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## **Report on Zero Hours Contracts in the University & College Sectors in Scotland**

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## **Abstract**

*This report uses a survey to measure and consider the current use of zero hours contracts in Colleges and Universities and compares the data to a similar survey in 2013. The results show that there has been a dramatic reduction in the use of zero hours contracts in the University sector over the last 5 years, and a significant reduction in the College sector. Furthermore, a number of large Universities in particular have eliminated their use of zero hours contracts entirely despite being significant users in 2013. As a result, in 2018 the College sector now has more zero hours staff than the University sector in Scotland. There remains some variability within both sectors and local increases in zero hours contract use – especially in the college sector. Zero contract hours have been displaced by an increased use of annualised hours contracts and fixed term contracts. Women are still more likely to hold zero hours contracts than men, which is a concern and may raise issues of indirect discrimination. The lack of regular Equality Impact Assessments in both College and University sectors remains a concern, as well as a continued failure by a few institutions to pay occupational sick pay to zero contract holders.*

## **SECTION 1: BACKGROUND**

### **Zero Hours Contracts**

In simplistic and extreme terms; employers, tend to want as much work done as possible by the workers for as little pay as possible, whereas the workers want to do as little work done as possible for as much pay as possible. From these opposing and competing objectives, a balance has been achieved for most workers in the UK. In recent times however, for some workers this balance seems to have been lost and the balance of power moved to the employers' favour. One example of this is the so called "Gig Economy" which ostensibly covers self-employed people but in reality, traps many workers in devices such as zero hours contracts that exploit and do not accord the employment rights that many of these contract holders should properly have as employees.

This paper looks at how zero hours contracts have evolved and are evolving in Scottish colleges and universities, and whether they have reduced in number and how they have been replaced, and whether the replacement employment practices are truly an improvement for workers relative to zero hours contracts. The paper uses the results of a Freedom of Information (Fol) survey to all Scottish colleges and universities to explore these questions and has configured the survey in such a way to enable the results to be longitudinally compared to an earlier survey that the author carried out on behalf of the EIS in 2013.

The paper also briefly considers the latest developments in caselaw around zero hours contracts.

The paper then draws these two strands together to consider ways in which trade unions can further combat the use of zero hours contracts or other exploitative contracts.

### **Zero Hours Contracts**

The relationship between employers and employees have long been moderated by the law, mostly in the form of employment law which has evolved from contract law. This reflects the fundamental nature of employment relationships in the UK – which is that there is a contract of employment between the employer and employee.

Employees have many statutory rights and rights that have been determined by caselaw such as Employment Appeal Tribunals and other judicial appeal bodies. Under s.230(1) and (2) of the Employment Rights Act 1996, an "employee means an individual who has entered into or works under a contract of employment", whether express or implied and (if it is express) whether oral or

in writing". Employees have full employment rights. All employees are workers, but workers are not employees.

The key element of a contract of employment is a mutuality of obligation in which work must be offered with pay by the employer and must be personally carried out by the employee. There is also a control aspect on employment contracts, whereby the employers control of the employee's work is clear and real.

There are two other groups of individuals that carry out work; workers and self-employed (aka contractors).

Workers are those individuals that hold, according to s.230(3)(b) of the Employment Rights Act 1996, "any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

Whilst there is a contract in place between the worker and "employer", it is not a contract of employment, and most importantly therefore there is no mutuality of obligation between the two parties. In other words, the "employer" is not required to offer work and "worker" is not obliged to carry it out. Workers are often known as 'casual workers' and have fewer statutory rights than employees.

A self-employed person usually has a contract for services in place between him/her and the "employer" that sets out the work to be done and leaves to how it's done (or by whom) to the self-employed person. A self-employed person has few statutory rights.

It is important to note that the contract between a worker and the other party is neither an employment contract (contract of service) nor a contract for service – but a contract sui generis (of its own kind).

### **Zero Hours Contracts – A Statutory Definition**

The term "zero hours contracts" came to public prominence after 2010, during the age of austerity following the 2007 Financial Crisis. There was public concern around zero hours contracts and yet there was no agreed definition or statutory definition of a zero hours contract – not surprising given its origin. A statutory definition was set out in the Small Business, Enterprise and Employment Act 2015 that stated:

"In this section "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 (b) there is no certainty that any such work or services will be made available to the worker."

ACAS sets out the statutory definition in the following way, "A zero hours contract is generally understood to be a contract between an employer and a worker where the employer is not obliged to provide any minimum working hours, and the worker is not obliged to accept any work offered."

Selwyn's states that "there has been a growth in the use of casual contracts in recent years, becoming known as zero hours contracts. The Small Business, Enterprise, and Employment Act (2015) was used by the government of the period to stop one exploitative contractual clause that some employers operated within their zero hours contracts – the exclusivity clause (which prevented the contract holder accepting work elsewhere even if there no work with the substantive contract).

