

Resolution Foundation

Zeroing In

Balancing protection and flexibility in the reform of zero-hours contracts

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March 2014

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Acknowledgements

We would like to thank all those who attended the stakeholder roundtable held in October 2013 who provided initial input into the development of a set of recommendations. Particular thanks go to those who have since offered detailed advice on specific recommendations and on drafts of the report. We are also grateful to Unbound Philanthropy who have made this report and the Foundation's wider work on insecure employment possible.

Executive Summary

Some have described zero-hours contracts—contracts which do not guarantee any hours of work— as exploitative, offering little but insecurity to those employed on them. Others have argued that the flexibility they provide has played a valuable role in the resilience of the UK's employment rate since 2008. The debate has been complicated by questions regarding the reliability of the data. It is clear, however, that the use of zero-hours contracts has been on the rise in recent years and, according to a survey of employers, looks set to remain a fixture of the UK economy.

Given the value placed on them by some employers and workers, and the incomplete picture of their scale, an outright ban seems inappropriate at this time. But maintaining the status quo would overlook the poor use of these arrangements in a considerable minority of cases. The problems go beyond the exclusivity clauses that were the sole focus of the government's recent consultation on zero-hours contracts and include workers not knowing the terms of their contract when they are hired; having their hours changed without adequate warning; and facing negative consequences for refusing to accept additional hours. This report makes a number of recommendations that respond to these concerns and seek to strike a better balance, providing protection and choice for workers while ensuring flexibility is maintained for employers:

- To ensure that individuals who are hired on a zero-hours contract are fully aware of the nature of their contract and associated entitlements, everyone employed on a zero-hours contract should receive **a statement of employment particulars**. This extends the current right to workers, not just employees.
- To address significant knowledge gaps among many employers about their obligations under zero-hours contracts, Acas should work with unions and employer representatives to develop **a good practice guide**. This would start off as non-statutory guidance but could be revised if improvements were not forthcoming.
- To increase the likelihood that employers who abuse zero-hours contracts are identified and pursued, **increased funding and better sharing of information between enforcement agencies** should be made available. This would enable more proactive enforcement action rather than simply following up on complaints.
- To ensure that zero-hours contracts offer flexibility to workers as well as employers, **a ban on the use of exclusivity clauses** in zero-hours contracts should be introduced. This would end the practice whereby employers do not offer any guaranteed hours and at the same time prohibit their workers from taking jobs elsewhere.
- To prevent zero-hours contracts being used to erode employee rights rather than to manage short term fluctuations in demand, staff on zero-hours contracts should have **the right to a fixed hours contract after 12 months of employment**, provided their weekly pattern of hours worked is relatively consistent. The decision of whether to switch contracts would remain with the worker.

While these recommendations would apply across the economy, there are worries that in specific sectors of the economy, use of zero-hours contracts is more problematic. Much of this relates to publicly-funded services, with social care being particularly troubling. There are limits to what can be achieved without greater funding but the following changes to local authority commissioning would help zero-hours workers:

- There should be a shift from time and task to **outcomes-based commissioning** to give providers greater flexibility in how they deploy their staff and to improve incentives to focus on the quality of care provided.

- In light of the Public Services Act and EU Procurement Directive, commissioners are expected to consider the social value of procurement decisions and not focus exclusively on value for money. **Workforce terms and conditions** should be included within definitions of social value given the local economic significance of improving pay and income security.
- **Local authorities should play a wider role as market managers** to support more sustainable local care markets. If providers are able to consolidate activity within a local area, they are better able to offer workers guaranteed hours rather than a zero-hours contract.

Introduction

Zero-hours contracts—contracts which do not offer guaranteed hours of work—have been the subject of much recent debate. Uncertainty remains however about the extent of their use. The most recent estimate from the Office for National Statistics (ONS) based on the Labour Force Survey for the last quarter of 2013 indicates that 583,000 people are employed on a zero-hours contract in the UK, or just under 2 per cent of the workforce.¹ As Figure 1 shows, this suggests a sharp increase in the use of zero-hours contracts since 2012. However, as the ONS highlights, this spike is likely, at least in part, to reflect greater awareness of zero-hours contracts at the end of 2013 than in the preceding year following significant media coverage of the issue.

Figure 1: Number of people employed on a zero-hours contract



Source: ONS, Labour Force Survey, October to December 2013

While the Labour Force Survey estimate published by the ONS is based on a survey of employees, a non-representative survey of employers conducted by the CIPD in 2013 produced a significantly higher estimate. The CIPD employer survey found that one million people - 3.1 per cent of the workforce – are employed on a zero-hours contract, with nearly a quarter of employers stating that they make use of zero-hours contracts.² It is probable that employer surveys offer a more accurate picture of the use of zero-hours contracts than surveys of employees because they do not rely on individuals being fully aware of their contractual status in order to respond accurately. The ONS is in the process of conducting a nationally representative survey of employers' use of zero-hours contracts which will be published in April and should give the most accurate picture yet of the extent of their use across the economy.

Bearing in mind current data limitations and discounting the sharp spike in 2013, existing evidence indicates an increase in the number of people employed on a zero-hours contract over the last five years.³ Some of this increase is likely to be cyclical. Employers may have managed their way through the unpredictable demand of a long downturn by reducing their payroll costs and only paying for staff as and

