

STATES OF JERSEY



ZERO-HOURS CONTRACTS (P.92/2016): AMENDMENT

Lodged au Greffe on 8th November 2016
by the Minister for Social Security

STATES GREFFE

ZERO-HOURS CONTRACTS (P.92/2016): AMENDMENT

1 PAGE 2, PARAGRAPH (a) –

After the word “prohibited”, insert the words “, subject to sufficient evidence that exclusivity clauses are being misused in zero-hour contracts in Jersey”.

2 PAGE 2, PARAGRAPH (b) –

For the words “, in consultation with the Employment Forum,” substitute the words “to direct the Employment Forum to consult, and the Minister”; delete the words “within 6 months”; and after the word “proposals” insert the words “when the Employment Forum has the capacity, sufficient evidence has been presented, and law drafting time is available”.

MINISTER FOR SOCIAL SECURITY

REPORT

Purpose of the amendment

The effect of the amendment would be as follows –

- “(a) that ‘exclusivity clauses’ in zero-hours contracts should be prohibited, subject to sufficient evidence that exclusivity clauses are being misused in zero-hour contracts in Jersey; and*
- (b) to request the Minister for Social Security to direct the Employment Forum to consult, and the Minister to bring forward for approval by the States the necessary draft legislation to give effect to the proposals when the Employment Forum has the capacity, sufficient evidence has been presented and law drafting time is available.*

The amendment would ensure that the requirement to introduce legislation follows after the presentation of the appropriate evidence.

It would ensure that the correct procedure is followed; the Minister directs the Forum to consult and make a recommendation as to the extent to which exclusivity clauses should be prohibited, prior to requesting law drafting time and seeking States approval.

It would not be possible to undertake public consultation and law drafting on a complex issue such as this within a 6 month period.

Findings from Scrutiny Review of Zero-Hour Contracts

Deputy S.Y. Mézec of St. Helier’s report is based on the recent report of the Health and Social Security Scrutiny Panel, which put forward 21 recommendations in relation to zero-hour contracts.

The main evidence put forward by the Scrutiny Panel in respect of exclusivity clauses was that employees reported that they did not think they were allowed to work for a second employer. This finding was not supported by the evidence from employers, none of whom suggested that they used these clauses. The report of the Scrutiny Panel did not provide any evidence of the wording of any contracts in use in Jersey.

These results, and other findings of that Scrutiny review, suggest that there is a low level of understanding amongst employees as to the details of their contract of employment. For example, many employees also reported that they were not entitled to holiday pay. This is an existing statutory obligation that applies to all employees, including those working under zero-hour contracts.

Improving communication

The Scrutiny Panel made a number of recommendations to improve the information available to the Public, and the Minister has accepted 6 recommendations to increase awareness and enhance guidance. The Panel was correct to draw attention to this, and the following actions have already been implemented.

1. The JACS guide has been updated to address a number of the Panel's recommendations.
2. A simple new JACS information sheet clarifies that zero-hour contract employees have employment rights.
3. JACS has publicised its services to raise awareness.
4. A States social media campaign has been used to raise awareness of entitlement to rolled-up holiday pay for zero-hour staff amongst employers and employees.

The actions taken as part of the campaign to date have been completed quickly, they provide direct support to employees, and they do not introduce any new red tape. The actions are an appropriate response to the local situation.

Insufficient evidence

The Minister expects that many Members would agree that a requirement for an employee to work exclusively for one employer under a zero-hour contract seems unfair, and the Minister would take action to address this if there was a problem.

The Minister has proposed this amendment to Deputy Mézec's proposition because of the lack of evidence –

- (1) that exclusivity clauses are creating problems for workers in Jersey; or
- (2) that this matter should be prioritised for consultation and law drafting above the promised review of family-friendly rights.

The Minister stated that she had rejected the recommendation of the Scrutiny Panel for the following reasons –

“The Panel has not presented sufficient evidence that exclusivity clauses are being used in Jersey or that they present a significant problem that would justify the time required to consult and prepare legislation. It is not clear from the report what practice the Panel actually seeks to abolish (see Finding 13). Banning exclusivity clauses is unlikely to make any practical difference to the experience of employees. It may be more appropriate to provide additional support to employees to help them understand their terms of employment.”

None of the employers who responded to the Scrutiny survey prohibited their employees from working for other employers, and no new evidence has been presented on the use of exclusivity clauses by Deputy Mézec in his report. Statements from local organisations are included below to confirm the current situation in Jersey.

Given the lack of evidence that exclusivity clauses are causing difficulties, local employees will see little or no benefit by introducing legislation to ban them.

Consequences of banning exclusivity clauses under the Employment (Jersey) Law 2003 (“the Employment Law”)

There are a number of definite and potential problems that arise from agreeing to change the Law in the near future, as proposed by Deputy Mézec. The negative consequences are potentially far more damaging than any perceived short-term positive impact.

1 – Delaying the review of family-friendly rights

Given the lack of evidence presented, the Minister is not willing to delay the promised review of family-friendly rights and divert the resources that have been allocated to help working parents. Extending family-friendly rights would bring a real benefit for a large number of employees in Jersey.

2 – More complicated legislation

It is often believed that the Employment Law contains a provision that permits exclusivity clauses, and that a simple amendment to strike out the provision would achieve the desired effect. This is not the case.

