



Zero-hour contracts: the continued debate in 2014

IES Perspectives on HR 2014

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The year ahead is likely to see continuation of the heated zero-hours debate. In January 2014 the House of Commons will hear the second reading of the Private Member's Bill to prohibit the use of zero-hours employment contracts. Later in the year the findings from the government consultation, launched by Business Secretary Vince Cable, on zero-hours contracts should also be made available. Mr Cable has suggested that one possible outcome from this consultation is a code of conduct for employers, which would mean the developments in this area should be on the watch list for all HR practitioners and employers in 2014.

During 2013, the issue of zero-hours contracts was hotly debated with widely differing views on the issue and a considerable lack of understanding of the scale of their usage or their impact. Zero-hours contracts are where a person does not have a contract to work a set number of hours and is only paid for the number of hours actually worked (IDS, 2013). As a result, opinions on zero-hours contracts range from considering that they are a necessary response by employers to cope with fluctuations in demand or workload; that they serve to exploit vulnerable workers; or that they represent a shift in the power balance between employers and employees where a skilled employee can pick and choose work and achieve greater flexibility and work-life balance.

In this paper, we attempt to tease out the key issues and signpost developments expected in this field in 2014.

How big is the zero-hours issue?

The size of the zero-hours contract issue is debatable. Evidence suggests that the number of people on zero-hours contracts has risen in recent years, with the latest Workplace Employment Relations Study (2011, published in January 2013) showing the proportion of workplaces with employees on zero-hours contracts has risen from 11 per cent in 2004 to 23 per cent in 2011 (House of Commons, 2013a). However, actual estimates of numbers of people engaged on these contracts range significantly from 250,000 (0.8 per cent of the working population) based on Labour Force Survey (LFS) figures for Q4 2012 (ONS, 2013a), to a CIPD estimate of around one million individuals (three to four per cent of the working population) (CIPD, 2013), based on a 2013 survey of employers. The lower government estimate is based on self-declaration and the ONS has outlined the limitations of this method, including the concern that individuals may themselves not select 'zero-hours contract' as their employment status when other response options in the LFS such as part-time or shift-working may be more meaningful to them (ONS, 2013a). In August 2013, the ONS announced that they would consult on a better means of collecting this information from September 2013 with the first figures, using the new statistics for measuring this employment category, available from early 2014 (ONS, 2013b). This timetable has since been revised and the consultation document was released on 23 October 2013 (ONS, 2013c) with the results

of the methodology consultation expected on 10 January 2014 and initial data in March 2014.

Where are zero-hours contracts used?

What was once seen as a characteristic of the low-paid sectors such as care work and retail, zero-hours contracts have spread to the skilled professions such as university lecturers and hospital consultants (IDS, 2013) (covering 11 per cent of professionals, CIPDa, 2013). According to the CIPD, the voluntary (34 per cent) and public sectors (24 per cent) now have the highest proportions of employers using zero-hours contracts (compared to a private sector figure of 17 per cent), with the industries most commonly using zero-hours contracts being the higher education sector (35 per cent); healthcare sector (27 per cent); and hotels, catering and leisure (48 per cent), to cope with seasonal demands.

Are people on zero-hours contracts ‘employees’?

A critical question for both employers and those engaged on zero-hours contracts is whether these individuals are classed as ‘employees’. As HR practitioners and employment lawyers will be well aware, employee status does not come with a clear definition but is determined by a series of tests which on balance may create the picture of an employment relationship.

The most cited ‘employment test’ in relation to a zero-hours contract is that of mutuality of obligation. This is the concept that states that in an employer-employee relationship there must be a reciprocal obligation on the employer to provide work and pay for it and on the employee to carry out that work. In a standard contract, this would typically be seen as a set number of hours work for which the employer will pay and for which the employee has agreed to perform. The crux of the zero-hours contract is that whilst it is a contract with many of the standard clauses that would exist in a typical employment contract, there is no set number of hours which must be worked. Depending on the contract, there can be specific phrasing explaining that there is neither an obligation on the employer to provide hours nor an obligation on the worker to accept them; in other contracts, the wording may be looser stating simply that hours will be confirmed ‘as and when available’, and will ‘vary from week to week’.

