

16 Oct 2020

3CS Newsletter

Employment

Zero-hour contracts and employment status

In recent years there has been a huge increase in the use of zero-hour contracts especially with the rise of the 'gig economy'. They offer flexibility to an employer that doesn't know how much work there might be. They can also provide greater flexibility for an individual who might be juggling different commitments and welcomes being able to refuse work. But they also come with a lack of certainty about income - as individuals are only paid when they work - and job insecurity. There is also the thorny issue of employment status which makes all the difference to individual rights.

What does 'zero-hours' mean?

The term 'zero-hours contract' is commonly used to describe many different types of casual arrangements between an employer and an individual. The key feature is that the employer does not guarantee the individual any minimum hours of work but rather offers work as and when it arises. The individual can either accept the work offered, or depending on the terms of the agreement, can decide not to take up the offer of work on that occasion. Importantly, the employer cannot restrict them from working for other businesses as exclusivity clauses in zero-hour contracts are banned.



Why employment status matters

There are three kinds of status an individual can have: that of employee, worker or self-employed. Unfortunately, the legislation does little to help us properly understand who falls into which category.

The genuinely self-employed have very few rights: their health and safety is protected and they have a right not to suffer discrimination. Workers have more rights than that, including paid annual leave and the right to a minimum wage. Employees have the most rights: all of the above and also rights like maternity leave, redundancy pay and, critically, the right not to be unfairly dismissed.

How to determine status

Recent years have seen high-profile cases from the gig economy where individuals who have become unhappy with their conditions of work, pay or job security have challenged their self-employed status in order to obtain specific protections.

Regardless of what an employer and individual might agree between them or what a written contract might record, the courts apply their own test in deciding employment status.

Two employment status tests are applied when a court seeks to resolve a status dispute:

1. The "multiple" test, where an individual seeking employee status needs to show that:
 - a. they are under the control of the employer (shown by things like wearing a uniform, having to obey instructions and being told when, how and where to work);
 - b. they have to do work personally with no right to substitute someone else;
 - c. there is nothing that points away from employee status - e.g. paying their own tax or maintaining their own vehicle and meeting those expenses.

2. The "mutuality of obligation" test i.e. an obligation on the employer to provide work, and a corresponding obligation on the individual to do the work.

CONTUNUED BELOW

This newsletter is designed to provide general information only. It does not constitute legal or other professional advice and thus should not be relied on. Definitive advice can only be given with full knowledge of all relevant facts. If you would like to discuss any aspect further, please contact us.

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In a well-known case brought by Uber drivers, the Court of Appeal found that the drivers are in fact workers and are not self-employed, even though they can choose when to work. The courts decided that the degree of control exercised by Uber over how bookings and payments are made, and the fact that there is no right to substitute meant that these drivers are not actually self-employed. As they could choose *not* to work, they were not employees either, but were found to be workers.

Similarly, with a case brought against Pimlico Plumbers, a claimant who had to do the work personally, wear a uniform, buy supplies from a company-approved supplier and drive a company van was found to be a worker and not self-employed. Yet, in a case brought against Deliveroo, the drivers were found to be self-employed contractors: individuals were permitted to use a substitute and, significantly, the company could demonstrate that the drivers had exercised this right in practice.

There is simply no definitive checklist by which to ensure the employment status of an individual. It is therefore advisable to always take advice when your business is engaging someone on a purportedly self-employed basis, or you could find yourself liable for back-dated holiday pay, sick pay and tax liabilities.

What about those under a zero-hours contract?

With zero-hours contracts, there is no obligation on the employer to offer a set amount of work so someone on a zero-hours contract will *usually* not be an employee. However, they will generally be a worker if they are under the control of the employer when they work and have to do the work personally.

It is, however, possible for an individual on a zero-hours contract to be an employee. Often a situation will evolve over a period of time such that an individual might start on a very flexible arrangement but over time they work on specific days/regular hours and a pattern of work emerges. Whilst this may not have been the intention at the beginning of the arrangement, a regular pattern of work over time can result in the individual acquiring employee status even if that contract states that it is zero-hours and that the individual is not an employee.

It is also possible for those who are genuinely self-employed to work under a zero-hours arrangement, for example, a self-employed handyman might take up work offered on a zero-hours basis from a number of regular clients, but he remains self-employed.

Ultimately, it will depend on how the contract actually works in practice.

Things to bear in mind

- First, think about the right type of contract for your business and the individual. If you don't know when or how much work will be available, then a zero-hours contract could be sensible but, if you know you have work for a certain number of hours over a certain period, then a fixed term arrangement might be more appropriate.
- Most zero-hours workers will be working on a part-time basis and will be protected by the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. This means that you can't treat them less favourably than full-time workers and they should have the same access to training and promotion opportunities.
- You should review what work is being offered to zero-hours workers and how often: be alert to whether a regular pattern of work is emerging and the possibility of the worker acquiring employee status.

We are ready to assist and advise your business. Please get in touch with us.

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