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## **Ain't that typical? Everyday challenges for an atypical workforce**

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**Atypical forms of work have been making the headlines for a number of years – from front page stories about zero-hours contracts, to the rapid rise in self-employment, recent focus on the use of agency workers and the huge interest in the growth of the so-called 'gig economy'.**

While the vast majority of working people are still employed in traditional full-time jobs with one employer, focus on the growing minority engaged in atypical forms of work has been fuelled by a wider sense of urgency to understand how advances in digital technologies may be changing the world of work for all of us. There is a developing sense that we may be witnessing a shift in the way we work which may see atypical arrangements become increasingly typical in the years ahead.

Opinions on these as yet non-standard forms of work tend to be highly polarised. For some they represent more flexibility, independence and greater choice for workers, employers and consumers alike. For others, they represent a worrying trend towards more insecure forms of work and less employment protections.

Policymakers, think-tanks, employer bodies and trade unions are all seeking to better understand the potential opportunities and challenges that these forms of work present. A number of recent high profile Parliamentary inquiries and Government-led reviews indicate a growing and welcome policy focus on the importance of good workplace practices in atypical arrangements and the nature of 'good work' more generally in the 21<sup>st</sup> century.

This paper seeks to contribute to the developing picture on atypical work and to inform current debates on the appropriate direction of policy in this area. It draws on Acas' extensive practical experience of the diverse contractual arrangements in the modern workplace, evidence from previous Acas' research on various types of atypical contracts, and findings from a recent analysis of calls to the Acas Helpline from people engaged in these arrangements. The paper:

- Starts with a broad overview of what is currently known about atypical work in the UK
- Summarises Acas' insights into the types of problems that can be encountered by some of those engaged in these forms of work
- Reflects on areas where good practice can be encouraged and improved and how these insights can help inform policy development in this area.

## Key messages

Atypical forms of work represent an increasingly wide range of working arrangements that don't conform to the 'traditional' model of working regular hours for a single employer on an open-ended contract.

These types of arrangements have risen rapidly in recent years, although they still represent a small minority of total employment. The emergence of the 'gig economy' suggests a potential for atypical forms of work to grow more significantly in the years ahead.

There is some evidence that the majority engage in atypical arrangements because it suits their individual needs and circumstances, but that a significant and growing minority only do so because they cannot find a job offering a 'traditional' contract.

Views tend to be polarised on the potential benefits and concerns of these contracts. From one point of view, they can offer flexibility for both individuals and organisations and help boost employment. From another perspective, they represent a drift towards more insecure work with less employment protections.

Acas' experience highlights a number of challenges encountered by many of those engaged in atypical working arrangements. These include:

- lack of clarity around employment status and corresponding rights and responsibilities, impacting on people's ability to resolve concerns satisfactorily in the workplace;
- reduced confidence in asserting rights and voicing concerns at work due to a sense of insecurity; and
- the challenge of finding the right balance between flexibility and building an experienced, skilled and committed workforce that delivers high quality services to clients and consumers.

These issues suggest the need for some tailored solutions alongside the promotion of good management practices to ensure that the everyday working experience of the atypical workforce is positive, engaged and productive.

The recent government-commissioned Taylor Review on Modern Employment Practices has been welcome in helping to galvanise a shared sense around the importance of good workplace practices in atypical arrangements and the nature of 'good work' more generally. As the debate moves forward, Acas and others should continue to share expertise and insight to support the development of practicable and balanced solutions.

## What do we know about atypical work in the UK?

### What is atypical working?

There is no single agreed definition of 'atypical' or 'non-standard' working. Generally speaking, though, these terms indicate a range of working arrangements which don't conform to the 'standard' model of an individual working regular hours for a single employer on an open-ended contract. 'Atypical' can encompass, for example, part-time work and fixed-term contracts.<sup>1</sup> However, the policy debate in the UK in recent years has focused especially on zero hours contracts, agency work, self-employment and the emergence of 'gig working', and it is with these that this paper will be largely concerned.

