



Terms of Reference

Chief Minister's Zero Hours Contracts Committee

Approved by:	Committee	Date: 21/11/18
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Revised by	Jon Callister & Secretariat
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Version:	V2	Date: Dec 2018
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1. Purpose

- 1.1 The Zero Hours Contracts Committee ("the Committee") has been established as a Committee by the invitation of the Chief Minister.
- 1.2 The Chief Minister has commissioned the Committee to look carefully at the issues faced by those on zero hour contracts and to ensure that they are not being abused by employers.¹
- 1.3 The purposes of the Committee are to:
 - explore the prevalence and use of zero hour contracts in the Isle of Man;
 - explore any possible abuse in relation to zero hours contracts including any abuse in relation to National Insurance payments by employers or workers;
 - (if there is evidence of abuse) make recommendations for dealing with it; and
 - produce a report by March 2019 for submission to the Chief Minister.

2. Definition

- 2.1 For the purposes of the Committee's work a "zero hours contract" means a contract of employment or other worker's contract under which:
 - a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker and there is no certainty that any such work or services will be made available to the worker²;and

¹ Tynwald, 16 November 2018

² s166A940(b) Employment Act 2006

- b) any other contracts or arrangements under which an employer and an individual agree terms on which the individual will do any work where the employer makes it available to the individual and the individual agrees to do it, but the employer is not required to make any work available to the individual, nor the individual required to accept it.

Further information on zero hours contracts can be found at Appendix 1.

3. Constitution

- 3.1 The Committee was established by the Chief Minister as a stand-alone Committee to examine and report on a specific issue.

- 3.2 Under the Government Departments Act 1987 section 6:

(1) "The Council of Ministers may, after consultation with any Department, give to the Department directions as to the exercise of its functions in relation to any matter which appears to the Council of Ministers to affect the public interest, and the Department shall comply with any such directions.

(2) Every Department shall supply to the Chief Minister such information, and render such other assistance, as the Chief Minister may from time to time require, and shall permit any person appointed for the purpose by the Chief Minister to inspect and make copies of its accounts, books, documents and papers, and shall afford such explanation thereof as that person may reasonably require."

- 3.3 In carrying out its functions, the Committee may invite relevant Departments, Boards and Offices to participate and does so under the power stated above.

4. Membership

- 4.1 The Chief Minister has appointed Hon D J Ashford MHK, Minister for Health and Social Care as Chair.

- 4.2 The Committee comprises:

Political Membership:

Hon D J Ashford MHK, Minister for Health and Social Care (Chair)

Mr L L Hooper MHK, Member for Enterprise

Mr R W Henderson MLC, Member for Treasury

Dr A J Allinson MHK, Member for Cabinet Office

Officers:

Executive Director, Office of Human Resources (OHR), Cabinet Office

Recruitment Improvement and Project Manager, OHR, Cabinet Office

Head of Legislation, Department for Enterprise

Director of Change and Reform, Cabinet Office

Director of Social Security, Treasury

Secretariat:

Executive Office, Cabinet Office

- 4.3 In order for there to be a quorum at a meeting at least 3 of the 4 political members must be present. However 2 of the 4 political members can be considered to be quorate if they have the other members' permission.
- 4.4 The Executive Office, Cabinet Office will provide secretariat support to the Committee. The Office of Human Resources, Cabinet Office will provide research and administrative support to the Committee. Other officers will be co-opted to attend as and when required by the Committee.

