

# Zero hours contracts consultation

Analysis by/response from  
Thompsons Solicitors

## Introduction

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 29 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

## Initial Observations

The debate about zero hours contracts (ZHCs) has become oversimplified. 'Zero Hours Contract' is not a legal term. Contracts and clauses may take many forms, but "zero hours contract" is a convenient shorthand for contracts with disparate provisions such as those which provide that a worker is only paid for work actually performed while at other times being available for work, and prohibited from working for other employers, despite there being no guarantee of further work. Employers choose whether to offer work, when and for how much. Employees can only accept the work or decline, and refusal risks not being offered work again.

Although portrayed as a flexible labour solution to short-term problems, the evidence shows the widespread and long-term use of ZHCs as a means of circumventing employment protection and job security. This is an inherently abusive practice.

In order properly to understand the issues involved it's important that the language used to describe ZHCs is precise. Unfortunately, the language is often unhelpfully muddled.

### Language

Annex 2 sets out the legal approach, but does not go far enough. To understand the position it is necessary to understand the context: case law on ZHCs only occurs when cases go to appeal. The cases do not generally involve parties who agree with each other, and in many their factual and legal complexity is a result of deliberate management decisions specifically intended to prevent workers from acquiring the rights which attach to the status of 'employee'.

The fact is that ZHCs are almost always offered on a 'take it or leave it' basis in circumstances where new employees have no realistic option but to accept those terms. This is the exploitation which needs to be tackled. It is a myth that employees welcome these contracts freely and after being fully informed about what they mean for them.

A non-comprehensive summary of the main rights is on page 8 of the consultation. The value of those rights is a key driver to litigation being pursued at all.

An individual who works under a contract of employment is an 'employee'. Legally, this is a precise term, which distinguishes that individual from 'workers' and the 'self-employed'. The consultation makes the error of using the terms 'employee' and 'employer' in circumstances where that does not reflect the proper statuses involved. While this may appear to make the consultation accessible to the lay person, it has the presumably unintended effect of rendering it legally unintelligible.

In this document we will use the following phrases in the following contexts

<b>Employee</b>	A person engaged to work under a contract of employment <sup>1</sup>
<b>Worker</b>	A person engaged to work but who is not an employee, and so is considered to be self-employed <sup>2</sup>

## Law

The consultation observes that “It is likely that the majority of individuals on zero hours contracts are either employees or workers”.<sup>3</sup> That is not necessarily true, since the legal tests for employment will generally exclude the worker contracted on genuinely zero hours (see for example *Carmichael v National Power plc* [2000], House of Lords).<sup>4</sup> Some forms of ZHC will result in employee or worker status, but many will result in neither.

## The Value of Employee-status rights

Employee-status rights give legal force to basic fairness, and grant employees redress where those rights are breached. They are therefore a valuable asset as well as being vital to day-to-day exigencies such as getting a mortgage or tenancy, paying the bills, and reducing reliance on the benefits system.

As well as having to show the employment contract relationship, employee rights generally also demand a qualifying period of 2 years continuous employment. Where the staffing need is genuinely short-term, staff on a ZHC would not accumulate sufficient continuous employment but when research shows that, in fact, 83% of staff on a ZHC have been so engaged for longer than 6 months and 65% for 2 years or more,<sup>5</sup> the ZHC looks more like an abusive device to avoid employment responsibilities than a genuine need for flexibility.

## Economic Value

Most ZHCs are disadvantageous and unfair. Where they strip away workplace rights workers have the same employment status as the self-employed even though that reflects neither that individual's wish nor the underlying reality. Workers exploited by ZHCs ‘choose’ to be self-employed only in the sense that a prisoner ‘chooses’ to remain within the prison. The lack of choice debases and distorts the phrase “self-employed”.