## **Problems Associated with Zero Hours Contracts**

Zero hours contracts are perceived as means by which employers can circumvent providing statutory rights to individuals that carry out work for them. Zero hours contracts are creating situations whereby “employers” are getting regular work done by “workers” at a fraction of the financial costs and risks associated with having “employees”. In effect, some “employers” are getting full time staff for low pay, no costs associated with holiday or sickness benefits, and no pension liabilities. Worse of all, since these “employers” are not guaranteeing any future work there were no costs in not providing any further work.

For staff, zero hours contracts present huge drawbacks in comparison to permanent regular work. These include for the college and university sector, but are not limited to, there is no guaranteed level of regular earnings; no guaranteed future work; future work is erratic and often last minute; difficulty obtaining low rate loans or mortgages as financial stability cannot be shown; that provides any certainty over meeting bills or planning for the future; work does not crystallise into a regular contract; fewer benefits such as sick pay; limited or no career development. A further issue with ZHC is that a manager within the “employer” have has the power to choose how much ZHC work to provide and to whom it should be offered. This creates unbalanced relationships and can lead to abusive behaviours.

The 2013 EIS survey of HEIs showed that women were more likely to be zero hours contract holders than men.

Another issue around Zero Hours contracts is that they are based on the no mutuality of obligation, thus a university may pay a ZHC worker to do work this week but will not guarantee work next week or next term. Ostensibly is a two-way lack of obligation, i.e. the ZHC is also in the position of being able to turn down work offered next week or next term. The problem for the ZHC is that the “employer” may then go elsewhere and the ZHC will be effectively penalised for refusing work. In reality therefore, ZHC often feel that there is an obligation (i.e. a necessity) on them to accept any work given thereby adding to the unbalanced nature of the contract.

There are many downsides for “employers” associated with zero hours contracts. Evidence from ACAS suggests that the use of zero hours contracts corrode trust in the workplace – often putting fear and financial insecurity where fairness and mutual confidence should flourish. Research suggests this can damage performance and safety.

The UK Government addressed one minor but invidious provision of zero hours contracts – the exclusivity clause, but it has shied away from making any fundamental change to statute.

As employment law is a reserved matter, the Scottish Government is unable to amend statute around zero hours contracts. The Scottish Government has however set out its clear opposition to the principle of zero hours – as set out by Cabinet Secretary for Fair Work, Skills, and Training Roseanna Cunningham<sup>1</sup>:

“The Scottish Government firmly believes that making employees feel valued, rewarded and engaged in their work is good for growing a sustainable, strong economy. We are leading by example by not directly employing people on zero hours contracts and absolutely condemn the inappropriate use of them.”

“The Fair Work Convention, established last year, is also considering zero hours contracts in its role to reduce inequality and promote diversity, innovation and equality in the workplace while we grow our economy. Their final report will be published later this month.

“While employment law is reserved to the UK Government, we will continue to do everything we can to promote fair working practices and discourage the inappropriate use of zero hours contracts with the powers available to us.”

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<sup>1</sup> <https://news.gov.scot/news/scotland-improves-on-zero-hours-contracts>

The Scottish Government's clear position on this matter, and possibly the mood of the public here in Scotland, has led to some public bodies in Scotland (e.g. College) and some bodies that are largely funded by public monies (e.g. universities) to review and reduce their use of zero hours contracts.

One way in which the Scottish Government has encouraged this is by facilitating and promoting the "Scottish Business Pledge"<sup>2</sup> which promotes good employment practices and encourages no (or very limited) use of zero hours contracts. Several universities have signed the pledge which is to be welcomed.

National statistics from the ONS show that Scotland has the lowest proportion of people in employment on a zero hours contract of all the countries of the UK, and that it is falling unlike the rest of the UK<sup>3</sup>.

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<sup>2</sup> <https://scottishbusinesspledge.scot/>

<sup>3</sup> <https://news.gov.scot/news/scotland-improves-on-zero-hours-contracts>

## **SECTION 2: PREVIOUS EIS ZERO HOURS CONTRACTS SURVEY (2013)**

### **The EIS 2013 Zero Hours Contracts in Universities & Colleges Surveys**

In 2013, the EIS carried out a Zero Hours Contracts Survey (in the form of a FoI requests) of Universities. The survey set out to explore the amount of zero hours contracts use in Scottish Universities, and to scope the employments rights given by each University to their zero hours contract staff. All Universities eventually responded in full.

A similar survey was carried out in Scottish Colleges at the same time.