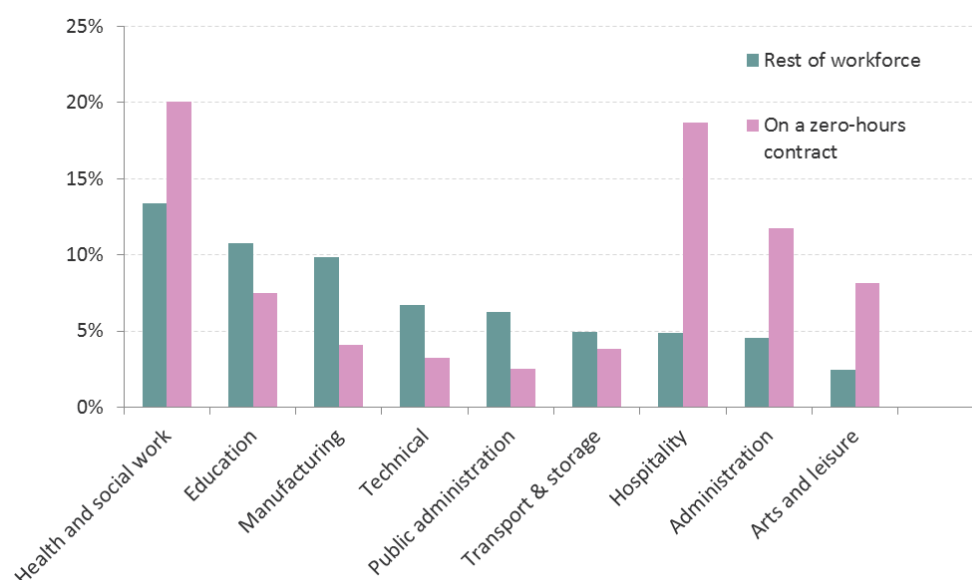
¹ The ad hoc analysis published by the ONS estimates the numbers to between 522,000 and 645,000. For more detail see: <http://www.ons.gov.uk/ons/about-ons/business-transparency/freedom-of-information/what-can-i-request/published-ad-hoc-data/labour/february-2014/zero-hours-analysis.xls>.

² Chartered Institute of Personnel and Development (2013) *Zero-hours contracts: myth and reality*, London: CIPD.

³ Pyper, D. and McGuinness, F. (2014) *Zero-hours Contracts. Commons Library Standard Note*, London: House of Commons.

when needed. This mechanism may have helped keep employment higher than expected during the downturn and contributed to a reported growth in insecurity in recent years.⁴ Some parts of the economy appear far more reliant on zero-hours contracts than others. The use of zero-hours contracts is concentrated in a small number of industries; health and social work, hospitality and administration account for over half of all workers on a zero-hours contract. For example, and as Figure 2 shows, although less than 5 per cent of the total non-zero-hours workforce is found in the hospitality industry, it contains nearly 19 per cent of all zero-hours workers.

Figure 2: Share of all zero-hours contract workers and non-zero-hours workers across industries



Source: Resolution Foundation analysis of the Labour Force Survey Q4 2012

We will have to wait some time to fully understand the extent to which the increase in the use of zero-hours contracts has been cyclical or structural, but there is some evidence to suggest that it is in part structural. According to the Work Foundation, 44 per cent of people on zero-hours contracts have been with the same employer for at least two years and 25 per cent for five or more years.⁵ Close to half (45 per cent) of employers surveyed by CIPD said that zero-hours contracts were part of their organisation's long term workforce strategy compared to 15 per cent who said their use was a short term measure.⁶ Among domiciliary care workers, 61 per cent are employed on zero-hours contracts, making zero-hours contracts the dominant employment model.⁷ These findings suggest that zero-hours contracts are not always a temporary adjustment to changes in demand, nor are they only used at the margins. Furthermore, nearly two-thirds of those employed on zero-hours contracts are over the age of 25, indicating that these highly flexible contracts are not simply a route into employment for young people or a stepping stone to better terms and conditions.⁸

⁴ Plunkett, J., Hurrell, A. and Whittaker, M. (2014) *The State of Living Standards*, London, Resolution Foundation.

⁵ Brinkley, I. (2013) *Flexibility or insecurity? Exploring the rise in zero-hours contracts*, London: The Work Foundation.

⁶ CIPD (2013).

⁷ This information was requested in a parliamentary question:

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130708/text/130708w0004.htm#13070846000527>.

⁸ Pennycook, M., Cory, G. and Alakeson, V. (2013) *A Matter of Time: The rise of zero-hours contracts*, London: The Resolution Foundation.

Issues raised by zero-hours contracts

A core argument in favour of zero-hours contracts is that they offer flexibility to both employers and staff. Staff can choose when they work, and balance work and other commitments, while employers can quickly adjust their staffing at no cost. Central to whether or not zero-hours contracts work well for individuals as well as employers is the way in which the flexibility they offer is used. If workers are free to turn down hours when they are offered, then the case for flexibility on both sides can be made. It is difficult to see, however, how a lack of guaranteed hours but no right to turn down work provides flexibility to better manage caring responsibilities or take on other jobs. Even when workers face no explicit prohibition on refusing work, there can be a perception of negative consequences as a result of turning down hours.

Evidence about the nature of employment on a zero-hours contract is far from definitive and generally paints a mixed picture. For example, it is unclear how many people on a zero-hours contract would prefer to be on a permanent contract if one were available. Almost all of the zero-hours contract workers we interviewed for our previous report, *A Matter of Time*, had not known that they were on a zero-hours contract until their hours were reduced.⁹ Our interviews highlighted the difficulties that zero-hours workers face in exercising rights they may have when they are exposed to the threat of having their hours cut. For example, it can be difficult to raise concerns around the unlawful deduction of wages as a result of entitlements to paid holiday leave not being recognised. (See box on the employment status of workers and employees for further discussion.) They also revealed the challenge of meeting everyday costs in the face of fluctuating wages. This issue of income insecurity was particularly acute for those on low pay and for those with children and other family commitments.

In contrast, the CIPD survey indicates that the majority of people on zero-hours contracts are broadly happy with their contractual arrangement. When zero-hours contracts are well-managed by employers, they can be mutually beneficial. Some types of zero-hours work such as NHS nursing banks are well established and generally offer individuals genuine choice to top up their hours. However, the survey also reveals that a significant minority of individuals experience problems with the way in which their contract is managed. Echoing findings from *A Matter of Time*, the CIPD survey identified the following problems with the use of zero-hours contracts:

- Nearly four in ten workers on a zero-hours contract want to work more hours than they typically receive in an average week;
- A fifth of workers say that they are always or sometimes penalised for not accepting hours from their employer;
- Nearly a third of employers expect staff on zero-hours contracts to always or sometimes be available for work, despite not offering any guaranteed hours of work;
- Around one in ten employers report that they pay staff on zero-hours contracts less than those doing the same role on a permanent contract;
- Four in ten employers say that they do not have any policies or procedures related to notice periods for staff on zero-hours contracts if their hours are changed or cancelled.

Issues such as the ones identified above have prompted extensive debate about the future of zero-hours contracts in the UK economy. Some Labour MPs and trade unions have called for an outright ban on their use, while others have cautioned against taking action before the recovery is firmly established.¹⁰ This report takes as its starting point that an outright ban of zero-hours contracts is not the appropriate response, for several reasons.