The flexibility ZHCs offer to employers is generated by transferring some of the risk of running a business onto individuals. A workplace reliant upon ZHCs is necessarily predicated upon a proportion of the workforce being treated as if self-employed. This is not necessarily economically or socially beneficial. According to the Resolution Foundation, the median self-employed salary is now £12,000 a year.<sup>6</sup> A report from the IFS last year estimated that 40% of the self-employed were at or below the minimum wage.<sup>7</sup>

Job security is important for motivation. Research on the psychological contract has suggested that relative security both of employment and of status in the organisation is a fundamental part of the expected rewards for effort and that if it is undermined, there is a disruption of the effort-reward balance. Where employees feel unfairly treated or that the intrinsic quality of their jobs is at risk, they are likely to feel less committed to their organisation and hence may be less likely to put in discretionary effort.<sup>8</sup>

For increasing numbers of people their work reality is reflected in one of the facts below. The divide between those in a work relationship of their choice and those forced to accept what they can get has grown dramatically in the last few years as government policy seeks to undermine the model of secure employment:

- OECD research shows that between 2008 and 2012, the real value of average annual earnings fell in the UK and just five other countries, with only Greece and Hungary seeing larger falls.<sup>9</sup>
- For the first time, there are more people in working families living below the poverty line (6.7 million) than in workless and retired families in poverty combined (6.3 million);<sup>10</sup>

- Over the last decade the incomes of the self-employed have fallen more than the general population;<sup>11</sup>
- 99.9% of private-sector businesses are SMEs, and 75.3% of private businesses employ no-one other than their owner;<sup>12</sup>
- Almost all the recent increase in self-employment has come from people working for themselves and not setting-up in business or self-contracting;<sup>13</sup>
- The rise in business start-ups has been driven by the growth in the numbers of smaller, non-employing businesses;<sup>14</sup>
- 40% of self-employed people are in the bottom 20 per cent of earners;<sup>15</sup>
- Worldwide, high levels of self-employment are associated with low per capita GDP and poorly performing economies;<sup>16</sup> and
- Self-employment increases inequality levels in most major economies.<sup>17</sup>

These facts reflect serious consequences for individuals, their families and the UK economy. They can't all be laid entirely at the door of ZHCs, but the 1 million people on them represent a significant proportion of the self-employed, a large number of citizens and a very large number of households.

## Specific Responses

### Addressing exclusivity

#### Question 1

**Are there circumstances in which it is justifiable to include an exclusivity clause in a zero hours contract? If you answer yes, please describe the circumstances that justify such a clause.**

No. We can envisage no circumstances where it is justifiable.

If an employer is not prepared to commit to an individual then it is iniquitous to expect that individual to commit to an employer in a manner which prevents them earning a living. Even feudal serfs had that level of mutual obligation.

#### Question 2

**Do you think the Government should seek to ban the use of exclusivity clauses in employment contracts with no guarantee of work?**

Yes.

#### Question 3

**Do you think an outright ban on exclusivity clauses in employment contracts with no guarantee of work would discourage employers from creating jobs? Are there any other unintended consequences of Government action that should also be considered?**

No. If anything we would expect the opposite to happen.

Exclusivity clauses allow employers to have their cake and eat it. They can deny a competitor a knowledge or skills resource without having to pay for that tactical advantage as the cost is passed onto the individual worker. Were it not possible to do so, this would incentivise more traditional employment arrangements.

While the consultation is correct to note research showing that 9% of individuals on ZHCs are locked into exclusivity agreements, it omits to mention that the same research shows a further 15% which are only allowed to seek work elsewhere "sometimes." The groups are therefore 24% with some form of exclusivity restriction, and 59% without.<sup>18</sup>

#### Question 4

**Do you think Government should provide more focused guidance on the use of exclusivity clauses, for example setting out commonly accepted circumstances when they are justified and how to ensure both parties are clear on what the clause means? If you answer yes, what information should be included?**

No. They should be banned.

The logic underpinning this question and the notion of justification which it alludes to are unclear. The classical analysis of employment relationships is an archaic one that assumes that both parties are free to contract with each other or not, and to do so on terms which are agreed after negotiations. This is an attitude which has revealed itself with consistent regularity from the current government's consultation papers. But it is not one which anyone in business would recognise, and it has been rejected by the Supreme Court:

"Dismissal from employment is a major event in anyone's life. Decisions that may have a profound effect on one's future require to be made. It is entirely reasonable that the time (already short) within which one should have the chance to make those decisions should not be further abbreviated by complications surrounding the receipt of the information that one has in fact been dismissed.

