

## ZERO HOURS CONTRACTS

### Introduction

As part of the general attack on staff terms and conditions that has accompanied the intensification of privatisation and cuts to funding across the public services, employers have increasingly been turning to zero hours contracts. Under these contracts, an individual typically undertakes to be available for work but the employer does not undertake to provide any work and only pays for the hours worked.

The number of staff on zero hour contracts across the UK economy continues to be a matter of considerable debate. In 2013 the Chartered Institute of Personnel and Development (CIPD) estimated that the number of staff on zero-hours contracts was around one million (3.1% of the UK workforce). Since April 2014 the Office for National Statistics (ONS) has been collecting data from two sources on zero-hours contracts using figures from the Labour Force Survey (LFS) and from the ONS survey of businesses, which gives an indication of the number of employee contracts being used that do not guarantee a minimum number of hours.

Recently published data from the LFS showed a marked increase in the number of people employed on zero-hours contracts as their main employment putting the figure at 697,000 for October to December 2014 (2.3% of people in employment). This is a rise of 111,000 people from the same period the previous year. The second source of data from the ONS survey of businesses mirrored this increase and indicated a considerable rise in the number of contracts that do not guarantee a minimum number of hours from 1.4 million in January 2013 to 1.8 million contracts in August 2014.

The difference between the figures from both sources of data have been attributed in part to the increase in the recognition of the term “zero-hours contract”, as the LFS data only records those people who indicate that the zero-hours contract they are employed on is their main employment. The ONS survey of businesses takes into account the number of contracts rather than people and therefore the increase in contracts could suggest that workers may be employed on more than one zero-hours contract or that workers are now supplementing their main employment with a secondary zero-hours contract.

Other key findings from the Office of National Statistics data found that women were more likely to be on a zero-hours contract, as well as people in full-time education and workers in the younger and older age groups. The published data in the [analysis of employee contracts that do not guarantee a minimum number of hours](#) details the distribution of workers on zero-hours contracts by industry, by age, by gender and by region which may be useful data for regional committees and self-organised groups.

Across sectors, the CIPD found that the use of zero hours contracts within the voluntary and public sector employers was more prevalent, with 35% of education and 27% of healthcare

employers utilising zero hours. The private care sector has been particularly vulnerable to the practice and a recent UNISON survey of homecare workers found that 41% are on zero hours contracts, which was in line with the government's recent acknowledgment that 307,000 care sector workers in England have these terms of employment.

However, almost all areas of public service are now seeing a rise in zero hours contracts. In the case of the NHS, the new commissioning system which means that providers are not guaranteed any minimum level of work is having the knock-on effect of pushing employers towards contracts that mirror such arrangements. This trend is taking place in areas traditionally vulnerable to zero hours arrangements, such as cleaning, but also hitting new areas such as cardiac services, physiotherapy, psychiatric therapy and hearing services.

## Damaging effects

For staff, zero hours contracts present huge drawbacks in comparison to permanent and regular work.

- There is no guaranteed level of regular earnings that provides any certainty over meeting bills or planning for the future.
- The need to respond to calls to attend work, frequently at short notice, disrupts life outside of work and places a particular strain on families and arranging care for dependants;
- A multitude of employment rights that are usually clearly defined for permanent staff become variable and dependent on the irregular hours of work;
- While weekly income can frequently be inadequate, the need to be available for work when required by the employer hinders the ability of staff to take up other employment;
- The variability of earnings throws into doubt an individual's eligibility to claim various state benefits. For example, the working tax credit for a single parent can only be claimed if that person works 16 hours a week, but whether someone exceeds these hours can vary from week to week under zero hours, creating even greater uncertainty over income. In addition, lack of income certainty makes it extremely difficult to obtain a mortgage or other form of loan.
- Zero hours contracts have also shown themselves to be more open to abuse than regular permanent contracts. For example, scheduling of working hours in the homecare sector that allowed no time for travel time between home visits has led to staff working considerably beyond their paid hours in some cases. The government has even acknowledged that such practices have been deliberately used by companies in homecare to avoid paying the national minimum wage.
- Uncertainty about hours offered each week can lead to fear among staff about complaining or raising issues concerning any aspect of the job or service.
- Fewer hours and lower pay rates mean that average weekly earnings for zero hours workers stands at £188, compared to £478 for permanent workers<sup>1</sup>.

