Line Manager Guide

How to Employ on a Zero-Hour or Casual Contract

Introduction

A 'zero-hour' contract is a contract under which the individual is not contracted to work a set number of hours and is paid only for the number of hours that they actually work. Likewise, casual workers are not generally guaranteed a fixed number of hours of work.

The terms 'casual' and 'zero-hour' are often used interchangeably, and, in practical terms, there may be little to distinguish between these types of working arrangements.

For the purposes of this guidance, the term 'Employer' is used to refer to the entity engaging the individual to perform the work, whether as an Employee or as a worker.

Using casual and zero-hour contracts

Staff engaged under casual, or zero-hour contracts are commonly recruited by Employers for which business is seasonal or where demand can fluctuate from week to week and where the requirement for workers is unpredictable, such as in the agricultural, hospitality, retail, and tourism sectors.

The recruitment of casual and zero-hour staff by Employers to work alongside their existing workforce can provide Employers with an element of flexibility, without the obligations and duties associated with employing individuals on fixed hours.

However, while casual and zero hours contracts can be useful for Employers, they are not necessarily straightforward to adopt and can result in a legally uncertain employment status. These types of contract can also present practical difficulties for workers, particularly those with caring responsibilities, who are likely to find it difficult to accommodate fluctuating hours. Without a regular fixed income, many workers under zero or casual contracts may have to find an alternative income and juggle two jobs.

Employers use zero-hour and casual contracts to retain the maximum amount of flexibility and to remain competitive. Their reliance on zero-hour contracts has been criticised by trade unions as these contracts are viewed as being too heavily weighted in favour of the Employer and designed to deprive individuals of a guaranteed income and many of their employment rights.

The decision on whether casual or zero-hour contracts are appropriate for a particular organisation to adopt for a section of its workforce will depend on a number of factors. These factors include the type of work that will be undertaken and the extent to which a high degree of flexibility, over a sustained period of time, is necessary to meet the needs of the business in an economic way. Employers should also consider the management of staff on these types of contract and how the rota arrangements will work in practice.

Status of casual and zero-hour staff

There is no legal definition of 'casual worker' or 'casual Employee'. It is a term that is commonly adopted by Employers that wish to engage individuals on an 'as and when' basis, but it has no real meaning in determining employment status or to what rights those individuals may be entitled.

An individual may be engaged under a casual contract or a zero-hour contract, but again, other than in the context of the unenforceability of exclusivity terms, these types of contracts have no legal definition and do not confer any special status on the individual. They are often used interchangeably by Employers and there is a large degree of crossover between the two types of contract.

Determining the employment status of individuals who work under a zero-hour or casual arrangement is important in determining their statutory employment rights. This depends on whether they fall within the

definition of 'Employee' or 'worker'. An individual's status is not always clear from the terms of the zero-hour or casual worker contract and, even when the contract is drafted with the clear intention that it does not create an employment relationship, the express contractual terms may be overridden if they do not properly reflect the true relationship between the parties.

Definition of 'Employee'
The legal definition of 'Employee' is set out in s.230(1) of the Employment Rights Act 1996 as 'an individual who has entered into or works under a contract of employment', which is defined as a 'contract of service or apprenticeship' (s.230(2)).

An individual who is not engaged under a contract of employment and is therefore not an Employee within the meaning of the legislation, may, instead, work under a contract whereby 'the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not that of a client or customer' (s.230(3)). Such an individual will generally be a 'worker' rather than an 'Employee'.

A contract of employment is commonly referred to as a 'contract of service', which should be clearly distinguished from a contract for services.

Employment status
The three principal tests in establishing employment status are, in general terms:

1. personal service
   the individual must be required to provide their services personally, rather than being able to send a substitute to carry out the work in their place.
2. mutuality of obligation
   the Employer is obliged to provide work, and the individual is obliged to carry out the work when it is offered; and
3. control
   the Employer must exercise a sufficient degree of control over the manner in which the individual carries out the work, consistent with an Employer-Employee relationship.