⁹ Ibid.

¹⁰ See for example: <http://www.bbc.co.uk/news/uk-politics-22328897>

First, zero-hours contracts can offer valuable flexibility for employers and, where they are well-managed, can be helpful to employees who also need flexibility. Second, there is significant variation in the use of zero-hours contracts between sectors and within the same sector. Some organisations make extensive use of zero-hours contracts, others—including large employers in low-paying industries—do not use them at all. Others use them but offer individuals the choice between zero-hours and fixed hours contracts. For example, major supermarkets do not use zero-hours contracts to manage fluctuating demand but NHS trusts increasingly do. Even within the care sector where overall use of zero-hours contracts is high, practice varies. For example, Allied Healthcare, a large provider of care services employing 15,000 staff announced in November 2013 that it would offer all staff a choice of contracts.¹¹ Other providers for example Dimensions, a leading provider of learning disability services, does not use zero-hours contracts at all. This suggests changes could be made without the need for a ban, if more employers were made aware of established good practice and were incentivised to better plan their staffing needs.

Third, in the face of a ban, unscrupulous employers would most likely shift workers onto other forms of casual employment. Zero-hours contracts are just one form of atypical working alongside casual contracts, agency staff and increasingly self-employment.¹² These other types of contractual arrangement, though currently receiving less media attention, can also offer flexibility for some but create uncertainty and a lack of security for others. In fact, some employers use zero-hours contracts to move away from agency staff, judging that being on a zero-hours contract is a better form of employment than being contracted through an agency. Without robust enforcement, employers who are determined to cut costs and shirk their responsibilities to staff will find alternative means to do so if zero-hours contracts were banned. An unintended side effect of a ban could, therefore, be to penalise good employers who use zero-hours contracts in a responsible and fair way, without having a significant impact on those who seek to shirk their responsibilities. It could result in good employers following their less scrupulous competitors into employment practices that may be worse than the current arrangement, or employing staff on contracts that deny them the flexibility they require.

But while an outright ban is not appropriate, the need for specific action is clear. We came to the view that a significant minority of people on zero-hours contracts face real challenges as a result of the poor use of these contracts. We were not persuaded by the view that no change is possible or desirable or that these problems are an inevitable consequence of flexibility. These issues must be tackled to provide better protection for workers and ensure that flexibility for employers does not come at the expense of individuals. In the vast majority of sectors of the economy, the objective should be to ensure that a greater number of individuals are offered a choice between a zero-hours and a fixed hours contract. However, in domiciliary care where zero-hours contracts are the dominant employment model, there is a strong case for reducing the overall use of zero-hours contracts by funding and commissioning services adequately, given the impact on workers, individuals receiving services and the wider public purse.

¹¹ <http://www.alliedhealthcare.com/offer-contracted-hours-to-care-workers.aspx>.

¹² Plunkett et al. (2014).

Worker or Employee?

One of the most important distinctions in UK employment law is between *workers* and *employees*.^{*} Although the process of determining a person's exact status is not straightforward, a person is usually a *worker* if:

- they have a contract or other arrangement to do work or services personally for money or a benefit in kind
- they only have a limited right to send someone else to do the work
- they have to turn up for work even if they don't want to
- their employer has to have work for them to do as long as the contract or arrangement lasts

An *employee* is similar but has a more formalised arrangement and working pattern. An *employee* works under an employment contract which sets out an employee's employment conditions, rights, responsibilities and duties. These different statuses are important as they bring with them different rights:

- *Workers* are entitled to be paid the National Minimum Wage; be protected against unlawful deductions from wages; have the statutory minimum levels of paid holiday and rest breaks; to not work more than 48 hours on average per week or to opt out of this right if they choose; to be protected against unlawful discrimination; to be protected for 'whistleblowing' (reporting wrongdoing in the workplace); and to not be treated less favourably if they work part-time.
- *Employees* receive all these rights plus Statutory Sick Pay and Redundancy Pay; maternity, paternity and adoption leave and pay; minimum notice periods if their employment will be ending; protection against unfair dismissal; the right to request flexible working; and time off for emergencies. Some of these may only apply after a period of continuous employment.

People employed on zero-hours contracts will not fall uniformly into one category or the other. However anecdotal evidence suggests that some people on zero-hours contracts who, as a result of their working pattern and arrangement, should properly be treated as *employees* are not. This may be through employers actively attempting to limit their responsibilities to their staff or through a lack of knowledge of employment law. This is not a problem that affects only those on zero-hours contracts.

* <https://www.gov.uk/employment-status/overview>

We welcome the government's recent consultation on zero-hours contracts as recognition of the problems caused by their misuse and the need to strike a better balance between flexibility and security. But the terms of the consultation do not go far enough, focusing on the use of exclusivity clauses that prevent zero-hours staff from working for other employers.¹³ This is an important issue which we recommend taking action against but by no means the only or even the most important one. The problems that poor management of zero-hours contracts can cause necessitate a broader response than the one the government is proposing. This report, therefore, puts forward a range of measures to address the worst practices while preserving flexibility to use zero-hours contracts in many instances.

Given uncertainties about the use of zero-hours contracts, and the advantages that appropriate use can sometimes offer, we are inherently cautious in the proposals we make. While these recommendations should result in genuine improvements for those on zero-hours contracts, they should not be considered

¹³ <http://news.bis.gov.uk/Press-Releases/Ministers-to-consider-outlawing-exclusivity-on-zero-hours-contracts-6976e.aspx>.

the final word on reform of these arrangements. The development of zero-hours contracts, in terms of the quality of the data and how their use varies as the economy strengthens, should be closely monitored. Furthermore, recognising existing pressure on the public finances, the report minimises new spending commitments but highlights the limits to progress in areas such as social care given significant under-funding.

The first section of the report presents a set of proposals that could be implemented economy-wide. Section two focuses specifically on the public sector, especially the social care sector, where the use of zero-hours contracts is greatest and where government as a purchaser could be more active.¹⁴

What can be done economy-wide

Greater clarity over the use of zero-hours contracts in different sectors is vital; the ONS's renewed attention to the methods used to count zero-hours workers should improve our understanding of their use across the economy. However, there is already a case for action to prevent poor practice and enable more people to have a choice between a zero-hours and a fixed hours contract. This section outlines a number of economy-wide recommendations which would represent a meaningful improvement for those on zero-hours contracts, while avoiding knee-jerk responses which could have unintended and undesirable side effects for employers and workers.