The main findings are set out below:

- There were 8401 zero hours contracts recorded in the Scottish University sector
- Women were statistically more likely to hold zero hours contracts than men,
- Most Universities had not (as of 01 August 2013) carried out Equality Impact Assessments into the use of zero hours contracts.
- Every HEI in Scotland used some form of zero hours contract – some HEI’s used thousands of zero hours contracts whilst a few made minimal use of zero hours contracts.
- Different Universities gave different rights and benefits to zero hours staff resulting in a range of practices across Scotland. Some Universities defined zero hours contract holders as “employees” and clearly sought to give zero hours contract holders the same rights as employees, albeit without any security of hours. Other Universities gave the minimal rights under law to their zero hours contracts and defined them as “workers”. These Universities did not pay occupational sick leave nor occupational paternity and maternity benefits.
- No University used “exclusivity clauses” within their zero hours contracts.
- No University had an intrinsic zero hours contract complaint/appeal process, and all seem to rely on grievance procedures.
- Most Universities applied their disciplinary policies to cover periods between work as well as during work.

To summarise these key findings, there were 8401 zero hours contracts recorded with all Universities using them in one form or another. Most Universities used them to provide work on a ‘no mutuality basis’ in mirroring regular employee terms & conditions as far as possible, the major exception around being obliged to provide work.

The EIS 2013 Zero Hours Contracts Survey in Colleges was similar to the one sent to Universities. Its findings were very similar their use. There were 1089 zero hours contracts recorded, with most colleges using them in one form or another.

## **SECTION 3: THE RESEARCH ELEMENT**

### **The EIS 2018 Zero Hours Contracts in Universities & Colleges Survey**

#### **(a) METHODOLOGY**

Freedom of Information requests were sent to all Scottish Universities and Colleges on 11 January 2018 seeking information on the scale of the use of zero hours contracts, the terms & conditions of their contracts, if and how the institution had reduced the number of zero hours contracts, and the terms & conditions of any replacement contracts based on an annualised hours model. A sample Fol request is attached as Appendix 1.

The first stage of the Fol gives a snapshot of the current situation in Colleges and Universities in Scotland at the moment with regards to the use of zero hours contracts i.e. a cross-sectional view. By aligning these questions to the 2013 Fol we are in a position to compare what has happened at individual institutions (and across each sector) since 2013, i.e. create a longitudinal view. If any institution used zero hours contracts, then key terms & conditions were surveyed. The key terms & conditions explored are set out below:

- Number of Zero Hours Contract (ZHC) holders according to ACAS definition – to ensure consistency in the use of the term zero hours contracts
- No of female ZHC holders – to explore potential sex discrimination
- Whether they are considered as employees or workers – to explore whether institutions were following a minimal statutory compliance (i.e. workers) standard or not (employees)
- Whether there is a central or departmental process for dealing with ZHC – to explore whether institutions were seeking consistency across them or giving managers discretion
- Whether they paid occupational sick pay or not? – to explore whether Institutions were following a minimal statutory compliance standard or not
- Whether they have paid leave or paid time off in lieu? – to explore whether Institutions were paying paid leave or paid payments in lieu of time off (which is unlawful)
- Whether they could access occupational pension? – to explore whether Institutions were following a minimal statutory compliance standard or not
- Whether they could appeal unfairness in allocating work? – to explore whether Institutions were following good practice by ensuring that zero hours contracts were allocated fairly
- Whether ZHC could crystallise into open ended contracts? - to explore whether Institutions were following good practice/prevention of less favourable terms regulations by ensuring that zero hours contracts crystallised into permanent contracts

The second part of the Fol effectively seeks information as to how they have reduced their use of zero hours contracts, if indeed they have.

The third section explores one type of contract that it is believed that some institutions have used to replace zero hours contracts – annualised hours contracts. The terms of conditions of any annualised contracts was also followed up – using the same questions as those for zero hours contracts. The purpose of this is to see whether the replacement contracts are truly better for workers than zero hours contracts.

## (b) RESULTS

### (ii) Results from Universities

**Table 1: Number of Zero Hours Contracts in Scottish Universities**

	<b>2018</b>	<b>2013</b>
EDINBURGH NAPIER UNIVERSITY	217	241
GLASGOW CALEDONIAN	0	57 <sup>4</sup>
GLASGOW SCHOOL OF ART	7	48
HERIOT WATT UNIVERSITY	0	5
QUEEN MARGARET UNIVERSITY	0	54
ROBERT GORDON UNIVERSITY	6	35
ROYAL CONSERVATOIRE OF SCOTLAND	0	101
SRUC	2	20
UNIVERSITY OF ABERDEEN	19	356
UNIVERSITY OF ABERTAY	5	308
UNIVERSITY OF DUNDEE	50	30
UNIVERSITY OF GLASGOW	136	715
UNIVERSITY OF EDINBURGH	0	3231
UNIVERSITY OF ST ANDREWS	0	1348
UNIVERSITY OF STIRLING	0	1000
UNIVERSITY OF STRATHCLYDE	0	233
UNIVERSITY OF THE HIGHLANDS & ISLANDS	6	11
UNIVERSITY OF THE WEST OF SCOTLAND	158	608
Total	<b>606</b>	<b>8401</b>

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<sup>4</sup> These were defined as “casual contract holders by GCU.



