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Storm surrounding seasonal staff

As Christmas approaches, it is worth bearing in mind the current controversy surrounding the issue of zero-hour contracts and the fact they can leave workers with little security, uncertainty about earnings and vulnerable to exploitation.

A zero-hours contract means an employer does not guarantee to provide work and only pays for the work actually carried out. The worker is expected to remain available when or if called on by their employer, often at short notice. Under this type of contract, the employer is not legally obliged to provide either a guaranteed or minimum number of hours of times of work. Many such contracts also prevent the worker from working for other organisations.

However, in practice, a significant percentage of workers engaged under zero-hour contracts work regular hours for the same employer, but with limited access to employment rights, lower wages and no job security. These types of contract are often used in the retail and hospitability industries to meet seasonal work demands. Currently, the amount of zero-hour contracts in the UK has reached 1.4 million. Although we have no similar statistics as to the extent of their use by the Isle of Man private sector we understand the public sector uses them on a regular basis.

Although an organisation using such contracts to engage individuals is referred to as an "employer", in fact one main purpose of using these types of contracts is to avoid creating an employer and employee relationship. Instead, the individual will usually have the legal status of a worker, not an employee and so will not have the full legal rights of employees that include the protection from unfair dismissal, to receive redundancy payments, maternity and other family leave and pay rights. As workers, individuals only have some rights – to be paid the national minimum wage, to a minimum period of paid annual leave and have legal protection from discrimination.

An individual’s status depends on the actual facts of the situation, not just want the contract states. These include whether there is:

- Mutuality of obligation to provide and do works
- Integration of the individual into the employer’s organisation
- High level of control by the employer over how the work is done
- Any financial risk borne by the individual
- Payment of Income Tax and National Insurance by the employer, and
- Company equipment provided by the employer.

Undoubtedly, zero-hour contracts maintain a country’s flexible job market and reduce the amount of unemployment. Additionally, zero-hour contracts can be seen by some employers as a very cost effective way of meeting their short term staffing needs. They can effectively guarantee that the employer has access to a pool of trained people who are available at short notice as and when needed.

However, zero-hour contracts also reduce the legal obligations of the employer towards the worker. If an employer frequently uses zero-hour contracts to meet its business needs so a regular pattern of work emerges, this is more akin to an employment relationship. These individuals should, therefore, be regarded as an employee rather than as a worker or self-employed person and are thus are at risk of being exploited.

Recently, this exploitation has been targeted in the UK by business secretary MP Vince Cable, who has proposed a Bill to Parliament providing that staff should be given a statutory right to request a fixed term contract from their employers. Additionally, recommendations have been made to ban the exclusivity clause many employers use, which prevents their staff from obtaining further employment elsewhere. The UK Government has also launched a consultation discussing how to ensure zero-hour contracts are being used fairly and are even considering using potential consequences, such as civil penalties, as a way to deter employers from exploiting their employees.

The issue of zero-hour contracts is also prevalent on the Island, with the Department of Economic Development seeking information as to whether there is any need to curtail the use of such contracts. Currently, the Isle of Man Government is undertaking a consultation on the proposed Equality Bill 2015, which seeks to provide fairness and equality in employment, and it is yet to be seen whether this piece of legislation will include any provisions restricting the use of zero-hour contracts.

Therefore, whilst undoubtedly popular with both employers and some individuals, zero-hour contracts present various legal challenges, some of which are ultimately being tackled by the government. The potential or accidental exploitation of workers is real and the negative PR associated with getting it wrong can be highly damaging for any organisation. The message must be they should be used with caution.

Simcocks' top tips for employment advisors:

- Consider the reality of the employment relationship – if the relationship is more akin to that of an employee/employer, then the zero-hour workers should be hired on that basis.
- Consider the flexibility and obligation the employer requires commercially.
- Ensure there are methods in place for approximately calculating accrued holiday pay.
- Consider whether you can use any other methods, such as voluntary overtime by permanent staff for responding to surges in business needs.

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