



EIS-FELA Report on the FoI Requests on Zero Hours Contracts issued to FE Colleges in Scotland in August 2013

EIS –FELA Report- Zero Hours Contracts Fol Responses

Scottish HEIs and FE Colleges are issuing increasing numbers of zero hours contracts. This paper explores the characteristics of zero hours contracts and analyses the responses made to the EIS Fol on the use of zero hours contracts in the College sector.

Section 1: Zero Hours Contracts

There is no legal or agreed definition for a zero hours contract.

The EIS used the following definition in its recent Fol request to HEIs and FEIs: *“A contract or arrangement that the Institution has with an individual in which it may offer work to that individual although there is no guarantee to offer any work.”*

ACAS has defined zero hours contracts as:

“The term 'zero hours' is not defined in legislation, but is generally understood to be an employment contract between an employer and a worker, which means the employer is not obliged to provide the worker with any minimum working hours, and the worker is not obliged to accept any of the hours offered.”

Individuals in work fall into three general categories:

1. Employees
2. Workers
3. Self-employed (aka freelancers, contractors)

Employees

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.

Workers

Under s.230(3)(b) of the Employment Rights Act 1996, workers are individuals who have a contract "whereby an individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of that contract that of a client or customer of any profession or business undertaking carried on by the individual". It is important to note that the contract between a worker and the institution (or "employer") is not a contract of employment (i.e. a contract of service).

Workers have fewer employment rights than employees, and for example cannot raise unfair dismissal claims nor have the legal right to occupational sick, paternity or maternity pay.

Zero Hours Contract holders: Fewer rights than employees

The ACAS website states that zero hours contract holders are usually "workers". As such, zero hours contract holders do not enjoy the same statutory employment rights as employees. Workers and zero hours contract holders therefore have no right to raise unfair dismissal claims, fewer paid holidays (the statutory minimum rather than the contractual amount enjoyed by part time and permanent staff), fewer maternity rights, fewer paternity rights, limited pension accessibility and no right to occupational sick pay.

These disadvantages are in addition to the lack of job security, no guaranteed income, limited workplace training and promotion prospects for zero hours contract holders.

Contractual Confusion – eg variable hours contracts

There is evidence that many employment contracts for casual staff or part time staff are written in such a way that does not make it clear that the contract is actually a zero hours contract – and that it is possible that no work may be offered. This has led to some cases within the EIS of lecturers that have previously believed that they were part-time or variable hours contracts learning that they actually hold zero hours contracts.

Mutuality of Obligation

All employment contracts have a mutuality of obligation between the parties and may simply be described as the requirement for the employer to provide work and for the employee to accept that work. Zero hours contracts are designed to ensure that no mutuality of obligation exists, or will develop, between the worker and the “employer”, thus preventing the worker from having an expectation of work or gaining full employment rights (eg protection against unfair dismissal etc).

Section 2: Findings of the EIS-FELA FoI Request to FE Colleges on Zero Hours Contracts

The findings of the FoI request¹ are set out below:

1. (i) How many individuals does the Institution have holding a zero hours contract on 01 August 2013?
**12 Colleges stated they did not use zero hours contracts as defined by the EIS definition.
18 Colleges stated that they did use zero hours contracts as defined by the EIS definition.**
Total number of individuals on zero hours contracts: 1089
- (ii) How many of the individuals holding zero hours contracts are women?
Total Women of the 1089 individuals on zhc : 660
60.6% of zhc are women.
2. Does the Institution process all zero hours staff centrally or do Departments arrange and process some zero hours contracts?
Almost all Colleges centrally process, even if local demand. WCS only exception.
3. Do the Institution’s policies and procedures allow different parts of the Institution to deal with zero hours contracts in different ways?
All Colleges stated that it was College policy to deal with zhc in the same way, although there were TUPE related factors in two colleges that created differences across the college.
4. (i) (a) Does your institution define zero hours contract staff as employees or workers whilst carrying out work at the Institution?
**One College defined zhc as Workers (Shetland College).
Two defined employees and workers according to post.
One stated "not defined"
Fourteen (14) stated that they were "employees" or "treated as employees".**

¹ The EIS sent the FoI request out on 23 August 2013 and it asked for responses as of 01 August 2013. The 01 August 2013 was a date of a number of college mergers, as was 01 November 2013. The EIS FoI therefore included 30 colleges as of 01 August 2013 – some of these colleges have subsequently merged.