**Table 2: Number of Female Zero Hours Contract Holders in Scottish Universities**

	<b>Total Number of ZHC</b>	<b>No of Women</b>
EDINBURGH NAPIER UNIVERSITY	217	96
GLASGOW CALEDONIAN	0	0
GLASGOW SCHOOL OF ART	7	2
HERIOT WATT UNIVERSITY	0	0
QUEEN MARGARET UNIVERSITY	0	0
ROBERT GORDON UNIVERSITY	6	0
ROYAL CONSERVATOIRE OF SCOTLAND	0	0
SRUC	2	0
UNIVERSITY OF ABERDEEN	19	11
UNIVERSITY OF ABERTAY	5	3
UNIVERSITY OF DUNDEE	50	39
UNIVERSITY OF GLASGOW	136	84
UNIVERSITY OF EDINBURGH	0	0
UNIVERSITY OF ST ANDREWS	0	0
UNIVERSITY OF STIRLING	0	0
UNIVERSITY OF STRATHCLYDE	0	0
UNIVERSITY OF THE HIGHLANDS & ISLANDS	6	5
UNIVERSITY OF THE WEST OF SCOTLAND	158	85
<b>Total</b>	<b>606</b>	<b>325</b>

## **SUMMARY OF RESPONSES TO OTHER QUESTIONS WITHIN SURVEY**

Table 1 sets out the FoI responses to the number of zero hours contracts in place at each university in 2018.

The total number of zero hours contracts in place according to the FoI responses in early 2018 is 606, which is a huge reduction from the 8,401 contracts stated in a similar FOI survey carried out in 2013. This is a reduction of around 92%.

Table 2 sets out the number of women holding zero hours contracts in each university.

Of the 606 zero hours contracts in place in Scottish Universities according to the FoI responses, 325 of them are held by women, 53.8%. This figure has risen marginally since the 2013 EIS survey that had a 52.7% of zero hours contracts being held by women.

The 2018 finding supports the notion that women are more likely than men to hold zero hours contracts in universities, even after a 92% drop in their use. This finding also reflects the fact that women are more likely to hold part-time<sup>5</sup> or temporary posts than men and are paid less – this creating the gender pay gap.

### **Number of Universities that “Has the Institution made efforts to reduce the number of zero hours contracts in the last 5 years? If so, how?”**

The University of Edinburgh stated that it had introduced a “Guaranteed Hours Contract” which were a form of annualised hours contract to replace its “HTBN Contract” which had eliminated the zero hours contracts at the University.

The University of Stirling stated that it had introduced “Activity Agreements” at the University, but that they were not annualised hours contracts. Further investigatory work is required to explore this form of contract.

Queen Margaret University responded “We abolished the use of them in 2014, that was how we stopped using them.”

Only the University of the Highlands & Islands (UHI) stated that it had not made any effort to reduce the number zero hours contracts.

### **Terms & Conditions Applied to Zero Hours Contract Holders**

Responses indicated that 10 Universities currently use zero hours contracts, just over half of 19 surveyed.

Nine Universities stated that they defined zero hours contract holders as employees– i.e. giving T&Cs associated with employees, e.g. occupational sick pay. UWS stated that it defined zero hours contract holders as “workers” although it also stated that such these workers were paid occupational sick pay etc, i.e. enjoyed employee type T&Cs albeit without a guarantee of work.

The UHI<sup>6</sup> stated that its zero hours contract holders were “employees” but stated that it does not pay occupational sick pay and give other employee benefits. In other words, UHI treats its zero hours contracts as workers and does not give employee type T&Cs. This is a cause of concern and reflects the low-cost staffing model<sup>7</sup> in place at the UHI.

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<sup>5</sup>

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/howdothejobsmenandwomendoaffectthegenderpaygap/2017-10-06>

<sup>6</sup> The UHI is the only Scottish university that does not recognise trade unions for collective bargaining and has successfully ensured that staff have little input of effect on its staffing policies.

<sup>7</sup> UHI Executive Office employed lecturers are the lowest paid HE lecturers in Scotland, earning less than FE lecturers with equivalent service.

### **Use of Alternative Annualised Contracts to Zero Hours Contracts**

Nine Universities stated that they used annualised hours contracts, although one University's response may have conflated an annualised hours contract with fixed term contract. The use of this contract has risen significantly and has been used by the Universities that previously held high numbers of zero hours contracts – such as the Universities of Edinburgh & Glasgow.

### **Terms & Conditions Applied to Annualised Hours Contract Holders – Where They Exist**

All the Universities that responded that they used annualised hours contracts stated that they defined annualised hours contract holders as employees, and their responses showed that these staff were given all employee rights, e.g. occupational sick pay.

The Universities had no specified minimum of hours to their annualised contracts, with exception of the University of Aberdeen.

