

ZERO HOURS CONTRACTS: THE PITFALLS AND RISKS

The 'Gig Economy' has had a lot of coverage recently, however these cases don't make it easy to compare like-for-like to much smaller businesses who use casual workers, for example pubs or restaurants.

They may assume they fall under the radar when it comes to close scrutiny of practices, however it is completely free to lodge a claim with an Employment Tribunal, and as an employer, you could find yourself with an unexpected claim by your zero hours workers.

HERE ARE SOME RISKS YOU PROBABLY DIDN'T KNOW ABOUT:

- **'Zero hours contract' is not a legal definition.** Section 27A(1), ERA 1996 says: 'The employment status of someone working under a zero hours contract is determined in the usual way.'

If you don't know the employment status of your staff, you don't know your obligations.

For example: The business may dismiss someone on the basis that they are a casual worker and therefore cannot bring a claim for unfair dismissal however if they are actually an employee, **once they reach 2 years' service they can bring a claim for unfair dismissal in an employment tribunal.**

- **You might be under the impression that you are employing casual workers, however there is actually an employment relationship.**

A common trend is to assume that where someone is on a zero hours contract, they are a casual worker not an employee.

To follow on from the dismissal example given before, if the business wants to dismiss someone, they might do so under the assumption that they are a casual worker so to not give them the statutory notice period. If it is found that the person is actually an employee, the employer would be liable for Wrongful Dismissal.

- **Be careful not to refer to the relationship as 'employment' or them as an 'employee' (a common mistake when drafting contracts similar to those of your employees)**

- **There might be an umbrella contract where it can be demonstrated that there is mutuality of obligation.** If the course of dealing gives rise to an expectation that the employee will be given work each week even though there is no obligation for them to be offered any or to accept it, this may give rise to an overriding umbrella contract which precedes any casual worker relationship. (St Ives Plymouth Ltd v Haggerty UKEAT/0107/08)



- **Exclusivity clauses are banned for zero hours contracts** (since 25th May 2015).

You can't have a clause in the contract, whether they are an employee or a worker, preventing them from accepting work from another employer whether that other employer is a direct competitor or not.

If you dismiss someone for accepting work from another business, this will be automatically unfair regardless of whether they have completed 2 years' service.

Likewise, if you choose to not give the person any work anymore due to knowing they also have another job, that person would have a claim. (Regulation 2(1) of the Redress Regulations.

You can't sidestep this by simply giving them a minimum hour contract (such as one hour) either.



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- **Holiday pay. Employers need to carefully consider whether their staff are receiving sufficient pay for their holiday entitlement** under the Working Time Regulations.

Most variable hours workers have the right to the pro rata equivalent of 5.6 weeks' leave per year, with the right to be paid a week's pay for a week's leave.

As there is no statutory definition of a week's leave in UK law, many employers opt to take a simple calculation approach and pay leave at a flat rate of 12.07% of hours worked. However, there are some circumstances where this could result in an inaccurate calculation of a week's pay. This could result in the correct percentage calculation being much higher, meaning that effectively, part time workers receive a windfall compared to their full time colleagues by virtue of the hours that they work.

There is no obligation to effectively pro-rata part time workers' holiday entitlement (Brazel v Harpur Trust UKEAT/0102/17) to ensure that full time workers are treated no less favourably, even though casual workers may receive a higher rate of holiday pay.

That means that employers should actually calculate a week's pay as the average of the earnings over the last 12 weeks as provided by the ERA 1996, not simply use the 12.07% accrual rate.

The safest option is to consider carefully the nature of the relationship you want to create, and then make sure your contracts and working practices are appropriate for that relationship.