Viewing the relationship in this way, without mutuality of obligation, would mean that the individual on the contract would not be an employee but a worker with the consequent diminished employment rights. These workers would have rights to the National Minimum Wage for the hours worked; to paid holiday; to benefit from protection and the duty of care under Health and Safety legislation; and the employer should also not be able to restrict the individual’s engagement in any other employment activities. However, the worker would not be eligible for sick pay,

maternity pay, redundancy and many of the other benefits that accrue to those who are considered to be employees. As such, this reduces the employment costs to the employer to a greater extent than other forms of contract such as annualised hours or part-time working, which may help deliver the working time flexibility but without such reduction in employer costs. However, the lack of employment rights is precisely the reason these contracts have become so vilified by the media and a focus of interest for the government.

Also, employers should be aware that if, in practice, the individual on a zero-hours contract does have to accept all the work offered to them or that, in reality, they are offered the same hours week-in, week-out, an employment tribunal might well find that an employer-employee relationship does, in fact, exist, with all the liabilities that this would entail.

On the other hand, IES knows of at least one large employer that uses zero-hours contracts but grants full employment rights in terms of benefits such as maternity pay and sick pay to those employed in this way. These contracts therefore can be considered as genuinely being used to increase resourcing flexibility. The significant variability in the treatment of individuals on zero-hours contracts is critical in determining their impact and adds to the problem of definition, and assessing the size of the zero-hours population.

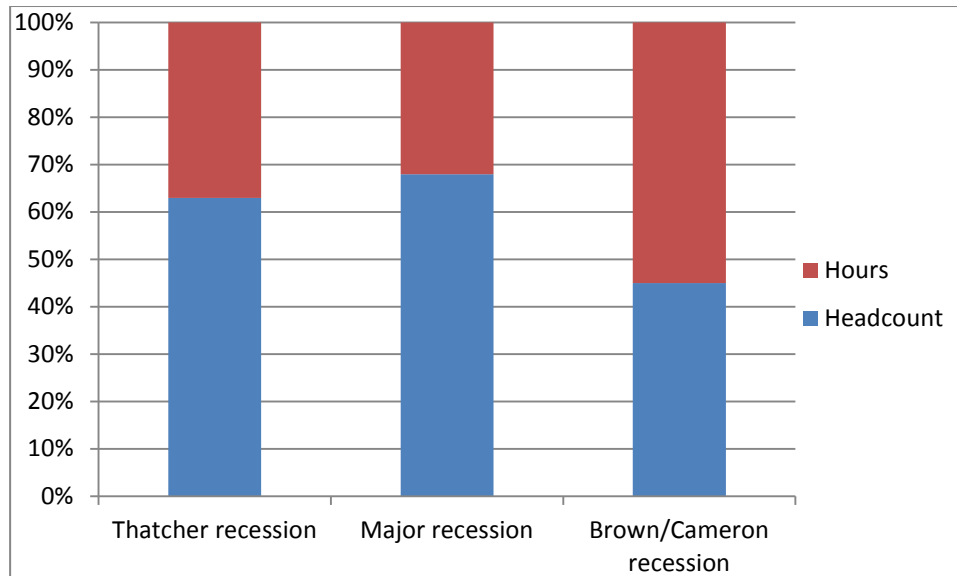
As mentioned in the introduction, a private member's bill that aims to prohibit zero-hours contracts has been sponsored through parliament by Labour MP Andy Sawford. Little information is currently available on the definitions that will be used, the way the proposed prohibition would work and any exemptions that may be granted, but the sponsorship of the bill stems from concerns around the individual consequences of zero-hours contracts on the lowest paid and most vulnerable workers, particularly in areas where there are very limited employment choices.

Have you used zero-hours contracts to meet flexibility needs?

