STATES OF JERSEY

REGULATION OF ZERO-HOURS CONTRACTS

Lodged au Greffe on 9th April 2021
by Deputy G.P. Southern of St. Helier
Earliest date for debate: 11th May 2021

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) to agree that legislation should be introduced to protect employees from the challenges caused by the increased casualisation of work, and to strengthen the regulation of employment through –

(i) a definition of zero-hour employment contracts;
(ii) the prevention of employers requiring zero-hour workers to always be available for work;
(iii) a ban on exclusivity clauses;
(iv) a right for zero-hour workers, who in practice work regular hours, to switch to a contract which reflects the normal hours worked;
(v) a right to reasonable notice of work schedule;
(vi) a right to compensation for shift cancellation or curtailment without reasonable notice; and

(b) to request the Minister for Social Security to bring forward for debate the necessary legislation, and any such enforcement regulations as may be required for the implementation of the matters described in Paragraph (a), by the end of the first quarter 2022.

DEPUTY G.P. SOUTHERN OF ST. HELIER

REPORT

Introduction

This proposition has as its starting point the regulation, but not the outright ban, of the use of Zero-Hour contracts (ZHCs) in the Jersey economy. As such it accepts that their use is entirely appropriate where there is a requirement for a flexible workforce to be temporarily available. Examples are many, but include:

- Teaching staff on the supply list
- Nurses registered on the "bank" to cover staff absence
- Waiting staff needed to cater for a large banquet
- Seasonal pickers of certain crops

But having witnessed the slow but steady erosion over the past 5 years of the measures put in place to protect workers terms and conditions in the UK economy, some of which were picked up and mirrored in Jersey, I was delighted when the Supreme Court last month ruled that Uber drivers were not self-employed but workers.

The ruling put an end to a particularly egregious business model aimed solely at reducing the employer's costs by passing the cost of National Insurance contributions to their workers.

Why regulate?

While we in Jersey, along with the UK government, have taken pride in our ability (pre-Covid) to create jobs, it has been recognised by many that many of these jobs have been low quality, low paid work. Employment conditions have worsened in what has been labelled as the "Gig Economy".

Workers on zero-hour contracts suffer several basic problems:

- Unpredictability - Last minute shift changes make it difficult to cater for family needs
- Income insecurity – variable hours make it difficult to manage finances or access credit
- Inability to assert rights – put at its simplest, if you are on a ZHC you could be sacked tomorrow. So you don't argue with the boss, at the risk of being "zeroed down".

In this high-cost, low-wage economy, workers often resort to taking on two jobs to make ends meet, or fall into spiralling debt to survive. We need to legislate in order to mitigate these harms, and to eliminate poor employment practice.

The Uber Case

The company said drivers would earn at least the National Living Wage, or £8.72 an hour, in a move that could shake up the wider gig economy. Uber said it was "turning the page" when it came to workers' rights.

Writing in the Evening Standard, Uber's chief executive Dara Khosrowshahi said: "This is a significant improvement in the standard of work for UK drivers. But I know many observers won't pat us on the back for taking this step, which comes after a five-year

legal battle. They have a point, though I hope the path that we chose shows our willingness to change."

Union leaders and employment experts said Uber's move would have far reaching consequences for the gig economy. Bates Wells lawyer Rachel Mathieson, who represented Uber drivers fighting for worker rights, called it "a very significant milestone".

Uber said the changes to its UK drivers' pay would form an earnings floor, not an earnings ceiling. The company said the new rates would come on top of free insurance to cover sickness, injury and maternity and paternity payments which have been in place for all drivers since 2018.

Uber says:

- It will pay at least the National Living Wage for over-25s**,** irrespective of a driver's age, after accepting a trip request and after expenses
- All drivers will be paid holiday time based on 12.07% of their earnings, paid out on a fortnightly basis
- Drivers will automatically be enrolled into a pension plan with contributions from Uber alongside driver contributions, setting drivers up over the long term
- It will continue free insurance in case of sickness or injury as well as parental payments, which have been in place for all drivers since 2018
- All drivers will retain the freedom to choose if, when and where they drive

Nonetheless, employment experts said the ramifications of Uber's changes would be felt across the gig economy. Nigel McCay of law firm Leigh Day, which represented Uber drivers in the recent court battles, told the BBC: "We see so many other operators using this employment model which is questionable. And they'll now see this decision and think: 'Hang on, if Uber have had to finally give in and accept that the drivers are workers then how long are we going to be able to sustain an argument that our workers shouldn't be entitled to those rights?"

