

New forms of employment

Casual work, UK

Case study 48: Policy analysis

The recent growth in zero hours contracts in the UK has generated significant interest – and also some concern. While the government and employers view zero hours contracts as a means of maintaining employment levels in times of recession, potential problems for workers include uncertainty over income, unemployment benefits and working time schedules.

Introduction

The recent growth in zero hours contracts in the UK has generated considerable media and policy interest, reflecting concerns over the impact of unemployment on the increasing use of these contracts and the impact of zero hours on employment security and wage income. Zero hours contracts have not developed out of any new initiative or new regulations in the UK with respect to either employment regulations or benefit regulations. It has thus always been possible to use zero hours contracts.

As zero hours contracts have no specific legal status, there is no one definition of this form of work. For the Advisory, Conciliation and Arbitration Service (ACAS), zero hours contracts occur when ‘people agree to be available for work as and when required, but have no guaranteed hours or times of work’ (ACAS, undated).

The only purpose of zero hours is to provide employers with flexibility in the use of labour. Although some employers claim (CIPD, 2013a) zero hours contracts suit their employees’ flexibility needs, these contracts are not normally initiated by employees – except occasionally by retirees who may want to retain occasional work involvement. The use of zero hours contracts is not explicitly mandated by the state, but can be seen as a consequence of the long-term and cross-party support for flexible and deregulated labour markets.

The government regards zero hours contracts as having boosted employment growth in the recession and as a useful form of flexibility for employers (BIS, 2013). However, the unfavourable publicity on the growth of zero hours contracts has led the government to initiate a consultation to address two issues it identified as a concern (BIS, 2013). The first issue concerns the requirement in some zero hours contracts for ‘exclusivity’, that is, the agreement not to work for any other employer. The second issue relates to transparency, including knowledge of being on a zero hours contract, such that some people are not aware that they are at risk of being offered no work. The consultation ended in March 2014 and this led to a further consultation on how to include a ban on exclusivity on a forthcoming parliamentary bill. This ended in November 2014 but the bill has yet to be passed (status January 2015).

Background and objectives of zero hours contracts

The UK’s employment system is characterised by both weak collective regulation and limited legal employment rights. Legal employment rights have been extended under the influence of the European Union, although the most notable intervention, the introduction of a legal national minimum wage

(NMW) in 1999, was initiated by the UK government. The outcome has been an increase in juridification (that is, the process of increased legal intervention in the employment relationship). In this context, employers might be expected to take actions, such as the use of zero hours contracts, to evade these constraints, even though they are still weak by EU standards. These contracts normally state that the employer is not obliged to provide work and that the employee is not obliged to provide a service when requested. As discussed below, there is ambiguity over whether or not those on zero hours contracts are eligible for a range of employment rights. However, employer beliefs that they are not eligible or that the workers may not be aware of their rights may have fuelled the growth in the use of zero hours contracts.

Assessment of existing research, policy debates and interviews suggest that factors associated with the recent growth in zero hours contracts and its incidence by type of firm appear to be fourfold.

1. Cost minimisation through spot rather than continuous contracting: Management's pursuit of cost minimisation by cutting paid hours to match actual demand at short notice appears to be increasing. This is most likely being fuelled both by the recession and by state policy to treat employment as highly flexible. Management may also mistakenly believe that, by using zero hours contracts, they can legally avoid employment rights such as paid holidays.
2. Legitimation of flexibility through use of non-standard contracts: Although there are limited legal restrictions on the flexibility associated with regular contracts, zero hours contracts may be used to increase acceptance of flexibility among employees (Rubery et al, 2014; Rubery et al, forthcoming) and the non-provision of full employment rights. That is the legacy of a standard employment relationship with relatively fixed and continuous shifts, and overtime providing temporal flexibility continues to influence employer practice.
3. Procurement of public services on terms incompatible with the standard employment contract: Public sector contracting of services to the private sector may not be compatible with the provision of standard employment contracts and full protection of employment rights (Unison, 2013; Resolution Foundation, 2013, 2014; Rubery and Irwin, 2011; Rubery et al, 2013). This situation applies particularly to domiciliary care, which has been increasingly contracted out since the late 1990s, with the private sector now providing 89% of the service (Laing and Buisson, 2013). Procurement practice can largely explain the high incidence of zero hours contracts in this sector.
4. Availability of labour supply for flexible contracts: The availability of a labour supply for zero hours contracts is clearly a factor in its growth. The recession is one factor generating a labour supply, although unemployed people receiving benefits may not be a major source of supply due to problems with benefit entitlements. Young people and students are overrepresented, as are those seeking flexibility or part-time employment, including therefore those seeking a second job, those with caring responsibilities and people at or near retirement (CIPD, 2013a). Workplaces that employ non-UK nationals are also more likely to use zero hours contracts (Resolution Foundation, 2013).

Characteristics of zero hours contracts

Use of zero hours contracts

Zero hours contracts vary not only in their legal status and implications, but also in relation to the types of flexibility that employers are seeking. They all share a concern to minimise staffing costs in the face of variations in demand; however, the nature of these variations, and the role played by zero hours contracts in accommodating these fluctuations, may vary (Table 1). Furthermore, the differences in demand patterns also suggest that some alternatives to zero hours contracts could work in some contexts, but less well in others.

Four types of flexibility may be sought to deal with four types of variations in demand (Table 1).