Zero-hours contracts can be a legitimate tool for HR practitioners to generate greater flexibility for their organisations. Aside from zero-hours contracts, the variety of types of flexibility that organisations can use include 'temporal flexibility' adjusting the time worked through means such as annualised hours, part-time working and term-time-only working; 'numerical flexibility' varying the size of the workforce through calling on temporary staff, fixed-term workers or agency workers and 'functionality flexibility' which entails multi-skilling and task flexibility (Mercer and Reilly, 2012). Data shows that responsiveness to reducing market demands during the recent recessionary period was achieved more through flexibility in numbers of hours per worker than in headcount adjustments, compared with the previous two recessionary periods (under

the leaderships of Thatcher and Major). It may be that the increase in usage of zero-hours contracts has contributed to this change.

Source of labour input reductions in successive recessions



Source: ONS

Flexibility vs. Uncertainty

Skilled workers with portfolio careers or those who simply want to balance their work and their non-work lives may appreciate being able to choose when to accept hours from a particular employer. Those with particular specialisms in their field understand that they need to be 'on the books' of organisations, particularly in those sectors where background checking can be a long and involved process such as education, finance or health and that this will not necessarily immediately bring in paid work. This view of the situation appears to be confirmed by the CIPD finding that only 14 per cent of those on zero-hours contracts state that their employer often fails to give them sufficient hours (CIPD, 2013). A CIPD employer survey in 2013 found that the average hours worked by someone engaged on a zero-hours contract was 19.5 hours (Beatson 2013). However, the literature on flexible working also questions the impact on the individual of imposed flexibility rather than being the preference of the worker.

A Westminster Hall debate in July 2013 raised a number of concerns around zero-hours contracts, including the lower earnings of zero-hours workers; the difficulty zero-hours workers have in planning their finances due to the variability of their earnings; their lack of employment rights; and that the choice to turn down work is often considered 'illusory' (House of Commons, 2013a). The uncertainty and lack of control that employees can experience as a result of zero-hours contracts can also be a cause of stress at work, which can impact their productivity and reduce employee engagement

(BPS, 2013). However, it could be suggested that some of the sectors in which zero-hours contracts are more common, are less concerned with achieving high levels of employee engagement. Yet, despite the type of job performed, the flexibility which employers seek through the use of zero-hours contracts could be considered as coming at the cost of employees' security.

IES's Peter Reilly observed in his August 2013 blog post on the subject of zero-hours contracts that they are: *'suited to unpredictable staff needs, like short-term absence or a sudden peak in orders'...*(but) *'using zero-hours contracts for predictable or recurring work patterns appears to be a misuse of its purpose and rightly makes one suspicious of the motives for its adoption'*. The Westminster Hall debate also suggested that for the employer zero-hours contracts can be damaging as they can lead to *'inadequate staffing levels, the loss of training and skills development and an inability to attract and hold on to the highest quality staff'* (House of Commons, 2013a).

The future of zero-hours

In summary, we will expect to see 2014 bring an improved method of measuring the extent of zero-hours contracts use in the UK and the findings from the government consultation on the issue. It is hoped that it will also shed light on how mutuality of obligation can function in the context of zero-hours contracts and the consequent employment status of those individuals contracted under them. The year will also bring more details on the private member's bill and its progress through parliament, although many commentators think it is unlikely to result in a complete ban on the use of such contracts. Outside of regulation, many alternative solutions exist, for example, the Recruitment and Employment Confederation has called for a voluntary code of good practice for zero-hours contracts and measures that will mitigate the worst practices (BBC News, 2013). Most importantly, the government review of the use of such contracts is expected to bring some greater clarity on how the flexibility achieved through such contracts can be combined with protection and greater certainty for the most vulnerable workers.

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IES Briefing: Zero hours contracts: the only route to workforce flexibility?
13 November 2014, London
with Peter Reilly

Zero hours contracts have been in the news and become a political football whilst the rationale for their proper use has been consigned to the margins of the debate. So when are zero hours contracts a good idea and when not, and what alternative options are there to flex work inputs to meet variable business demands? Our discussion will feature legal and practitioner contributions as well as IES.

To find out more and book a place visit www.employment-studies.co.uk/network/events



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