### Sizing the atypical workforce

Estimating the share of the labour market that these forms of work represent isn't straightforward. This is partly because terms like 'gig work' are used to refer to very disparate types of activity. Eye-catching media headlines have reported that up to 30 per cent of us are already working in the 'gig economy' in one way or another.<sup>2</sup> But a closer look at the figures behind the headlines finds that what might be termed 'gig work' as such (trading one's time and skills via online 'labour-based platforms' like Taskrabbit or Uber) can often be conflated with other types of activity in the much wider 'sharing economy' (think 'asset-based platforms' like Airbnb, or crowdfunding activities).

A number of recent analyses have suggested that 'gig work' currently accounts for around 4 to 6 per cent of total employment – with between 1.1 million to 1.9 million workers finding work through digital platforms on a regular basis – while significantly more appear to be seeking gig work more infrequently.<sup>3</sup>

### What is the 'gig economy'?

In broad terms, the gig economy refers to short-term employment contracts or freelance work – 'gigs' – as opposed to traditional, permanent jobs. But it often refers more specifically to the use of online platforms for sourcing such 'gig work'.

The gig economy is part of the wider 'sharing' or 'collaborative' economy, in which providers and customers connect via digital technologies to trade goods and services as well as labour.

Figures on self-employment are clearer, with the Office for National Statistics (ONS) estimating there are now 4.8 million self-employed people in the UK, a record high of 15 per cent of all people in work.<sup>4</sup> The latest statistics from the ONS also suggest that 905,000 people, or 2.8 per cent of people in employment, are on a zero hours contract in their main job<sup>5</sup>, while analysis conducted by the Resolution Foundation has estimated that there are 865,000 agency workers in the UK today.<sup>6</sup>

Looking at a wider set of working arrangements, McKinsey has estimated that 6 to 14 million people in the UK (up to 26% of the working population) are engaged in some form of “independent work” – defined as “the increasingly broad range of ways in which individuals earn income outside of the traditional long-term employer-employee relationship”. This includes “the self-employed, independent contractors, freelancers, some small business owners, and many temporary workers, including those who get short-term assignments through staffing agencies.” (McKinsey Global Institute 2016)

These studies are based on different approaches and the figures they produce are not necessarily consistent nor comparable. However the picture they present is of a significant, albeit still relatively small, proportion of the UK workforce engaged regularly in some form of atypical working arrangement, with a lot more such activity going on in the margins.

### **The growth of the atypical workforce**

It’s not only the size, however, but also the growth of this share of the labour market that has been grabbing attention. Those latest figures on zero hours contracts signal an increase of 13 per cent in a single year (albeit likely due in part to growing awareness and increased reporting of these contracts<sup>7</sup>). The Resolution Foundation has found a 30 per cent rise in agency working since 2011 (Judge and Tomlinson 2016). And the rise in self-employment has perhaps been even more remarkable, accounting for around 45 per cent of all UK employment growth since 2008.

While some recent indications suggest that we may in fact have reached a ‘peak’ in terms of growth of atypical work in the UK<sup>8</sup>, commentators have also noted the increasing ease with which individuals and organisations can connect with each other via online platforms in the gig economy. According to the largest survey on the gig economy in Britain to date, almost a fifth (18 per cent) of the working age population would consider some form of gig work – suggesting to the authors that “[t]he “gig economy’s capacity to grow is immense” (Balaram et al 2017).

### **Who are the atypical workforce?**

Those employed in atypical working arrangements are not limited to particular silos of the labour market. While the focus in the media might suggest that gig workers typically comprise taxi drivers and couriers, and that zero hours contracts are confined to low-skilled, low pay occupations, the reality is a much more diverse mix of sectors, skills and income distribution:

- The Royal Society of Arts (RSA) has found, for instance, that gig work is typically of a highly-skilled nature: 59 per cent of gig workers are providing professional, creative or administrative services; and 33 per cent provide skilled manual or personal services (such as plumbing, electrical maintenance, or carpentry). Those providing driving and delivery services were found to be in the minority – just 16 per cent.<sup>9</sup>
- An independent review by Julie Deane O.B.E. in 2016 found the self-employed to be “an incredibly diverse group, covering a wide range of

occupations sectors and industries”, and that “nearly 60 per cent of the rise in self-employment in the last five years has come in higher skilled managerial, professional and associate professional jobs.” (Deane 2016)