Table 1: Types of variable demand and zero hours contracts

	Feasibility of guaranteed hours	Benefits of zero hours contracts for employers
Intermittent demand	Not feasible – need to assemble team per event	Secures a labour pool in advance Secures access to specialist services
Seasonal demand	Yes, within seasons or annualised	Simplifies layoffs – no notice required if work starts/stops early Annualised hours may be difficult if high annual labour turnover is expected and total demand is unpredictable
Variation within week and day/night	Yes, with variable days/shifts plus overtime	Increases pressure on staff to accept unsocial hours/weekend working Reduces risk of overstaffing on slack days/shifts
Discontinuous daily demand	Yes, if price for periods of high demand covers wages during breaks/low demand or if combined with complementary activities	Facilitates fragmented time employment arrangements, with pay linked directly to demand: discontinuous work periods, no minimum shift, variable schedules by day and week – minimising any risk of overstaffing

Source: Authors' own analysis and Rubery et al (2014)

Intermittent demand is the form most commonly associated with zero hours contracts. In this case, demand does not take a regular form and there may be long gaps between employment periods – for example, in relation to occasional events such as conferences, weddings, concerts and festivals, but where organisations wish to draw on a labour pool of already identified and possibly trained staff. Some employers may rely on temporary work agencies, but others may prefer their own pool of zero hours staff – although the more intermittent the demand, the lower the expectation that they would be available to take the work. Another type of intermittent demand is where specialist staff may be needed from time to time, for example for specialist technical, legal or professional work, and a zero hours contract may increase the likelihood that someone with some knowledge of the organisation may be willing to provide this service when it is needed. In the case of both types of intermittent demand, it is unlikely that employers would offer an employment contract with guaranteed hours. However, it is possible that they might consider paying retainer fees to guarantee access to specialist services, though this is not a legal requirement.

Zero hours contracts are also used where there are strong seasonal trends in demand. Here, the main reason may be to provide employers with maximum flexibility as organisations could make use of either a fixed-term contract for each season or an open-ended contract with layoffs at the end of the season. Annualised hours contracts could also be used, but these mainly work well when there is limited staff turnover between seasons and overall annual demand is predictable. Zero hours contracts might provide employers with more flexibility in bringing forward or postponing the seasonal start and end dates. Examples of instances where zero hours contracts are used in seasonal industries include tourism, agriculture, retail and education.

The third form of variation that leads some employers to use zero hours contracts is peaks and troughs over the week. In this instance, zero hours contracts may be used primarily to induce compliance with

changes in shifts according to changing patterns of demand. Variable staffing over the week or between day and night shifts can be written into a standard employment contract and is not dependent on zero hours contracts. However, fear of loss of future shifts if not compliant may reduce the worker's resistance to changes in patterns, particularly at short notice, thereby offering maximum opportunities to match staffing levels to variations in demand over the week. While total hours of work may vary, employers could still use either guaranteed hours plus overtime or annualised hours contracts, both with flexibility as to the days worked, as alternatives to zero hours contracts. Examples of industries with variable demand over the week include hospitality and retail. However, there are limited reasons for all staff to be on zero hours contracts as both these sectors also have fixed opening hours, for instance in the case of shops, pubs and restaurants. This should provide the basis for guaranteeing hours at least for some staff, as minimum staffing levels have to be maintained during fixed opening times.

The fourth type of variation in demand is peaks and troughs over the day, leading to incentives not to provide continuous shifts or to cut short or cancel shifts according to demand. It is this type of flexibility that may be moving the employment relationship closer to a spot contract, and where the lack of guaranteed hours relates not to an inability to guarantee some hours but to a perceived need to induce compliance in fragmented work schedules, unpaid breaks and cancelled work at short notice, including when on shift (Bessa et al, 2013; Unison, 2013; Rubery et al, forthcoming). This approach not only minimises the risk for employers of overstaffing and maximises wage bill flexibility, but also in some contexts, particularly social care, may lead to underpayment of the NMW if some of the unpaid breaks should count as working time or travel time between clients (Rubery et al, forthcoming). Other sectors where this approach may be common are hotel cleaning, where shifts may be reduced on the day due to lower than expected hotel occupancy, and hospitality and retail, where cutbacks to shifts may be made according to customer footfall on the day.

Finally, it is also clear that the status and bargaining power of the employees may affect the likelihood of zero hours contracts and could be a major factor in the recent rise in zero hours contracts. It is notable that the Chartered Institute of Personnel and Development (CIPD) survey of employers (CIPD, 2013a) cited cleaning as the most frequent occupation where someone on zero hours contracts would be employed, even though cleaning work is probably not as subject to demand swings as many other employment areas. This suggests that it is the low bargaining power of many cleaners that may lead to the high incidence, although some areas such as hotel cleaning may be more sensitive to changes in demand.

Clearly, these forms of demand and the employment of more vulnerable workers may overlap. For example, hospitality is affected by variations in demand by season, through the week and with peaks and troughs through the day and night; this sector may also employ more vulnerable workers such as young people and migrants. However, not all sectors using zero hours contracts face particularly strong variations in demand along all these dimensions. Social care, which accounts for a large share of zero hours workers in the UK, is not strongly seasonal and there is relatively regular demand over the whole seven days. Here it is the peaks and troughs and the changing composition of clients that may be leading to the use of zero hours contracts, perhaps together with the employment of women and migrants.

Legal and institutional framework

Zero hours contract is not a legal term and has no specific legal status. Thus, zero hours contracts may vary from employer to employer, although they are characterised by a lack of any guaranteed hours in the contract. There are no current legal or financial penalties associated with zero hours contracts for employers, that is, no extra payments are made for the flexibility benefits they offer. Furthermore, there are no regulations related to minimum work periods. All benefits are based on actual earnings, and national insurance payments decrease if hours decrease; this is because the earnings threshold before employers have to contribute is relatively high (€135 a week, based on an exchange rate of conversion rate of €1 = GBP 0.82), though below the weekly threshold of €187 for employee contributions. The importance of thresholds has recently been increased by a new auto-enrolment occupational pensions

system, which requires matching contributions from employers; auto-enrolment does not apply if annual earnings are below €12,195.