However, it also has to be acknowledged that a minority of staff find some advantages in these working arrangements, particularly if they can find a way of balancing a zero hours contract with a second job, so that the income represents a supplement to a more permanent source of earnings. Sometimes zero hours contracts can help staff with caring responsibilities and provide slightly better terms than agency work or other forms of casual work, since they entail a more direct relationship with the employer.

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<sup>1</sup> TUC, The Decent Jobs Deficit: The Human Cost of Zero Hours Working and Casual Labour, 2014

## Employment rights

The employment rights of those employed on zero hours contracts pivots on whether the contract imposes mutuality of obligation between employer and employee.

All workers are generally covered by employment legislation such as the national minimum wage, the working time regulations and the Equality Act. However, if there is an employment relationship, an employee on a zero hours contract will also acquire the same comparative rights as other employees in areas such as unfair dismissal, redundancy payments and maternity/paternity pay. Entitlement to some dimensions of employment rights, pay and benefits may be linked to the average number of hours worked or years of service (if applicable) and worked out on a pro rata basis in comparison to full time employees.

How tribunals assess the employment relationship was illustrated by the case of *Wilson v Circular Distributors Ltd*. Mr Wilson worked as a relief manager when required by an employer but his contract also provided that "there is no payment when work is not available". The employer argued (and the employment tribunal agreed) that this meant this was not an employment relationship. The employment appeal tribunal (EAT) in Scotland had a different interpretation. The EAT found that the employer had an obligation to provide work when it was available and the employee had an obligation to undertake this work. As there was mutuality of obligation, the contract was one of employment and Mr Wilson had the right to claim unfair constructive dismissal.

The [House of Commons Note on Zero Hours Contracts](#) states that "notwithstanding the intentions of the draftsman, the case law indicates that, if the day-to-day reality of the work suggests a relationship of employment, the contract will be one of employment." It then goes on to assert that "when deciding whether a zero hours contract constitutes a contract of employment, conferring employee status, the wording of the contract will not be determinative of whether there is, in practice, a mutuality of obligation. The tribunal will look closely at the reality of the agreement. If the reality is that there is a pattern of regular work which is regularly accepted, the tribunal may deem the contract to be one of employment."

However, whether any specific zero hours proposal meets the requirements of mutuality of obligation has to be assessed on a case by case basis, so please refer to your regional officer for advice.<sup>2</sup>

Employers sometimes draw a distinction between "casual" workers and "zero hours" staff on the basis that casual workers have no obligation to accept an offer of employment whereas zero hours contracts imply an obligation to be available and accept offers made. However, this definition of the two types of employment has no basis in law and any tribunal would apply the "mutuality of obligation" test to any case that comes before it to decide what employment rights should apply.

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<sup>2</sup> "Casual" contracts often take a similar form to zero hours contracts, with no guarantee of work provided, and, just as in the case of zero hours, "mutuality of obligation" forms the key test of whether someone is classified as an employee and therefore has "employment rights"

Zero hours contracts are usually part-time contracts and therefore the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 may be useful to staff in seeking parity of conditions. However, a worker on a zero hours contract may find it difficult to identify a comparator in order to take advantage of the regulations if there are no full time employees on zero hours contracts.

In June 2014, the government set out some very limited legislation that is set to ban “exclusivity clauses” for zero hours contracts that do not guarantee any hours of work. This means that such zero hours workers cannot be prevented from obtaining additional work for another employer.

## **Branch action**

### **i) Making the case to an employer**

When confronted with proposals for introducing zero hours contracts, the crucial first step is to try to persuade the employer to look beyond any short term cuts in cost from employing staff on zero hours contracts, and to consider the long term effect on its ability to deliver quality services.

The principal consequences that need to be driven home to employers are set out below:

- The damaging effect on the employer’s ability to attract high quality staff;
- The damaging effect on the employer’s ability to hold on to high quality staff;
- The consequent reduction in continuity and quality of services provided;
- The danger of inadequate staffing levels if workers on zero hours contracts are unable to respond to the call to come into work;
- The loss of training and skills development that tends to accompany such contracts, leading to a further decline in the quality of service delivered;
- The increased likelihood of deterring whistle-blowing on poor organisational practice (including health and safety issues), due to workers’ fears that they will be victimised through cuts in hours offered.