- (b) Does your institution define zero hours staff as employees, workers or neither in between work assignments at the Institution?

**10 Colleges as employees.
5 as "neither"
1 as "employees and neither"
1 as "employees and workers"
1 as "not defined"**

- (ii) (a) Do the Institution's disciplinary and grievance policies apply to zero hours contract holders?

Yes to all except one Campus in Edinburgh College (Granton). Shetland College, Yes.

- (b) If so, do these policies apply whilst working or in between assignments or both?

**9 Colleges responded whilst working only,
9 Colleges responded both.**

- (iii) Does the Institution have a procedure to notify zero hours staff when they are unlikely or not to be offered work in the future?

Only 6 of the 18 Colleges using ZHC stated that they do have whole College policies.

- (iv) Does the Institution offer redundancy consultation or compensation to zero hours contract holders when it knows that no further work will be offered or when no work has been offered for a set period?

**12 (of the 18) Colleges responded that redundancy consultation and redundancy is possible - with qualifying periods.
6 Colleges responded no, including one answer being understood to mean no.**

- (v) Does the Institution offer the same pension to zero hours contract holders as permanent staff doing like work?

**Two colleges stated that ZHC staff did not have access to the same pensions as other staff doing like work.
Other colleges said yes, within the eligibility rules of the pension schemes.**

- (vi) Does your institution pay occupational sick pay to zero hours contract holders?

Five Colleges said that ZHC do not pay occupational sick pay to some or all of their ZHC staff; Ayrshire College, Dundee College, North Highland College, Forth Valley College, Edinburgh College - Granton Campus,

- (vii) Does your Institution pay occupational maternity pay or paternity pay to zero hours contract holders?

Four Colleges said that they did not give occupational paternity and maternity pay for ZHC staff; Dundee College, Shetland College, North Highland College, Edinburgh College - Granton Campus.

- (viii) Has the Institution carried out an Equality Impact Assessment into the use of zero hours contracts at the Institution?

Only four Colleges in Scotland stated that they had carried out an Equality Impact Assessment into zero hours contracts.

5. (a) Does your institution give payment for holidays or does it give paid leave to a zero hours contract holder?

**11 Colleges paid in lieu of holidays (rolled up holiday pay).
7 Colleges either give holiday pay at holiday time or paid leave.**

- (b) If your institution gives payment for holiday – on what calculation does it do so? Is the basis equivalent to other staff carrying out like work?

Almost all Colleges gave the same holidays/holiday pay as other staff doing like work.

Two Colleges pay the statutory minimum for holidays - 28 days , Dundee College & Ayrshire College. Coatbridge College did not give a clear response.

6. Does the Institution have an Institution wide procedure for deciding which individual zero hours contract holder is awarded hours or work?

Only 3 Colleges had institution wide appointment policy.

7. Do some or all of the Institution zero hours contracts to commit holders to accepting any work offered? *(Note it is probable that your Institution has a range of zero hours contracts, some of which may require acceptance of hours offered whilst others may not (such as external examiners etc.)*

No college has a contractual clause stating that work must be accepted - an exclusivity clause. Some Fol responses gave the impression that a few colleges may not understand the meaning of the term, "mutuality of obligation".

8. Does the Institution have a procedure for giving each zero hours contract holder a plan of expected work?

Eight Colleges stated that they did share a schedule of work with ZHC staff in advance of the work, or provided a schedule of planned work with the contract.