A key issue in the debate on zero hours contracts is whether those employed on these contracts are workers who are employees or workers who are not employees, and thus by default dependent self-employed. This is important because some employment rights accrue to employees only and some to all workers, whether employees or self-employed. It is generally agreed that self-employed people who are independent contractors are unlikely to be on zero hours contracts.

The complication with respect to the employment status of zero hours contract workers is that it is possible and indeed probable that their employment status may be subject to variation; see Deakin and Morris (2012) for more discussion on the complexities of zero hours contract). Thus, once they are engaged to work a shift, they may become employees, but once the shift has ended they may no longer have an employment relationship; moreover, in the time between periods of work, there may be workers without an employment relationship, that is, people who are dependent self-employed. As many employment rights in the UK depend on continuity of employment relationships, this likelihood of discontinuities in the employment relationship may have significant impacts on employment rights. Only if an umbrella or global employment relationship is in place between periods of active employment is it likely that someone on zero hours will have access to full employment rights such as redundancy pay and protection against unfair dismissal, apart from protections that are independent of continuity of employment such as gender and race discrimination. This additional complexity, where the issue is not only to establish employment status at a point in time but also over time, means that some of the documents on zero hours contracts in the public domain are potentially misleading as they fail to distinguish between these two dimensions of employee status. While still reliant on these documents for information and analysis, this report also identifies areas of ambiguity in the information, particularly where no clear distinction is made between umbrella employment relationships and employment relationships during the period when work is carried out.

Although there is a legal requirement to provide employees with a written employment contract, this only applies after one month of continuous employment. As a result, zero hours contract workers may not be eligible. The contract may or may not state if the person hired is to be treated as an employee or a worker, but either way the contract does not actually define employment status. Furthermore, case law (O’Kelly v. Trust House Forte, 1983; Carmichael v. National Power plc, 1998) has established that whether or not a contract of employment exists is not simply a matter of law but is a matter of ‘mixed law and fact to which several correct answers are possible’; see also Deakin and Morris (2012, p. 148).

According to a consultation document from the Department for Business, Innovation and Skills (BIS, 2013), three factors have influenced case law decisions on employment status. These include:

- mutual obligation – that is, whether the employer is obliged to provide work which the employee is obligated to undertake for a wage;
- whether the service must be provided in person (that is, if a substitute is acceptable or not);
- whether the employer exercises a degree of control over the individual and the way in which that individual undertakes their work.

The first two factors normally apply to all zero hours workers, so that the distinction between those deemed to be employees and those treated as workers hinges primarily on mutuality of obligation. Legal advice provided by CIPD, through the legal firm Lewis Silkin suggests that, if the employer wants the individual ‘to provide personal service, to be fully integrated into its business and to receive a range of benefits and to control the way the work is done and provide work to the individual for a prolonged period’, then the individual is likely to be classified as an employee in case law, not a worker (CIPD, 2013b). Furthermore, if the employer includes an exclusivity clause, then they are more likely to be treated as employees with an ‘umbrella’ or global contract (Deakin and Morris, 2012, p. 165). Such contracts establish ongoing obligations between the employer and the employee which are not dependent on the individual being currently in work. This facilitates the payment of holiday pay and other benefits.

To avoid an umbrella contract, employers should apparently confirm that each assignment is a separate contract with no expectation of any future contracts – hence the incompatibility with an exclusivity clause. In a frequently cited case (*Pulse Healthcare v. Care Watch Services and Ors*, 2012), staff on zero hours contracts were deemed to have a continuing employment relationship despite the employer claiming that there was no mutuality of obligation (Pyper and McGuinness, 2014). However, Deakin and Morris (2012) point out that employment rights may be even more difficult to establish. In the O’Kelly case, which involved regular casual workers employed as waiters at various events, the Industrial Tribunal found that a global or umbrella employment contract was not in place on the grounds that they were not under any obligation to accept work and were thus not employees at the time they were dismissed. The waiters themselves claimed that they would have been taken off the preferred list of workers if they had refused work. Deakin and Morris (2012, p. 171) conclude that, because there is a multiplicity of tests for employment status, the position of casual workers on contracts such as zero hours is uncertain at best, particularly with respect to the existence or not of a global contract.

Table 2 provides a summary of entitlements to employment rights according to employment status, drawing on information provided by the government (BIS, 2013) and by CIPD (CIPD, 2013b). Many entitlements hinge on whether or not the person is an employee or only a worker – although as discussed above, organisations may treat staff as employees when working but not between assignments, which means that they do not have the continuous employment relationship required to gain access to most of these rights that only apply to employees. The final arbitration as to what rights they are entitled to can only be determined in court. Thus, this ambiguity leaves staff open to the interpretation of rights used by their specific employer.

Table 2: Comparison of employment rights for employees, workers and the self-employed

Employment right	Eligibility	Employment right	Eligibility
National minimum wage	Employee Worker	Right not to be unfairly dismissed (after two years’ service, except for automatically unfair reasons such as discrimination)	Employee
Protection from unlawful deduction from wages	Employee Worker	Right to written statement of terms and conditions	Employee
Paid annual leave	Employee Worker	Itemised payslip	Employee
Maternity, paternity, adoption leave and pay	Employee	Pension auto-enrolment	Employee Worker
Part-time status – no less favourable	Employee Worker	Right to be accompanied at a disciplinary/grievance hearing	Employee Worker
Fixed-term status – no less favourable	Employee	Rights under data protection legislation	Employee Worker Self-employed
Rest breaks	Employee Worker	Whistleblowing protection	Employee Worker Self-employed (possibly)

Employment right	Eligibility	Employment right	Eligibility
Right to request flexible working	Employee	Statutory sick pay	Employee Worker (possibly)
Right to request time to train	Employee	Unpaid time off to care for dependants	Employee
Protection from discrimination	Employee Worker Self-employed	Time off for antenatal care	Employee
Minimum notice periods	Employee	Time off for trade union activities	Employee
Collective redundancy consultation	Employee	Health and safety in the workplace	Employee Worker Self-employed
Statutory redundancy pay	Employee	Transfer of undertakings protection	Employee

Note: Professor Deakin's view is that it is only health and safety at the workplace rights which apply to independent subcontractors who are self-employed; all other rights probably only apply to workers, but the categories have been reproduced from the two sources as published.