**(ii) Results from Colleges****Table 3: Number of Zero Hours Contracts in Scottish Colleges**

	<b>2018</b>	<b>2013</b>
Argyll College	6	N/A
Ayrshire College	58	6
Borders College	8	0
City of Glasgow College	267	0
Dumfries & Galloway College	8	30
Dundee & Angus Angus College Dundee College	0 See note 1 below	N/A
Edinburgh College Sighthill Campus "Milton Road/ Midlothian Campus" Granton Campus	0	41 15 0
Fife College	2	154
Forth Valley College	1	13
Glasgow Clyde College <sup>8</sup> Anniesland Cardonald Langside	0	15 73 48
Glasgow Kelvin College John Wheatley College North Glasgow College Stow College	0	15 0 0
Inverness College	112	29
Lewis Castle College	8	0
Moray College	56	133
Newbattle Abbey College	0	0
New College Lanarkshire Coatbridge College Cumbernauld College Motherwell College	0	30 23 10
NESCoI Aberdeen College Banff & Buchan College	0	0 39
North Highland College	2	N/A
Orkney College	33	22
Perth College	112	127
Sabhal Mor Ostaig	3	0
Shetland College	24	34
South Lanarkshire College	0	0
West College Scotland	0	182
West Highland College	3	N/A
West Lothian College	0	0
<b>Total</b>	<b>703</b>	<b>1039</b>

<sup>8</sup> Blank space refers to no response

Note 1: Dundee & Angus College made the following response:

“Dundee and Angus College employs some of its lecturers on a variable-hours basis. These are not “zero hours contracts”. Although the employment contract for this type of employment indicates no obligation on the College’s part to offer work, the purpose of this is to make clear that hours may vary in response to operational needs. If a lecturer’s hours were to be reduced to zero (and not as a result of planned timetabling, for example where specialist skills are employed in semester 1 each year but not semester 2), the College would recognise and honour its legal duties in respect of redundancy.” The lack of obligation on the college to offer work would suggest that these are in reality zero hours contracts.

**Table 4: Number of Female Zero Hours Contract Holders in Scottish Colleges**

	<b>Total</b>	<b>No of Women</b>
Argyll College	6	5
Ayrshire College	58	33
Borders College	8	0
City of Glasgow College	267	140
Dumfries & Galloway College	8	6
Dundee & Angus <sup>9</sup>	x	y
Edinburgh College	0	0
Fife College	2	0
Forth Valley College	1	1
Glasgow Clyde College	0	0
Glasgow Kelvin College	0	0
Inverness College	112	51
Lews Castle College	8	5
Moray College	56	40
Newbattle Abbey College	0	0
New College Lanarkshire	0	0
NESCol	0	0
North Highland College	2	2
Orkney College	33	22
Perth College	112	66
Sabhal Mor Ostaig	3	3
Shetland College	24	17
South Lanarkshire College	0	0
West College Scotland	0	0
West Highland College	3	Not Surveyed
West Lothian College	0	0
<b>Total</b>	<b>703</b>	<b>391</b>

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<sup>9</sup> The results from this FoI require further exploration.

## **SUMMARY OF RESPONSES TO OTHER QUESTIONS WITHIN SURVEY**

Table 3 sets out the FoI responses to the number of zero hours contracts in place at each college in 2018.

The total number of zero hours contracts in place according to the FoI responses in early 2018 is 703, which is a reduction from the 1,039 contracts stated in a similar FOI survey carried out in 2013.

Table 4 sets out the number of women holding zero hours contracts in each university.

Of the 703 zero hours contracts in place in Scottish colleges according to the FoI responses, 391 of them are held by women, 56.6%. This figure has reduced since the 2013 EIS survey that had a 60.6% of zero hours contracts being held by women.

The 2018 finding supports the notion that women are still more likely than men to hold zero hours contracts in Scottish Colleges. This finding also reflects the fact that women are more likely to hold part-time<sup>10</sup> or temporary posts than men and are paid less – this creating the gender pay gap.

### **Number of Colleges that “Has the Institution made efforts to reduce the number of zero hours contracts in the last 5 years? If so, how?”**

Nine colleges stated that they had reduce the number of zero hours contracts issued, whilst a few stated that no effort had been made. Several colleges provided answers that did not clearly answer the question.

### **Terms & Conditions Applied to Zero Hours Contract Holders – Where They Exist**

Responses indicated that 16 Colleges currently use zero hours contracts, whilst 8 stated they do not. Dundee & Angus College’s response stated that it did not but the description of the “variable hours contracts” with no obligation to offer work suggests that in actual fact it is a form of zero hours contract.

Twelve Colleges stated that they defined zero hours contract holders as employees, and 3 (Ayrshire, Orkney and West Highland Colleges) of them treated them as workers. Of these three colleges both Ayrshire and Orkney gave statutory sick pay whilst West Highland College does not to give occupational sick pay to zero hours contract holders.

