Zero-hours contracts: legal challenges and solutions

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Summary of talk

• Defining ZHCs
• Extent and nature of ZHC working
• Employment status: employee or worker?
• Exclusivity clauses
• Continuity of employment
• Minimum wage: on-call time
• Jobseeker’s allowance and tax credits
• Reform
Defining ZHCs

• BIS 2013: ‘an employment contract in which an employer does not guarantee the individual any work and the individual is not obliged to accept any work offered’.

• Adams and Deakin, 2014, IER: ‘a ZHC is a contract under which an employer agrees to pay for work done but makes no commitment to provide a set number of hours of work per day, week or month.’
SBEEB 2014

• Small Business, Enterprise and Employment Bill 2014:

(1) In this section ‘zero hours contract’ means a contract of employment or other worker’s contract under which—
(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and
(b) there is no certainty that any such work or services will be made available to the worker.

(2) For this purpose, an employer makes work or services available to a worker if the employer requests or requires the worker to do the work or perform the services
Extent of ZHCs

• Labour Force Survey: 583,000 people employed on ZHCs in the period October-December 2013, approximately 2% of the employed workforce, compared to 250,000 in the same period in 2012, approximately 0.8%

• ONS business survey: 1.4 million employment contracts that did not guarantee a minimum number of hours but nevertheless provided some work in the fortnight prior to 20 January 2014.

• The ONS figure excludes ZHC workers who did no work in the survey reference period. A further 1.3 million contracts were reported for this category.
Nature of ZHCs

• Between a fifth and a quarter of ZHC workers are looking for other employment, compared to 7% of employees with regular hours

• Only 9% of ZHC workers are union members, compared to 23% of those in regular employment

• Gross hourly wages were £9 per hour for ZHC workers compared to £15 an hour more generally

• 44% of ZHCs last for two years or more, and 25% for five years or more. Two thirds of people employed on ZHCs report that they have a permanent job (ONS)
Insecurity and precariousness

- Average working hours for ZHCs are 24 per week compared to 34 for all employees.
- Between 25% and 40% of ZHC workers say that they want to work more hours.
- 75% of ZHC workers report that their hours vary each week, compared to 40% of all employees.
- 20% of firms report penalising ZHC workers for not accepting work, 30% expect staff on ZHCs to be available for work despite not offering them guaranteed hours in return, and 40% do not have policies or procedures in place for giving ZHC workers notice of work being cancelled or rearranged (ONS/LFS).
Employer strategies

• 69% of providers in the domiciliary care sector used only ZHCs for their care staff, and 88% made some use of them (Manchester Fairness at Work Centre)

• Over 45% of all organisations employing over 250 workers report using ZHCs, but only just over 12% of those employing under 20 workers do so (ONS)

• Users of ZHCs include Sports Direct, Cineworld, Tesco, Subway, Wetherspoons, Macdonalds and Amazon
ZHCs and employment status

• A ZHC worker is likely to be an ‘employee’ while working and almost certain to be a ‘worker’

• It is open to a court to find a ‘global contract’ where work is given and accepted on a regular basis: *Pulse Healthcare v. Carewatch Care Services* 16.8.12, EAT
ZHCs and continuity

• The problem with ZHCs is not employee or workers status as such, but the difficulty in establishing continuity of employment

• Even the one month’s continuity initially required may be hard for a ZHC worker if work is intermittent

• So ZHC workers, in practice, lack most employment protection rights
The minimum wage

• Time spent ‘on call’, or waiting for work at the employer’s instruction or request, may count as working time for the purposes of minimum wage legislation. This is the case where a worker who is paid by the hour or by reference to some other unit of time (which will typically be the case with ZHCs) ‘is available at or near a place of work for the purpose of doing time work’. See NMWR reg. 15.
Derogations from the on-call time rules

- There are two exceptions to the rule on on-call time.
- The first applies where the worker spends time on call at home, when their home is at or near their place of work.
- The second covers periods when the worker, by arrangement with the employer, spends part of their on-call time sleeping, using the employer’s facilities.
Travelling time

• Certain periods spent travelling in connection with work may also fall within the definition of working time for the purposes of the minimum wage. Time spent travelling to and from home is excluded, as is time spent travelling which is ‘incidental’ to the duties of the worker, in the sense that he would not otherwise be working at that time. However, where hours of work and the timing of those hours vary, to the extent that ‘it is uncertain in relation to particular time when the worker is travelling whether he would otherwise be working’, those periods count towards working time. (NMWR 1999, reg. 15).
Exclusivity clauses

• Only 10% of ZHC workers have a formal contractual prohibition on seeking work elsewhere while their contract is in force, while one in eight have a restriction of some kind.