Source: BIS (2013), CIPD (2013b)

Many of the rights that employees, but not workers, are entitled to are not necessarily applied to those on zero hours contracts. This is due to the lack of continuity of employment and the limited awareness of rights to, for example, unfair dismissal, redundancy pay or statutory maternity leave, all of which require some continuity in the employment relationship. Moreover, even when both employees and workers are eligible for annual paid leave, only 59% of organisations employing zero hours staff in a 2013 survey of CIPD members said they believed these staff were entitled to annual paid leave and only 46% of the zero hours workers in the CIPD's employee survey said they were entitled to annual paid leave (CIPD, 2013a). All this suggests that practice is more important than formal legal status in shaping the employment conditions and rights of zero hours workers.

Some of the problems that zero hours staff face in gaining access to benefits relate to statutory rules rather than directly to employee or worker status or employer practices. Eligibility for statutory sick pay (paid after four days of sickness) depends on earning an average of at least €135 a week over the eight weeks prior to the period of sickness and paying Class 1 national insurance contributions (that is, for employees rather than the self-employed persons and payable by workers as well as employees). However, the week to week variability in earnings implied by zero hours contracts increases problems in meeting these requirements.

Zero hours contracts may also be used as a basis for cutting short an existing shift or for offering split shifts during the day according to demand. There has been considerable debate over what should constitute working hours both in relation to the working time directive and in relation to compliance with NMW regulations. According to ACAS the rules are that it is not legal to ask staff to clock off and not be paid if they are required to stay on or near the premises waiting for work, but it is legal to cut short shifts and send staff home without pay (ACAS, 2012); Professor Deakin's view is that staff paid on an hourly basis may be deemed to have the right to at least one hour's notice before being sent home on a pre-arranged shift. Even if the staff are waiting to be called back to work, time spent at home does not count as working time provided that they are free to be at home. However, there is some ambiguity over how this applies to domiciliary care staff, one of the largest groups on zero hours contracts, as their unpaid

breaks between clients may not be long enough for them to return home if their client calls are not local (Unite, 2014). While some rest breaks can be expected and required under law, it is not clear whether too many unpaid breaks that do not allow the worker to return home, without either high cost or risk of not meeting the next appointment, could be considered working time or not.

Another ambiguity relates to the treatment of travel time as working time. Employers do not have to compensate for travel to and from work at the beginning and end of a shift. However, this also seems to apply for zero hours staff, who may travel to find that there is no work and not be compensated for out-of-pocket expenses. In addition, for domiciliary care staff who have to travel between clients, this should constitute working time for the purposes of eligibility for the NMW; however, this may not be paid as only face-to-face care time may be paid for by the organisation commissioning the work from their employer. It is also not clear how many times a day staff could be expected to travel from home to work on unpaid time.

The relationship of zero hours to the UK's benefit and tax credit system is a less discussed and researched area, even though there are numerous interactions that could create problems for individuals, employers, the government and tax payers. The current arrangements make it difficult for those on out-of-work benefits to take zero hours jobs. This could change if the plan to introduce the Universal Credit system in the UK is realised. This system would harmonise benefits paid to those out of work and those in work, by using the same benefit system for all and removing working time thresholds as currently used to determine if one is treated under the in-work or the out-of-work benefit regulations. Zero hours contracts are by definition ambiguous as to whether someone is currently in or out of work, and this change would in some respects simplify the interactions with benefit systems for many zero hours workers. However, it may also introduce the risk that more employers may switch to zero hours contracts and vary hours more according to demand levels as they expect their staff to be subsidised in the downturns by the state.

For individuals, problems with the current benefit system relate to:

- eligibility for benefits and meeting requirements to be at work or seeking work;
- delayed or underpaid or overpaid benefit payments;
- administrative problems, not least in rectifying and/or reapplying for benefit.

Thus, the key issues for individuals are whether:

- variability of hours under zero hours may result in ineligibility for statutory benefits, including unemployment benefits and sick pay, due to a pattern of intermittent contributions to national insurance;
- variability of hours leads to delays and overpayment or underpayment of tax credits;
- variability of hours put them above or below the 16 hours threshold used for eligibility for different types of benefits, thereby requiring them to change benefits, again risking delays and underpayment or overpayment issues;
- leaving a zero hours job on grounds that no work has been provided could be treated as a voluntary departure, leaving an individual without access to unemployment benefits for six weeks; it could also lead to ambiguity over how long one may have to wait for benefits, that is, whether a period with no work counts towards the seven days' wait for unemployment benefits (increased in 2013 from three) or whether the seven days start from the date of application for benefits.

A report on problems encountered by individuals on zero hours contracts who consulted the Citizens' Advice Bureau (CAB) in England and Wales cites a case where someone claiming unemployment benefit was encouraged to apply for a job that claimed to be full-time and temporary, but that in practice involved a zero hours contract which he would not have applied for if this had been made clear (CAB, 2013). His claim for reduced unemployment benefits for the weeks when he was only offered two days' work was turned down because:

- his required interview at Job Centre Plus was scheduled after he was back working full-time hours;

- his employer declined to provide a written employer statement that they could not employ him full time that week.

The same employee had been told by Job Centre Plus that, if he were to leave his job, he would face sanctions for six months.