- McKinsey’s international study of “independent workers” also found these “in all occupations and industries, roughly mirroring the broader sector mix of each country” and spanning “the full range of skill levels and income brackets”. It added that “the independent workforce is diverse in terms of age ... educational attainment, and gender – and this holds true across countries.” (McKinsey Global Institute 2016)

A further important dimension of the atypical workforce is whether engagement in atypical work is by choice or involuntary for those involved. A CIPD review concluded that most people are in atypical employment (defined as temporary work, zero hours contracts, self-employment and gig economy work) because it suits their individual needs and circumstances, while between 14 per cent and 33 per cent of people are in these roles only because they could not get regular employment (CIPD 2017). Elsewhere, McKinsey has suggested that there are four key segments of “independent workers”:

- “*free agents*”, who actively choose independent work and derive their primary income from it (32 per cent of independent workers in the UK, or 4 million individuals);
- “*casual earners*”, who use independent work for supplemental income and do so by choice (42 per cent, 6 million);

- “*reluctants*”, who make their primary living from independent work but would prefer traditional jobs (12 per cent, 2 million); and
- “*the financially strapped*”, who do supplemental independent work out of necessity (14 per cent, 2 million). (McKinsey Global Institute 2016)

According to some studies, the share of involuntary atypical working appears to be growing. Recent analysis by the TUC, for example, found that “30 per cent of all of those working in temporary work are doing so because they cannot find a permanent job, up from 25 per cent a decade ago.” (TUC 2016)

### **Risks and benefits – for individuals, organisations and the economy**

Views tend to be highly polarised on whether a shift towards atypical work is beneficial or concerning for individuals, organisations and the economy. From one viewpoint, these forms of work facilitate opportunities for more flexible working arrangements that can bring a range of benefits for all concerned:

- For organisations, atypical arrangements, and the emergence of gig-economy technologies in particular, enable the deployment of an increasingly scalable workforce, allowing costs savings and greater efficiency in workforce planning.
- For individuals, the flexibility atypical contracts offer can allow greater choice and control over when and where they work. The CIPD has found, for example, that on average 65 per cent of zero hours workers say they are satisfied with their work-life



balance compared with 58 per cent of all employees. (CIPD 2013)

- In terms of wider economic benefits, it has been argued that the UK's flexible labour market helped buoy employment levels during the recession and has since contributed to the UK's highest employment rate since records began. And the CBI has recently reported that 97 per cent of firms say that this flexibility is important to their competitiveness.<sup>10</sup>

Counter-arguments, however, see the growth in non-standard forms of work as a concerning shift towards less secure and lower paid employment – driven not simply by the choices of some individuals but also by the nature of the UK's employment regulatory framework and its interactions with its wider tax and welfare policy landscape.<sup>11</sup> From this point of view, the flexibility in these arrangements can come at the expense of job security, predictable working hours and a reliable source of income for individuals, significantly shifting the balance of risks in the employment relationship. Particular concerns in recent debates have included:

- That atypical arrangements are often subject to different employment rights and protections than apply in standard forms of employment. In the UK, fewer of these are available to atypical 'workers' than to traditional 'employees' – and very few apply in the case of self-employment. The intermittent nature of much atypical work can also present an obstacle to qualification for some rights, such as sick pay and maternity pay, which are

dependent upon a minimum length of continuous service;

- The use of 'disguised employment relationships', or bogus self-employment – i.e. misclassifying workers as self-employed while still maintaining a high degree of control over their work – to minimise responsibilities towards individuals, reduce tax and social security liabilities, and gain unfair competitive advantage. Also the use of zero hours and agency workers for employment that otherwise resembles a 'standard' working relationship in involving regular and continuous work for a single organisation over long periods of time;
- An association in some instances between forms of atypical work and poor working conditions and unfair treatment; broader industrial relations concerns about how the growing use of these contracts may be driving down terms and conditions for the workforce more generally; and the potential contribution of the rise in atypical working to the UK's weak wage growth in recent years.<sup>12</sup>

Many of these pros and cons will apply in different degrees to different forms of atypical work, of course, and can also depend on the particular circumstances and motivations of the parties engaged in a given individual arrangement. The question of whether the atypical nature of the arrangement is voluntary or involuntary for the individuals involved is especially relevant here. For some, less security and access to fewer employment protections may be an agreeable *quid pro quo* for a greater

degree over control over their working hours – especially where they are making a proactive and well-informed decision to prioritise a lower degree of commitment. Others will question why a trade off on security should be a necessary corollary of flexibility. Where there is broad agreement, however, is that the trade-off between these benefits and risks takes on a much greater significance for those in non-standard forms of employment who are not willingly choosing them.