Recommendation 1: Extend the right to a statement of employment particulars to workers.

One of the reasons why precise estimates of the scale of zero-hours contracts use have been difficult to come by is the lack of awareness among those employed on them about the nature of their contract. Growing media attention and public debate about zero-hours contracts over the last year have led to increased awareness. However, confusion persists for many. In our research we came across substantial anecdotal evidence to suggest that many workers only realise they are employed on a contract that provides for no guaranteed hours when those hours are changed. We also heard cases of employers moving staff onto zero-hours contracts from more standard forms of employment with workers being unaware that they were giving up a degree of security. As a first step, it is essential that workers are made more aware of the implications of signing a contract containing no guaranteed hours.

Currently, as part of the Employment Rights Act 1996, only employees are entitled to receive a statement of employment particulars within eight weeks of beginning work. This includes basic details of their employment, such as the names of the employer and employee and the date on which the contract begins. Crucially, it also ensures that employees are fully aware of the nature of their agreement, including entitlements to holiday and sick pay and the length of notice periods.

Amending Section 1 of the Employment Rights Act 1996 to extend this right to all 'workers' not just 'employees' would ensure that all individuals who are hired on a zero-hours contract have to be informed about their entitlements and crucially, are made aware that they are not guaranteed any minimum number of hours. Where at all possible, this information should be provided before the start of their employment. Clarifying contractual terms in this way would allow both parties to enter into a zero-hours contract more aware of their rights and obligations. Having to provide a statement of particulars to all staff by law would also encourage employers to clarify whether staff are being hired as 'workers' or 'employees' and the entitlements associated with this distinction.

¹⁴ The proposals presented here have been informed by the views of a range of stakeholders who participated in a policy seminar in October 2013 and have since commented on the development of specific proposals.

However, we know that in many workplaces the imbalance of power between workers and employers means that even if individuals are aware of their rights, they are not always able to exercise them. For people who have little security in their role and are often low paid, fear of endangering their position and income may mean they stay quiet and do not assert their rights. In this context, greater information alone is unlikely to be adequate.

Recommendation 2: *The Department of Business, Innovation and Skills should ask Acas to work with unions and employer representatives to develop a good practice guide for the use of zero-hours contracts.*

As discussed above, there is good evidence that both employers and staff are poorly informed about their obligations and entitlements under zero-hours contracts. For example, the CIPD survey found that, despite almost two-thirds of employers assigning employee status to their zero-hours staff, only four in ten employers view their zero-hours employees as eligible for parental leave, a right to which every employee is entitled. Issues such as how to calculate redundancy payments and holiday entitlements for staff on zero-hours contracts are particularly tricky given a fluctuating pattern of hours. This is especially the case for small employers, who do not have dedicated human resources functions, and who we know from anecdotal reports often rely on online contract templates and other short cuts to meet their employment obligations. To respond to gaps in knowledge in this area, there is a strong case for Acas to work with employer organisations and unions to develop a good practice guide as a means to improving current practice. The scope of the guide would be decided by the partners but should include:

- Reasonable notice periods when hours are offered or shifts cancelled. To some extent, this will vary by sector but there should be a reasonable minimum and written policies around notice period.
- How to calculate employment entitlements for zero-hours staff, especially holiday and redundancy entitlements.
- Offering staff on zero-hours contracts with the relevant skills first call on applying for permanent positions when they are advertised.

The development of a good practice guide could be further supported by greater efforts to document the business case for offering a choice of contract. Employers who offer choice of contract or do not use zero-hours contracts argue that there is a business benefit to doing so in greater staff loyalty, better retention, less sickness and absence and better quality service provision. In the public sector, there are arguably also wider public costs and benefits of different terms and conditions. For example, a lack of continuity in domiciliary care may result in more use of emergency services and additional costs to the NHS. This will be discussed further in the next section. However, there is little published evidence to support a business case that could encourage those organisations that currently make extensive use of zero-hours contracts to change their behaviour to benefit their workers and their business.

It may be helpful here to learn lessons from other areas where the business case has been put forward to argue for improved practice among employers. The Living Wage campaign is foremost among these. An important part of the campaign's approach has been to argue that employers will also benefit from paying their workers more in terms of reduced staff turnover, improved performance and reduced absenteeism. A number of the tactics used by the campaign, such as a logo, allow employers who pay the living wage to differentiate their brand in a positive way.

Some would argue that a good practice guide is not strong enough and should be replaced by a statutory code of practice that could be developed through a similar process and would be admissible in evidence at

an employment tribunal. A breach of the code in itself would not however render an employer liable to proceedings. An employee would still need to bring a case against their employer but breach of a statutory code adds to the weight of evidence before the tribunal.

However, few cases reach tribunal which means that the statutory basis of the code would rarely be invoked, its main force being its definition of good practice. Given the barriers to reaching tribunal discussed below, efforts should be made to act on poor practice in a preventative way. In this context, it would appear that there is sufficient lack of information available to employers that a good practice guide would help the majority of employers who are well-intentioned but are currently poorly informed. The non-binding nature of the code of practice should be kept under review by the Department for Business, Innovation and Skills. If sufficient improvements in practice are not deemed to have been made, a statutory code should be considered in the next Parliament.

Recommendation 3: Increase the funding of enforcement agencies and facilitate sharing of information between agencies

One of the central limitations of the UK employment rights system is that rights largely have to be enforced through an employment tribunal rather than through proactive enforcement. This puts the onus on individuals to pursue their own cases. This can be particularly difficult for low paid, relatively powerless workers. Workers on zero-hours contracts, particularly those in non-unionised workplaces or those who are part of a fragmented workforce where they do not regularly meet other workers, for example domiciliary care workers, are at risk of having limited knowledge of their legal rights and where they should go if they have a complaint.