Employers may currently find that individuals' needs to work below or above a threshold number of hours linked to specific benefits may restrict the pool of workers able to accept zero hours jobs. Although these thresholds are planned to be abolished under Universal Credit, this simplification for both employees and employers could, as suggested above, increase costs for government and taxpayers if employers use the more flexible universal credits to increase variations in hours of work provided for a wider group of staff than those currently on zero hours contracts, including extending zero hours contracts with the government providing some income security.

Insights into the impact of government plans regarding Universal Credit and zero hours are provided by the response from the Department for Work and Pensions (DWP) to a Freedom of Information request (DWP, 2013). The response clarifies that eligibility for Universal Credit in principle requires a 'claimant commitment', which could apply to anyone earning less than the national minimum hourly wage times 35 hours a week (that is, around €1,163 per calendar month). But because the extension of activation policies to a large proportion of those claiming in-work benefits would involve a massive expansion of activation work, initially this commitment will be limited to those who would have been eligible for out-of-work benefits in the previous systems (that is, those earning less than €402 a month for single people and €640 a month for a couple). The 'claimant commitment' involves a personalised set of activities to increase earnings through searching for more work, although these requirements may be modified if the person is responsible for childcare. The Freedom of Information response does not clarify how far this commitment is possible within a zero hours job where employers decide how many hours to offer, though this may restrict the right of claimants to turn down any hours of work offered however short the notice or inconvenience. In addition, if claimants are required to spend time at job centres on job search and other job-seeking related activities, the flexibility for employers may be reduced and the employee may be left trying to manage the varying and potentially competing time demands from the employer and Job Centre Plus.

Currently, the government has stated – through ministerial statements – that unemployed people claiming benefits are not required to accept a zero hours contract job (DWP, 2013; Pyper and McGuinness, 2014). However, this means that many jobs being created are not currently available to those who are both in need of a job and claiming benefits. The government's response to the Freedom of Information request implies an end to that position. It states that it expects claimants to do all they reasonably can to look for and move into paid work and that, under Universal Credit, there will no longer be a need to claim different benefits when hours worked change, as the same benefit system applies whether one is out of work or however many hours one is in work. This change is said to reduce the risk of losing access to benefits by moving into employment. Moreover, under Universal Credit, if a claimant were to refuse a particular vacancy, DWP would need to look into the circumstances of the case and consider whether they had a good reason before deciding whether a sanction applies. The implication is that the fact that a job is based on a zero hours contract would no longer be considered a good reason.

This policy is presented as a means of reducing the benefits bill by encouraging more unemployed people to seek work. Nevertheless, it implicitly takes employers' decisions as to whether to offer guaranteed hours or zero hours contracts as predetermined. This new form of benefit might encourage employers to offer more flexible hours jobs, as those employed will be partially compensated for hours' reduction by increased benefits. This potential increase in the overall benefit bill is not identified here.

Zero hours staff may also be legally denied access to important private resources – particularly credit, mortgages and rental agreements – as credit providers can legally treat the zero hours contract as a risk of default.

Outcomes and effectiveness

Prevalence of zero hours contracts

Following newspaper revelations about the widespread use of zero hours contracts in a particular retail chain (The Guardian, 2013), there has been much debate about the prevalence and growth of zero hours contracts. Estimates from the Labour Force Survey (LFS) showed a fall from over 200,000 zero hours contracts in about 2000 to around 100,000–120,000 in 2004–2006; numbers then rose reaching over 200,000 in 2012 (250,000 after a new methodology revised the figures upwards), but then more than doubling to 583,000 in 2013. This doubling is attributed to the widespread publicity around zero hours contracts, which may have increased awareness of these employment forms.

Surveying employers may further increase estimates; a survey by CIPD of 1,000 human resource managers estimated that one million workers are on zero hours contracts, double the estimate in the LFS, with 23% of organisations employing one or more people on zero hours contracts. The Office for National Statistics (ONS) has also surveyed employers and estimated that 1.4 million zero hours contracts were in use during a two-week period, along with up to 1.3 million more zero hours contracts that were not active over this time period (ONS, 2014).

According to the CIPD survey, the incidence of zero hours contracts is higher in private sector organisations, at 24% compared with 12% of public sector organisations (CIPD, 2013a). Moreover, 85% of zero hours workers were employed in the private sector compared with 76% on other contracts (Resolution Foundation, 2013, p. 11). Those organisations using zero hours contracts in the CIPD survey employed on average 19% of staff on these contracts, suggesting an overall estimate of one million on zero hour contracts or 3.1% of the workforce. The Workplace Employment Relations Survey in 2011 found a lower incidence at 8% of workplaces (Resolution Foundation, 2013, p. 10). Thus, there is considerable uncertainty about the full incidence of zero hours contracts. One quarter of organisations using zero hours in the CIPD survey had started to do so since 2010; however, the survey did not cover the specific reasons behind the increasing usage of such contracts. Of those organisations that did not use zero hours contracts, only 3% were considering using them and a further 10% might do so in the medium term.

According to the CIPD survey, average working hours for zero hours staff amounted to 24 hours a week, which is below the overall average for employees of 34 hours, but nevertheless substantially above zero. LFS data give similar comparisons between zero hours and regular staff, at 21 and 31 hours a week respectively (Resolution Foundation, 2013).

For those zero hours staff identified in the surveys, there is evidence of a relatively high level of economic activity. However, some staff on zero hours contracts who are not currently in work may not be identified in the surveys as zero hours staff but instead as inactive or unemployed. Moreover, according to LFS data, two-thirds considered their jobs to be permanent and only one-third thought they were temporary (Work Foundation, 2013). Thus, zero hours contracts are not used mainly to deal with speculative or highly intermittent demand, but may account for up to 2% of actual total volume of current working hours (authors' own estimate based on the reported average working hours of 34 for 97% of those in employment and 24 for the 3% on zero hours). The share of wages will be lower as average hourly pay for zero hours staff is €11 compared with €18.3 for those not on zero hours contracts (Resolution Foundation, 2013, p. 9; LFS estimates).