Time for Change

This ruling lays down a marker for those who want to stop the slide into low-quality, low-pay work (the Gig economy) where minimum standards are the norm and where employees cannot rely on a steady income because of fluctuating hours. As I understand it, we have yet to see Tribunal judgements locally on the use bogus self-employment, but I am convinced that will come in due course. In the meantime, I am impressed by the long list of benefits that Uber say workers are eligible for:

- holiday pay (at 12%)
- employer pension
- sickness and parental payments
- National Living wage £8.72

Furthermore, I am encouraged to see what can be done to improve matters for our own gig workers who are subject to conditions which are said to offer flexibility for both the employer and employee, but in reality only offer "one-way flexibility" in favour of the employer. The most significant means to deliver flexibility in the Jersey economy, is the widespread use of the "so-called" zero hours contract. I say "so-called" because, as

can be seen below, there is no accepted legal definition for this type of contract, at least not in Jersey.

Zero-hour contracts

ZHCs are used by employers whereby workers have no guaranteed hours and agree to be ***potentially*** available for work. They are used by companies seeking labour flexibility and by workers seeking flexibility around their other commitments. The Jersey Advisory and Conciliation Service (JACS) in its 2016 Guide to Zero-hour contracts draws attention to the absence of a clear definition of what constitutes a zero-hour contract:

*"Zero-hour contracts are arrangements where people agree to be available for work **'as and when'** required but that no particular number of hours or regular times of work are specified.*

***If you look through the legislation you will not see the term 'zero hours' used or defined**; however the term is understood to be a contract between an individual and a business to undertake work when it is offered, and equally an understanding that no work may be offered.*

Furthermore, the individual is not under any obligation to accept any hours even when offered them. This is because there is likely to be a lack of "mutuality of obligation" between the two parties.

Out of interest, the UK legislature defines a zero-hours contract as a 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
(b) there is no certainty that any such work or services will be made available to the worker

As is often the case, it is difficult to 'borrow' legislation from elsewhere and assume it will work in our system. Nonetheless, I am confident that we can arrive at a practical working definition based around the UK definition.

If the States accepts that there are indeed issues associated with certain uses or abuses of ZHCs and to agree to regulation, then the first thing we need is a clear legal definition. *Hence Paragraph (a)(i)* of this proposition.

Changing the Rules

Clarification of employment law in this area has been long overdue. Just as the distinction between self-employment and employee status has been refined through the UK courts over the last five years, so the interpretation of the use of zero-hour contracts has been developed over time in Employment Tribunal rulings.

Today the JACS Guide clearly indicates that any employee working under a contract of employment – regardless of any hours – is protected under the Employment (Jersey) Law 2003. JACS is clear that ***people working under zero-hour contracts will generally***

be employees and will receive the same rights as all other employees, whereas each case could only previously be determined by a Tribunal on grounds of mutual obligation.

History

This is not the first time I have attempted to encourage the States to act to control the use of ZHCs. In response to the growing concerns being expressed even then over these contracts, eight years ago now, I brought a proposition, P.100/2013, Zero-hour Contracts: Regulation. It contained the following request the Chief Minister to work with the Minister for Social Security to investigate fully the impact of ZHCs on working conditions in the Jersey economy, as follows:

(a) investigate the extent to which zero-hours contracts are used across the various sectors of the economy;
(b) examine the impact of these contracts on employers and employees;
(c) work with the Jersey Advisory and Conciliation Service (JACS) to create a regulatory system to control this employment practice; and
(d) prepare and lodge such draft legislation as is necessary to implement part (c) above for approval by the States.

