

XpertHR Weekly Podcast

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Susan Dennehy: Hello and welcome to XpertHR Weekly with me, Susan Dennehy. Zero hours contracts have been around for a long time but their use has attracted a lot of attention over the last few years. According to figures released from the Office of National Statistics, their use has become increasingly prevalent. Opinion is divided: good for business because of the flexibility that they offer or exploitative of workers? There have been some very recent changes introduced. It's not all altruism. The government is concerned about the monopoly of labour by some employers and the need to increase job opportunities, as well as concern for workers with no guarantee of hours.

I am joined today by senior employment law editor, Clio Springer, who is going to talk us through zero hours contracts and the recent changes. Welcome back to XpertHR Weekly, Clio.

Clio Springer: Thank you, Sue.

Susan Dennehy: You're going to tell us what those changes are but first, zero hours contracts are quite difficult to define, aren't they?
[0:01:00.0]

Clio Springer: Well that's right and traditionally there's no legal definition of zero hours contracts and the term 'zero hours contract' and 'casual contract' could be used interchangeably as well.

Susan Dennehy: It is very easy to confuse the two. You said traditionally there's no legal definition. What did you mean by that?
[0:01:14.9]

Clio Springer: Well until recently there was no definition, or no legal definition. However, there are now some new provisions about exclusivity clauses and for these purposes there is a definition of zero hours contracts, which has been added to the Employment Rights Act. That legal definition relates to provisions on exclusivity, so it doesn't necessarily extend beyond that.

- Susan Dennehy: So 'exclusivity clauses' – that's a term that we've heard bandied around for a while now. What exactly are they? [0:01:39.4]
- Clio Springer: Well they're effectively clauses that prevent a zero hours worker from working under another contract at the same time.
- Susan Dennehy: Okay. So there is a definition of zero hours contracts for exclusivity clauses. Can you give us, in a nutshell, the definition? And the definition is crucial here, isn't it? [0:01:55.1]
- Clio Springer: Well that's right, and it's defined as a contract under which an undertaking to do or perform work or services is conditional on the employer making work or services available, but where the availability of work or services is not certain. And I think that would conform with most people's understanding of the zero hours contract. So you work where work is available, but that availability is uncertain.
- Susan Dennehy: So we now have a statutory definition of zero hours contract, albeit as you say, just for the purposes of the new provisions. We'll come back to the new provisions in a bit, but can you tell us a bit more in general terms about zero hours contracts and the distinction with casual contracts? [0:02:31.0]
- Clio Springer: The terms 'casual' and 'zero hours' don't give special legal status to workers or define their employment rights and they're typically used to describe an arrangement whereby workers are not guaranteed a fixed number of hours and are paid only for the hours that they actually work.
- Susan Dennehy: And I think it's fair to say it's not always clear-cut, is it? What is the main difference between them, then? [0:02:50.1]
- Clio Springer: Well 'casual' and 'zero hours' are terms that are often used interchangeably and there might not be much to distinguish them in practical terms. However, the term 'zero hours contract' does tend to be used to describe a contract where the individual is obliged to accept work that the employer offers, whereas there's usually no such obligation under a casual contract and the worker can turn down the work.
- Susan Dennehy: And you mentioned pay there. Workers are paid only for the hours they actually work under the zero hours contract? [0:03:14.7]
- Clio Springer: Well this is one of the benefits for the employer of using this type of contract, is it's only going to be paying workers for the work that they actually do, as well as some holiday

entitlement of course, as these workers are covered by the Working Time Provisions.

- Susan Dennehy: And I want to just pause there. That's important to remember, isn't it, the Working Time Regulations, and the Working Time Regulations do apply, and that will include holiday, rest breaks and everything that goes with that. [0:03:36.3]
- Clio Springer: That's right. As long as they're workers or employees, and I should point out also that they're entitled to the national minimum wage.
- Susan Dennehy: So you only pay for hours worked and that's a big advantage for employers where the work is unpredictable and may enable the employer to be quite flexible and only pay for the work to be done when necessary. That's a big advantage, isn't it? [0:03:52.8]
- Clio Springer: Well that's right and these types of contract tend to be used in certain sectors that are affected by seasonal demands, such as agriculture. And they're also used quite a bit in the care sector.
- Susan Dennehy: And you can see how they could be useful for small, fledgling businesses who might not employ someone unless they could have that sort of flexibility. Are there any disadvantages for employers? [0:04:11.0]
- Clio Springer: Well one disadvantage is that there is quite a lot of uncertainty about the employment status of workers under zero hours contracts and casual contracts and this ambiguity can get employers into difficulty and make it difficult to decide what to do if, for example, they want to end the arrangement either because there's not enough work or because of a conduct or capability issue.
- Susan Dennehy: And that really is the big problem with zero hours contracts, the uncertainty around their nature generally. Can you explain in a bit more detail why that may be a problem for employers and why that might take the attractiveness out of their use? [0:04:44.0]
- Clio Springer: Well with regular employees you have systems and procedures in place for dealing with various issues, to accept that they are employees with employment rights. With zero hours contract workers and casual workers, because of the supposed flexibility, some employers tend to take the view that these workers don't have employment rights and might then terminate an agreement without going through the procedures that they would normally go through with their