The introduction of fees for the first time in July 2013—£390 for simple cases and £1200 for more complex ones—are likely to act as a disincentive to those considering taking a case against their employer. Furthermore, the most recent analysis of payment of claims following successful tribunals found that less than half of claimants had been paid in full.¹⁵

Reduced reliance on employees taking action will be essential to improving enforcement to ensure employers are providing staff on zero-hours contracts with their full rights. However, the current landscape of enforcement is both underfunded and fragmented, placing severe limits on the extent to which enforcement agencies can make proactive inspections and not just respond to complaints. A number of different bodies act upon various elements of employment law but information is not shared between organisations to help crack down on the worst offenders. The Health and Safety Executive enforces aspects of the legislation on working time; HMRC enforces the National Minimum Wage; the Employment Agency Standards Inspectorate enforces rules around employment agencies; and the Gangmaster Licensing Authority enforces legislation on gangmasters who work in agriculture and food processing. Given the relatively small budgets of these organisations, it is unsurprising that the TUC claims that the average employer is visited by a health and safety inspector only once every 12 to 20 years.¹⁶

Despite several reports that have called for enforcement agencies to have better methods of sharing information regarding infringements of employment law—including a central point of contact, more inspections and more funding—little change has come about.¹⁷ To improve proactive enforcement, the following actions should be taken to ensure that those on zero-hours contracts have their rights fully recognised:

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf.

¹⁶ TUC (2007), *Safety & Migrant Workers: A practical guide for safety representatives*, London: TUC.

¹⁷ See for instance TUC (2008), *The Commission on Vulnerable Employment*, London: TUC.

- End the current freeze on the enforcement budget and designate enforcement as ‘essential expenditure’
- Reduce the reliance on proactive self-reporting by individual workers through having enforcement agencies work more closely together and with other organisations, for example local authorities, to identify and target employers likely to be in breach of the law.
- Ensure that zero-hours contract workers who successfully win a claim for unlawful deduction of wages receive the pay they are owed, for example for holiday leave that was unpaid but should have been paid. A government fund should be created, or the scope of the National Insurance Fund extended, to immediately reimburse low-paid workers who have been victims of unlawful deductions and make government, rather than vulnerable individuals, responsible for recovering funds from employers.

Recommendation 4: Introduce a ban on exclusivity clauses in zero-hours contracts

The majority of workers on zero-hours contracts (60 per cent according to the CIPD) are allowed to work for another employer when their primary employer has no work available for them. However, 1 in 8 workers sometimes face restrictions on seeking other employment and nearly 1 in 10 (9 per cent) are banned from seeking additional employment. Even if an individual’s contract does not include a specific exclusivity clause, there can be a clear expectation that they should not seek work elsewhere.

Similarly, some zero-hours contracts require individuals to accept work when it is offered, despite the fact that there is no onus on the employer to offer a certain amount of work. According to the CIPD survey, 15 per cent of employers said that zero-hours staff are contractually expected to be available for work and 1 in 5 workers reported being sometimes or always penalised for not being available for work.

Exclusivity clauses that prevent individuals from freely seeking work elsewhere violate the basic principle of zero-hours contracts that flexibility is available to both employers and workers. Without guaranteed hours from their primary employer, many workers need to be able to take up additional hours in order to make ends meet. Complete or partial restrictions on taking up other jobs, whether through a prohibition on working elsewhere or a requirement to always be available for work, are not acceptable.

The government should follow through on its recent consultation on zero-hours contracts and introduce a ban on the use of exclusivity clauses to ensure flexibility is available to employers and workers. Under exceptional circumstances, there are competitive reasons for introducing an exclusivity clause, for example to prevent an individual with highly specialist skills working for a direct competitor. However, these situations are rare and do not apply to the vast majority of zero-hours workers. Any permitted exceptions to the ban would need to be carefully defined as part of the legislative process required to implement a ban.

There are two possible approaches to legally introducing a ban on exclusivity clauses. The first would be to define zero-hours contracts in law. Despite their longstanding role in the UK labour market and widespread awareness of the term, there is no legal definition of a zero-hours contract.¹⁸ Defining a zero-hours contract is not straightforward because a range of practices are included under the term zero-hours contract. Some employers treat their zero-hours staff as employees; others perceive them to be workers. In a minority of cases, they are classed as self-employed and a small number of employers surveyed by the

¹⁸ While it has no grounding in employment law, HMRC uses the following definition: “A zero-hour contract generally is a contract where the employer does not guarantee to provide the worker with work and will only pay the worker for those hours which are actually worked.”

CIPD did not know the legal status of their zero-hours staff.¹⁹ It is the nature of the employment relationship between an employer and their staff that has a basis in the law and determines an individual's working arrangements rather than their contract per se.

Working with this diversity to define zero-hours contracts is not straightforward. A simpler approach would be to amend the existing legislation that applies to 'workers'. This would extend the ban on exclusivity clauses to all forms of casual employment. While this approach goes beyond just those who are on zero-hours contracts, it would avoid the need to undertake the complex process of defining zero-hours contracts in law. This is particularly problematic because zero-hours contracts are only one form of atypical contract. Defining zero-hours contracts would, therefore, create an exception in the current legal framework which distinguishes only between workers and employees, singling out zero-hours contracts over and above other forms of atypical arrangement.

Recommendation 5: *Staff on zero-hours contracts should have the right to a fixed hours contract after 12 months if their pattern of weekly hours is relatively consistent and they would prefer to have regular hours.*

The central argument made for zero-hours contracts is that employers need to be able to respond to short term changes in demand that cannot be anticipated. Therefore, they need a layer of flexibly employed staff on top of their core staff to provide this sort of responsiveness. However, there is evidence that some staff on zero-hours contracts work relatively consistent hours and that this can continue for long periods of time. According to the Labour Force Survey, a quarter of those on zero-hours contracts see no variability in hours week to week.

Where individuals are employed on a zero-hours contract and work a relatively consistent pattern of hours, the contract is probably being used inappropriately and a fixed hours contract would better suit their employment situation. Continuing to use zero-hours contracts for these staff may be the result of poor work flow management and staff planning or a more explicit attempt to reduce worker rights. Allowing unscrupulous employers to take this 'low road' disadvantages and undercuts organisations who comply with the spirit of employment law and guarantee their employees what they are properly due.

Some employers already seek to offer a fixed hours contract to those who have been on a zero-hours contract for several years, rewarding their commitment to the organisation. We should build on this element of best practice and create a statutory right to a fixed hours contract, for those who want one, after a year of service on a zero-hours contract, provided they work a relatively consistent pattern of hours. This would take the form of a proactive duty on employers to provide individuals with a written contract reflecting their guaranteed working hours after 12 months.

