Zero hours contracts are a type of contract where workers are not guaranteed hours and are only paid for work carried out. The precise number of workers on zero hours contracts in the UK is far from clear. Estimates range from 250,000 to 1 million, with some unions such as Unite suggesting the figure may be considerably higher. What is clear, however, is that this type of working arrangement is being used increasingly by employers across a wide range of employment sectors.

Employment status

The approach to the question of whether those engaged under zero hours contracts are to be classed as ‘employees’ or ‘workers’ for employment law purposes is the same approach that will apply when determining employment status under any working arrangement: if the day-to-day reality of the work suggests a relationship of employment, the contract will be one of employment and the person working under it will be classed as an employee.

While a number of factors determine whether or not a contract is one of employment, the essential elements, said to form the irreducible core of a contract of employment, are firmly established:

- there must be a mutuality of obligation between the parties
- there must be a sufficient degree of control over the worker
- the contract must impose an obligation on a person to provide work personally.

While many zero hours contracts will expressly provide that the employer is under no obligation to provide work and the worker under no obligation to accept work, employment tribunals will need to look beyond the written terms to determine whether they accurately represent the reality of the agreement.

In Pulse the EAT was required to decide whether the claimants were employees, within the meaning of s.230 ERA 1996, despite being employed under zero hours contracts where the written terms suggested otherwise. The EAT noted that the proper approach to interpreting labour contracts is that set out by Mr Justice Elias in Kalwak:

‘The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.’

The EAT found in Pulse that there was sufficient mutuality of obligation for the claimants to be employees, having regard to various factors including the fact that once the employer had prepared the rota the claimants were required to work to it and the employer was required to provide that work. The claimants were subject to control and discipline; they had to provide personal services; they were provided with uniforms and equipment and were paid on a PAYE basis.

The proper classification of each zero hours arrangement will, of course, fall to be determined by reference to its particular facts but what Pulse makes plain is that an arrangement under which hours are not guaranteed does not carry with it any guaranteed non-employee status.

Unfair dismissal

For those zero hours workers who are employees, current legislation provides for a raft of rights and protections that perhaps have not been fully appreciated until now. Zero hours employees with sufficient continuity of employment will have statutory protection against unfair
dismissal. Continuity of employment in this context is likely to prove yet another area ripe for legal argument.

For some zero hours workers employee status will arise only in respect of each individual engagement (see Edwards). In these circumstances continuity of employment may still be preserved in between each specific engagement by virtue of s.212(3) ERA 1996, either because at least one shift has been completed each week for a two-year period or because any gaps can properly be regarded as being on account of a temporary cessation of work.

This was the approach taken by the Court of Appeal in Prater. In that case a teacher’s continuity of employment was preserved by virtue of s.212(3)(b) because, even though there was no obligation to offer or accept teaching assignments, each one was held to amount to a contract of service and the intervening breaks due to temporary cessation of work.

S.212(3)(c) ERA 1996 will also assist. It preserves continuity where by arrangement or custom the employee is regarded as continuing in employment ‘for any purpose’. (See the discussion at para 2.55 of the IDS Employment Law Handbook ‘Continuity of Employment’ for an example of the application of this provision.) Staff on zero hours contracts who are required to be available for work between shifts can properly be regarded as continuing in employment in between shifts for the purpose of keeping themselves available.

It will fall to the employment tribunal to determine in each case whether a zero hours arrangement represents an overriding (or umbrella) contract of employment or a series of contracts lasting for the duration of each engagement; and whether a series of short contracts may be bridged to provide continuity of employment.

Less favourable treatment of part-time workers

Many workers engaged under zero hours contracts will be part-time workers for the purposes of the PTWR. In the case of Wippel, the ECJ ruled that a part-time worker who had no fixed working hours and worked only on demand could not bring a claim relying on the Part-time Workers Directive in circumstances where there were no full-time employees engaged under a ‘work on demand’ contract.

The case has led some commentators to suggest that part-time workers under a zero hours contract cannot compare themselves to full-time workers engaged under a guaranteed hours contract for the purposes of the PTWR. However, the later House of Lords case of Matthews makes clear that claimants must only show that they are employed on the same type of contract as the comparator and do the same or broadly similar work. As both full- and part-time firefighters were engaged on contracts of employment, they were held to be on the same type of contract. Their Lordships were not concerned with differences between the actual contractual terms.

It is likely therefore that if a part-time worker under a zero hours contract is employed under a contract of employment, then the correct comparator will be a full-time worker also under a contract of employment who is doing the same or broadly the same work, regardless of the fact that the latter has guaranteed or set hours.

