Business Ethics Briefing

Briefing

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# Fairness in the Workplace: staffing and employment contracts

**This Briefing is the second in the mini-series related to issues of fairness in the workplace. It considers staffing arrangements and employment contracts. Specifically, it looks at the potential ethical implications of the observed 'casualisation' of the workplace. It also provides some examples of good practice which organisations have put in place to ensure consistency in their treatment of all employees.**

According to their annual reports, many organisations consider their employees to be their greatest assets. **Ensuring fairness in the workplace is a proven way of building trust and motivating the workforce**. Safeguarding this relationship is a key component in helping to build a reputation for conducting business in an ethical manner.

Whilst many organisations have well established ways in which they are ensuring fairness for full-time, direct employees, there are a growing number of atypical employment contracts, where the same principles are not necessarily being applied.

## Changes in Working Arrangements

Globally there has recently been a rise in the number of people employed on part-time or atypical contracts. This is especially prominent in the UK where the availability of temporary and part-time work has contributed to labour market flexibility, and has helped keep the unemployment rate down during the recession.

Employers are becoming attracted to more flexible types of employment contracts because of the ability they give to meet increasing variations in demand. These flexible contracts can also be considered beneficial by employees, some of whom may wish to balance working with other commitments such as caring responsibilities or education.[1] However, some view such flexible employment practices as an arrangement which favours the employer over the employee. In extreme instances, the view could be taken that the arrangement is in place to flout regulations applicable to full-time, permanent workers, such as training provision, career enhancement opportunities, or holiday pay. There is also evidence that workers on such contracts may not benefit from basic workplace rights such as Statutory Sick Pay and job protection rights.[2]

Another risk is related to the discrimination of groups of employees who are more frequently employed in flexible forms of work, such as women and younger workers. Research shows that workers aged under 30 are heavily employed on temporary contracts.[3] Whereas on one hand this could offer young employees valuable experience and an introduction to permanent forms of employment, temporary working is not always what is required, and '*under-employment*' can also create issues. Younger employees would often prefer more secure forms of work which are more likely to provide access to training and workplace benefits.[4]

It is important for both employers and employees to be aware of the possible ethical risks connected with atypical forms of work contract, in order to use them in a way that serves the interests of both parties in a mutually beneficial way. Ethical issues and examples of good practice in the use of agency staff, part-time staff, and those on zero-hours contracts are considered below. In addition, safeguards for employees' rights under TUPE (explained on page 4) are also covered.

## Agency contracts

Employment of staff on agency contracts is one type of flexible working arrangement which is becoming increasingly prominent, especially in certain sectors. An

1. **See Working Time Solutions 2013 –** *Employers need flexible workforces but at what cost?*
2. **See TUC2014** – *The Decent Jobs Deficit*.
3. *ibid* fn[2].
4. **See gov.uk 2014** - *Flexible Contracts: behind the Headlines.*

agency worker can be identified as someone who has an agreement with an agency to work for another employer, generally for a temporary period of time. Employees on such contracts may commonly work alongside direct employees, yet they may not be treated in a consistent manner.

There are some instances in which employers do need to treat agency workers differently to direct employees to ensure there is not a co-employment risk. For instance, agency workers will often have a different appraisal system and salary review timelines from direct employees who may be doing the same job.

A report by the International Confederation of Private Employment Services (CIETT), one of Europe's largest employment agencies, revealed that the number of agency workers in the UK doubled between 1996 and 2006. In addition, it also revealed that globally, Britain has the highest agency work penetration rate at 4.5% of the work force.[5] The use of staff on agency contracts varies substantially, and can result in complex employment arrangements. Regardless, fairness and mutual benefit are required.