Workers who are on zero-hours contracts for 12 months and work largely consistent hours will have accumulated employment rights under common law that would be recognised by an employment tribunal. Introducing this new right, therefore, ensures that employers formally recognise the rights their staff have accumulated and employees are made aware of these rights. However, introducing this right for those who want to exercise it after 12 months rather than 12 weeks as in the case of the Agency Workers' Directive ensures that employers retain considerable flexibility and have time to plan.

The argument against such a right is that employers' need for flexibility does not diminish over time and, therefore, fixed hours contracts after a year are no easier to manage than at the outset. However, the right to a fixed hours contract would only be available to those workers on a zero-hours contract who

¹⁹ CIPD (2013).

work a relatively consistent pattern of hours week to week. An individual's weekly work pattern would have to be calculated over a period of time to ensure that employers did not simply make changes to hours just before individuals became eligible for this new right. Of course, there is always the risk that a minority of employers will sack individuals just prior to 12 months in order to avoid granting further rights. This is a theoretical risk with any extension of rights but is likely to be outweighed by the benefits gained as the vast majority of employers would seek to comply. This report has not sought to specify how a relatively consistent pattern of hours should be defined. As with any new right, reaching a workable definition will require iteration and co-operation between employers and unions.

Implementing this new right to a fixed hours contract would require a change in legislation. As discussed above in the context of introducing a ban on exclusivity clauses, there are two possible approaches: define zero-hours contracts in law as a first step to establishing a new right after 12 months, or extend the right to all workers and amend existing worker legislation. The same pros and cons discussed above would apply in this case.

Zero-hours contracts in publicly-funded sectors

The previous section put forward a set of recommendations to increase the number of individuals who can choose between a zero-hours and fixed hours contract and reduce the misuse of zero-hours contracts economy wide. This next section focuses on publicly-funded services. While the recommendations set out above would also apply to these sectors, there is a case for government as a funder to go further, particularly in social care where the use of zero-hours contracts is extensive.

Current evidence indicates that zero-hours contracts are more prevalent in the public and third sectors than in the private sector. The recent CIPD survey found that 28 per cent of employers in the public sector and 42 per cent in the non-profit sector employ people on zero-hours contracts compared with 23 per cent in the private sector.²⁰ Additionally, zero-hours contracts are used by private sector organisations that deliver publicly-funded services, notably in health, social care, education and government administration.

- Skills for Care, the sector skills body for care services, estimates that 307,000 adult social workers in England are employed on zero-hours contracts as of May 2013, equivalent to 30 per cent of all adult social workers.²¹ Among domiciliary care workers, 61 per cent are employed on zero-hours contracts.
- According to a Freedom of Information request by the Labour Party, 75 per cent of NHS hospitals use zero-hours contracts. Zero-hours contracts have long been a staple of NHS bank staff, many of whom have permanent positions and accept bank work for additional earnings. However, there is concern about the growth of zero-hours contracts in the NHS, especially in clinical roles. Between 2009-10 and 2012-13, there was a 17 per cent increase in the use of zero-hours contracts in the NHS and a 12 per cent increase in the number of clinical staff employed on a zero-hours contracts.
- In further and higher education, a Freedom of Information request submitted by the University and College Union revealed that 61 per cent of further education colleges in England, Wales and Northern Ireland have teaching staff on zero-hours contracts and 53 per cent of UK universities have staff on zero-hours contracts.²² Zero-hours contracts are more common among teaching-only than research staff.
- Zero-hours contracts are also used by local authorities for the staff they directly employ. Information about their use is patchy and largely drawn from Freedom of Information requests in specific regions. For example, a request by BBC London revealed that 13 out of the 32 London local authorities use zero-hours contracts, although in some boroughs this will represent only a small number of staff.²³

As in the rest of the economy, the increase in the use of zero-hours contracts in publicly-funded sectors is due to a greater perceived need among employers for flexibility. However, the underlying drivers are somewhat different. Significant cuts to public spending since 2010 are likely to be the most significant driver of the greater use of zero-hours contracts. Unprotected government departments have seen their funding cut by 40 per cent, with a knock-on impact on local authority funding. Even in protected areas of public spending such as the NHS, demographic and technological pressures mean that the system is in

²⁰ Ibid.

²¹ <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130708/text/130708w0004.htm#13070846000527>.

²² <http://www.ucu.org.uk/6749>.

²³ <http://www.bbc.co.uk/news/uk-england-london-23520698>.

effect facing a real terms cut in funding of 9 per cent per person.²⁴ Given ongoing pressures on the public finances, further spending cuts are likely to follow post-election.²⁵

Greater funding pressure has forced organisations that depend on public funding—further education colleges and hospitals for example—to pare back their costs as much as possible. Under this pressure, the drive to reduce staff costs to only those that are essential has been strong, probably pushing up the use of zero-hours contracts which allow staff to be paid only for the hours in which they actually deliver a service. As there is no improvement in the funding position in sight, the pressure on providers to reduce costs looks set to continue.

Alongside reduced funding, providers of public services also face less funding certainty as a result of changes to public sector commissioning. Across all services, funding is becoming more tightly linked to demand and activity rather than traditional bulk purchasing. In the NHS, this started with the introduction of national tariffs in the acute sector in 2003 and is now moving into community health services. In further education, funding for courses is more closely tied to student and business demand, leading to mid-year changes in funding. In social care, local authorities are increasingly using framework contracts to recruit preferred providers who are then required to bid for individual care packages. The mainstreaming of personal budgets in 2007 has introduced individual commissioning into the system, making it more challenging for providers to anticipate demand or gather sufficient volume to be economically efficient.

In many ways, the consequences of zero-hours contracts in the delivery of public services are more significant than in many other sectors in terms of the potential impact of workforce insecurity on the quality of life and well-being of service recipients. It is highly likely that the way in which zero-hours contracts impact on individuals who receive services has a cost elsewhere in the public sector.

