld by the Supreme Court in 2011, seems likely to have contributed to uncertainty in the broad use of self-employed arrangements and the consequential surge in zero-hours contracts.

In *Autoclenz*, a number of car valeters brought an Employment Tribunal (ET) claim to establish that they were in fact employees of Autoclenz, rather than self-employed contractors, as stated in their contracts and tax returns. The case history is instructive.

First, the ET judge held that the valeters were employees, despite the fact that "all the valeters knew when they were taken on that they were being offered a role which was described as and intended by the respondent to be one of self-employment".

The Employment Appeal Tribunal disagreed, holding that they were not employees. The Court of Appeal overturned that decision and held that they were employees, despite their contracts, tax returns and considerable flexibility in their working arrangements.

Indeed, even the lack of exclusivity, such that one of the valeters had also worked for a direct competitor of Autoclenz for a few weeks (without



giving any formal notice to Autoclenz), was nonetheless regarded as consistent with him being an employee of Autoclenz.

The case then went to the Supreme Court, which upheld the Court of Appeal's decision. As in the Court of Appeal, the Supreme Court urged ETs to find the "true agreement" (on the facts), perhaps controversially by taking into account "the relative bargaining power of the parties".

However, any imbalance of bargaining power present in such arrangements has since got far worse under zero-hours contracts.

Miliband view

There is now mounting clamour for action. Labour leader Ed Miliband recently announced plans to prevent workers being forced to be available outside contracted hours, prohibit exclusivity clauses and provide a right to compensation if scheduled hours were cancelled at short notice.

However, Ben Willmott, head of public policy at the Chartered Institute of Personnel and Development, has expressed concerns about the unintended consequences of these proposals while some employment lawyers question how they would be implemented.

Labour also proposes to give workers the right to a fixed-hours contract if they have been working regular hours on a zero-hours contract for a year.

Although doubtless well intentioned, this may just create a revolving door for such employees who may lose all work from that employer after 11 months. What is clear is that striking the right balance effectively may require a deeper rethink.

Some steps towards change are afoot. After a review of zero-hours contracts last summer, Vince Cable MP announced the coalition government's consultation on it, to be conducted by BIS.

The policy objectives recognised potential benefits from zero-hours contracts but proposed "to address any market failures in the use of ZHCs in the UK, and to address concerns of equity, or fairness, in their use. The intended effects would be to make the UK labour market operate more fairly, and more efficiently, for the benefit of both employers and individuals".

But how do you strike a sensible balance between employers and individuals?

One course open to parliament would be to clarify the law on self-employed contracts, thrown into unprecedented uncertainty by the decisions in *Autoclenz* and *The Hospital Medical Group v Westwood* in 2012.

No obligations

Contracts intended to engage people as self-employed contractors have the relative merit of imposing no obligations on either side to offer or perform work. They also do not include exclusivity clauses, prohibiting individuals working for others.

By contrast, some zero-hours contracts make it very difficult for employees to commit to doing any work for anyone else as the employees have to be available to work for the employer at any time, even where there is no express exclusivity clause.

Indeed, it appears clear that for some employees, working under zero-hours contracts is not



Where pressure is put on job seekers to accept zero hours, it compounds the scope for abuse by the employer

'IF THERE'S TRUST, THERE'S FLEXIBILITY'

Zero-hours contracts work – this is the problem. They work for employers and they work for some employees. But despite the news that 1.4 million employees are engaged under these controversial contracts, they do not work for everyone.

At the heart of the issue is our perception of a 'fair deal'. We don't like to see big businesses treating the little employee in a way that seems to be unfair. Where is the commitment to the employee? What about consistency in treatment with other employees? A lack of certainty in being provided with specific and regular work, hours, pay and benefits are causing widespread concern.

I have drafted many casual employee contracts over the past few years for clients who, from time to time, require a flexible workforce. Sometimes these are new businesses, finding their footing and without the resource – financial or otherwise – to support a fledgling, sometimes unqualified, workforce.

Perhaps there is an element of dangling the proverbial carrot at the end of a stick, but the

fundamental basis of any employment contract is trust. So long as there is trust between an employer and employee, there is considerable scope for flexibility in other terms.

Like payday loans and 'greedy' bankers, what doesn't seem fair still works for many. If Ed Miliband and others want to make zero-hours contracts a campaign point in the forthcoming European election, General Election or even the Scottish referendum, it may not prove to be the low-hanging and popular hit it seems.

As for the coalition government, it would not want to knock 1.4 million off the employment list – certainly not in an election year.

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employment in any meaningful sense at all. No security, no guaranteed minimum income, no bargaining power, and no freedom to offer their services to another employer.

Where pressure from some Jobcentre Plus staff is put on job seekers to accept zero hours, combined with threats to sanction them if they leave such roles, it simply compounds the scope for abuse by the employer, especially where not enough hours are offered.

As well as evidence of insufficient hours (with the consequent financial insecurity), there was evidence of employees on these contracts effectively being forced to work excessive hours (but without normal overtime payments) including on Christmas Day and other public holidays. One employee regularly worked 70 hours a week, with no overtime above the 40-hour threshold for permanent employees.

Dave Prentis, general secretary of Unison, has said that: "The vast majority of workers are only on these contracts because they have no choice. They may give flexibility to a few, but the balance of power favours the employers and makes it hard for workers to complain."

CIPD survey

These problems have also been highlighted by the CIPD and the House of Commons Scottish Affairs Committee in its interim report, which recorded evidence given to the committee.

It revealed that thousands of social care workers are not paid for travel time between appointments;

5 per cent of those on zero-hours contracts are paid less than minimum wage; 6 per cent turn up for work, only to find that there is none on offer (despite having travelled and, perhaps, paid for childcare); and 20 per cent are paid at a lower rate than equivalent permanent employees.

The CIPD survey showed that 64 per cent of employers who responded said that they classed their zero-hours workers as 'employees' but such staff were frequently regarded as ineligible for normal employment rights.

Only 31 per cent employers provide statutory redundancy pay (all employees are eligible after two years' service); only 40 per cent of employers afford such employees statutory maternity, paternity and adoption rights; and nearly half of employers reported that their zero-hours workers had no protection against being unfairly dismissed after two years (this right should be available to all employees).

Ian Davidson MP, chair of the Scottish Affairs Committee has condemned zero hours as "abusive and exploitative" saying they should be abolished. The committee's interim report recommends limiting their use to where they can be objectively justified, providing clarity on terms and ensuring provisions for reasonable notice and compensation for those who travel only to find no work available.

Clarifying the law on self-employment would be no panacea and some further proportionate protections will need to be implemented for those who remain on zero-hours contracts. The question remains as to how this is to be done. **SJ**