Research has highlighted a link between this form of work and low levels of training and lower job satisfaction compared to permanent staff.[6] A study by the Advisory, Conciliation and Arbitration Service (ACAS) supports the view that many agency workers often work very long hours, receive little training or career development, and experience increased perceptions of uncertainty.[7]

However, in some situations, agency contracts may also favour those on such contracts. This has been observed in the NHS where some nurses and doctors think that they are better off on agency contracts. In order to compensate for inconveniencies, such as shift allocation on very short notice, "*super premium*" rates can be charged by agencies.[8] Therefore, agency contracts usually carry increased costs for organisations in the form of agency fees. Again, this is recognised as an issue in the NHS, to the extent that Monitor, the NHS financial regulator, has observed that NHS Trusts are now facing "*unprecedented financial pressure*" as a result of their reliance on agency staff.[9]

In the UK, the *Agency Workers Regulations 2010* provide some guidelines on the matter.[10] These regulations give effect to *the EU Temporary and Agency Work Directive*, and are intended to prevent the discrimination of people employed as agency workers, supplied both by temporary work agencies and via intermediaries. They state that upon completion of a 12 week qualifying period, such workers should not receive less favourable treatment in pay and working time than their full-time colleagues who do the same work. However, some argue that the UK is failing to properly implement the European Directive.

Examples of good practice in the use of agency staff have been shown by Imperial College London and Aviva, amongst others. After recognising the issue, **Imperial College London** issued specific guidance for managers on how to engage with agency workers.[11] The guidance aims to ensure that managers have adequate information about this particular contractual form so that they can offer fair and mutually beneficial employment conditions. It also includes anti-avoidance provisions to guarantee that agency work assignments will not be used to avoid regulations or employees' rights to equal treatment. Another example is that of insurance company, **Aviva**. Who acknowledged the problem of discrimination against contract staff, and pledged to improve the wages of its subcontractors, including cleaners and caterers, by paying its entire workforce at least a living wage, putting temporary workers on the same minimum rate as permanent staff.[12]

## Part-time contracts

Part-time working arrangements are becoming increasingly popular. Recent estimates suggest that there are more than 8 million part-time workers in the UK[13], and that the number of part-time roles advertised

5. **See International Confederation of Private Employment (CIETT) 2014** – *Economic Report*.
6. **See University of Leeds 2010** – *Agency Working in the UK: What Do We Know?* Centre for Employment Relations, Innovation and Change, Policy Report n.2.
7. **See ACAS 2006** – *The experience of ethnic minority workers in the hotel and catering industry: Routes to support and advice on workplace problems*.
8. **See The Telegraph 2015** – *A&E doctors paid up to £3,200 a shift, in spiralling crisis* (24/03/2015).
9. **See The Guardian 2014** – *NHS spending on agency nurses soars past £5.5bn* (01/11/2014).
10. **See gov.uk 2010** – *The Agency Workers Regulations 2010*.
11. **See Imperial College London 2012** – *Engaging Agency Workers – Guidance for Managers*.
12. For more information see **IBE Business Ethics Briefing 42**: Fairness in the Workplace – pay.

increased by 44% over the last year.[14] Statistics also show that part-time arrangements are especially popular amongst women who account for almost 75% of those in part-time employment in the UK.[15]

However, a Unison survey of over 2,500 employees showed that part-time workers often feel that they are treated unfairly or marginalised. The research revealed that they are also likely to be used as flexible and cheap labour to fill gaps after staff have been made or full-time posts have been made redundant.[16]

One of the most controversial aspects related to part-time employment contracts is the unfair treatment of part-time staff when compared to full-time employees. Examples of unfair practices can be found in terms and conditions of employment, selection for redundancy, dismissal, access to training, or promotion as well as other benefits.

Discriminatory practices against part-time employees are also prevented by legislation. The *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000* prohibit an employer treating part-time workers less favourably in their contractual terms and conditions than comparable full-time workers, unless different treatment can be justified on objective grounds.[17] These regulations are the UK transcription of an EU Directive (*97/81/EC*), and form part of the European Union's programme to combat discrimination against atypical workers. Under these regulations, part-time workers have the same entitlement to maternity/parental leave, annual leave, pensions, perks and sick pay as full-time employees on a pro rata basis. Furthermore, they should not be excluded from training simply because they work part-time. Despite this regulation, discrimination against the part-time workforce still occurs.