Indirect sex discrimination

National workplace statistics show that it is overwhelmingly still women who require part-time work to meet childcare or other carer commitments. As most zero hours contracts afford workers few contractual benefits, businesses that only offer their part-time staff zero hours contracts rather than permanent part-time hours will need to be able to objectively justify that practice or risk claims of indirect sex discrimination.

Similarly, zero hours arrangements that require workers to be available at all times put those with primary caring responsibilities at an obvious disadvantage.

Holiday rights

Zero hours contract workers will be entitled to take paid annual leave under the WTR in the same way as any other worker. However, due to the obvious uncertainty over hours worked, there are often practical problems in calculating how much holiday a zero hours worker will accrue over any period.

One method previously commonly used to address this issue was ‘rolled-up’ holiday pay. Under that system, the hourly rate of pay was stated to include an amount for holiday pay. This meant, however, that if a worker took holiday, they would receive no pay while they were actually on leave, as they had already been paid rolled-up holiday pay in their normal wages.

The ECJ in Robinson-Steele found this to be contrary to the purpose of the Working Time Directive as it discouraged workers from taking leave. However, it also held that sums
already paid under a transparent rolled-up arrangement could be offset against a claim for unpaid holiday pay. This meant that while rolled-up holiday pay was technically unlawful, workers receiving it appeared to have no effective remedy, except potentially a claim for just and equitable compensation under reg 30 WTR.

Nevertheless, as a result of this uncertainty, rolled-up holiday pay has fallen out of fashion and employers generally deal with holiday for zero hours workers in other ways. Some employers allow workers simply to accrue holiday on the basis of the hours they work each month and then take those holidays when they choose. This potentially conflicts with reg 15 WTR, however, which requires that workers should not have to have accrued holiday in any leave year before taking it (although under reg 15A WTR, this rule only applies after the first year of employment).

An alternative system is to estimate how much holiday a worker will accrue over a particular period of employment and then adjust final pay according to the hours actually worked and to how much holiday was taken. Of course, making such estimates for zero hours workers with variable hours could be difficult, resulting in workers being required to repay large sums at the end of the particular period or vice versa.

Any threat of reducing hours as a way of discouraging zero hours workers from taking leave would be an unlawful detriment under s.45A ERA 1996 and would potentially give workers the right to claim compensation under reg 30 WTR.

**Minimum wage**

A zero hours contract worker will almost certainly be entitled to the national minimum wage and will be deemed to be carrying out ‘time work’ under reg 3 of the National Minimum Wage Regulations 1999.

A time worker must be paid at least the national minimum wage for the times when they are actually working, although this does not include rest breaks (reg 15(7)). In addition, if workers are required to be available for work ‘at or near the place of work’, they must also be paid the national minimum wage during that time. It does not matter if work is actually provided. Zero hours workers who are called in to work, only to be told that they are not needed (which is reportedly common practice among some employers), can claim national minimum wage at least for the time they are required to attend at the workplace waiting to be given work.

A worker who is on standby or on-call at home, however, is not entitled to the national minimum wage for that time. Zero hours workers will generally not, therefore, be entitled to pay where they have not been allocated hours and are not required to be at work, even if they may regard themselves as on standby.

**Conclusion**

Opinion on zero hours contracts is divided. Unsurprisingly, employee organisations tend to highlight the fact that they result in financial insecurity for workers who lack key employment rights. Others argue that they provide flexibility for both parties.

Following a review of zero hours contracts over this summer, BIS has announced that it will shortly be launching a consultation to look at the issues in more depth. No doubt employment lawyers on both sides of the debate will be watching with interest.

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**Key**

- **Pulse** Pulse Healthcare v Carewatch Care Services Ltd & ors [2012] UKEAT 0123/12
- **ERA 1996** Employment Rights Act 1996
- **Kalwak** Consistent Group Ltd v Kalwak [2007] IRLR 560
- **Edwards** North Wales Probation Area v Edwards UKEAT/0468/07/RN
- **Prater** Cornwall County Council v Prater [2006] ICR 731
- **PTWR** Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- **Wippel** Wippel v Peek & Cloppenburg GmbH & Co KG [2005] IRLR 211
- **Matthews** Matthews & ors v Kent and Medway Towns Fire Authority & ors [2006] UKHL 8
- **WTR** Working Time Regulations 1998
- **Robinson-Steele** Robinson-Steele v PD Retail Services [2006] IRLR 386