



# **EIS Report in the Use of Zero Hours Contracts in Scottish Universities**

## EIS –ULA Report- Zero Hours Contracts FoI Responses

There is anecdotal evidence that Scottish Universities<sup>1</sup> are issuing increasing numbers of zero hours contracts. This Report explores the characteristics of zero hours contracts and analyses the responses made to the EIS FoI(S)A on the use of zero hours contracts in the Scottish University sector in August 2013.

### 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 FoI 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."*

The EIS has asked Universities Scotland and the Scottish Government to explore to common definition of zero hours contracts.

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.

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<sup>1</sup> Universities include all HEIs for the purposes of this report – including SRUC, RSC and GSA.

## **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-ULA FoI Request to Scottish Universities on Zero Hours Contracts

The questions sent out in the FoI request<sup>2</sup> are set out below:

1. (i) How many individuals does the Institution have holding a zero hours contract on 01 August 2013?

**8,461**

- (ii) How many of the individuals holding zero hours contracts are women?

**Total Women 4466 (53%)**

**13 HEIs had women holding more than 50% of their zero hours contracts - only 5 HEIs had less than 50%. It is clear that this data suggests that zero hours contract holders are more likely to be women in the majority of HEIs, which may suggest indirect sex discrimination in the use of zero hours contracts.**

2. Does the Institution process all zero hours staff centrally or do Departments arrange and process some zero hours contracts?

**In general, Universities stated that the decision to appoint zero hours staff was devolved to Departments but followed the same University wide procedures.**

3. Do the Institution's policies and procedures allow different parts of the Institution to deal with zero hours contracts in different ways?

**Universities responded to state that they did not allow different parts of their Institutions to deal with zero hours contracts in different ways.**

4. (i) (a) Does your institution define zero hours contract staff as employees or workers whilst carrying out work at the Institution?

**12 Universities classified zero hours staff as employees and 5 classified them as workers. 1 University stated that it "did not hold this information."**

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

**8 Universities classified zero hours contracts as employees between assignments, 2 as workers, 4 as neither and three HEIs were unable to respond to this question.**

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

**16 Universities stated that disciplinary and grievance policies did apply to zero hours contract holders, 2 stated that they did not.**

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

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<sup>2</sup> The EIS sent the FoI request out on 13 August 2013

**12 Universities stated that employment policies are applicable whilst zero hours contract holders were not working in between assignments. 4 said the policies did not apply in between assignments.**

- (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?

**Universities responses were generally evenly split between; yes, no and it was devolved to the department that the zero hours contract holder worked at.**

- (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 Universities stated that they did offer redundancy consultation or compensation to zero hours contract holders, 5 stated that they did not.**

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

**All Universities bar two responded yes. UHI stated no and QMU did not answer the question.**

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

**11 Universities stated that they did pay occupational sick pay.**

**6 Universities responded stating that they did not; University of St Andrews, University of Strathclyde, University of Stirling, UHI, Glasgow Caledonian University and the University of Dundee. QMU did not respond to this question.**

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

**11 Universities responded to state that they did pay occupational paternity and maternity pay to zero hours contract holders. 6 Universities stated that they did not. One responded it was not applicable – despite having “casual staff” that met the EIS definition of a zero hours contract.**

**(The EIS assumes the eligibility conditions referred to by some HEIs are the same criteria as apply to non - zero hours contract staff.)**

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

**13 Universities stated that they had not carried out an Equality Impact Assessment on the use of zero hours contracts, 3 said yes and 2 stated “not applicable”.**

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

**All Universities stated that they pay in lieu of holidays, although two Universities stated it offered pay in lieu or paid holidays (i.e. both).**

- (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?

**The amount of ratio of holiday pay varied in the Universities' responses from 8.3% to 21.5%.**

**Around 8.3% is the statutory minimum as set out by the Working Time Regulations, whilst 21.5% is equivalent to other staff at Universities.**

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

**Only a few Universities responded that they had Institution wide procedures.**

7. Do some or all of the Institution zero hours contracts 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.)*

**Only the University of Dundee required a specific group of zero hours contract holders to accept work if it was offered.**

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

**5 HEIs responded to stated that they did have a procedure for giving a zero hours contract holder a plan of expected work – although one University linked this to the "Activity Plan".**

**The balance of Universities responded by saying that they expected individual departments (at which the zero hours contract holder worked) to provide zero hours contract holders with a plan of expected work.**

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

**Only 1 HEI gave a guaranteed minimum notice of work - University of Dundee.**

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?

**3 HEIs do not have any mechanism in place for staff to appeal zero hours work.**

**13 HEIs identify the grievance procedure as one zero hours staff should use to challenge any aspect of their zero hours contracts.**

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

**10 Universities stated yes, although one made it clear that this did not refer to academic posts.**

**5 Universities said no, and one University did not seem to be sure.**

**The University of St Andrews stated that it did not understand what the EIS meant by "routine work".**

- (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)?

**A range of responses were given; some responded 'no', others that they had an annual review of contract, payroll monitoring hours worked with a threshold for review or a review by the contract holder's departmental.**

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)?

