

Zero Hours Contracts Speech

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Introduction

'Zero Hours Contract' is not a legal term it is convenient shorthand for contracts with provisions which include those which mean a worker:

- is only paid for work actually performed
- is required to be available for work; and
- is prohibited from working for other employers, despite there being no guarantee of further work.

Power is always in the hands of the employer in a workplace but ZHC's take that power to another level, allowing them to choose whether to offer work, when and for how much. Employees can only accept the work or decline, and refusal risks not being offered work again as well as, at least in the UK having your benefits stopped.

Although ZHC's are portrayed by their supporters (who just happen to be those who might be portrayed as ultimate free marketers) as a flexible labour solution to short-term problems, the evidence actually shows that ZHCs are used widely and for long periods, often years as a means of circumventing employment protection and job security. This is abusive of working people and their security and underhand.

When research shows that 83% of staff on a ZHC have been so engaged for longer than 6 months and 65% for 2 years or more, the ZHC looks more like an abusive device to avoid employment responsibilities than a genuine need for flexibility.

Only 42% of those on ZHCs in the UK report having a lot of choice in the hours they work, 38% would like to work more hours than they do, and 14% report that they often have insufficient hours to maintain even a basic standard of living (i.e. being able to pay rent or mortgage, utilities, insurance, medical, transport, property maintenance, child support, food and sundries).

In the UK there is the added sting for those seeking work and an extra incentive for employers to offer ZHC's given that failing to take up a ZHC is deemed to be refusal of a reasonable offer of employment and benefits are stopped. The notion of an 'informed choice' therefore needs to be placed firmly in a real-world context - in which there is actually very little choice at all.

In order properly to understand the issues involved it's important that we start first with the language used to describe ZHCs because, unfortunately, it is often unhelpfully (or perhaps deliberately) muddled.

Language

The fact is that ZHCs are almost always offered on a 'take it or leave it' basis in circumstances where new employees have no realistic option but to accept those terms.

It is a fundamental misconception and misrepresentation of the dynamic between the employee and the employer to suggest that they are equals and the employee lives in a nirvana where they can pick and choose their employment options at will and with ease. It is a complete myth that employees welcome ZHC's freely and after being fully informed about what they mean for them.

In the eyes of the law an individual who works under a contract of employment is an 'employee'. Legally, this is a precise term, which distinguishes that individual from 'workers' and the 'self-employed'.

Some forms of ZHC will result in employee or worker status, but many will result in neither.

The Value of Employee-status rights to the individual

Being an employee gives legal force to basic fairness, and rights which the employee can enforce if there is a breach.

Being an employee also enables an individual to be able to get a mortgage or tenancy, know that they can pay their bills, and, looking at it from the position of the State, reduce reliance on the benefits system.

Economic Value of the ZHC to the employer

Most ZHCs are disadvantageous and unfair.

Where they strip away workplace rights workers have the same employment status as the self-employed even though that reflects neither the individual's wish nor the underlying reality.

Workers exploited by ZHCs 'choose' to be self-employed only in the sense that a prisoner 'chooses' to remain within the prison.

The lack of choice debases and distorts the phrase "self-employed". Think Uber. Think Deliveroo.

The flexibility ZHCs offer to employers is because they transfer some of the risk of running a business onto individuals with their being treated as if self-employed.

Significantly, according to the Resolution Foundation, the median self-employed

salary is £ 12,000 a year. A report from the IFS in 2012 estimated that 40% of the self-employed were at or below the minimum wage. And 40% of self-employed people are in the bottom 20 per cent of earners.

Job security is important for motivation. Research has suggested that relative security both of employment and of status in the organisation is a fundamental part of the expected rewards for effort and that if it is undermined, there is a disruption of the effort-reward balance. Where employees feel unfairly treated or that their jobs are at risk, they are likely to feel less committed to the organisation and less likely to put in optional effort.

In my view and that of my union, if an employer is not prepared to commit to an individual then why should the employer expect that individual to commit to an employer in a manner which prevents them earning a living? Even feudal serfs had that level of mutual obligation.