9. Is there a minimum amount of notice of any work given by the Institution to zero hours staff?

Only two (2) Colleges had minimum periods of time before awarding work.

10. Is there an appeal mechanism for a zero hours contract holder to appeal any potential unfairness or discrimination in the way that such work is allocated?

Only one College stated that it had an appeal mechanism for ZHC staff to appeal the allocation of work; Dumfries & Galloway College.

Four colleges stated that there was no appeal mechanism.

Other Colleges stated that ZHC staff could rely on their Grievance Procedures.

11. (i) Does the Institution use zero hours contract holders to carry out routine work?

Five Colleges stated that ZHC carried out routine work.

Four colleges stated that they did not understand the term "routine work"; Cumbernauld College, Edinburgh College (Sighthill Campus) and Coatbridge College. Inverness College gave a vague response).

Nine Colleges stated that the work was not routine.

- (ii) If so, does the Institution have a procedure in place to determine whether a zero hours contract or a fixed term contract is used (or an open ended fractional contract)?

Three Colleges have a procedure in place to determine whether a ZHC or a FT is used, of the 18 Colleges that use zhc.

12. Does the Institution have a procedure for allowing a zero hours contract holder relationship to crystallise into employee status (i.e. with a mutuality of obligation aka open ended employment contract)?

Six (6) Colleges have a policy or mechanism to allow zhc staff to become temporary or permanent employees.

13. Do academic staff on zero hours contracts receive payment for preparation, marking or assessment purposes?

All Colleges (except Dundee that stated N/A) stated that academic staff were paid additionally for preparation, marking and assessment.

14. Do academic staff on zero hours contracts have Institutional staff email addresses?

Almost all Colleges responded yes.

15. Do academic staff on zero hours contracts have full access to the library, academic journals and other Institutional resources?

All Colleges offered college resources to ZHC staff, although one stated "not as a matter of course" (Edinburgh College, Granton Campus).

16. Do students that attend lectures given by zero hours staff receive support such as meetings in "office hours" of the type offered by permanent academic staff doing like work?

Ten (10) Colleges stated that zero hours contract staff provide student support such as "office hours". Two (2) Colleges stated that ZHC did not include academic staff.

Key Findings

The key findings of the EIS survey include:

- Women were statistically more likely to hold zero hours contracts than men (60.6% of ZHC holders were identified as women by Colleges), suggesting that the use of zero hours contracts is potentially discriminatory. Every College that used zero hours contracts identified a majority of holders as women.
- Most Colleges had not (as of 01 August 2013) carried out Equality Impact Assessments into the use of zero hours contracts.
- Most Colleges in Scotland use some form of zero hours contract, 10 of the thirty questioned. Two of the 18 Colleges stated that they did not issue zero hours contracts to academic/teaching staff.
- Different Colleges give different rights and benefits to zero hours staff resulting in a range of practices across Scotland. Most Colleges define zero hours contract holders as "employees" and clearly seek to give zero hours contract holders the same rights as employees albeit without any security of hours by giving benefits which include occupational sick pay, occupational maternity pay, equitable pension etc.
- A few Colleges give minimal rights under law to their zero hours contract holders and define them as "workers". These Colleges do not pay occupational sick leave nor occupational paternity and maternity benefits. The EIS believes that these Colleges are seeking to avoid their responsibilities as employers to these zero hours staff- many of whom may have worked for the College for years. (Examples: Ayrshire College, Dundee College, North Highland College, Forth Valley College, Edinburgh College – Granton Campus.
- Most Colleges stated that they give payment in lieu of holidays (i.e. rolled up holiday pay) – with a number also offering paid leave as an option. The EIS believes that this practice is unlawful as it means that zero hours contract holders do not receive 28 days (pro rata) of paid time off and Employers should only pay staff in lieu of holidays upon termination of their contracts. The EIS also believes that Employers must pay their employees at the time they take their leave. (<https://www.gov.uk/holiday-entitlement-rights/holiday-pay-the-basics>).
- Most Colleges give zero hours contract staff the same holiday entitlement (albeit as payment in lieu) as permanent employees – the highest being 30%. Some Colleges give zero hours contract

holders the statutory minimum 28 days pro rata (8.3% (i.e. the minimum stated by the Working Time Regulations). This means that some zero hours staff are receiving between 8.3% and 30% holiday pay – depending on which College they work at.