In short, zero hours contracts are not compatible with developing a professional workforce delivering quality services.

The following two examples reflect the damage that an organisation can sustain when it goes down the route of zero hours contracts.

The available evidence suggests that the use of zero hours contracts contributed to the G4S security fiasco during the 2012 London Olympics, when the firm was unable to meet the contracted staffing requirements. The agreement under which G4S engaged many staff was at pains to emphasise that there was no mutuality of obligation and staff had “no employment rights whatsoever.” However, the downside for the company in practice was that it was unable to attract sufficient staff under those terms and, with no obligation on staff to turn up, the firm could not guarantee that it would meet required staffing levels. Therefore, for the sake of short term cost cutting measures, it ended up with a loss of £50m on the contract, once the extra costs of covering the shortfall at the last minute had been met.

UNISON's 2012 study of the homecare sector provides a more anecdotal but nonetheless valuable insight into the consequences for a service when a major part of the workforce moves onto zero hours contracts. Workers soon noted the damage to continuity of care for people in their homes that resulted when zero hours contracts began to make shifts much more variable and reduce the chances that carers would visit the same homes. The last minute scheduling arrangements that tend to be inherent in a zero hours system also created breakdowns in services that left carers struggling to deal with the consequences and apologising to the people they care for and their families.

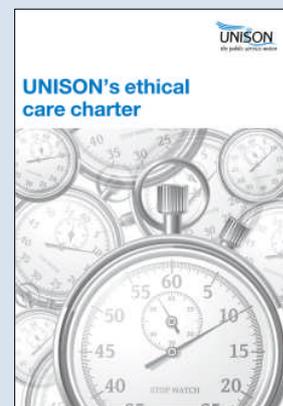
A model letter to assist branches in seeking discussions with an employer on zero hours contracts is set out in Appendix 1 of this factsheet.

## Success stories

UNISON campaigns to persuade employers that the damaging effects of zero hours contract must be tackled have produced results across a number of sectors.

In Local Government, the [Ethical Care Charter](#) for home care includes a commitment to eradicate zero hours contracts in recognition that they are not a suitable form of employment for delivering quality services.

**Wirral Council** signed up to the charter for its domiciliary and reablement services after it recognised that its former service was based on a low cost, zero hours model that delivered inadequate quality of service as well as recruitment and retention problems.



In London, **Islington and Southwark Councils** signed up, prompting Southwark Council cabinet member Catherine McDonald to acknowledge that it had been “utterly unfair that those who provide crucial home-caring services to our most vulnerable people are often forced on to zero hours contracts, meaning no guarantee of work or pay.” Similarly, MiHomeCare in Southwark branch manager Fay Howell stated that the changes to working conditions would “help to ensure quality care for service users and career development for support workers,” along with improved “recruitment and retention, leading to a more stable workforce.”

**Reading and Renfrewshire Councils** have also become recent signatories to the Ethical Care Charter and a petition signed by 8,000 people prompted **Stoke-on-Trent Council** to conduct a review of its home care services, which concluded that provision of improved services required the banning of zero hours contracts.

**Lancashire Council** committed to minimising the use of zero hours contracts in its home care services for the elderly and people with physical disabilities as part of a commitment to move the service to a greater emphasis on quality over price.

In the education sector, weeks of campaigning by UNISON with staff, students and the public ended with an agreement to end the use of zero hours contracts at **University of Manchester Catering Ltd**. The campaign had exposed the wastefulness of the previous staffing arrangements, which had led to spending of over £13m spent on agency employees to cover gaps in delivering services.

## ii) Alternative tactics

While variations in demand for services are a reality that many organisations have to grapple with, particularly with the introduction of the Agency Workers Directive to strengthen workers' rights in 2011, the use of part-time, temporary and agency staff are all options available for dealing with fluctuating demand that do not sacrifice employment rights to the same degree as zero hours contracts and do not have such a damaging effect on services delivered.

However, where it is not possible to resist zero hours contracts entirely, the less damaging option for workers' terms and conditions lies in negotiating permanent contracts that specify a minimum number of hours per week and allow a limited zero hours element for additional hours beyond the minimum. In this way, it is possible to ensure that the employment rights that come with a permanent contract apply to all the work carried out by the employee, including the zero hours element. Annualised hours options can also give flexibility without loss of rights.