North Highland College stated that it defined its zero hours contract holders as “employees” (as oppose to “workers”) but did not give these “employees” occupational sick pay. Both North Highland and West Highland Colleges are part of the University of the Highlands and Islands.

### **Use of Alternative Annualised Contracts to Zero Hours Contracts**

Seven Colleges stated that they used annualised hours contracts, whilst one stated that they were considering introducing annualised hours contracts. A few of these colleges stated they used fixed term contracts with specified hours. The conflation between fixed term contracts and annualised hours is due to the way in which the question<sup>11</sup> was framed. Annualised hours contracts are not usually fixed term contracts<sup>12</sup> but open-ended contracts.

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<sup>10</sup>

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/howdothejobsmenandwomendoaffectthegenderpaygap/2017-10-06>

<sup>11</sup> “Does the Institution use annualised hours contracts with academic staff, or any other form of contract that guarantees a specified number of hours for a specified period of time?”

<sup>12</sup> <http://www.acas.org.uk/index.aspx?articleid=4288>

<https://www.personneltoday.com/hr/annualised-hours-contracts-five-hr-steps/>

### **Terms & Conditions Applied to Annualised Hours Contract Holders – Where They Exist**

All 7 colleges that responded that they used annualised hours contracts stated that they defined annualised hours contract holders as employees, and their responses showed that these staff were given all employee rights, e.g. occupational sick pay.

Four of the 7 Colleges had a specified a minimum number of hours to their annualised contracts, of 2 or 3 hours per week. One College stated that they did not have minimum hours specified and one stated that 1 hour a week was the minimum contractual amount.



## **(c) Findings**

### **i) Universities**

A majority (10 out of 19) Universities currently use zero hours contracts. The only University with a high ratio of zero hours staff relative to the number of academic staff employed is Edinburgh Napier University. All other Universities that used zero hours contracts had fewer than a hundred such contract holders. In 2013, all Scottish Universities used zero hours contracts.

There has been a dramatic reduction in the use of zero hours contracts in the Scottish universities – down by around 92%. Some universities such as University of Edinburgh and St Andrews University have gone from thousands to zero – i.e. eliminated zero hours contracts.

According to the responses, women are still statistically more likely to hold zero hours contracts than men in Scottish Universities. This remains a cause for concern and adds to the gender pay gap within the sector. This may also be a sign of indirect discrimination against women workers.

Most Universities stated that they had not recently carried out Equality Impact Assessments into the use of zero hours contracts. This is a cause for concern – and Branch Secretaries will need to pursue this matter.

Nine of the ten Universities stated that they defined zero hours contract holders as employees, and eight of them treated them like employees – i.e. giving T&Cs associated with employees, e.g. occupational sick pay. The UHI<sup>13</sup> stated that its zero hours contract holders were “employees” but gave them the statutory minimum T&Cs for “workers” and therefore does not pay occupational sick pay and other employee benefits. The UWS stated they were “workers” but seems to give them employee types benefits (albeit without the guarantee of employment).

No University had an intrinsic zero hours contract complaint/appeal process, and all seem to rely on grievance procedures.

All Universities that responded that they used annualised hours contracts stated that they defined annualised hours contract holders as employees, and their responses showed that these staff were given all employee rights, e.g. occupational sick pay.

Only one of the universities that use annualised hours contracts has a minimum time specified – the University of Aberdeen. The other universities had a specified minimum of hours to their annualised contracts, which is a matter of concern.

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<sup>13</sup> The UHI is the only Scottish university that does not recognise trade unions for collective bargaining and has successfully ensured that staff have little input of effect on its staffing policies.

## ii) Colleges

Sixteen Colleges used zero hours contracts whilst eight stated that they did not. Two colleges have a high ratio of zero hours staff relative to the number of academic staff employed; City of Glasgow College and Inverness College. All other Colleges that used zero hours contracts had fewer than a hundred such contract holders. In 2013, prior to College Reorganisation there were 10 additional colleges - and thus the colleges have been grouped by FE region to help to identify a trend. Relative to 2013, three current Colleges have eliminated zero hours contracts relative to 2013 for themselves or their pre-cursor colleges – the biggest example being Edinburgh College.

Four colleges since 2013 have moved from no zero hours contracts to using zero hours contracts: Borders College, City of Glasgow College, Sabhal Mor Ostig and Lews Castle College. The City of Glasgow College now uses 267 such contracts out of a FTE staff of 803. These four colleges are going against the downward trend of the University sector, and the college sector as a whole.

There were 703 zero hours contracts recorded in the Scottish college sector in 2018, more than the combined University sector in Scotland. The number is down from 1039 in 2013. Some colleges have, in proportional terms made significant changes to their staffing profiles. The City of Glasgow College stands out in the survey as it moved from not using zero hours contracts in 2013, to being the largest user of zero hours contracts of any tertiary body in Scotland.