5. Meetings and minutes

- 5.1 Meetings of the Committee will be scheduled and agreed with the Chair but shall take place at least monthly. Recognising the need to provide suitable dates for external attendees, extraordinary meetings may be convened at short notice.
- 5.2 Minutes will be prepared in accordance with Minute Taking Guidance prepared by the Cabinet Office and will be issued to the Committee at the earliest opportunity and no later than ten days following each meeting.
- 5.3 Agendas are compiled with the approval of the Chair.
- 5.4 A request for an item to be included on the agenda should always be accompanied by supporting documentation. The agenda and papers will, wherever possible, be distributed to members at least one week before each meeting by the Secretariat.
- 5.5 In normal circumstances late papers will not be accepted, in exceptional circumstances approval for late papers to be circulated must be obtained from the Chair otherwise papers should be brought to the meeting under Any Other Business and considered at the discretion of the Chair.
- 5.6 All documentation issued in relation to the Committee including the Terms of Reference, proceedings and papers are subject to the same statutory confidentiality as applies to the meetings and proceedings of the Council of Ministers, and should be therefore treated accordingly, unless agreement is given.
- 5.7 Documents should not be circulated for wider distribution other than to nominated officers without first seeking the necessary permission of the Chair.

6. Reporting

- 6.1 The Committee will provide a report to the Chief Minister detailing its conclusions and any recommendations by March 2019.

7. Contracts and finance

- 7.1 The Committee has no authority to contract out work to a third party and has no funds allocated to it.

Appendix 1

1. What is a Zero Hours Contracts

A zero-hours contract is a contract under which a worker undertakes to work for an employer on a regular basis without any minimum amount of work being guaranteed. Pay is only for actual hours worked. The legal definition encompasses both **employee** contracts and other **worker** contracts (e.g. those of an agency worker or casual worker) so a zero hours worker can have either the employment status of an employee or a worker. For further information on employment status see 8 below.

In the case of an employee contract the contract will be viewed as continuing in force throughout the year even when there is no work available. Thus an overriding or umbrella contract exists during periods when the individual is not working.

Zero-hours contracts can be designed in different ways:

- a contract under which the individual is under an obligation to work whenever the employer demands (subject to certain times of the year when, for example, the individual may be on holiday); or
- a contract under which the individual is obliged to come into work subject to a minimum notice period being given, but otherwise not obliged to work; or
- an arrangement under which the individual is free within reason to accept or reject any offer of work (although if this was the arrangement it would be unlikely that the individual could assert that they were an employee of the organisation due to the lack of mutuality of obligation).

2. Employment Rights

Everyone employed on a zero hours contract is entitled to statutory employment rights. There are no exceptions.

A person will benefit from the employment rights associated with their employment status and individuals on a zero hours contract will either have the employment status of a 'worker' or an 'employee'.

Any individual on a zero hours contract who is a 'worker' will be entitled to at least the minimum wage, paid annual leave, protection from discrimination under the Employment (Sex Discrimination) Act 2000 and will be entitled to rights under the Equality Act 2017 as the various rights under that Act come into operation from January 2019 . To find out more information on employment statuses and all the rights associated with them, see Appendix 1 of the Department for Enterprise Guide [Isle of Man Employment Rights and Responsibilities: a Guide for Employers, Employees and Workers](#).

3. Appropriate Use

Zero hours contracts are useful where work demands are irregular or where there is not a constant demand for staff. Zero hours contracts can also provide a level of flexibility for the individual, which allows them to work around other commitments such as study or childcare.

Some types of work are driven by external factors that are out of the employer's control and this can happen in a range of sectors including, for example, hospitality, leisure and catering.

The following are all examples of when a zero hours contract might be appropriate, but it is not an exhaustive list. There are also other employment choices available to employers in these situations.

- **New businesses**

When a new business starts up it might need to build up a customer base to undertake work so, at first, they may need to employ people on zero hours contracts in addition to any permanent staff to manage fluctuating and unpredictable demands.

- **Seasonal work**

Seasonal work or peaks in demand, where it is known that for short periods of time additional staff are needed to manage surges in demand such as retail sales at Christmas time or providing a cleaning service for example, following a festival or a New Year celebration.

- **Unexpected sickness**

Employers may need to be ready to cover periods of unexpected staff sickness and be able to call on experienced staff, for example, a pharmacist in a chemist or a lifeguard at a leisure centre.

- **Special events**

A wedding venue, restaurant or a bar may need to be able to call on trained and experienced staff when a wedding or function is booked.

- **Testing a service**

A company may be considering testing a new service they are thinking about providing, but need to hire staff on an ad hoc basis before they can make a decision about rolling out the service.