To achieve the aim of Deputy Mézec's proposition, all of the following areas would need to be defined and then added to the Employment Law –

- Definition of a zero-hour contract
- Definition of an exclusivity clause
- Circumstances in which zero-hour contracts are not permitted to be exclusive
- Circumstances in which zero-hour contracts are permitted to be exclusive (e.g. high-earning executives)
- Anti-avoidance measures (e.g. if the employer offers an exclusive contract guaranteeing one hour per month, the rule wouldn't apply)
- Penalties against employers and/or compensation for employees.

3 – More red tape

Adding extra definitions and rules to the Employment Law will make the Law more complicated. Our Law is currently simple and appropriate for Jersey. More red tape and bureaucracy brings a cost to employers, particularly to the large proportion of small firms operating locally.

4 – Employers increase use of self-employment

If employers rely on casual staff and wish to avoid the perceived additional complexity around zero-hour contracts, they may seek to find an alternative arrangement, such as fake self-employment, 'gig' work or freelance work, where employees have no contract or employment protection at all.

This would be a far more insecure situation for employees.

There is evidence that self-employment is on the rise in the U.K., and a number of tribunal cases are underway, testing whether individuals have any employment rights under such arrangements.

Wider perceived concerns about zero-hour contracts

For those Members who have wider concerns about zero-hour contracts, Deputy Mézec's proposition will not address the perceived failings. It only deals with the limited issue of the use of exclusivity conditions within a zero-hours contract.

- It will not give employees more hours of work.
- It will not provide more certainty about their working hours.
- It will not encourage employers to offer contractual sick pay or an occupational pension.

Current evidence

The Minister has gathered the following evidence which indicates that there is no direct evidence of exclusivity clauses being used in Jersey, and that industry representatives already advise their members not to use exclusivity clauses.

The Jersey Advisory and Conciliation Service (“JACS”) has advised that, in the year to date, it has not received any queries in respect of exclusivity clauses in zero-hour contracts, commenting that: *“if anyone is aware of these JACS would be more than happy to speak/advise such individuals. Therefore whilst this may have previously been an issue in the UK which has now been redressed by legislation changes, from the apparent lack or number of such issues here in Jersey would seem that effectively legislating against such clauses is unlikely to have any significant impact.”*

Huw Thomas, employment lawyer – *“I have not seen any employers in Jersey using exclusivity clauses in zero-hour contracts. To seek to ban exclusivity clauses is the biggest red herring imaginable as it will simply not assist employees. Zero-hour employees are already protected by the Employment Law. We just need to ensure that the Law is applied and that rights are upheld by the Tribunal.”*

Chamber of Commerce, Jersey Branch – *“While Chamber would agree that employers should not include exclusivity clauses in zero-hour contracts, we do not agree that legislation is necessary to stop this happening. Chamber has seen no evidence that this is happening amongst our membership and we would always strongly advise our members against using this practice.”*

It is vitally important that existing demands on legislation are not side-tracked by perceived issues that could be clarified when licences are issued. The States Assembly should be focussing on growing the economy rather than creating more red tape for businesses in relation to issues that Chamber cannot clarify exist in Jersey.”

Jersey Branch of the Chartered Institute of Personnel and Development (“CIPD”) – The local CIPD confirmed that it does not support the use of exclusivity clauses and commented that it: *“would actively discourage employers from using exclusivity clauses in their zero hour contracts which we believe would prevent employees from gaining employment with another employer, who would be able to provide additional hours of work to the individual.”*

Jersey Hospitality Association (“JHA”) – *“The JHA believes to the best of their knowledge that exclusive zero-hour contracts are not being used by their members in the hospitality industry. Zero-hour contracts are being used quite genuinely to formalise what would previously have been a casual arrangement, under which exclusivity would not be required. It is not clear to the JHA how a ban on exclusivity clauses would benefit employees in practical terms as it would be almost impossible to police.”*

Jersey Farmers' Union – *“The Jersey Farmers' Union is knowledgeable in the use of these Contracts which may be used in certain circumstances. We are aware of the implications and our members are advised that the Contracts should always be used appropriately. An exclusivity clause is not acceptable – our members are informed of this fact and from the responses received we are not aware that any member is operating a Zero Hour Contract containing an exclusivity clause. Furthermore, if any member was to seek advice regarding the inclusion of an exclusivity clause in a Zero Hour Contract we would strongly advise against it.”*

Enforcement inspectors – The Social Security enforcement team visit employers' premises and examine contracts on a regular basis. The team will respond to queries and concerns from employees and members of the Public, as well as undertaking pro-active visits. Concerns can be raised on a completely anonymous basis. They have advised that they have not seen any exclusivity clauses in zero-hour contracts when conducting inspections of employment contracts, and they have not received any queries about exclusivity in zero-hour contracts from employers or employees.

Income support – The Income Support system requires workers to work for 35 hours a week, if possible. Claimants who work less than 35 hours a week are required to engage with an employment adviser to increase their overall employment hours. To date, there have been no instances in which a benefit claimant has suggested that s/he is unable to take on additional hours due to an exclusivity clause in their ongoing employment.

Financial and manpower implications

There are no additional financial or manpower implications for the States arising from the proposed amendment.