The special case of social care

Within publicly-funded services, the use of zero-hours contracts in social care is of particular concern. First, in the domiciliary care part of the sector, zero-hours contracts have become standard and predate the current period of austerity. Widespread use of zero-hours contracts has been common for over a decade. Second, zero-hours contracts coincide with low pay, low skills and low status, creating a particularly vulnerable, largely female, workforce. For a significant minority of the workforce, the very basics of receiving the National Minimum Wage are not even guaranteed due to the failure to adequately cover travel time between clients.²⁶ Third, this poorly paid, insecure workforce delivers care to some of our most vulnerable older and disabled people, increasingly in short fragments of time—as little as 15 minutes in some cases—that make it almost impossible to provide high quality, consistent care or to meet the basic human needs for conversation and interaction.

There is increasing disquiet about the impact of zero-hours contracts on the care provided to some of the most vulnerable in society and a growing realisation that high quality care demands greater investment in the workforce that delivers that care. For example, the Equality and Human Rights Commission has cautioned that where the maximum price of homecare imposed by local authorities is lower than the actual cost of care, the human rights of people who receive homecare services could be placed at risk.²⁷ Furthermore, the costs of poor quality care in the home are felt elsewhere in the public sector. Greater

²⁴ Crawford, R., Emmerson, C., and Keynes, S. (2014) [Public finances: risks on tax, bigger risks on spending?](#) London: Institute for Fiscal Studies.

²⁵ Ibid.

²⁶ Pennycook, M. (2013) [Does it pay to care? Under-payment of the National Minimum Wage in the social care sector](#), London: Resolution Foundation.

²⁷ Equality and Human Rights Commission, (2013) [Close to home recommendations review](#), London: Equality and Human Rights Commission.

spending on social care has been shown to reduce the costs of delayed hospital discharge and emergency admissions in the NHS.²⁸

The recent Cavendish Review into healthcare assistants and support workers in the NHS and social care highlighted the limitations of delivering the kind of health and social care system the country wants and needs under current workforce terms and conditions:

“An inescapable fact is that good caring takes time. It will not be possible to build a sustainable, caring, integrated health and social care system on the backs of domiciliary care workers who have to travel long distances on zero-hours contracts, to reach people who have to see multiple different faces each week.”²⁹

The rest of this section puts forward recommendations for reducing the use of zero-hours contracts in social care as the most urgent area within publicly-funded services. However, these recommendations have wider relevance for other public services.

The funding question

While the rest of this section will go on to look at the improvements that can be made within the current social care funding settlement, it is clear that, without additional funding, it will be difficult to make significant moves away from zero-hours contracts and improve wider workforce terms and conditions. In the face of rising care needs, local authorities have reduced their spending on adult social care between 2010-11 and 2012-13 by 8 per cent, with further falls to come. A quarter of these cuts have been funded by paying providers less, reducing back office costs and changing commissioning, while the rest has been met by restricting access to care.³⁰

The United Kingdom Homecare Association (UKHCA) recently estimated that the minimum price for an hour of homecare to achieve full-compliance with the 2013-14 National Minimum Wage was £15.19/hour.³¹ However, using the Freedom of Information Act, the BBC uncovered just four out of 101 local authorities had minimum prices above this amount.³² UKHCA’s figure is based on payment for ‘contact time’ (the time spent in a person’s home). This figure would need to be substantially higher in order to offer a guaranteed hours contract in place of a zero-hours contract.³³

If the pressure on social care budgets is only going to increase, it seems difficult to imagine how progress on reducing the use of zero-hours contracts can be made. At the moment, the workforce is taking the strain of funding cuts, with the risk being passed down to the frontline in the form of greater insecurity. The £3.8 billion Better Care Fund that provides NHS resources to support integration with social care could provide a route for some local areas to address workforce issues. But to tackle zero-hours contracts sector wide will require a broader commitment to improving the treatment of the workforce.

Two London local authorities—Islington and Southwark—have estimated the costs of supporting providers to no longer use zero-hours contracts. They are taking these steps as part of a broader

²⁸ National Audit Office (2014) [Adult Social Care in England: Overview](#), London: NAO.

²⁹ Cavendish, C. (2013) [The Cavendish Review: An Independent Review into Healthcare Assistants and Support Workers in the NHS and social care settings](#), London: Department of Health.

³⁰ NAO (2014).

³¹ Angel, C. (2014) [UKHCA Briefing A Minimum Price for Homecare](#), Sutton: UK Homecare Association.

³² See <http://www.bbc.co.uk/news/uk-26021026> and BBC Radio 4’s “File on Four” programme “Cut-Price Care” at <http://www.bbc.co.uk/programmes/b03szh9m>.

³³ The UKHCA’s figure includes payment of travel time (11.4 minutes for 1 hour of contact time) and reimbursement of travel costs (4 miles to the hour at 35 pence per mile).

commitment to implement Unison's Ethical Care Charter. This involves an across the board improvement in pay and conditions for the workforce, including the Living Wage and additional payment for travel time. Their estimates of the cost of moving away from zero-hours contracts range from £500,000 up to £4 million, reflecting differences in population and the number of contracts currently in place. The cost of such a change could be reduced if the change were made at the point of contract renegotiation when providers could be expected to absorb some of the costs themselves, particularly as improvements in conditions are likely to translate into fewer indirect costs for providers.

These local authority estimates make clear that to substantially reduce the use of zero-hours contracts across social care would require new investment from government. We need a national conversation about the value of care in an ageing society and the costs of today's poorly skilled, insecure workforce. We need a debate about the kind of workforce we want to look after our most vulnerable citizens and what we are willing to pay for that, and the costs that we pay elsewhere because of the current race to the bottom. Within the care sector, those who work with older people tend to have the worst pay and conditions, despite cross-party concern about dignity and respect in later life.

While there are limits to what can be achieved without greater funding, improvements can be made within current resources by changing approaches to commissioning. The problem is too serious to wait for a better funding settlement.

Recommendation 6: Shift from time and task to outcomes-based commissioning

In response to funding pressures, local authorities have sought to manage providers' time closely to ensure that commissioners are getting what they pay for. This has led to an increase in the amount of care commissioned in small increments. A report by the disability charity, Leonard Cheshire, found a 15 per cent increase in the proportion of visits that last 15 minutes.³⁴ One in eight councils they surveyed deliver more than a quarter of all their visits in 15 minute slots. While short visits are a separate issue from zero-hours contracts, they are closely related because zero-hours contracts provide the flexibility to match care workers to constantly shifting volumes and patterns of commissioned care.