The examples below also show the type of practical steps that branches can take to limit the damage caused by zero hours contracts or pursue alternatives.

The UNISON branch at one NHS ambulance trust was unable to demonstrate mutuality of obligation and therefore claim the consequent employment rights for its zero hours staff. However, over a period of time, in the course of negotiations on a variety of issues, it was able to persuade the employer that there were issues of fairness to be addressed in the treatment of zero hours staff. As a result, it managed to weave into its agreements clauses for zero hours staff that enabled them to benefit from the same incremental progression and unsocial hours payments as permanent staff, along with the right to follow established grievance and disciplinary procedures. The impact of zero hours was also limited by an agreement that a minimum core element of every shift would be covered by permanent staff.

At **Hugh Baird Further Education College**, a sustained UNISON campaign has been seeking to tackle the use of zero hours contracts for care and additional support workers in the college's Learners Support department. Talks are under way to explore options for replacing zero hours contracts with permanent, possibly annualised hours contracts, that guarantee core hours while allowing for additional hours to be added.

## iii) Equality duties

A further issue for consideration is that in the areas that have seen the most widespread use of zero hours contracts so far, there has been a marked tendency for women to be disproportionately affected and one in every three zero hours employees are under the age of 25<sup>3</sup>. Therefore, there may be opportunities for challenge under the Public Sector Equality Duty that requires public authorities in England, Wales and Scotland to promote equality of opportunity and eliminate discrimination for service users and staff (in Northern

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<sup>3</sup> <http://www.bbc.co.uk/newsbeat/22528914>

Ireland equality legislation falls under Section 75 and Schedule 9 of the Northern Ireland Act 1998).

The general duty of the Public Sector Equality Duty does not impose a legal requirement to conduct impact equality impact assessments. However, impact assessments remain the most reliable way of demonstrating that equality issues have been given due regard prior to changes such as the widespread introduction of zero hours contracts. In addition, the specific duties that apply to listed bodies (see <http://www.legislation.gov.uk/ukxi/2011/2260/made> ) are more prescriptive in requiring published analysis of the impact of a policy on equality.

#### **iv) The Right to Request Flexible Working and Zero Hours Contracts**

The right to request flexible working ([factsheet here](#)) may be of assistance to some employees on zero hours contracts who would like to have more stable hours of work. In July 2014, The Employment Relations Minister was asked in Parliament "...what assessment [s]he has made of the potential effect of the Flexible Working Regulations 2014 on workers with zero hours contracts?"

The Minister answered that the right to request flexible working would apply in situations where a formal employment relationship has been established (for example, where there is a mutual obligation to work and for work to be provided). UNISON would argue that this is the case for the vast majority of zero hours workers, though this would need to be established in each individual's case. The Minister said that all "employees" with 26 continuous weeks of service have the right to request flexible working from their employer.

The Minister went on to say that under flexible working arrangements, "Individuals on zero hours contracts, and who are employees, can request a change in their contracts which could also include a request to move to a fixed hours contract..."

This means that there is a right for employees to request a *less* flexible work pattern and ask their employer to move them to fixed hours. Of course this is a very limited right. Employers can refuse the request if they have a "sound business reason" for doing so. However, there may be some UNISON members on zero hours contracts who would be able to change their situation for the better by putting in such a request. UNISON branches could encourage such requests, where employers are refusing to get rid of zero hours contracts by negotiation.

#### **v) Recruitment and Organising**

A recruitment and organising strategy needs to focus on what we can do for workers on zero hours contracts in practical terms, while being careful to ensure that we don't over-complicate matters or give false hope. However, we can drive home the message that joining the union will help zero hours workers find out what their rights as workers are and enforce those rights.

By developing such a recruitment drive, drawing zero hours workers into the same union as their full-time colleagues, it is possible to help break down barriers in the workplace

Mapping of zero hours workers across the workforce will be a key starting point for any organising campaign. Information on the number and location of zero hours workers should be made available to a union representative under the general duty on employers who recognise a trade union to disclose information for collective bargaining purposes (as set out by ACAS in its [code of conduct](#) ). In the event of an employer refusing to provide such information, it is possible to challenge the refusal through the [Central Arbitration Committee](#). Though this route should be the main method for obtaining information, in the case of public authorities it is also possible to utilise the Freedom of Information Act and a model Fol letter to assist branches in this process is set out in Appendix 2.