regular employees. And if the casual worker objects, they might challenge this and argue that the employment rights do apply.

Susan Dennehy: To claim employment protection rights, they do need to be an employee under the Employment Rights Act, so someone who works upon a very ad hoc basis, they won't be an employee will they? [0:05:21.2]

Clio Springer: Well they might not but if in the event of the termination, for example, that's challenged, an employment tribunal might find that the tests for employment status are satisfied.

Susan Dennehy: So these tests are things like the employer having control over how the work is done and there being mutuality of obligation – that's the obligation for the employer to provide work and the employee to accept work. Presumably mutuality of obligation is the sticking point with zero hours contracts. If there's no mutuality, won't the individual fail the test of being an employee and therefore unable to claim things like unfair dismissal and redundancy rights? [0:05:52.1]

Clio Springer: Well that's right and in many cases that will be so. But the tribunal will be looking at the circumstances, what's been formally agreed, and behind that, what's actually happening in practice.

Susan Dennehy: And can you remind us what some of those circumstances you mentioned are? [0:06:04.4]

Clio Springer: So for example, if it finds that the worker has, over a period, accepted all the work that's been offered, or the individual is obliged to accept the work offered, a mutuality of obligation might be established. But it's worth bearing in mind that there's no minimum amount of work that needs to be offered for there to be mutuality.

Susan Dennehy: Assuming that they can establish employment status and mutuality is key here, the worker then would be entitled (if they were deemed to be an employee) to other rights – maternity rights and family-friendly rights – and the employer might find itself liable for a very costly unfair dismissal claim, for instance. [0:06:37.6]

Clio Springer: Well that's right and I should also say that employment status might be established under an overarching or umbrella contract, which means that there's a contractual framework in place, even when the individual is not provided with work.

- Susan Dennehy: Can you tell us a bit more about what employers can do to avoid the ambiguity? [0:06:52.2]
- Clio Springer: Well they can either bite the bullet and treat their casual and zero hours contract workers as they would their more regular employees and comply with all the usual requirements, so giving them a Section 1 statement of terms and conditions, recognising on-going employment rights and following proper procedures if terminating.
- Susan Dennehy: But this can cause a problem, can't it, if you acknowledge employment rights in one respect? [0:07:11.4]
- Clio Springer: Well yes, there's a bit of a Catch-22. So if, for example, you give the person a Section 1 statement of terms and conditions, this might indicate or imply that you're acknowledging employment status, which would mean that then, of course, you have to do that for everything else.
- Susan Dennehy: And that's a really important point, isn't it? You can't pick and choose the employment rights that you acknowledge. [0:07:28.5]
- Clio Springer: Well that's right.
- Susan Dennehy: Section 1 statement could be a factor indicating employment, especially if the employer complies with other employment obligations that you would have to for other employees, such as following the disciplinary procedure. But I suppose if you don't acknowledge employment status but the individual is subsequently able to demonstrate it, then you've gone wrong from the very beginning and could potentially be liable for previous breaches of employment rights. You're not expecting it and that could be quite costly.
- Clio Springer: And in many ways it may make sense just to acknowledge those rights from the start to avoid those problems later and make the situation less ambiguous.
- Susan Dennehy: But if you don't want to do this, is there any way you can avoid the worker acquiring employment rights? [0:08:07.0]
- Clio Springer: Well there's no guarantee but what may help is making sure that the working pattern is not regular, so it really is casual and that your casual and zero hours workers genuinely are not obliged to carry out work.
- Susan Dennehy: And what about putting it in writing? [0:08:19.1]