- These factors have been referred to as the 'irreducible minimum' of the employment relationship and, if any of these elements are not present, it is unlikely that an employment relationship exists.
- In the absence of all the necessary elements for an employment relationship, it is therefore likely that the individual will be a worker rather than an Employee.
- If none of the elements are present, it is more likely that the individual is self-employed.

For the purpose of determining the status of individuals engaged under casual or zero-hour contracts, it is the mutuality of obligation test that is, in practice, likely to be the key factor.

When considering the issue of an individual's employment status in the event of a claim, the employment tribunal will look at the terms of any agreement between the parties. However, it will also consider the overall picture and consider how the relationship works in practice.

Where necessary, it will look beyond the express terms of any agreement and may still make a finding of employment status if the surrounding circumstances are suggestive that an employment relationship exists, even if the contract was drafted with the intention of establishing worker status.

Distinction between Employee and worker
The distinction between an Employee and a worker is important in determining what legal rights and protections are available to the individual concerned. Workers have a limited number of statutory rights, including:

- The right to paid annual leave and other entitlements under the Working Time Regulations 1998.
- The right to be paid the national minimum wage.
- The right to itemised pay statements; and
- The right to a written statement of employment terms (April 2020 onwards).

However, Employees have a much broader range of entitlements in addition to the rights available to workers which include:

- The right to take periods of family-related leave (e.g., maternity, adoption, and parental leave)
- Provided that they have accrued sufficient continuity of service, the right to claim statutory redundancy pay and bring a claim for unfair dismissal.

Both Employees and workers are protected from discrimination under the Equality Act 2010, and they are also covered by the provisions protecting workers who make a protected disclosure (i.e., whistleblowing) or take certain action to protect themselves in relation to health and safety.

Unenforceability of exclusivity terms
Under s.27A of the Employment Rights Act 1996, clauses in zero-hour contracts that prohibit workers from working or performing services under a contract for another Employer or that prohibit workers from doing so without the first Employer's consent, are unenforceable. These clauses are referred to as 'exclusivity terms.' Employers drafting contracts for arrangements where the availability of work is uncertain should be aware that any clause that seeks to prevent the worker from working for another Employer or requires the worker to obtain its permission before working for another Employer, will not be enforceable. If an Employer acts against a worker for breaching such a clause, it risks a successful employment tribunal claim.

Casual worker contracts
Most Employers will want to engage casual staff as workers rather than Employees, to retain maximum flexibility and to avoid the possibility that they will be entitled to the additional rights available to Employees, particularly the right to claim unfair dismissal on termination.

When recruiting casual workers, it is important that Employers make clear from the outset, in job adverts and recruitment literature or correspondence, that the contract will not guarantee any set hours of work and that it is not suggestive of an employment relationship. Under a casual contract, there is commonly no obligation on the Employer to offer work to the individual and, crucially, no obligation on the individual to accept work that is offered. The contract should set out the arrangements between the parties for when work is carried out by the individual worker but make it clear there is no guarantee of work and that the individual is free to accept or turn down offers of work by the Employer. The intention behind this is that one of the key factors in creating an employment relationship, namely mutuality of obligation, does not arise.

From April 2020, the right to a written statement of terms and conditions of employment extends to workers. This right applies from the start of employment, so Employers will need to issue a statement to a casual worker from their first engagement. The information that must be included in a written statement was also expanded from this date. Of particular relevance for workers on casual and zero-hour contracts, Employers must include terms relating to hours of work, including days of the week on which the worker will be required to work, if and how working hours or days may be varied and how this variation is determined.

Therefore, the written statement should include details of the arrangements for offering and agreeing hours of work, which might, for example, be through the use of a rota published in the preceding week, and entitlement to rest breaks, which must be in accordance with the Working Time Regulations 1998. The written statement must include information on certain other terms of employment, including the benefits to which the worker is entitled.

Given that workers on casual and zero-hour contracts might not be entitled to some of the benefits that their Employer offers to its Employees, the Employer must ensure that statements issued make this clear.