These considerations provide the essential rationale for not following the conventional contract law route in the approach to an interpretation of [statutory notice of dismissal]. As Mummery LJ said, it is a statutory construct. It is designed to hold the balance between employer and employee but it does not require – nor should it – that both sides be placed on an equal footing. Employees as a class are in a more vulnerable position than employers. Protection of employees' rights has been the theme of legislation in this field for many years. The need for the protection and safeguarding of employees' rights provides the overarching backdrop to the proper construction of s.97."<sup>19</sup>

Surrendering the ability to earn a living without anything substantive in return suggests an exploitative situation, not one freely entered into. It is a function of the power imbalance which the Supreme Court identifies as underpinning employment legislation and its context is that only 42% of those on ZHCs report having a lot of choice in the hours they work<sup>20</sup>, 38% would like to work more hours than they do,<sup>21</sup> and 14% report that they often have insufficient hours to maintain even a basic standard of living (i.e. being able to pay rent or mortgage, utilities, insurance, medical, transport, property maintenance, child support, food and sundries).<sup>22</sup>

We cannot envisage a non-exploitative example of this situation. If such a clause were enacted it should be valid only after the individual has received independent legal advice of the type in s.205A(6) Employment Rights Act 1996.

#### Question 5

**Would a Code of Practice setting out fair and reasonable use of exclusivity clauses in zero hours contracts (a) help guide employers in their use, and (b) help individuals understand and challenge unfair practices? Please explain your response.**

No. Exclusivity clauses in ZHCs should be banned.

The consultation notes that it would be "an employer-led Code of Practice". Given that employers are one half of the relationship and the whole of the problem (since they dictate the terms of the relationship), we fail to see how any such Code of Practice could garner sufficient legitimacy so as to be seen to be fair if its drafting excluded employees and employee representatives.

The weakness of all non-statutory Codes of Practice are that employers trying to act properly will seek to comply, whereas less scrupulous employers will not. No enforcement mechanism, or sanction, means no remedy for an individual other than refusing to work in those circumstances which, if they are vulnerable and desperate, is not an option at all.

Worker-led unemployment is no remedy for employer-led abuse.

### Question 6

**Do you think existing guidance and common law provision are sufficient to allow individuals to challenge exclusivity clauses and therefore no specific action from Government is required?**

No. We believe that specific action from Government is required.

The consultation says “It is already possible for an individual to challenge an exclusivity clause – either informally during the process of agreeing the employment contract or under common law.” Thompsons can state with authority as leading legal practitioners in the field that this is entirely fanciful and neither is realistic.

Research shows that the bulk of individuals on ZHCs are in low-skill, low pay occupations. It is ludicrous to suggest that such workers will go to law to overturn an exclusivity clause. In any event, the common law remedy being referred to, is so impracticable to all but the highest earners that it may as well exist purely in theory. It is absurd to suggest that an average worker can litigate in the High Court for a declaration and just as absurd to suggest that this is the preferred path to resolution. Why a government that is otherwise so keen to reduce court and tribunal claims should suggest more litigation as a solution is surprising unless the reality is that the government actually believes, as we do, that the prospect of litigation is not real and this is in fact, a way to appear fair whilst actually providing succour to employers.

### Improving the transparency of zero hours contracts

#### Question 7 - Improving the transparency of ZHCs

**If you have sought employment information, advice, or guidance on ZHCs before,**

**(a) Where did you receive it from?**

**(b) How helpful was it to you in terms of explaining your position in regard to zero hours contracts, and**

**(c) How could it have been improved?**

Thompsons is not in a position to respond to this question but does wonder how many individuals will actually respond. We suspect that this question is more for show than a genuine quest for information.

### Question 8

**Would the additional information, advice and guidance suggested in the first option (first bullet point, para 41), help individuals and business understand their rights and obligations? If not, what other information should Government provide?**

[This question makes a cross-reference that does not exist in the consultation. We therefore approach it disregarding the bracketed text.]

No.

As noted elsewhere, employers have engaged a lot of resources over a long period of time trying to evade their responsibilities towards employees. This has produced a plethora of arrangements and explanations which misstate the legal position. The response of the courts, as is noted in Annex 2 of the consultation, is to disregard the paperwork where the reality of the arrangements are at odds with it.