According to the responses, women were statistically more likely to hold zero hours contracts than men. Female zero hours contract holders held 391 of the 703 contracts. This information shows that women are more likely to hold zero hours contracts, and this may be a sign of indirect discrimination.

Most Colleges had not recently carried out Equality Impact Assessments into the use of zero hours contracts. This makes potential discrimination – especially indirect- more likely.

Twelve Colleges stated that they defined zero hours contract holders as employees, and 3 (Ayrshire, Orkney and West Highland Colleges) of them treated them as workers. Of these three colleges both Ayrshire and Orkney gave statutory sick pay whilst West Highland College does not to give occupational sick pay to zero hours contract holders.

There were differences in the ways in which different colleges applied their terms and conditions to colleges for example Orkney Is College defines zero hours contract holders as workers but gives them access to an occupational pension scheme whilst Shetland Is College defines them as employees but does not give access to an occupational scheme.

A few Colleges stated they had an appeal process to zero hours contract to appeal allocations of work. Further exploration is needed to ascertain whether these are intrinsic zero hours contract complaint/appeal process or simply grievance procedures. Whilst some Colleges stated that there was central control over allocating zero hours contracts, a number stated that it was devolved to line managers. This is a cause for concern as it creates the right circumstances for favouritism, and abuse, especially as most zero hours contract holders are women.

All 7 colleges that responded that they used annualised hours contracts stated that they defined annualised hours contract holders as employees, and their responses showed that these staff were given all employee rights, e.g. occupational sick pay.

Fife Colleges had a specified minimum of hours to their annualised contracts, of 4, 3 or 2 hours per week. One College stated that they did not have minimum hours specified and one stated that 1 hour a week was the minimum contract.

There may be some confusion in some Colleges' responses between an annualised hours contract and a fixed term contract with a specified number of hours to be taught per week – which is not an annual hours contract. At least one college made the point that their standard contract was an annualised hours contract of 860 hours per year.

## Conclusion

In both University and College Sectors there has been a significant reduction in the use of zero hours contracts. The reduction in the university sector has been so drastic that it now has fewer zero hours contract holders than the college sector according to these FoI responses. In some cases, Universities which were heavily geared to zero hours contracts have eliminated them. There has been some movement to annualised hours contracts but not enough to explain the drop in zero hour contracts. There seems to have been a significant move to fixed term contracts – sometimes defined by specified activity rather than specified time.

Most Colleges and Universities that use zero hours contracts define such holders as “employees” and use their discretion to give them employee type terms & condition – except for guaranteed hours. This arrangement is beyond the statutory minimum. A few Universities and Colleges give statutory minima terms as “workers” to zero hours contract holders, i.e. they apply the minimum requirements of the law. These colleges and university are disproportionately located in the Highlands and Islands – i.e. are part of the University of the Highlands and Islands. This is the only University without a trade union collectively representing staff interests.

The fact that a few Colleges and one University do not pay occupational sick pay is a disgrace within the 21st century and forces sick people to attend work. The fact that the college sector is a part of the public sector and the University sector is publicly funded reinforces this view. Collectively or politically these need to be addressed.

There has been an unexpected growth in zero hours contracts in some parts of the College sector, which is surprising since it is part of the public sector and the Scottish Government has such a clear policy against such contracts. It is also surprising since the college sector and the EIS have agreed at the NJNC that the national conditions of service for lecturers will not include zero hours contracts.

Causality cannot be shown between the Government’s clear policy against zero hours contracts and their reduction in the College and University sectors, although the author speculates that there must be a link. The fact that so many Universities have signed the Scottish Business Pledge is also a welcome development. The fact that Edinburgh Napier has signed this pledge and yet makes extensive and disproportionate use of zero hours contracts requires further exploration.

It is however clear that zero hours contracts are not necessary to run a large modern university or college. The success of the Institutions that have no zero hours contracts after using them extensively in 2013 is important. It is also clear that that it is the largest and most prestigious Universities that have led the way in this regard in the University sector. Results from the College sector also show that large and small colleges do not need to use zero hours contracts to thrive.

The lack of Equality Impact Assessments around the use of zero hours contracts is inexplicable – as the risks to women from the use of zero hours contracts is well known. Especially since many employers state that individual managers make decisions related to zero hours contract renewal etc. This is a recipe for favouritism, bullying and abuse that has been shown by recent BBC Survey<sup>14</sup>. Some Colleges stated they had appeal mechanisms which could mitigate such events – and further exploration is required of these. Most colleges and universities stated that grievance procedures were in place to deal with such appeals. It is not understood how a person who held a zero hours contract last academic year and is told in August/September this academic year that they have no hours (i.e. no work) can apply the grievance procedure as if they are a member of staff.

There is clear evidence in this survey and the 2013 Survey that women in both the University and College sectors are more likely to hold zero hours contracts. This may be a sign of indirect discrimination to women – ie. when there's a practice, policy or rule which applies to everyone in the same way, but it has a worse effect on some people than others.