## Zero-hours contracts

Zero-hour contracts are a specific type of part-time contract which is a current issue of contention in the UK. They are at the extreme end of part-time employment, and therefore can carry great risk of unfairness in the way they are operated. The use of zero-hours contracts in themselves is not, however, necessarily unfair. It is the abuse, rather than the use, of these types of contracts which raises the issues of unfairness. This can cause reputational damage to employers. On the one hand they are considered to be a viable solution to flexible working arrangements, which "*play a key role in delivering positive labour market outcomes*".[18] On the other, they have a reputation for being used by employers to exploit employees.

Zero-hours contracts are generally understood to be employment contracts between an employer and a worker whereby the employer is not obliged to provide the worker with any minimum number of working hours and the worker is not obliged to accept any of the hours offered.[19] The use of these contracts is widespread and the Office for National Statistics (ONS) estimates that nearly half of all big companies in the UK, including **Sports Direct**, **JD Wetherspoon** and **Buckingham Palace**, use more than 1.4million such contracts.[20]

The use of '*exclusivity clauses*' is considered to be particularly controversial. An exclusivity clause is a clause in the contract which prevents the employee from working elsewhere, whilst also providing no guarantee of any paid hours. Such clauses are considered to be exploitative, and consequently, have been banned by a provision in the *Small Business, Enterprise and Employment Act*.[21]

Yet, exclusivity does not have to be written in to the contract for employees to feel '*trapped*' by them. ACAS says that it receives around 70 calls a week from employees on zero-hour contracts. Many of these callers cite the feeling or perception of '*effective*

13. **See The Guardian 2014** – *Are you entitled to work part-time, and what are your rights if you do?*
14. **See HR Magazine 2014** – *Part-time vacancies up 44% in a year*.
15. According to the **Office for National Statistics** *Statistical Bulletin – UK Labour Market*, in March 2015, there were 6.15 million women in part-time employment in the UK, and 2.15 million men. 6.15 million of the total 8.3 million equates to slightly more than 74%.
16. **See The Guardian 2014 –** *Overworked and underpaid: the truth about part-time workers in councils*.
17. **See gov.uk 2000** – *The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*.
18. **See CBI 2014** – *Zero Hours Contracts*.
19. **See ACAS** – *Zero Hours Contracts*.
20. **See BBC 2014** – *ONS: UK firms use 1.4m zero-hour contracts*.
21. **See gov.uk 2015** – *Small Business, Enterprise and Employment Act 2015*, paragraph 153 – Exclusivity terms unenforceable in zero hours contracts.

*exclusivity*' as a major concern.[22] Therefore, employers should ensure that they do not send out messages which imply such exclusivity.

The risks related to zero-hours contracts are effectively summed up by Sir Brendan Barber, Chairman of ACAS, who said: "*Our analysis reveals that many workers on zero-hours contracts experience a deep sense of unfairness and mistrust that go beyond the use of exclusivity clauses. A lot of workers on zero-hours contracts are afraid of looking for work elsewhere, turning down hours, or questioning their employment rights in case their work is withdrawn or reduced. This deep rooted 'effective exclusivity' can be very damaging to trust and to the employment relationship. There also appeared to be a lack of transparency on the terms of their contractual arrangements.*"[23]

Legal firm **Norton Rose Fulbright** offer guidance on zero-hour contracts, suggesting that employers should "*actively monitor their need for zero-hours contracts*". They also suggest that "*it is important for employers who take on workers on zero-hours contracts to be aware of the reality of their working situations*".[24] This guidance is shown in Box 1.