P.100/2013 (with a minor amendment to part (c)) was accepted by the Assembly by 39 votes to nil. A Report, R.52/2015, was duly produced and presented to the States in 2015 by the then Social Security Minister. It contained a full response to part (a) but did very little to address part (b). In fact it made no effort to produce an impact assessment, and without this, of course, regulation was unsurprisingly not deemed to be required. Parts (c) and (d) consequently just fell away.

We were left with only the JACS 2016 Guidance on ZHCs, which was of very little use, especially because to be effective any guidance must be widely promulgated and easily understood by the potential worker. The HSS Scrutiny Panel review S.R.3/2016 into zero-hour contracts, conducted in 2016, revealed that 77 % of ZHC employees, along with a quarter of employers, had not even seen the guide. It is unsurprising then that there were not many complaints made about the use or abuse of ZHCs when the workers were not aware what their rights are. There is no evidence that employment law is better understood today.

In practice ZHCs can include a range of relationships:

1. Genuinely casual work which is occasional and of short duration - e.g. Supply teachers, bank staff;
2. Where the individual is dependent on the employer to earn his/her living, but the hours vary in each week and there is no guaranteed minimum;
3. Agency work where an individual is supplied to an end-user but the agency remains the employer.

Categories 1 and 3 are widely used and are not generally seen as problematical. It is the second arrangement that arguably has the clearest potential for misuse, and therefore may require some action to update regulations to cater for today's changed conditions.

The Law

For almost 2 decades the Employment (Jersey) Law 2003 has been the main framework for governing relations between employees, employers and the States. It has served us well, but the growth in the Gig economy demands some accommodation to cater for modern labour practices.

The introduction of the Employment (Jersey) Law 2003 created a framework to

- amend enactments relating to employers' obligations
- specify terms of employment,
- the payment of wages,
- the notice required to terminate contracts of employment;
- provide for compulsory minimum periods of leave and rest time for employees;
- provide employees with rights not to be unfairly dismissed and
- be paid a minimum wage;
- the establishment and jurisdiction of Tribunals to hear and determine employment disputes;
- permit the Minister for Social Security to appoint officers with the power to require the production of any records relating to employment matters covered by the Law and regulations.

Over this time we have seen the introduction of the minimum wage, the rights of Trade Union recognition and representation and the development and extension of parental rights. The time has come to modernize and recognize the Gig economy.

Numbers of ZHCs

The UK Labour Force Survey (LFS) asks workers about the employment arrangements in their main job and as such will only identify those workers on zero-hours contracts who are aware that their contract allows for them to be offered no hours. Estimates for April-June 2018 suggest that 780,000 people in the UK were reliant on zero-hours contracts for their main job, 2.4% of all people in employment. This was lower than previous estimates which had seen several years of growth.

Here in Jersey, figures released in 2015 revealed the prevalence of zero-hour contracts in the Jersey economy. Of the 5,522 people with at least one ZHC, 3,998 people had a zero-hours contract as their main job. This represented 7.3% of the economically active population (55,039). Since then, the use of ZHCs has increased to stand at around 11% of the workforce. June 2020 saw a slight drop, partly as a result of the pandemic, nonetheless there were 5,740 jobs filled on ZHCs representing 10% of total employment.

Why are ZHCs problematic?

There is no doubt that some unscrupulous employers look to zero hours contracts as the least risky and least expensive form of employment. For evidence members only have to look to the court action in the UK over whether Uber drivers are employees or self-employed. This was partly about what protections workers have under the UK employment law, but critically about who pays their NI contributions as employers

sought to keep costs down. A similar set of cost-saving arguments apply in Jersey to ZHC terms and conditions.
Employers and their representatives argue that the use of these contracts is a question of responsible management. There are situations where zero-hour contracts are said to be a good fit for employee and employer.

Alexander Ehmann, former Head of Regulatory Policy at the Institute of Directors said:

"Taking on a full-time member of staff remains a risky and potentially expensive option for any company emerging from the downturn. Zero Hours Contracts can be a vital tool in our economic recovery, giving flexibility to both employer and worker whilst also guaranteeing basic employment rights."