Advice inevitably relies on the paperwork accurately reflecting the legal reality. The danger of trying to set out advice and information like this is that it can inadvertently mislead the reader. A skilled employment law advisor is able to take into account the courts' approach and look behind the paperwork. A lay person is far less able to and, in most cases, will find it impossible. Guidance of this sort thus risks misstating the relationship, leading to industrial discord from the inappropriate denial or assertion of rights and obligations, and a loss of confidence in government advice.

### Question 9

**Further to your answer to Question 5, would a broader employer-led Code of Practice covering all best practice on zero hours contracts encourage more transparency?**

No. A Code of Practice is not a panacea and not a substitute for banning exclusivity clauses. We also repeat our concerns in Answer 5 about the extent to which any Code of Practice should be legitimately 'employer-led' and what it can reasonably achieve.

### Question 10

**Do you think that model clauses for zero hours contracts would assist employers in drawing up zero hours contracts, and support employers and individuals to better understand their employment rights and obligations? If you answer yes, what should be the key considerations be in producing model clauses?**

In our experience, this is not currently a problem.

The problems are with the use and abuse of ZHC's, not how easily employers can operate them.

This proposal is therefore neither necessary nor appropriate and again lends weight to the impression that much in this consultation is 'window dressing' to appear fair and reasonable.

### Question 11

**Do you think that existing employment law, combined with greater transparency over the terms of zero hours contracts, is the best way of ensuring individuals on zero hours contracts are making informed choices about the right contract for them to be on?**

No.

This question gives the impression that potential new staff can somehow choose from a menu of employment relationships, and if they want to choose a ZHC rather than a contract of employment then they can.

This is not the case.

Employees or workers very rarely have any choice in what type of contract they choose, or what is contained within it and even less so amongst the group of workers who are vulnerable to being offered a ZHC as their only work option. Nor does the DWP smile sympathetically and issue benefits if told that rejecting a ZHC was a valid decision, in fact, quite the reverse. We have knowledge of numerous cases where failing to take up a ZHC is deemed to be refusal of a reasonable offer of employment and benefits are stopped. The notion of an 'informed choice' therefore needs to be placed firmly in a real-world context – in which there is actually very little choice at all.

It would be disingenuous to suggest that the current law is sufficiently clear and accessible to be left alone with only the addition of a little non-binding guidance, when the consultation notes that "there is no legal definition of a zero hours contract in domestic law."<sup>23</sup>

Existing employment law gives no real certainty in this area. This is reflected by the fact that the tests for ascertaining employment status have oscillated over the last 30 years between the control test, the organisational test, the economic reality test and the multiple test, and the fact that it has taken at least 2 separate trips in 11 years to the Supreme Court to consider the issue.

In our view the following practical steps should be introduced:

- All ZHCs could be deemed to be contracts of employment by exercising the existing power contained within s.23 Employment Relations Act 1999 to extend the various employment-status rights to those engaged under them. This would remove both the uncertainty that haunts these arrangements, and a key driver for some unscrupulous employers;
- Exclusivity clauses should be banned entirely;
- A mechanism could be implemented whereby after a period of employment on a zero hours contract an individual could seek to have it transformed into 'traditional' contract of employment. This structure already exists for those employed under fixed-term contracts for a continuous period of 4 years.<sup>24</sup> This would address the abusive position of long-term use of these contracts;<sup>25</sup>
- The introduction of a right to request a traditional employment contract. The Part-time Workers Directive was based upon an agreement between the European social partners (unions and employer organisations), clause 5(3) of which says, "as far as possible, employers should give consideration to ... (b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise."<sup>26</sup> As ZHCs are a form of part-time working this establishes a basis for that approach,
- Regulation 15 of the National Minimum Wage Regulations defines 'time work' as not just time when a worker is working but also 'time when a worker is available at or near a place of work for the purpose of doing timework and is required to be available for work', except where the worker lives near their place of work and can be at home. There is a similar definition in paragraph 17 of the Agricultural Wages Order. This could be modified to include in the definition of 'work' time where the worker is required to be available for work and is prohibited by the contract from working for another employer. This would have the effect of those periods being included in the calculation of NMW and would therefore mean the employer would limit those periods when the worker is 'on call' (similar to arrangements in the health service) enabling the worker to manage her time and take other work at other periods.

There are also further, collective, solutions which we would be happy to elaborate upon.