4. Inappropriate Use

Zero hours contracts allow flexibility for both employers and individuals. However, they should not be considered as an alternative to proper business planning and should not be used as a permanent arrangement if it is not justifiable.

Zero hours contracts might not be appropriate if the job offered will mean the individual will work regular hours over a continuous period of time. For example, if an individual is asked to work from 9am to 1pm, Monday to Wednesday for a 12 month period, it may be more appropriate to offer that worker a permanent part time contract or a limited term contract. Zero hours contracts do not allow employers to avoid their responsibilities. Dependent upon their employment status all staff, regardless of their contract, are entitled to employment rights and should be treated fairly and within the law.

Zero hours contracts are rarely appropriate to run the core business, but might be useful for unexpected or irregular events such as bereavement leave by staff, to deliver sufficient customer service during peaks in demand, or when preparing to open a new store. Many businesses provide a regular service or product and have a broadly predictable timetable or output and so permanent or fixed hour contracts can be more appropriate.

5. Alternatives

Employers should consider whether a zero hours contract is the best type of contract for their business need depending on the nature of the work to be offered and the specific circumstances. Depending on the business need, alternatives might include:

- offering overtime to permanent staff to ensure experienced staff deal with temporary fluctuations in demand
- recruiting a part time employee or someone on a limited term contract if regular hours need to be worked to adapt to a change in the business needs
- offering annualised hours contracts if peaks in demand are known across a year
- using agency staff can be a quicker and easier way to hire someone if staff are needed temporarily or at short notice.

6. Best Practice

Contracts should be clear and transparent so the individual can understand their rights and what the implications of such a contract means to them.

When offering a zero hours contract, employers should consider including information such as:

- whether the individual is an employee or worker and what employment rights they are entitled to
- if the individual is an employee, how statutory employment entitlements will be accrued where appropriate, for example, redundancy pay
- the process by which work will be offered and assurance that they are not obliged to accept work on every occasion if they so wish
- how the individual's contract will be brought to an end, for example, at the end of each work task or with notice given by either party

Employers should plan ahead and give as much notice as possible when offering work.

Those who work on a zero hours contract may have caring responsibilities or have studies and may need to plan for childcare or around exams. Employers should be transparent about how they offer work, for example, is there a rota?

Cancelling work at late notice, or when the individual turns up at the place of work, is unacceptable unless truly unavoidable. Employers should consider putting into place a policy explaining the circumstances when and how work might be cancelled, and how they try to avoid this, and whether the individual can expect any compensation for any caring costs they may have incurred.

When recruiting for a zero hours contract, the job should be clearly advertised as such and the individual should be clear that hours are not guaranteed, and that work may cease if there is a fall in demand.

Employers should ensure they familiarise themselves with their responsibilities when employing someone on a zero hours contract. Employers must comply with every aspect of the law, including employment law.

Those who take up work on a zero hours contract are often students, partially retired, or have caring commitments. Employers should respect the needs of those individuals to arrange care and be flexible in whether they can accept work at short notice or if they cannot arrange suitable care.

7. Exclusivity Clauses

Since 1st January 2018 section 166A of the [Employment Act 2006](#) has prohibited the use of exclusivity clauses or terms in any zero hours contract. This means an employer cannot stop an individual from looking for work or accepting work from another employer.

An employer must allow the individual to take work elsewhere in order to earn an income if they themselves do not offer sufficient hours.

If an employer includes an exclusivity clause in a zero hours contract, the individual cannot be bound by it, the law states the individual can ignore it.

An employer must not attempt to avoid the exclusivity ban by, for example, stipulating that the individual must seek their permission to look for or accept work elsewhere.

8. Employment Status

The legal rights enjoyed by a person flow from his or her employment status. This covers a spectrum of possibilities ranging from 'employees' who have the most rights to the genuinely self-employed who have the least rights. Between these two extremes there is an intermediate status, usually termed 'worker'; such persons enjoy certain core employment rights. Each of these categories is discussed further below.