As well as including the information that must be in all written statements a casual worker contract should confirm:

- That the Employer is under no obligation to offer work to the individual and the individual is under no obligation to accept work.
- That it is agreed mutuality of obligation does not exist between the parties between periods of work and that it is not the intention of the parties to enter into an employment relationship.
- That the individual is obliged to turn up and perform the work personally during the agreed hours.
- That payment will be made only for hours worked (usually as an hourly or a daily rate).

Holiday
Calculating casual workers' holiday entitlement and holiday pay has presented a problem for Employers as it is not usually known in advance for how long a period of work will last or the pattern of working hours for ascertaining holiday entitlement. For annual leave years beginning before 1 April 2024, the statutory minimum holiday entitlement of 5.6 weeks applies to all casual workers in the same way as to other staff.

The method for calculating holiday entitlement for casual and zero-hour workers who meet the new definition of irregular hours workers will change for holiday years beginning on or after 1 April 2024. Their entitlement will accrue throughout the year, at the rate of 12.07% of the actual hours that they have worked in each pay period. A pay period depends on how frequently the worker is paid. For example, if a monthly paid worker works 100 hours in a month, they will have accrued 12 hours of annual leave.

A worker meets the 'irregular hours worker' definition if the number of paid hours that they work in each pay period during the term of their contract in the leave year is, under the terms of their contract, wholly or mostly variable. Employers will be able to choose to implement rolled-up holiday pay for these workers. This means paying an additional amount representing holiday pay for each pay period throughout the year, instead of paying holiday pay at the time annual leave is taken.

For annual leave years beginning before 1 April 2024, and/or for workers who do not fit the definition of irregular hours workers, holiday pay should be calculated using the 'week's pay' calculation in s.224 of the Employment Rights Act 1996. Section 224 concerns workers who do not have normal working hours and requires Employers to carry out an averaging process to establish the amount of holiday pay.

The Government has published guidance which makes clear that holiday pay for casual workers, including workers on zero-hour, should be calculated using the averaging process.

Averaging should be carried out over the previous 52 weeks, discounting any weeks in which no remuneration was received. Where the worker does not have 52 weeks' service, the averaging is carried out over the number of weeks of employment that the worker has completed. Where the requirement to discount weeks with no remuneration means that the Employer has to consider earlier weeks, it should go no further back than 104 weeks. If this means that there are fewer than 52 weeks to use for averaging, it should use that reduced number of weeks. In the event that there are no weeks to consider, the Employer must base holiday pay on an amount that 'fairly represents a week's pay' based on the pay that the worker has received and been offered for the employment in question. The Employer must permit the individual to take a period of paid holiday, provided that they have properly requested it and subject to the Employer's right to postpone it or pay an amount in lieu of the accrued holiday on termination.

If a worker is found to be working under an umbrella contract, holiday is likely to continue to accrue even for periods during which they are not provided with work.

Sickness
To qualify for statutory sick pay (SSP), an individual must work under a contract of employment and meet earnings and other requirements. Whether or not a casual worker is entitled to SSP is likely to depend on the circumstances. Government guidance suggests there may be an entitlement to SSP for those engaged on a casual basis, but many genuine casual staff are unlikely to meet the earnings requirements.

Termination
The contract would not normally provide for termination on notice, as this could be suggestive of an employment relationship. Casual workers are not entitled to statutory minimum notice periods as they are not engaged under a contract of employment. Instead, Employers may wish to retain the ability to remove individuals from the work rota if they do not accept or carry out any work over a specified period.

However, written statements must include details of the notice to be given by both parties. Given the requirement to specify where no particulars apply (see earlier Casual worker contracts section), the written statement for a casual worker will need to state no notice provisions apply.

Disciplinaries and grievances
It would not usually be necessary for an Employer to follow a full disciplinary procedure in respect of a casual worker, provided that there is no risk that they could be regarded as an Employee with sufficient continuity of employment to pursue a claim for unfair dismissal.

If the disciplinary procedure is followed, this could actually be a factor that may be considered in establishing Employee status.