**2 Universities responded to say that they had such a procedure, 3 other Universities stated that the zero hours contract holders had become open ended contract holders.**

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

**All Universities bar two stated that zero hours staff receive payment for preparation and marking.**

**One stated that it did not pay for preparation, marking or assessment but stated that "however the hourly rate paid to zero hours staff is greater". One University stated that it did not use zero hours contracts to deliver academic work.**

14. Do academic staff on zero hours contracts receive annual appraisal and performance management targets as permanent academic staff doing like work?

**7 Universities responded that zero hours staff did not receive appraisal. The balance of the responses stated yes or referred to departmental appraisal or performance targets.**

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

**All Universities bar one stated yes.**

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

**All Universities that use zero hours contracts for academics responded yes.**

**The University of St Andrews stated that it did not have academics on zero hours staff, however it stated that student tutorials were undertaken by zero hours contract holders.**

17. 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?

**All bar five Universities used zero hours staff to provide support to students. Four Universities stated that they did not use zero hours staff for this purpose and 1 University stated that it did not hold this information (Glasgow Caledonian University)**

## Key Findings

The key findings of the EIS survey include:

- Women were statistically more likely to hold zero hours contracts than men, suggesting that the use of zero hours contracts is potentially discriminatory. Thirteen of the eighteen HEIs had more than 50% of zero hours contract holders recorded as female, and across the whole sector zero hours contract holders were 5% more likely to be female than male.
- 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 uses some form of zero hours contract – some HEI's use thousands of zero hours contracts whilst a few make minimal use of zero hours contracts. (University of Edinburgh 3231 to Heriot Watt University 5).
- Different Universities give different rights and benefits to zero hours staff resulting in a range of practices across Scotland. Some Universities 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 – which mitigates some of the inequities of zero hours contracts (eg. University of Edinburgh), by giving benefits including occupational sick pay, maternity pay, pension etc.
- Other Universities give the minimal rights under law to their zero hours contract holders and define them as "workers". These Universities do not pay occupational sick leave nor occupational paternity and maternity benefits. The EIS believes that these Universities are seeking to avoid their responsibilities as employers to these zero hours staff- many of whom may have worked for the University for years. (Examples: Universities of St Andrews, Strathclyde & Stirling).
- All Universities stated that they give payment in lieu of holidays (i.e. rolled up holiday pay) – with a small number also offering paid leave as an option. The EIS believes that this practice may be 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>). It is interesting that the EIS FE Colleges FoI identified that colleges do not generally pay holiday pay in lieu of holidays.
- Most Universities give zero hours contract staff the same holiday entitlement (albeit as payment in lieu) as permanent employees – the highest being 21.5%. Some Universities give zero hours contract holders the statutory minimum – 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 21.5% holiday pay – depending on which University they work at.
- No University generally uses "exclusivity clauses" within their zero hours contracts – which is a nugget of good news from the EIS FoI request.
- No University has a zero hours contract complaint/appeal process and all seem to rely on grievance procedures.
- Most Universities 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 University policy despite not working since the preceding October.

- It is not only the large Universities that use large numbers of zero hours contracts – proportionally speaking the University of Stirling had the highest proportion of zero hours contract staff – 75% followed by St Andrews University with 61%. (The University of St Andrews stated that "at least 95%" of their zero hours staff (according to the EIS definition) were students of the University).
- There is no common definition of a zero hours contract within the Scottish HE sector, in fact some Universities seem to have very narrow definitions of zero hours staff. This prevents transparency and accountability – and had the EIS used the University of St Andrews' definition of a zero hours contract then there would be no zero hours contract holders in the Scottish HE sector.

## Discussion Zero Hours Contracts in Scottish Universities

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

Most Scottish Universities have given zero hours contract holders 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 Universities 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 University is not obliged to offer any future work.

The EIS FoI reveals the wide range of terms and conditions given to all zero hours staff in different Scottish Universities. The amount of holiday pay can vary from 8.3% to 21%, occupational sick pay is not paid by five Universities and there is poorer pension provision identified at a small number of Universities.

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 the EIS suspects that a desire to reduce staffing costs to be a significant driving force.

There are also disadvantages to Universities using zero hours contracts, such as high zero hours contract staff turnover, zero hours contract 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 zero hours contract staff 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 Universities.

It is an unsustainable argument that zero hours staff must be used by Universities to ensure operational flexibility, since there is varying use of zero hours contracts across Universities. Some Universities seem to depend heavily on zero hours staff – including for delivering lectures and tutorials to students. Other Universities, such as Heriot Watt and Dundee seem to make very limited use of zero hours contract staff – and none for lecturing and delivering tutorials.

There is a suspicion within the EIS that zero hours contract staff are often used as cheaper and disposable labour.

## Conclusion

The results of the EIS FOI reinforce the EIS-ULA view that zero-hours contracts have no place in Scotland's Universities. 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-ULA Branches should continue to press on this issue at each individual University/HEI.