Employees

Many employment rights, such as the right not to be unfairly dismissed, are enjoyed only by 'employees' (and, in certain cases, only if they fulfil certain conditions, e.g. as to length of service). An 'employee' is a person who works for an employer under a contract between them, called a 'contract of employment' (which may, but need not, be in writing: it may be agreed orally or simply implied by the nature of the relationship). A contract of employment is defined as 'a contract of service or apprenticeship'.

A number of essential elements must be fulfilled in order for a contract of employment to be shown to exist:

- there must be a contract between the working person and the employer;
- there is an obligation on the working person to undertake work personally (and not to delegate it to someone else);
- the employer has an ongoing commitment to provide work, and there is a corresponding expectation by the working person of receiving work (sometimes called 'mutuality of obligation');
- the employer controls both what the working person does and the way it is done.

In most cases, it will be clear whether a person is or is not an employee, but in borderline cases the High Court or the Employment Tribunal³ will look to see if these elements are present and will, in addition, look at a number of factors, for example:

- to what extent is the person integrated into the structure of the employer's organisation?
- if the person needs clothing, equipment or materials to carry out the work, does the employer provide them?
- is the person allowed to work for others?
- how are payments to the person processed, and how are they treated for tax and national insurance purposes?
- does the person have access to benefits and sick pay?

Workers

Certain employment legislation, namely the Minimum Wage Act 2001 and parts of the Employment Act 2006 and some regulations made under that Act, such as the Annual Leave Regulations 2007, give a number of core rights to 'workers'. A "worker" is an individual who works under:

- a contract of employment, or
- any other contract whereby he or she undertakes to do or perform personally any work or services for a work provider who is not a client or customer of the individual's profession or business undertaking.

So, in addition to employees, the term 'worker' covers, for example, casual, intermittent and some freelance workers, and most employment agency workers other than those who are truly in business on their own account. Some self-employed people can also be classed as workers for the purposes of employment rights provided that the particular working relationship points to that conclusion.

Parts of the Employment Act 2006 extend the definition of 'worker' beyond its usual meaning elsewhere in the Act to give protection to additional categories of working person (e.g. homeworkers), which might otherwise fall outside the usual definition of 'worker', in respect of certain rights such as 'whistleblowing'

The Employment (Sex Discrimination) Act 2000 (ESDA) provides protection to persons under a contract of service or of apprenticeship or a contract personally to execute any work or labour. This means that that people who are 'workers' are protected by the Act but, unlike most legislation that covers workers, ESDA does not exclude those who provide personal services for a client or customer in the course of practising a profession or running a business. The Equality Act 2017 maintains this very wide approach.

Self employed persons

The final main category of employed persons, other than 'employee' or 'worker', is that of self-employed persons, that is, persons who are in business on their own account and whose relationship with the organisation for whom they provide their services is that of client or customer. Examples of self-employed individuals, whose contracts are with clients

³ The Employment Tribunal will become the Employment and Equality Tribunal from 1st January 2019.

or customers as opposed to employers, include electricians performing skilled work for their customers and advocates advising or representing their clients.

Although some self-employed people can be classed as 'workers' for the purposes of some employment legislation, the general rule is that genuinely self-employed entrepreneurs are not covered by employment protection legislation, save for a number of exceptions such as the rights conferred by ESDA.

Distinguishing between workers and self-employed persons

Just as there are cases where it can be difficult to determine whether a person is an employee or a worker there are also cases where it can be difficult to determine whether a person is a worker or self-employed. In borderline cases the High Court or the Employment Tribunal will look at the features of the particular contract and factors such as:

- whether the dominant feature of contractual arrangement was the obligation to personally perform work or whether it was a business outcome or objective;
- whether the individual has a single customer or a range of customers;
- the extent to which he or she was engaged in skilled activities;
- the extent of investment in his or her business;
- the extent to which he or she carried the risk of non-performance or faulty performance of the work in question; and
- the extent to which he or she was free to negotiate the terms and conditions of the services which were provided.