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<sup>14</sup> <https://www.personneltoday.com/hr/sexual-harassment-work-survey-reveals-employee-attitudes/>

There are also a large number of surveys and reports<sup>15</sup> that suggest that zero hours workers are more susceptible to harassment as they are afraid to raise complaints as this may lead to less work in the future. Zero hours contracts would seem to place women in a disproportionately vulnerable position with regards to harassment to men which is a further concern. One way would be for all Colleges and Universities that use zero hours contracts to review each individuals' contractual position each year – with a view to moving them onto another contract.

A further issue is the gender pay gap, which is not going to be closed if women are more likely than men to be carry out casual and precarious work underpinned by zero hours contracts.

There has been less of an increase in the use of annualised hours than expected, and it seems that many zero hours contract holders have moved to fixed term contracts. The latter trend is a good sign since such contract holders have employment rights and their contracts become open-ended after four years. The EIS has long argued that fixed term contracts for staff (including the large numbers of PhD students employed as tutors etc) are more suitable and equitable than zero hours contracts.

The no-minimum period of time in most colleges and universities policies on annualised hours is problematic – since a holding contract of an hour a week could be issued. This is an area that requires further campaigning.

Some Institutions stated that they used variable hours contracts and that these were not zero hours contracts. This seems difficult to believe and requires further exploration.

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[http://www.heraldscotland.com/news/15986715.Workers\\_on\\_zero\\_hour\\_contracts\\_more\\_vulnerable\\_to\\_harassment/](http://www.heraldscotland.com/news/15986715.Workers_on_zero_hour_contracts_more_vulnerable_to_harassment/)

## **Section 4: Brief Literature Search of Legal Developments for Zero Hours Contracts**

Zero hours contracts are not new, and there is case law regarding casual contracts or pool staff going back over 50 years in the UK.

MacKenna J. stated "in *Ready Mixed Concrete (South East) Ltd v. Minister of Pension and National Insurance* [1968] where his lordship considered that there were three conditions which must be fulfilled for a contract of service to exist:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

In expanding the point (i) MacKenna J stated "...there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill." In the judgment of Stephenson LJ in *Nethermere (St Neots) Ltd v. Gardiner* [1984] ICR 612 his lordship expanded the theory of MacKenna J further by stating that:

"There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt it can be reduced any lower than in the sentences just quoted [referring to those above]."

This approach was confirmed by a case of two tour guides that worked on a casual basis for National Power and sought employee status. The House of Lords *Carmichael v. National Power Plc* [1999] denied this status on the basis that there was no irreducible minimum of obligation on each side – and without a mutuality of obligation then there could be no employment relationship and thus the two tour guides were not employees.

The House of Lords made two other important points – firstly during the engagements they were employees, and secondly the Court needed to go beyond the contracts. The latter point was helpful to the employer in this case.

*Autoclenz Ltd V Belcher & Others* Supreme Court 2011 was a win for a group of individuals that Autoclenz claimed were working for them as self-employed contractors with substitution clauses in their contract. The Supreme Court upheld the Tribunal decision that they were employees despite the contracts in place since practices established were different. The judgement stated "the elaborate protestations in the contractual documents that the men were self-employed, when examined, bore no practical relation to the reality of the relationship".

Another case was *Pulse Healthcare v Carewatch Care Services* EAT (2013) takes thing further and set out a precedent to unmask bogus contractual arrangement. In this case the documents and contracts of the case were not as important as the actual working practices – in other words, whilst the agreed contracts may have stated that the care givers were zero hours contracts, in reality they were employees. The case also disregarded any gaps of employment (following *Prater* EAT) and that the Claimants were employed under a global "umbrella" contract instead of a series of short-term contracts.

In 2017 several other high-profile cases were also decided in the claimants' favour, with zero hours contract holders or self-employed contract holders employed at Uber, CitySprint and Pimlico Plumbers all separately found to be employees. The courts were consistently finding that contractual arrangements – often elaborate with substitution clauses – did not reflect the reality of the situations. Furthermore, the degree of control over the contract holders were akin to those over employees.

According to XpertHR several other cases have also been settled in “worker/employees” favour – e.g. Amazon Drivers with UKXD. (<http://www.xperthr.co.uk/news/amazon-drivers-false-self-employment-dispute-settled/162813/#loginSectionContainer> )

Because of these and other cases the employment law on zero hours contracts are being driven by judges in common law rather than by Parliament through legislation. Earlier this month the UK Government published its plans following the Taylor Review for dealing with the Gig economy and they were poorly received<sup>16</sup> as they do not go any meaningful distance to protect zero contract workers. It seems that the Courts will remain the best avenue to address bogus contracts to establish employee rights.

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<sup>16</sup> <https://www.personneltoday.com/hr/five-things-buried-good-work-plan-consultations/>