- Clio Springer: Well if you state there's no obligation on either side that's likely to help, as long as that's really what's happening, of course.
- Susan Dennehy: And we know the situation with sham agreements and the tribunal's willingness to look at the reality of the employment relationship, not just what the contract is called.
- Let's move on now to the developments around exclusivity clauses that you mentioned earlier. What's changed?
[0:08:39.4]
- Clio Springer: Well this is something that started with the coalition government and as you said, zero hours contracts had been in the news quite a lot. Their use had been criticised as being unfairly weighted against workers and last summer the then government stated its intention to ban exclusivity clauses in zero hours contracts, meaning clauses that prevent zero hours workers working for someone else. There have been a couple of consultations about zero hours contracts and the relevant provisions are now in the Small Business, Enterprise and Employment Act 2015, which became an Act just before parliament was dissolved before the General Election.
- Susan Dennehy: So despite the change of government, the current government is still committed to banning exclusivity clauses?
[0:09:15.1]
- Clio Springer: Yes. Dealing with exclusivity and zero hours contracts was a commitment included in their manifesto.
- Susan Dennehy: So what's happened? What's the latest? [0:09:22.3]
- Clio Springer: Well as I said, the Small Business, Enterprise and Employment Act was passed a few weeks' ago but the relevant provisions hadn't been brought into force into that point.
- Susan Dennehy: But they have now, haven't they? [0:09:31.1]
- Clio Springer: Yes. Provisions in the act rendering exclusivity clauses unenforceable came into force on 26th May.
- Susan Dennehy: And how will the ban on exclusivity clauses work? [0:09:39.7]
- Clio Springer: In basic terms, the new act added new clauses into the Employment Rights Act and says that any provision in a zero hours contract that prohibits a worker from working under another contract or prohibits a worker from doing so without the employer's consent cannot be enforced against the worker.

- Susan Dennehy: So it's an outright ban, then. And this is where the new definition of 'zero hours contract' you mentioned earlier comes in. [0:10:00.6]
- Clio Springer: Well that's right. It's a contract under which an undertaking to do or perform work or services is conditional on the employer making work or services available, but where the availability of work or services is not certain. And as I said earlier, effectively where work is available but that availability isn't definite. An employer is deemed to have made work or services available if it requests or requires the worker to do that work. And it's worth flagging up that there's no minimum notice necessary when offering work. It would still fall within the definition of zero hours contracts for these purposes.
- Susan Dennehy: And I know you're going to tell us about how the ban works, and it is just a ban, isn't it? There are no penalties on employers? [0:10:37.2]
- Clio Springer: Well that's right. At the moment it is just a ban. There aren't any consequences for employers.
- Susan Dennehy: Okay, well that's all very well. We know the former government feared that employers would be able to get around a ban, for instance introducing one-hour contracts. Just having provision in an act that says something is unenforceable, practically what is the effect of the ban going to be, in your view? [0:10:56.0]
- Clio Springer: Well that's a good question. There needs to be some way of giving the new provision some bite. The new act inserted another clause into the Employment Rights Act, giving the Secretary of State power to make regulations to support the ban on exclusivity clauses.
- Susan Dennehy: Okay, so there's scope to do more. Has there been any progress in this area? [0:11:11.4]
- Clio Springer: Well there are some proposals for draft regulations that, among other things, will include a right not to suffer a detriment for carrying out work under another contract and the right to go to an employment tribunal and claim compensation if you do suffer a detriment. But at this point nothing's been finalised, so it's really a case of keeping an eye out for developments on this.
- Susan Dennehy: And the zero hours contract ban, it will effect vulnerable workers. It's not really intended to catch – or it's not intended at all to catch – consultancy agreements, which are usually highly paid directors with more bargaining power. But what do

you think? Will provisions catch consultancy agreements where there's no guarantee of hours of work? [0:11:48.0]

Clio Springer: Well there are further proposals in the draft regulations that I mentioned. These will qualify the prohibition on exclusivity clauses so that it will apply only to contracts where the worker is not guaranteed a certain level of income. Unless the rate of pay for each hour worked under the contract is at least a certain amount, that certain amount is currently suggested at £20.

Susan Dennehy: And it's important to be clear though, these are just the proposals and it'll be one that'll be very interesting to watch.

Clio Springer: Well we need to keep an eye out for further developments, that's right.

Susan Dennehy: Okay. Thanks very much, Clio.

Clio Springer: Thank you.

Susan Dennehy: For more information on zero hours contracts, which we've been discussing here today, you can go to XpertHR and we have a 'how to' on zero hours contracts and casual contracts. That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. We're back again next Friday but until then, it's goodbye from us.