That said, it is advisable for Employers to follow a basic procedure, meeting the minimum requirements of the Acas code of practice on disciplinary and grievance procedures, where there is a risk that the individual in question could pursue a claim for unfair dismissal.

Casual workers are protected from unlawful discrimination under the Equality Act 2010. Therefore, Employers should deal thoroughly with grievances or complaints that they bring where there is any suggestion of discrimination or harassment.

Acquisition of employment rights
If it can be demonstrated that, over a sustained period, an individual has accepted all the work offered, even if they have the contractual right to refuse it, there is a significant risk that, in the event of a claim, the tribunal will take a pragmatic view of the arrangement and find that mutuality of obligation exists and an employment relationship has been established under an overarching or 'umbrella' contract.

This means that a contractual framework remains in place between the parties even when the individual is not provided with work. This could mean that the Employer has inadvertently acquired responsibility for the individual's accrued employment rights, such as the right to pursue a claim for unfair dismissal.

Whether or not an individual can pursue a claim for ordinary unfair dismissal depends on sufficient continuity of service. The individual may also have acquired the right to a statutory redundancy payment, and the right to statutory minimum periods of notice.

Continuity of service
If an Employee's length of service is insufficient, or if the Employer can show that continuity of employment has been broken, the Employee will not be able to establish the right to claim ordinary unfair dismissal.

They may still have the right to claim unfair dismissal where the alleged reason for dismissal is one that is automatically unfair for which no period of continuous service is required, for example dismissals relating to health and safety or whistleblowing.

Continuity is broken if there is a break of at least one week and that week does not count towards continuous service. The rules relating to continuity under s.212 of the Employment Rights Act 1996 are complicated, as there are circumstances when a week may count for continuity purposes even though the individual has not performed any work, and no contract of employment exists during that week. This provides individuals who are unable to establish that they are working under an umbrella contract with an alternative argument for continuous service.

Fixed-term employment

There is also a question of whether the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) could apply where an individual who satisfies the tests for establishing Employee status has worked under a series of separate 'casual' assignments.

Even if the individual does not succeed in establishing the continuity of service necessary for claiming unfair dismissal, if the Regulations do apply, they will have the right not to be treated less favourably than a comparable permanent Employee in relation to terms and conditions and the right not to be subjected to a detriment. The individual will then have the right to the same or equivalent terms as a permanent Employee doing the same or broadly similar work, including terms relating to benefits and access to training and promotion opportunities.

The casual Employee may however have some difficulty finding a comparable permanent Employee on which to base the claim. In addition, under the Regulations, the Employer may be able to justify objectively any differences in treatment.

Justification may be easier for an Employer to demonstrate in relation to individuals who are engaged on an ad hoc and short-term basis, considering differences between the work carried out by the permanent and temporary Employees.

Part-time workers

Casual contracts and zero-hour contracts are part-time contracts, and a worker engaged on one of these contracts may wish to bring a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) that they have been treated less favourably than a full-time worker in relation to contractual terms or detrimental treatment.

Zero-hour contracts

A zero-hour contract will typically but not necessarily always differ from a standard casual worker agreement in that, whereas in a casual worker contract there is usually no obligation on the Employer to offer work or on the individual to accept it, a zero-hour contract is usually drafted more favourably for the Employer. Most zero-hour contracts will make clear, by including a statement to this effect, that while the Employer is under no obligation to offer work, the individual is obliged to be available and to accept work offered, subject to any periods notified to the Employer in advance when the individual is not available, due to sickness or holiday, for example.

The Employer might give the individual a limited ability to turn down some of the work offered.

If individuals are permitted to refuse at least some of the work offered, even if the ability to refuse is limited to a fixed number of times per year, this may assist the Employer in demonstrating that mutuality of obligation does not exist and help to avoid the possibility of an employment relationship arising.

If the individuals to be engaged under zero-hour contracts are, in practice, likely to be offered regular, even if fluctuating, periods of work over a sustained period, it may be advisable for the Employer to accept from the outset that employment status will arise.