

# **BACKGROUND PAPER FOR CONSULTATION EXERCISE ON THE OPERATION OF ZERO HOURS' CONTRACTS IN JERSEY**

## **Introduction**

On 12 May 2021 the States Assembly agreed (in Proposition P.32/2021) to ask the Jersey Employment Forum to carry out, in 2022, a review of the operation of zero hours' contracts in Jersey, and to make recommendations to the Social Security Minister on possible changes to the Employment Law. Any such recommendations would be designed to strengthen and clarify the rights and responsibilities of employees and employers in Jersey.

The Employment Forum has embarked on its review, and, as part of it, intends to hold a wide-ranging consultation exercise to canvass the views of individuals and business and trade union organisations. This background paper highlights some of the issues the Forum would like individuals and organisations to address.

The paper is not an exhaustive list, and the Forum welcomes views on issue to do with labour protections more widely in the Employment Law, as part of its review.

## **Some background**

Proposition P.32/2021 set out several areas for the Employment Forum to consider as part of its review. These include:

- The definition of a zero hours' contract
- The prevention of employers requiring employees on a zero hours' contract to always be available for work
- A ban on exclusivity clauses
- A right for employees on zero hours' contracts, who in practice work regular hours, to switch to a contract which reflects the normal hours worked
- A right to reasonable notice of a work schedule
- A right to compensation for shift cancellation without reasonable notice
- Other measures to be identified as part of the review

In Jersey, unlike the UK, all those who work are classed as "employees", who are entitled to the same level of employment rights and protections, regardless of the type of contract they are employed on. By contrast, the UK government distinguishes between "employees" and "workers" with each group enjoying different levels of employment protection. In general, in the UK, those employed on a zero hours' contract are likely to be classed as "workers" and enjoy fewer employment protections.

The Employment Forum recognises, however, that the enhanced status that employees on a zero hours' contract have in Jersey – as compared to the UK – does not mean that they are not more vulnerable to abuse and exploitation.

## **Difficulties which may be faced by those employed on a zero hours' contract**

The following are some examples of difficulties which a zero hours' contract employee may face:

- Absence of a guaranteed income may cause difficulties in obtaining accommodation or loans, or prevent effective budgeting and financial planning

- An employee on a zero hours' contract dependent on an employer providing them with work may place them in a precarious position and feeling vulnerable to unfair treatment or unreasonable demands
- The possibility of being called into work at short notice may make it difficult to undertake work for another employer. While an employee may have the right to refuse an offer of work, they may worry that, if they do so, it could lead to less work being offered in the future

## **Some issues which the Employment Forum has identified for consideration as part of the consultation exercise**

### **1) A ban on exclusivity clauses**

As part of its agreement to Proposition P.32/2021, the States Assembly voted to ban exclusivity clauses in zero hours' contracts. The effect of an exclusivity clause is to prevent an employee from being employed by another employer, regardless of whether the first employer has any work to offer to the employee.

On 27<sup>th</sup> May 2022, an amendment to the Employment Law came into force. The amendment makes an exclusivity clause in a zero hours' contract unenforceable. This means that if an employer tries to restrict an employee on a zero hours' contract from taking work elsewhere, the employee has a legal right to challenge that restriction.

However, this is not a perfect solution to the issue of exclusivity clauses. An unscrupulous employer could simply replace such a clause with a provision that the employee must be available for work, for example, for a minimum of one hour a week or a month. This is an anomaly that has been identified in other jurisdictions which have legislated to ban exclusivity clauses.

The Employment Forum would be grateful for views about how such an anomaly might be tackled in Jersey law.

### **2) What constitutes a "zero hours contract"?**

Other jurisdictions have focused on the fact that work offered by an employer may be variable or unpredictable. Is it therefore at all helpful to refer to a "zero hours' contract"? Should the approach be instead to ensure that a contract of employment contains essential elements, backed up by employment rights and tailored to the type of employment and its regularity (or otherwise)?

The definition of a zero hours' contract is provided for in the amendment to the Employment Law, and reflects the definition contained in the Control of Housing and Work Order 2013. Is there more that could or needs to be done to strengthen or clarify the current definition?

### **3) Availability of the employee for work**

One of the key themes around availability is the precarious nature of certain types of employment and the pressure on an employee to be available for work, for fear that future work may not be offered.

The Forum is interested in understanding whether protections can be put in place which give the employee a right not to be put at a disadvantage if they refuse work at a given time. In other words, should there be no obligation on an employee to be available for work under the terms of a zero hours' contract, on the basis that an employer is not bound to offer any hours to the employee?

Other issues that may be covered by the requirement for the employee to be available were identified by the States Assembly in P.32/2021. Some are covered to a greater or lesser extent by the current provisions of the Employment Law:

- **A right for zero hours employees, who in practice work regular hours, to switch to a contract which reflect the actual hours worked**

The Employment Law already allows an employee to request a variation to their working pattern, and an employer cannot refuse, save in certain specific circumstances. In future, should an employee have the right, not just to request a variation, but be entitled to one, if they work “standard” hours over a qualifying period?

Should this entitlement not be restricted just to those employees on a zero hours’ contract, but be a more general right to seek a variation which recognises the actual employment hours over a qualifying period?

A key question which the Forum would like to understand is whether zero hours’ contracts are being used inappropriately in Jersey where employees already have a regular working pattern.

- **A right to reasonable notice of a work schedule**

By their very nature, zero hours’ contracts may typically be used for “short notice” work requirements. Should there be a requirement on the part of the employer to provide a minimum period of notice before the employee undertakes work which may fall outside the terms of their contract?

- **A right to compensation for shift cancellation or curtailment without reasonable notice**

Employees on a zero hours’ contract may be particularly vulnerable to having their shifts cancelled or shortened with very little, or without, notice.

In such a situation, should employees be entitled to a payment in lieu? Should any new legislation focus on alleviating the lack of certainty about the work that would be available to an employee in advance, and not just on whether this is a zero hours’ contract issue?

- **Other measures to be identified as part of the review**

The Forum wishes to take advantage of the scope offered by this part of Proposition P.32/2021 to look more widely at employment protections in Jersey.

What other areas of the Employment Law do respondents consider may need strengthening in terms of variable or insecure types of employment?

What other Employment Law measures might be taken to enhance employee protections and provide for better or fairer treatment for those employees in variable hours of employment?

## **Conclusion**

This background paper covers just some of the issues on which the Forum would be grateful for respondents’ views. The accompanying consultation survey will help the Forum to make informed decisions about eventual recommendations to the Social Security Minister.