The incidence of zero hours contracts is much higher among young people and slightly higher for those aged over 65 years-old. Women outnumber men, but the difference is not significant, although men still outnumber women for those not on zero hours contracts.

The incidence of zero hours contracts varies by sector and occupation, but the incidence ranking varies according to whether it is measured by share of organisations or as a share of those on zero hours contracts. Thus, the CIPD survey found the highest share of organisations in the education sector (38%),

but LFS data found the highest shares of those on zero hours employed in health and social care (20%) and hospitality (19%) (Resolution Foundation, 2013, p. 11).

Among organisations using zero hours contracts, the most frequently cited occupations using such contracts were cleaners and care workers. Recent research puts the share of domiciliary care workers on zero hours contracts at over 50% (Bessa et al, 2013) and the incidence of domiciliary care providers using only zero hours contracts at 69% (Rubery et al, forthcoming) and using some zero hours contracts at 88%. Most of this care work is commissioned and funded by public funds, suggesting that the public sector is outsourcing its use of flexible contracts.

Universities in the UK are included in the private sector not the public sector. As universities have a high use of zero hours contracts, this exclusion may contribute to the lower incidence of zero hours contracts estimated for the public sector. Among those responding to a trade union's Freedom of Information request (145 in total), no fewer than 61% of further education colleges (excluding Scotland) and 53% of UK universities have teaching staff on zero hour contracts.

Micro-level evidence: Reasons for use and impact on working conditions

The CIPD survey provides the main source of general evidence on why employers choose to use zero hours contracts (CIPD, 2013a). Unsurprisingly, two-thirds of employers said they used them to deal with peaks and troughs. However, half also claimed to use them to suit employees' flexibility needs, but there is no information on whether any employees actually initiated the use of zero hours contracts or refused an offer of guaranteed hours contracts. Employers may be reflecting more the tendency for those with flexibility needs to enter into jobs offered on a zero hours basis.

One major issue is whether obligations under zero hours contracts are one-sided, such that employers are not obliged to offer work but employees are obliged to accept. Six in 10 employers said staff were not contractually obliged to accept work, but 15% indicated that they were contractually obliged and a further 17% said that they were sometimes obliged to accept work (6% did not know) (CIPD, 2013a). Furthermore a quarter of organisations, when asked how contracts work in practice, indicated that staff were obliged to accept work, but 50% still said that staff can turn down work.

Four-fifths of employees in the CIPD zero hours worker survey (CIPD survey of 450 zero hours employees, constituting a boosted sample among a 3,000-employee survey) claimed they could turn down work without penalties, but 17% said that they were sometimes penalised and 3% said that they were always penalised. Thus, there is at least a sizeable minority of zero hours workers who feel obliged to accept work as offered.

Another issue of importance for staff security and their ability to plan their lives is the notice that staff have of schedules and changes to schedules. Only one-third of organisations using zero hours contracts have a policy on the period of notice given for asking staff to come into work; 40% did not have a policy and the remainder did not know if they have one. Almost half of zero hours workers said they received no notice or even found out at the start of a shift that the work had been cancelled (CIPD, 2013a).

A potentially critical issue for employment rights is whether or not a global or umbrella employment contract is recognised to be in place and is used as the basis for standard employment rights. Although evidence from the CIPD survey suggests that employers believe they are treating their staff as employees (64% of employers classified zero hours staff as employees, 19% as workers, 3% as self-employed and 14% had not classified them), it is unclear if they are thereby accepting the existence of global or umbrella contracts that contain employment rights. They were not asked specifically if they treated their staff as employees between work shifts.

Even some employment rights such as holiday pay, which apply to workers as well as employees, are not fully recognised. For example, only 59% of employers taking part in the CIPD survey said that their zero hours staff were entitled to annual paid leave even though, as a minimum, this should include all employees and workers, only excluding the self-employed. In total, 21% said their zero hours staff were

not entitled to any benefits, a much higher share than the 3% who indicated that they treated zero hours staff as self-employed, the employment status which attracts few benefits and entitlements.

Employment rights normally accruing to employees do not appear to follow automatically from employment status. All employees should have redundancy rights, statutory maternity and paternity leave, and unfair dismissal protection after two years. However, the percentages of employers who said their zero hours staff were eligible for these three employment rights were 31%, 41% and 55%, respectively (CIPD, 2013a), all lower than the 64% claiming to treat their zero hours staff as employees. This potentially reflects problems of employment continuity in claiming eligibility benefits for zero hours contract staff.

The share of surveyed zero hours staff who thought they were eligible for employment benefits was even lower. Only 46% thought they were entitled to annual paid leave and 45% to a written contract; less than 20% thought they were eligible for statutory maternity or paternity leave, statutory redundancy pay after two years' service, additional payments such as bonuses or benefits such as medical insurance, and rights to take legal action if unfairly dismissed after two years (CIPD, 2013a).

Two case studies from the CAB illustrate problems in accessing employment rights. One care worker employed for 11 years on regular shifts but on a zero hours contract was left without income when the home he worked for closed down (CAB, 2013). Instead of being made redundant, he was promised work at another home, but he received no pay while work was sought and was not given redundancy pay, despite requests. In another case, a care worker who had worked 40 hours a week for 14 months had her hours reduced to 11 after she announced her pregnancy and new staff were taken on. She suspected the employer was aiming to reduce her pay below the lower earnings limit for statutory maternity pay to avoid paying this benefit.