Where there is a genuine call for flexibility, then the variation in hours leads to financial insecurity as reflected in this comment from the TUC:

"*The TUC believes that the rise of involuntary and casual temporary work, along with increases in part-time work and zero-hours contracts, show that beneath the headline employment figures lies an increasingly insecure, vulnerable workforce. Too many workers are not working enough hours to get by, or have no guarantee of paid work from one week to the next."*

The trade union Unite has said:

"Unite believes that in general zero-hours contracts are unfair, creating insecurity and exploitation for many ordinary people struggling to get by. They are one of many blighting the British economy. Employers use them to cut wages, avoid holiday pay, pensions, or other benefits enjoyed by employees and agency staff forms of underemployment."

One-way benefits

In Jersey, a series of Tribunal judgements now make it clear that employment rights are protected no matter what hours are worked, but this has little significance if the workers are unaware of the protection. If the worker believes that their employer could cut their hours to zero next week, with little or no notice, this can produce massive insecurity. This leads to what Matthew Taylor in his report of July 2017, "Good Work: the Taylor Review of Modern Working Practices, refers to as "one-way flexibility", thus:

"We have heard repeatedly during the Review that there is an issue of flexibility not being reciprocated, with a requirement to be available for work at very short notice, without any guarantee that work will actually be available.

This makes it very difficult for a person to manage their financial obligations, or for example, secure a mortgage. This can feel unfair, especially when the reality of the working arrangement is that the individual regularly works 40 hours a week.

Whilst in theory individuals in these working arrangements have the right to turn down work, we were told that workers, needing work but unaware of their unfair dismissal rights, often felt that to express legitimate views about conditions or make even reasonable requests risked having future work denied to them."

This fear of being "zeroed down" and potentially losing all hours in the coming week or weeks, means that employers are rarely challenged.

As referred to above, the H&SS Scrutiny Panel Report into zero-hour contracts, S.R.3/2016, showed that a large majority of employees and some employers had not seen a copy of the JACS zero-hour guidelines and that significant numbers of ZHCs were not being used responsibly, in that:

- 40% of employees stated that they were always or sometimes penalised for turning down work when offered it;
- 40% of employers expected their ZHC workers to accept work when offered; and

Over half of employers reported that their ZHC workers had fairly regular hours. This can occur when the employer uses ZHCs because they believe that that it protects the business from claims for unfair dismissal, the need to give notice or the obligation to make redundancy payments. As we have seen from Tribunal judgements, it does not.

If the worker does consistently work full-time hours (35 +) then according to the JACs Guidelines their terms should be "reviewed" with the employer. As far as I can make out this rarely happens.

I believe that the time has come in Jersey to regulate the use of ZHCs to prevent some of the poor employment practices that they permit. They are largely taken from the Pickavance Report, published by the UK Labour Party in 2014, *"Zeroed Out: The place of zero-hours contracts in a fair and productive economy".* The report made a number of policy recommendations intended to "prevent certain exploitative practices used by a minority":

- **Employers should be prevented from requiring zero-hours workers to be available for work:** Clauses that require workers on zero-hours to be available for work should be declared by legislation to be unenforceable…. The employer would not be able to demand (either contractually or verbally) that they make themselves available without any guarantee of work**. *(Article (a)(ii)).***
- **Zero-hour workers who in practice work regular hours should after a certain period, should have the right to a contract with fixed minimum hours.**

Pickavance suggested a 2-stage process –

- After 6 months, workers should have a **right to request** a contract that is other than a ZHC which provides a minimum to reflect the regular hours worked
- Employers would only be able to refuse if they could prove that their needs could not be met by a part-time or full-time contract.
- After 12 months continuous service workers on regular hours should have the **right to be offered a full contract** which reflects the actual hours worked.
- Those working regular hours would only be able to be kept on zero hours if they formally opted out of these arrangements, after receiving independent advice from a trade union or other independent legal advisor.