Exclusivity clauses

In a UK government consultation in 2013 – the results of which they effectively ignored - 9% of individuals on ZHCs were said to be locked into exclusivity agreements, what they failed to mention was that the same research showed a further 15% were only allowed to seek work elsewhere “sometimes.” The groups are therefore, actually, 24% with some form of exclusivity restriction, and 59% without.

Exclusivity clauses allow employers to have their cake and eat it and as we know from watching and listening to the UK’s Foreign Secretary’s use of the phrase in relation to Brexit, that is both unrealistic and a distortion of political reality. They can deny a competitor a knowledge or skills resource without having to pay for that tactical advantage as the cost is passed onto the individual worker.

Banning exclusivity clauses would incentivise more traditional employment arrangements and training.

And in answer to the suggestion that there is no need for a ban because workers can go to law to overturn an exclusivity clause is absurd. Research shows that the bulk of individuals on ZHCs are in low-skill, low pay occupations. It is ludicrous to suggest that such workers will go to law. An average worker will simply not litigate in the UK High Court for a declaration.

The fact that a UK government that is otherwise so keen to reduce court and tribunal claims should suggest more litigation as a solution in the consultation I referred to isn’t in my view because the government actually believes, that the prospect of litigation is real but as a way to appear fair whilst actually helping employers to continue to exploit those they have working for them.

Codes of Practice?

The UK government has suggested that the answer is a 'Code of Practice setting out fair and reasonable use of exclusivity clauses in zero hours contracts'

Unsurprisingly for the UK government it is suggested that any Code of Practice should be 'employer-led'. Given that employers are one half of the relationship and yet the whole of the problem (since they dictate the terms of the relationship), I fail to see how any such Code of Practice could be seen to be fair if its drafting excluded employees and employee representatives.

In any event the weakness of all non-statutory Codes of Practice are that employers trying to act properly will seek to comply, whereas less scrupulous employers will not. No enforcement mechanism, or sanction, means no remedy for an individual other than refusing to work in those circumstances which, if they are vulnerable and desperate, is not an option at all.

A Code of Practice is not a panacea and no substitute for banning exclusivity clauses.

Model clauses?

The problems are with the use and abuse of ZHC's, not how easily employers can operate them. The idea that model clauses are the answer is another nonsense put out by those who want to legitimise an inherently unfair relationship.

The way forward in the UK

In our view the following practical steps should be introduced within the UK:

- All ZHCs should be deemed to be contracts of employment. Within the UK that would be by exercising the existing power contained within s.23 Employment Relations Act 1999 to extend the various employment-status rights to those engaged under them. This would remove both the uncertainty that haunts these arrangements, and a key driver for some unscrupulous employers;
- Exclusivity clauses should be banned entirely;
- A mechanism could be implemented so that after a period of employment on a zero hours contract an individual could seek to have it transformed into a 'traditional' contract of employment. This structure already exists in the UK for those employed under fixed-term contracts for a continuous period of 4 years. Giving this option after a year to the employee on a ZHC would address the abusive position of long-term use of these contracts;
- The introduction of a right to request a traditional employment contract. The Part-time Workers Directive was based upon an agreement between the European social partners and clause 5(3) of that says, "as far as possible, employers should give consideration to ... (b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise." As ZHCs are a form of part-time working this establishes a basis for that approach,
- Regulation 15 of the National Minimum Wage Regulations defines 'time work' as not just time when a worker is working but also 'time when a worker is available at or

near a place of work for the purpose of doing timework and is required to be available for work', except where the worker lives near their place of work and can be at home. There is a similar definition in paragraph 17 of the Agricultural Wages Order. This could be modified to include in the definition of 'work' time where the worker is required to be available for work and is prohibited by the contract from working for another employer. This would have the effect of making those periods of restriction being included in the calculation of the NMW and would almost certainly lead to employers being incentivised to limit those periods when the worker is 'on call' (similar to arrangements in the health service) enabling the worker to manage her time and take other work at other periods.