The close management of providers is inefficient and costly in terms of the time taken to monitor activity and the time spent by providers to comply with local authority requirements. More importantly, this approach leaves little room for consideration of the quality of the care delivered or the outcomes for the individual receiving care.

A number of local authorities are shifting towards outcomes-based commissioning for certain aspects of social care, for example Wiltshire, West Sussex and Camden Councils. Wiltshire Council's Help to Live at Home Service allocates a sum of money to providers on the basis of defined outcomes agreed by the older person receiving care and their assessment and care management worker. Providers, together with their customers, are responsible for the delivery of these outcomes rather than having their time managed by the local authority.³⁵

In the face of an aging population, commissioning on the basis of time and task is likely to exacerbate the pressure on funding and continue to drive down pay and conditions for the workforce. Time and task-based commissioning does not incentivise providers to rehabilitate or improve the independence of care recipients, resulting in less demand for care in the long term. However, 90 per cent of local authorities still pay providers according to the time they spend with an individual, rather than by the outcomes they

³⁴ Leonard Cheshire Disability, (2013) [Ending 15-minute care](#), London: Leonard Cheshire Disability.

³⁵ <http://www.wiltshire.gov.uk/help-to-live-at-home.pdf>.

achieve. Outcomes-based commissioning would free up providers to better manage their workforce by giving providers and people who use services responsibility for deploying staff rather than commissioners trying to control deployment from the centre. Shifting the sector to commissioning in this way would be in line with the recommendation of the Cavendish Review for outcomes-based commissioning to be in place across social care by 2017.³⁶ This is not an easy shift to make. As the National Audit Office has observed, though, some local authorities will need to develop their commissioning skills to make such a shift possible.³⁷ However, the improvements it should deliver, for both care givers and recipients, mean it is worth pursuing.

Recommendation 7: Include workforce terms and conditions within definitions of social value in procurement

The EU Procurement Directive that will come into force in 2014 is clear that procurement should take into consideration the wider economic, social and environmental impacts of the provider contract, not just price and quality. This approach to public procurement echoes the position set out in the 2012 Public Services (social value) Act. The Act places a requirement on local authorities when entering into public procurement contracts to give greater consideration to economic, social and environmental wellbeing during the pre-procurement stage. It supports a move away from a narrow view of best value that has often dominated procurement decisions. The Public Services Act has yet to be widely used but a number of local authorities, for example Croydon Council, are experimenting with this new way of commissioning services.

Currently, the potential relevance of these new approaches as drivers to improve workforce terms and conditions are being overlooked. Where they are being used, economic, social and environmental considerations are being taken on board in a more direct and conventional way, for example using providers who employ former users of services in the NHS or former offenders in the probation service. But using social value as a means to favour care providers who offer choice over zero-hours contracts, make less use of 15 minute visits and pay travel time would be equally important and have positive impacts on local economies.

Recommendation 8: Local authorities should play a wider role as market managers

Where providers have a concentration of business in any one area, it is easier for them to provide fixed hours contracts to staff. This is because they are more likely to be able to guarantee staff a certain number of hours across a local patch. Some providers are divesting themselves of contracts in order to create concentrations of activity to enable this to happen, for example Advance, a leading housing and support provider. This is one way in which providers can start to offer choice of contracts to staff within current funding arrangements.

To enable more providers to be able to offer this choice to staff, commissioners need to play a greater role as market shapers rather than allowing procurement to drive the contracting process. Procurement is too often driven by cost considerations alone but commissioners can support providers to make improvements in terms and conditions by adopting a more strategic approach. Commissioners should work more closely with providers to develop sustainable local care markets that can offer workers greater choice between zero-hours and fixed hours contracts. This would take into consideration the wider local market and the volume of business going to any one provider.

³⁶ Cavendish, C. (2013).

³⁷ National Audit Office (2014).

Conclusion

There is currently much that is unknown about zero-hours contracts. We will not have a clear sense about the full extent of their use until the Office for National Statistics has completed its proposed survey and we will not have the full picture of whether their increased use is cyclical or structural until the recovery has matured and the labour market tightened. This is some years off. However, despite these uncertainties, it is already clear that there is a certain amount of bad practice in the use of zero-hours contracts which affects a significant minority of those on these contracts. This goes beyond the imposition of exclusivity clauses that is the focus of the government's recent consultation on zero-hours contracts.

The modest recommendations and the promotion of best practice set out in this report are intended to encourage employers from all sectors to improve their practice and better plan how they use their staff to avoid the need for further action. This would allow more people to have a choice between the flexibility of a zero-hours contract and the greater security of a fixed hours contract. With better information, employees and workers will also be more able to understand their rights. However, even where individuals understand their rights, they do not always have the power to exercise them and, therefore, we propose introducing the right to have a fixed hours contract after 12 months for those who remain with the same employer and work a largely consistent pattern of hours. Taken together, these provisions seek to ensure that zero-hours contracts are used where there is a legitimate need for flexibility and make it more difficult for the minority of unscrupulous employers to use them to erode worker rights.

Of course, zero-hours contracts are just one form of atypical working alongside casual workers, agency staff and increasingly self-employment. These other types of contractual arrangements, though currently receiving less media attention, can also provide flexibility for some and create uncertainty for others. In fact, some employers use zero-hours contracts to move away from using agency staff, judging that having zero-hours employees is a better form of employment for individuals than being contracted through an agency. Acting on zero-hours contracts alone is, therefore, only a partial solution but one that seeks to balance the needs of employers with those of workers.

Our report singles out publicly-funded services, especially social care, for specific attention because this is where it will be hardest to reduce the use of zero-hours contracts. The report recognises that the growth of zero-hours contracts is in part due to the difficult financial climate facing public services, with significant cuts to spending since 2010 and more to come. However, the consequences of increasing use of zero-hours contracts in sectors such as care and education are arguably more significant than in other parts of the economy. The quality and continuity of care and education may be compromised at additional cost to the public purse and with negative impacts for those who receive services.

While the cautious approach to improving practice set out in this report is commensurate with the current uncertainties about zero-hours contracts, the report leaves open the possibility for further action. There is a need to keep the current situation under review as the recovery progresses and more accurate data become available to assess whether the proposals set out here are adequate or whether workers require further protection if voluntary improvements in practice are not forthcoming.



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