Use of zero hours contracts may increase the risk of not being paid the NMW for all work-related time if employers fail to pay for travel time or for other work-related time specified under the NMW regulations, such as training time or time spent on-call, at or near the premises. An investigation by Her Majesty's Revenue and Customs (HMRC) into the care sector found that underpayment of wages under the NMW regulations was high with a 48% non-compliance rate (HMRC, 2013). A study for the Low Pay Commission also pointed to the risk of underpayment of NMW if travel time was not funded (Bessa et al, 2013). A survey of 52 domiciliary care providers found a high incidence of non-payment of induction training time (27% of domiciliary care providers) and non-payment for other training courses in social care (10% of domiciliary care providers did not pay); moreover, only 19% actually paid for travel time between clients. All practices were associated with zero hours contracts and the limitation of pay to actual face-to-face care time (Rubery et al, forthcoming).

Zero hours staff are, almost by definition, at risk of not having enough hours of paid work to meet their needs. Nevertheless, over 50% of zero hours staff in the CIPD survey would not like more hours of work, although a third would like more hours, including the majority of public sector zero hours staff. Seven in 10 zero hours staff said they had a lot or some choice over hours and just under three in 10 said they had little or no choice. However, despite the apparent matching of hours to preferences for a high share of these staff, 31% of zero hours staff were looking for a new job compared with 24% of all employees (CIPD, 2013a). CAB has also reported that the zero hours staff who contact them face major problems with benefits – in particular, they experience significant fluctuations in income. They have to repeatedly send evidence of changing income for their benefit claims, and if they experience a week of no work, it may be several weeks before they receive a benefit payment for that week, even if their claim is accepted (CAB, 2013).

A further potential problem is low pay. According to both the employing organisations and staff, the majority are paid at similar rates to comparable workers on more permanent contracts, although this similarity of treatment might reflect a high share being paid the NMW (€7.70 an hour in 2013). However, a significant minority are still paid less than comparators on more secure contracts; the share of employers reporting this practice was 10% compared with 21% in the staff survey (CIPD, 2013a). If the regular

workers are full time, the zero hours staff would potentially have a claim as part-time employees for equality of pay between full-time and part-time workers under the part-time workers' directive. Regarding the use of exclusivity clauses, only 9% of zero hours staff in the CIPD survey said they were never allowed to work for another employer, while 60% said they were allowed and a further 15% said they were under some conditions (17% did not know).

The press release for the CIPD survey made much of the high satisfaction reported among zero hours staff both with respect to their contracts and working time, and their overall work experience. However, it is relatively common in UK research to find that low paid or otherwise disadvantaged workers report high satisfaction; this has been interpreted as possibly reflecting limited overall opportunities for these groups (Hebson, 2011). Nevertheless, the reason for the high satisfaction needs to be further explored, particularly to identify if zero hours staff believe the only way to have any flexibility over their working time is to accept this form of contract. The CAB reported examples where staff asking to work flexibly were only given the option of a zero hours contract (CAB, 2013).

Strengths and weaknesses

The strengths and weaknesses of zero hours contracts vary considerably between employers and employees. For employers, zero hours contracts are identified as a vital part of the UK's flexible labour market, although some employers' representatives do recognise that these contracts may be abused. Thus, some employers' organisations such as CIPD do support limited changes to the practice, such as better written information, codes of practice and rights to request reviews of contracts.

In the homecare sector, zero hours contracts are not only considered an important part of the UK's flexible labour markets but they are also deemed as vital for the financial survival of providers under current public procurement commissioning arrangements. While the main trade union, Unison, accepts that employers are under pressure due to procurement practices and the restrictions on council budgets, it believes too that employers also prefer the flexibility that zero hours contracts offer.

In addition, employers contend that one strength of zero hours contracts is the adjustment to employees' preferences for flexibility, but this claim may be made because regular contracts in their organisations do not provide any flexibility opportunities. Alternatives such as annualised hours contracts or flexible working combined with zero hours are options that would meet employee flexibility needs, but employers may only be offering zero hours contracts to anyone needing flexibility.

Employers' claims regarding the benefits of zero hours contracts for employees must thus be treated with some scepticism. For workers, there are clear objective problems with the terms and conditions associated with zero hours contracts. These include the uncertainty over income and working time schedules, the time spent waiting for work, the difficulties in planning home and family life, and the exclusion from forms of employment protection and social security. These poor working conditions have to be interpreted against the evidence that zero hours staff often express satisfaction with their contractual arrangements, but again this may be in relation to the alternative of inflexible work or in a context, for example for students, where they are not seeking regular work. Those groups that face limited alternatives, including for example young people, may be more willing to accept these conditions. The interviewee from Unison highlighted that other arrangements, such as annualised hours, provided better security and more employment rights for groups facing seasonal and other forms of fluctuation, such as gardeners working for local authorities.

According to the interview with the legal expert on labour law, the key problem is the uncertainty over the employment status of zero hours staff. As few cases actually reach the higher courts, much discretion is left with employers. Even the judgements made on those cases that do reach court may not provide clear guidance, as a range of factors which may vary from case to case impact on the outcome.

Finally, zero hours contracts create major problems for those who are on unemployment benefits and find this is the only type of contract available to them and for those in receipt of in-work benefits, as variations in hours may require them to change the type of benefits claimed. These contracts are thus not well suited

to helping people who are unemployed to enter employment and to establish new regular working and income security arrangements.

Transferability

The transferability of zero hours contracts to other country contexts depends on that country's legal system, the industrial relations system and the benefits system. As emphasised, the growth in zero hours contracts is unplanned in the UK, so there is no set of policy instruments to transfer, there are more gaps in current institutions in the UK, and ambiguities persist over employment status and employment rights. Similar institutional gaps may be found in other countries, but zero hours contracts do not provide an example of a new policy initiative and few would consider it an example of good practice. Even supporters regard it mainly as an appropriate practice for maintaining employment levels in times of recession for some forms of flexibility and/or for some groups only (including job seekers, young people and students, those with care responsibilities and partially retired people) and not as a form of regular work contract.

Commentary

The current debate and consultation on zero hours contracts has produced a whole range of recommendations for changes to current arrangements.