• Exclusivity clauses are almost certainly unenforceable at common law, on the grounds that they are in restraint of trade

• Thus the exclusivity clause issue is a red herring
Jobseeker’s allowance

• There is no statutory rule preventing an unemployed person being disqualified from jobseeker’s allowance for refusing to accept an offer of work in the form of a ZHC, or for resigning from one. Disqualification is more likely depending on the nature of the applicant’s previous employment and the precise terms of the ZHC being offered.
NICs

- The lower threshold for national insurance contributions was £109 in 2013-14 when Labour Force Survey data indicate that the average wage of a ZHC worker was £236 per week. However, because the weekly income of a ZHC worker varies, there will be weeks when the average wage is lower than £109 and no contributions are made, thus leading to gaps in contributory records.
Tax credits

• The jobseeker’s allowance is not available if a claimant is employed for 16 or more hours a week, but working tax credits are not normally payable to single earners without children who work less than 30 hours per week. In a household with children, a single earner can qualify for tax credits with 16 hours of paid work per week, but if they are in a couple they must normally be employed in paid work for 24 hours or more per week if the other partner does not work. If both partners work, they must have 24 hours of paid work between them each week, and one of them must be working for at least 16 hours in that week. These rules may lead to ZHC workers finding it difficult to establish their tax credit entitlements if their hours vary, as they are likely to, from one week to the next.
Universal Credit (from 2017)

- The introduction of UC may require benefit claimants to accept job offers for a few hours each week, or face disqualification.
- The proposed scheme for UC and associated revision to the rules governing the contributory jobseeker’s allowance make provision for the jobseeker’s agreement to be replaced by a ‘claimant commitment’ which, according to a government response to an FOI request in April 2014, may require benefit recipients to accept offers of ZHCs or face disqualification.
- Recipients of UC who are in part-time work may come under an obligation, as part of the claimant commitment, to seek full-time work as a condition of retaining their right to UC.
Some solutions

- Extend the right to written statement to ‘workers’
- Deeming provisions: deem zero-hours contracts to have a minimum content, e.g. a guaranteed daily or weekly wage
- Provide right to some payment for on-call time as in many continental European countries
- Certification process: name and shame employers overusing ZHCs (New Deal ‘blue eagle’; living wage campaign)
- ‘Controlled derogation’: ZHCs only permissible by agreement with union through collective bargaining
Italy: intermittent work

- In Italy, legislation governing on-call work (lavoro intermittente) was introduced in 2003.
- Use of on-call work must be justified by reference to production peaks and organisational needs; it may not be relied on to supply the enterprise’s general needs.
- The contract requires the worker to be available to be engaged by the employer for a pre-established period of time.
- Thus, like the ZHC, the contract requires availability, without guaranteeing work. However, in contrast to the ZHC, the employer may make use of the worker for only a limited number of days during this period.
- The employer must notify the worker that their services are needed at least one working day in advance, and the contract must stipulate a monthly allowance to be paid to the worker during the period when they are on standby, whether or not work is provided.
- The employer must notify the labour office each time the worker is called on.
Netherlands: FSA

• In the Netherlands, on-call work was largely unregulated until the passage of the Flexibility and Security Act (FSA) in 1999.

• The FSA introduced a minimum wage guarantee for on-call workers employed for less than 15 hours per week, under which they are entitled to at least 3 hours’ pay for each work call. After three months of paid work consisting of 20 hours or more of work per month, an employment contract is implied, under which the worker is guaranteed to receive at least the number of hours they had worked over the previous 3 month period.

• The aim of the law, in addition to the protection of the worker, was to stop the employer using the on-call contract as a veil for what should be standard employment. During the initial three-month period, the employer’s needs and those of the worker can be explored and regularized, but, unlike the British ZHC, the worker does not bear all the risk of fluctuations in demand.

• In the Netherlands, on-call workers do not consistently report lower satisfaction with their contracts than standard contract workers.