## Appendix 1

Copy of press release on this zero hours FoI 04 November 2013

### **"EIS Calls for the Abolition of Zero Hours Contracts in HE Sector**

The EIS has identified a number of serious concerns regarding the widespread use of so-called 'Zero-Hours' contracts within the Higher Education Sector in Scotland. The EIS recently carried out what it believes to be the most detailed Freedom of Information (Scotland) request on zero hours contracts in the Scottish HE sector and has been shocked by its findings.

The EIS findings illustrate the irregular and wide variation in the way that all Scottish Universities use 'zero hours contracts.' The survey highlights that all HE institutions in Scotland do use zero-hours contracts to a greater or lesser extent.

The results of the EIS survey also identify the Universities that give zero hours contract holders as few employment rights as legally possible – and the Universities that give more employment rights.

In the worst examples, the EIS findings highlight a number of serious issues, including potential sex discrimination against women in the use of zero hours contracts (since the majority of zero hours contract holders are women), no occupational sick pay, no occupational maternity and paternity pay, limited pensions, and significantly less annual leave than permanent employees.

Furthermore every Scottish University gave payment in lieu of holidays (rolled up holiday pay) rather than paid time off, a practice that the EIS believes is unlawful since Employers should pay their employees at the time they take their leave.

Commenting on the survey findings, EIS General Secretary Larry Flanagan said, "The results of the EIS FOI reinforce our view that zero-hours contracts have no place in Scotland's Higher Education Institutions. 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."

The EIS-ULA President Dr Nick McKerrell said "These findings illustrate the invidious nature of zero hours contracts and will make us redouble our efforts to eliminate them from the Scottish Higher Education sector. 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."

"There is no justification in having a two tier workforce in which a significant number of staff are denied stability, security and sick pay. This would create further division in an already embattled sector."

The EIS, together with the other HE trade unions included zero hours contracts as part of the 2013-14 Pay Claim. The UK University Employers Association (UCEA) has stated that zero hours contracts can only be looked if the trade unions accept a 1% pay offer. The UK University Employers Association has rejected a recent EIS request to look at zero hours contracts independently of the 1% pay offer.

The EIS will be raising zero hours contracts in Universities, as part of the 2013-14 Pay claim and under the heading of "Casualisation of the Workforce" at the University Sector Advisory Forum chaired by the Cabinet Secretary Michael Russell. The EIS will also continue to support individual members who find themselves subject to these invidious contracts.

The EIS submitted evidence on zero hours contracts to the Scottish Affairs Committee of the UK Parliament."

End

This press release was reported at the following websites:

<http://www.bbc.co.uk/news/uk-scotland-24794186>

<http://www.heraldscotland.com/news/home-news/eis-call-over-zero-hours-deals.21955153>

<http://www.scotsman.com/news/politics/top-stories/zero-hours-contracts-for-27-000-scots-public-staff-1-3179341>

<http://news.stv.tv/scotland/246849-educational-institute-of-scotland-claims-over-illegal-contracts/>

<http://www.holyrood.com/2013/12/in-scottish-he-the-roots-of-zero-hours-contracts-run-deep/>

## Annex 2: EIS Freedom of Information Act Request

The EIS asked the following questions of institutions on 9 August 2013

1. (i) How many individuals does the Institution have holding a zero hours contract on 01 August 2013?  
(ii) How many of the individuals holding zero hours contracts are women?
2. Does the Institution process all zero hours staff centrally or do Departments arrange and process some zero hours contracts?
3. Do the Institution's policies and procedures allow different parts of the Institution to deal with zero hours contracts in different ways?
4. (i) (a) Does your institution define zero hours contract staff as employees or workers whilst carrying out work at the Institution?  
(b) Does your institution define zero hours staff as employees, workers or neither in between work assignments at the Institution?  
(ii) (a) Do the Institution's disciplinary and grievance policies apply to zero hours contract holders?  
(b) If so, do these policies apply whilst working or in between assignments or 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?  
(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?  
(v) Does the Institution offer the same pension to zero hours contract holders as permanent staff doing like work?  
(vi) Does your institution pay occupational sick pay to zero hours contract holders?  
(vii) Does your Institution pay occupational maternity pay or paternity pay to zero hours contract holders?  
(viii) Has the Institution carried out an Equality Impact Assessment into the use of zero hours contracts at the Institution?
5. (a) Does your institution give payment for holidays or does it give paid leave to a zero hours contract holder?  
(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?
6. Does the Institution have an Institution wide procedure for deciding which individual zero hours contract holder is awarded hours or work?
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.)

8. Does the Institution have a procedure for giving each zero hours contract holder a plan of expected work?
9. Is there a minimum amount of notice of any work given by the Institution to zero hours staff?
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?
11. (i) Does the Institution use zero hours contract holders to carry out routine work?  
(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)?
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)?
13. Do academic staff on zero hours contracts receive payment for preparation, marking or assessment purposes?
14. Do academic staff on zero hours contracts receive annual appraisal and performance management targets as permanent academic staff doing like work?
15. Do academic staff on zero hours contracts have Institutional staff email addresses?
16. Do academic staff on zero hours contracts have full access to the library, academic journals and other Institutional resources?
17. 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