### Question 12

**Further to your answer to Question 11, do you think there is more employers can do to inform individuals on zero hours contracts what their rights and terms are?**

Yes. But this still does not address the underlying problems. We refer to our earlier responses.

### Question 13

**Are there unintended consequences of introducing any of these options? Please explain your response.**

We are unable to answer this.

### Questions 14 - 41

We make no reply to these questions.

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- <sup>1</sup> The statutory definition is in s.230(1) Employment Rights Act 1996
- <sup>2</sup> The statutory definition is in s.230(3) Employment Rights Act 1996
- <sup>3</sup> Paragraph 15
- <sup>4</sup> Carmichael v National Power plc [2000] IRLR 43, House of Lords. It is also worth noting that, in law, an employee is also a worker.
- <sup>5</sup> Table 8, Zero Hours Contracts: Myth and Reality, Chartered Institute of Personnel and Development, November 2013
- <sup>6</sup> The State of Living Standards, Resolution Foundation January 2014 available at <http://tinyurl.com/om4g5qb>
- <sup>7</sup> Source : What can wages and employment tell us about the UK's productivity puzzle? Blundell, Crawford and Jin, Institute of Fiscal Studies, June 2013, available at <http://tinyurl.com/pjkd5xa>
- <sup>8</sup> Gallie, D, Felstead, A, Green, F and Inanc, H (2013) Fear at Work in Britain: First Findings from the Skills and Employment Survey 2012, London: Centre for Learning and Life Chances in Knowledge Economies and Societies, Institute of Education
- <sup>9</sup> Reported as Table 14 in CIPD Megatrends Have We Seen the End of the Pay Rise? Available at <http://tinyurl.com/qefthqd>
- <sup>10</sup> Source : p.26 Monitoring Poverty and Social Exclusion 2013, The Joseph Rowntree Foundation, December 2013
- <sup>11</sup> Source : Changes in real earnings in the UK and London, 2002 to 2012, Sarah Levy, Office of National Statistics, 13 February 2013
- <sup>12</sup> Source : BIS Statistical Release, 23rd October 2013, Business Population estimates for the UK and Regions 2013
- <sup>13</sup> Source : Who are the new self employed? New Policy Institute report using figures from the Office of National Statistics, [www.npi.org.uk/blog/work-and-pay/who-are-new-self-employed/](http://www.npi.org.uk/blog/work-and-pay/who-are-new-self-employed/)
- <sup>14</sup> Source : BIS Statistical Release, 23rd October 2013, Business Population estimates for the UK and Regions 2013
- <sup>15</sup> Source : What can wages and employment tell us about the UK's productivity puzzle? Blundell, Crawford and Jin, Institute of Fiscal Studies, June 2013 available at <http://tinyurl.com/pjkd5xa>
- <sup>16</sup> Source : analysis by Gapminder from International Labour Organization statistics, <http://tinyurl.com/qyhxdd>
- <sup>17</sup> Source : An Overview of Growing Income Inequalities in OECD Countries: Main Findings, Organisation for Economic Co-operation and Development (OECD) 2011
- <sup>18</sup> Consultation page 13, referencing Table 18, Zero Hours Contracts: Myth and Reality, Chartered Institute of Personnel and Development, November 2013. 17% of respondents did not know.
- <sup>19</sup> Gisda Cyf v Barrett [2010] IRLR 1073 at 1078, Supreme Court per Lord Kerr (our emphasis)
- <sup>20</sup> Table 13, Zero Hours Contracts: Myth and Reality, Chartered Institute of Personnel and Development, November 2013
- <sup>21</sup> Table 14, Zero Hours Contracts: Myth and Reality, Chartered Institute of Personnel and Development, November 2013
- <sup>22</sup> YouGov/CIPD survey, 5th August 2013, page 91. At <http://yougov.co.uk/publicopinion/archive/7904/>
- <sup>23</sup> Paragraph 11
- <sup>24</sup> Regulation 8, Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- <sup>25</sup> See endnote 5 and note that 69% of employers intended to use zero hours contracts for over 2 years (Table 5, Zero Hours Contracts: Myth and Reality, Chartered Institute of Personnel and Development, November 2013)
- <sup>26</sup> Clause 5(3)(b) Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, Official Journal L14/9