Limiting use of zero hours contracts

Most stakeholders, even those most critical of zero hours contracts, tend to stop short of advocating an outright ban on zero hours. Such a ban would be difficult to enact as zero hours contracts have no separate or clearly defined legal status. Instead, trade unions have called for rights to contracts guaranteeing hours if working regularly (TUC, 2014; Unite, 2014). CIPD argues that good practice should mean only offering zero hours contracts when it fits both the employer's and the employee's needs, and regularly reviewing actual working hours to see if the contract is appropriate.

Clarification of employment rights and statuses

There is widespread agreement that there needs to be clarification and better awareness and advice regarding the rights of zero hours staff to employment rights. Trade unions are in favour of a presumption that everyone is an employee, thereby extending rights to those currently treated as workers. This recommendation may need further clarification to ensure that zero hours staff are on continuing employment contracts between assignments. There is also support for everyone, including workers, to receive written statements of terms and conditions of employment.

The problems observed for zero hours staff regarding the lack of clarity with respect to rights, the lack of awareness of rights and the lack of enforcement of employment rights highlight that zero hours issues are but one symptom of the problems generated by a deregulated labour market. These issues are not adequately solved by legal remedies in the absence of trade unions and collective regulation at the workplace. The case law approach to employment rights in the UK creates continuing ambiguity over rights; this may be reinforced by the reduced access of individuals to employment tribunals after the introduction of significant upfront fees in 2013.

Reducing penalties and costs to employees

The government consultation focuses primarily on one area of potential 'costs' to employees – that is, the inclusion of exclusivity clauses in zero hours contracts. Trade unions are against exclusivity clauses, and even the Institute of Directors found that 70% of its members were against such clauses, although they do not endorse a ban as confidentiality or intellectual property concerns may justify its use for highly specialised staff (IoD, 2014). According to ACAS, calls by workers to its helpline indicate that zero hours

staff are fearful of seeking work elsewhere, even without an exclusivity clause, as they have no protection against employers withdrawing future offers of work (ACS, 2014).

The Trades Union Congress (TUC) has called for zero hours staff to be compensated for the additional flexibility they provide (TUC, 2014). This could include, for example, a premium above the NMW, as applies in Australia for casual workers. This contrasts with the current situation where zero hours staff may be paid less than regular employees, although this may not be in line with employment regulation such as the part-time workers' directive (CIPD, 2013a). Zero hours staff may also incur travel costs only to find that the work has been cancelled or cut short. CIPD suggests that, under good practice, employers should pay travel costs and one hour's pay. The legal expert interviewee suggests that this may not need to rely on voluntary good practice; being called in to work could give rise to an implied contract to provide work and some paid work should be provided. Even the main employers' body, the Confederation of British Industry (CBI, 2014), concedes that a regulation requiring, for example, two hours' compensation for a cancelled shift would be better than a required notice period, although it does not explicitly recommend this change. Another issue is payment for time spent on call; the TUC calls for all time spent on call to be paid (TUC, 2014). One possible strategy would be to amend the NMW regulations (Thompsons Solicitors, 2014); another would be to limit the percentage of time one can be on call and to ensure that time spent waiting to work, for example in a car, counts as working time (Unite, 2014). Citizens' Advice Scotland (CAS, 2014) recommends the establishment of a 'Fair Employment Commission' to ensure that employment rights are protected.

Changing the interface with the benefit system

There is a need for greater clarity, information and training of Job Centre Plus staff to ensure that people on zero hours contracts are not penalised by the benefit systems for employers' changes to hours or for quits due to lack of work (CAB, 2013; CAS, 2014). Many problems relate to the widespread use of income thresholds in UK benefit systems for eligibility to both contributions and benefits. Although Universal Credit would simplify access to benefits, this may increase burdens on the taxpayer if more employers use this new benefit system to vary paid hours in line with demand. Employers already benefit from financial subsidies for short hours working, and this may be increasing the use of zero hours contracts.

It is notable that the growth in zero hours contracts under current arrangements could hinder rather than help the government's interest in using job creation to reduce welfare dependency and to promote activity in line with current beliefs about how to avoid long-term poverty risks. Although the government has hailed the role of zero hours contracts in apparently preventing higher unemployment during the recession and in assisting recovery, at the same time it has so far stated that those who are unemployed and in receipt of benefits are not obliged to take a zero hours job (DWP, 2013; Pyper and McGuinness, 2014;). Thus, if a high share of new jobs are created on a zero hours basis, the likelihood of achieving this goal diminishes. The alternative, as under Universal Credit, may allow employers to shift a large part of their risk to the state, making Universal Credit eventually unaffordable.

Promoting good employer practice

One of the key government consultation questions relates to a voluntary code of practice. While no stakeholders are directly opposed to it, trade unions (TUC, 2014; Unison, 2014; Unite, 2014) are much more sceptical as to the likely impact of a voluntary code of practice on actual practice than, for example, the CIPD.

Promoting better procurement practices

The high use of zero hours contracts in social care arises largely out of procurement practices (Rubery et al, forthcoming). Unison has launched an ethical care charter for councils, which requires contractors not to use zero hours contracts. The employers' association for homecare UK Homecare Association

(UKHCA), which was interviewed for this report in 2013, considers that a minimum fee level of over €18 per hour for social care would need to be paid before any change could be considered to zero hours contracting. However, HMRC is in the process of drawing up statutory guidance on travel time that could lead to changes in both procurement and pay practices in the sector. A think tank (Resolution Foundation, 2014) has made recommendations for improving social care procurement to reduce zero hours contracts, including allowing providers to design the care packages, using the EU provision for taking into account social value and not just value for money in commissioning. It also recommends organising care on a more local basis to help with work scheduling, though this conflicts with policies of individual choice over care providers.

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