**Box 1** *Guidance on zero-hours contracts*

1. "*If there is mutuality of obligation between an employer and their zero-hours contract workers, then these workers may actually be employees and as such have additional employment rights. Regardless of what is written in the contract itself, case law indicates that where a worker is employed on a zero-hours contract and provided with regular work which is regularly accepted, there is significant possibility that the contract will be treated as one of employment. Employers need to be alive to this and if they believe that their zero-hours contract workers are more likely to be employees, it would be sensible employ them as such, with the correct employment contract in place, and their employment rights recognised.*"
2. "*Workers on zero-hours contracts fall within the definition of "time workers" under the National Minimum Wage Regulations 1999. The National Minimum Wage must be paid to workers for all hours they are required to be at or near work and available for work even if they are not actually given any work during this time. Employers should ensure therefore that workers who are required to be on 'standby' or 'on-call' at or near their place of work are adequately compensated during this time.*"
3. Employers should ensure that the system for allocating hours is clear and fair and to avoid systems that could be viewed as discriminatory.

## TUPE

A final area of consideration is TUPE. This refers to the "*Transfer of Undertakings (Protection of Employment) Regulations 2006*[25]" as amended in 2014.[26] TUPE is aimed at safeguarding employees' rights in the event of a transfer to a new employer, following the change of ownership of the organisation, or through subcontracting. Employees from the newly-acquired business or contract will transfer automatically to the incoming employer maintaining the same terms and conditions of employment, with the exception of occupational pensions.

Statistics show there are a substantial number of such contracts. A 2013 government impact assessment revealed that "*there are between 26,500 and 48,000 TUPE transfers taking place each year*". This means that there are likely to be between 1.42 million and 2.11 million affected employees per year.[27] Although this is an instrument put in place to protect employees' rights, improper application of the regulations may create issues of fairness by not delivering all the intended benefits.[28]

Therefore, training the staff in charge of TUPE application properly is a necessary step to make sure that the terms and conditions of employment are fully understood and consistent across contracts. In this way, the employer will be able to engage with employees and seek to avoid negative consequences such as perceived discrimination, decreases in quality of work and morale, or reduced team performance.

22. **See The Guardian 2014** – *Zero-hours contracts breed mistrust and feelings of insecurity, says Acas*.
23. *ibid* fn [22]
24. **See Norton Rose Fulbright 2013** – *Employment Highlights - Zero-hours contracts*.
25. **See gov.uk 2006** – *The Transfer of Undertakings (Protection of Employment) Regulations 2006*.
26. **See gov.uk 2014** – *The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014*.
27. **See Department for Business, Innovation & Skills (BIS) 2013** – *Transfer of Undertakings (Protection of Employment) Regulations 2006: consultation on proposed changes to the Regulations*.
28. **See The Guardian 2012** – *TUPE needs better leadership and more effective sanctions*.

## Summary

Contractual arrangements described in this briefing all have the potential to raise issues of fairness.

This has been exaggerated by changing working patterns in which atypical contracts are becoming more common.

Previously, employment conditions tended to be homogeneous amongst all employees. Now a workplace might contain many employees all with different contracts. Consequently, differences could apply to two employees performing the same job.

Where there is a lack of equality of opportunity, the perception of unfair treatment, inconsistency and double-standards will be enhanced.

All employees in similar roles, regardless of the type of contract they are on, should be given equal opportunities.

Whatever kind of contract is in operation, employees are entitled to expect a degree of protection and expectation as to the number of hours they will work. Sickness and holiday pay should be available on a pro rata basis, either through the agency or the employer.

Employers need to be aware that zero-hours contracts may have serious implications for their business. For larger organisations, media reports of the abuse of the workforce through zero-hours contracts may cause reputational damage. For smaller and medium sized organisations, whilst the stories may not make national newspapers, the impact is likely to be similar as a result of local word of mouth. There is also an implication for company culture. An employee on a zero-hours contract may have zero interest in the company. If an organisation does not treat its employees, with fairness and respect, whatever their contract, they will have little interest in doing business ethically.

An employer acting ethically will want to treat all its employees fairly. Employees in return will want to 'do the right thing', creating a positive cycle of employee engagement.

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