Furthermore, in 2018 the Employment Forum recommended that "the qualifying period for the right to request flexible working should be removed in order to provide a day-

one right, extended to all employees. The Forum reported that *"This is likely to make a significant difference to zero-hour contract employees."*

- The then Minister promised that legislation to give effect to this change would be presented to the States for debate on 20 March 2018. From September…. all employees will have a day-one statutory right to request a change to their terms and conditions of employment, for example, so that the contract more accurately reflects the hours that are typically worked, or to request a specified number of contracted hours***. (Article (a)(iv))***

I cannot say whether this promise was ever delivered, but if the States were to adopt this proposal, the current Minister could replace the 2-stage process above with a day-one right, which would put Jersey in in advance of the UK Labour Party, which had a manifesto promise in 2015 to:

"Ban exploitative zero-hour contracts so that if you work regular hours you get a regular contract"

- **A ban on exclusivity clauses:** Workers on zero-hours contracts should be free to work for other employers…. Clauses that require workers on zero hours contracts to be available for work and prohibit the worker from working for another employer at the time should be declared by legislation to be unenforceable when there is no guarantee of work or pay. ***(Article (a)(iii))***

This proposal requires little explanation since the principle has been accepted previously by the States who agreed by 43 votes to zero with Senator Mézec's proposition P.98/2016, but only after a tremendous scrap over amending or withdrawal of part of the proposition. This saw action being deferred with the words "*subject to sufficient evidence that exclusivity clauses are being misused in zero-hour contracts in Jersey" and "when the Employment Forum has the capacity, sufficient evidence has been presented, and law drafting time is available".*

With such strong caveats surrounding the principle, and given the mind-set of successive governments (which is to do as little as possible to protect workers), it is not surprising that no enforcement action has been taken over the ensuing five years.

Instead the Minister reverted to the policy of issuing guidance and asked JACS to revamp their contracts guide, hoping that employees and employers would carefully study their terms and conditions along with the obligations involved. The 2016 version was still a complex document talking at length about "mutuality of obligation" and with many reservations such as "each case can only be determined by the Tribunal", "implied terms of contract" and "umbrella contracts." It was not an easy document for a worker with poor English to understand. Examination of the 2019 version is scarcely any clearer, with the end result that unfair treatment of zero-hour workers still occurs.

Good employers will follow the guidelines. Poor employers, seeking extra profit, may ignore them. As a worker, if you believe you are on a ZHC, you believe that your hours can be stopped instantly. This makes taking your individual case to a Tribunal, already a difficult task, even more challenging. No wonder we do not see many such cases, but those that do get through are often successful.

We now return to the enforcement powers available under the 2003 Employment Law. The Tribunal obviously operates on the basis of an individual challenge:

- ……. the establishment and jurisdiction of Tribunals to hear and determine individual employment disputes;

The law has hitherto taken a "light touch" to the enforcement of employer obligations:

- ……. the Minister for Social Security to appoint officers with the power to require the production of any records relating to employment matters covered by the Law and regulations.

For example, the employer, amongst other obligations, must:

- Pay the minimum wage.
- Keep a record of payments.
- Give the employee access to the record of payments, etc.

A Social Security officer has the power to act on behalf of any employee or group of workers with regard to any breach of the above and has further extensive powers under Article 97 of the Law.

After a decade of growth in the use and abuse of ZHCs, when Social Security ministers have chosen to take a light touch to the regulation of such contracts, the time has surely come to enforce good employment practice in Jersey.

Once adopted in our economy, it is a simple matter surely to extend the checks on the payment of the minimum wage to assess the use of ZHCs by a company are being used inappropriately for jobs that have regular hours and should be subject to proper full-time terms and conditions.

Equally, where variable hours are genuinely required, reasonable notice should be given to workers of the expected hours available and that zero-hour workers should have a right to compensation when shifts are cancelled at short or no notice. ***(Articles (a)(v) & (a)(vi)).***

Article (b) covers the need to monitor and enforce the measures in Article (a).

Financial and manpower implications

It is difficult to anticipate what the necessary resources will follow from a piece of legislation designed not to generate revenue but to change behaviour. In this case, perhaps the current enforcement officers would be able to cope with an increase in their workload from the extension to their powers. Failing this, I cannot see total additional costs totaling more than £150k for inspection and enforcement.

Re-issue Note
This Projet is re-issued because article references in the main report were incorrect when originally published.