Many workers on zero hours will face financial insecurity, so the services of the “There for You” UNISON Welfare charity, along with the array of discounts available to members, are worth stressing as benefits of membership.

The erratic hours of zero hours workers can pose organising difficulties in terms of getting together a group of workers in a single workplace at the same time. Therefore, it may be necessary to utilise social media, email and texting networks for distributing information and gathering feedback as a supplement to more traditional ways of organising. [UNISON’s full set of advice and guidance on recruitment work can be found [here](#) ]

Like any other group of workers, zero hours staff will have key issues of concern to them and it’s advisable to avoid jumping to the conclusions that insecurity will be foremost among those concerns. By developing a dialogue with zero hours staff, it will be possible to develop a fuller understanding of their views and how their priorities overlap with full-time staff.

Workers on zero hours contracts may have second and even third jobs – often these will be in other areas where the union organises, but may not be covered by your branch. Try to find out and record the details of any further jobs - if they’re not covered by your branch let the regional office know.

## APPENDIX 1

### TEXT FOR MODEL LETTER TO EMPLOYER

Dear

#### **Use of Zero Hour Contracts**

I am sure you will be aware of the extensive recent coverage given by the press to the rise of zero hour contracts.

These contracts are associated with job and financial insecurity, lack of proper holiday, sickness, maternity and paternity pay, lack of opportunities for professional development and promotion, as well as unequal terms and conditions. Zero hour contracts also exclude workers from participating in planning and decision making and deprive them of a sense of belonging in their workplace. Zero hour contracts are often used to circumvent the protection intended by existing employment legislation, leaving workers with little or no job security.

However, they have equally serious consequences for the delivery of quality services to the public. Zero hours contracts frequently serve to:

- Damage an organisation's ability to attract high quality staff;
- Damage an organisation's ability to hold on to high quality staff;
- Reduce the continuity and quality of services provided;
- Raise the risk of inadequate staffing levels;
- Increase the likelihood of staff being deterred from exposing poor organisational practice, such as health and safety failings.

Zero hours contracts are simply not compatible with developing a professional workforce delivering quality services.

This is clearly an issue that cannot be left unaddressed and we would welcome an opportunity to meet with you and your Officers to determine the best way to examine if the policies of (add organisation's name) are contributing to the growth of zero hour contracts and, if they are, how best we can work together to agree strategies to reduce the use of such contracts.

Under the ACAS code, we request information on the use of zero hours contracts for the purpose of collective bargaining.

I look forward to your reply and to meeting you soon to discuss this matter.

Yours sincerely

## APPENDIX 2

### TEXT FOR MODEL FREEDOM OF INFORMATION REQUEST FOR PUBLIC BODIES

Address your request either to the authority's FOI officer (contact details should be on its website) or to the person at the authority you normally deal with on the matter concerned

Dear

**This is a request under the Freedom of Information Act.**

**Could you please supply me with** (describe the information you want as specifically as possible).

**Please include copies of information which you hold on paper or in electronic form.** (This is worth saying if you're asking the authority to search their records for particular types of information. It's not necessary if you're asking for specific named documents.)

**I would be grateful if you would supply this information in the form of** (state your preferred format if you have one - eg by providing me with photocopies / by email / by allowing me to inspect the records etc. If you have no particular preference omit this paragraph.)

**If I can help to clarify this request please contact me by** (give your phone number and/or email address, if you're happy to be contacted that way.)

**I look forward to hearing from you promptly, as required by the legislation, and in any case within 20 working days.**

**Yours sincerely**

(Your name, position, and branch)

## **APPENDIX 3**

### **Links to related UNISON factsheets / guidance**

[Agency Workers Factsheet](#)

[Collective Redundancies Factsheet](#)

[Flexible Working Guidance](#)

[Fixed Term Workers Factsheet](#)

[Public Sector Equality Duty Factsheet](#)

[Unfair Dismissal Factsheet](#)

[Working Time Regulations Negotiators Guidance](#)