- No College uses “exclusivity clauses” within their zero hours contracts – which is good news from the EIS Fol request.
- Only one College has a zero hours contract complaint/appeal process and all seem to rely on grievance procedures.
- Most Colleges apply their disciplinary policies to cover periods between work as well as during work. This could lead to a zero hours contract holder being disciplined in September for breaching a Colleges policy despite not working since the preceding October.
- It is not only the large Colleges that use large numbers of zero hours contracts – proportionally speaking Moray College had for example 133 zhc holders which is the proportion of zero hours contract staff within the FE sector.
- There is no common definition of a zero hours contract within the Scottish FE sector, in fact some Colleges seem to believe that a zero hours contract needs to include an obligation to accept offered work.

Discussion: Zero Hours Contracts in Scottish Colleges

The wide use of zero hours contracts across the FE sector is a significant cause of concern to the EIS, which is committed to abolishing their use in the Scottish tertiary sector.

Most Scottish Colleges have given zero hours contract holders some of the same employment rights as their permanent employees – i.e. the same maternity, paternity, pension, holidays and occupational sick pay. In other words, they have given Zero Hours Contract holders employment rights that go beyond those required to be given to “workers” – as zero hours contract holders typically are. This is a voluntary act by the colleges concerned, which does not mitigate the injustices of these contracts. In voluntarily giving zero hours contract staff most “employee” rights does not get over the fact that they do not have any job or financial security – i.e. the College is not obliged to offer any future work.

The EIS Fol reveals the wide range of terms and conditions given to all zero hours staff in different Scottish Colleges – and in some cases (due to TUPE) – even within a single College. The amount of holiday leave can vary from 8.3% to 30%, occupational sick pay is not paid by five colleges and there is poorer pension provision identified by two Colleges.

The disadvantages for individuals holding zero hours contracts are well known. Employers often cite the need for flexibility to justify their use of zero hours contracts, although in reality many suspect a desire to reduce staffing costs to be the true driving force.

There are clear disadvantages to Colleges using zero hours contracts, such as high zero hours contract staff turnover, ZHC staff have little contact with the HEI’s quality assurance mechanisms or the development of the materials that they teach – leading to variable quality of delivery and a range of teaching practices, limited support opportunities to students, perceptions of bullying and favouritism and lack of medium staff planning as zhc appointments are typically confirmed shortly before the work is required.

It is also clear that a significant amount of routine and planned work is carried out by zero hours contract staff within colleges – despite four colleges claiming not to understand what “routine” college work was.

It is an unsustainable argument that zero hours staff are required by colleges for operational flexibility, since 12 colleges do not use zero hours contracts at all according to their responses in the EIS FoI. A further two Colleges did not use zero hours contracts for academic/teaching staff. There is a suspicion within the EIS that zero hours contract staff are often used as cheap and disposable labour.

Conclusion

The results of the EIS FOI reinforce the EIS-FELA view that zero-hours contracts have no place in Scotland's Colleges. The EIS opposes the use of zero hours contracts as they create an unbalanced or one sided relationship between the organisation and the individual contract holder who may be exploited by the organisation. Zero hours contracts rob individuals of full and fair employment rights and prevent them from gaining employment stability or financial security

Zero hours contracts should be replaced by fractional open ended contracts and, in limited cases, by fixed term contracts for unexpected short term staffing requirements. EIS-FELA Branches should continue to press on this issue at each individual College.