### Atypical work in the current policy landscape

The policy focus on atypical work has been building momentum for some time. The past 12 months in particular have witnessed a series of legal decisions and Government and Parliamentary inquiries, reviews and initiatives covering a wide range of issues across several government departments:

- On self-employment, we have seen the independent review by Julie Deane OBE; HMRC stepping up its investigations into potential misclassification of workers as self-employed; and a Work and Pensions Select Committee inquiry into self-employment in the gig economy;
- A BIS Select Committee inquiry into 'the future world of work' has taken a look at the status, rights, pay and working conditions of people working in a range of non-traditional working arrangements, with particular focus on practices at a number of well-known retailers and large gig economy employers;
- A series of high profile tribunal cases have been making the employment status of gig and other atypical

workers a regular front page news story;

- And the Prime Minister has commissioned RSA Chief Executive, Matthew Taylor, to conduct an independent review into 'modern employment practices', looking at the implications of non-standard forms of work on worker rights and responsibilities and employer freedoms and obligations.

This developing political and public consensus on the importance of addressing a range of issues thrown up by the ongoing growth in atypical forms of work, has in turn emerged as part of a wider sense of urgency to understand how digital technologies and the increasing rapidity of technological developments are changing the world of work for all of us. There has been increasing discussion that we may be in the midst of a structural change in the way the labour market works – a paradigm shift in the nature of work itself which, some argue, is being driven by developments in technology, automation and artificial intelligence (AI), often termed the Fourth Industrial Revolution.<sup>13</sup>

The feeling that there are big changes afoot for 'typical' working life is certainly a widely held one – a recent survey found that only 13 per cent of British people believe they will be working in traditional '9–5' employment by 2025.<sup>14</sup> But as labour market analysts have observed, there is as yet little hard evidence to support this belief – we have not yet seen, for instance, marked declines in full time and regular employment (Brinkley 2016).



However, if atypical forms of work currently remain precisely that – atypical – the intensifying focus on these working arrangements can also be seen as one thread within a complex weave of concerns about trends in wages, the growth of in-work-poverty, issues around job quality, skills, health and wellbeing at work, and the links between all of these with the UK’s well-documented productivity challenge. Brexit has arguably heightened the stakes in developing appropriate responses to all these challenges.

The burgeoning body of research and evidence across these areas is very much to be welcomed. But as we seek to build up a clearer picture of atypical work, its implications for employment regulation and its links with the wider policy landscape, it is vital that the debate is informed not only by a consideration of the many ‘macro factors’ at play but also by a better understanding of the ‘micro factors’ – including what goes in *inside* the workplace and within everyday working relations in atypical forms of work. Without suggesting that all such relationships are marked by challenges, this must include an appreciation of:

- The types of everyday practical concerns and problems that can be encountered by those engaged in these arrangements;
- How these can present different challenges and options, in some respects, to those encountered in ‘traditional’ working relationships; and
- The challenges and potential solutions these might present to policymakers, both in government and within organisations, looking to ensure a

positive, engaged and productive workplace experience for the growing atypical workforce.

## What kinds of problems can be encountered in atypical working arrangements?

Acas has published a number of research and discussion papers on non-standard contractual arrangements, including on zero hours contracts and agency working.<sup>15</sup> A recent analysis of calls to the Acas helpline has taken a further look at these as well as self-employed contractual arrangements.<sup>16</sup> Findings from across this body of work, all based on Acas’ practical experience, provide useful insights into areas where challenges can be encountered and good practice might be encouraged and improved.

It should be emphasised that Acas helpline users in general represent only a subset of those engaged in the labour market – broadly speaking, individuals and employers who have some kind of concern at work and who are seeking advice. The evidence from the helpline summarised in this paper is therefore not necessarily representative of atypical contractual arrangements more widely. However, its value is that it provides insights into an array of behaviours, concerns and views expressed by both individuals and employers engaged in atypical arrangements, although the bulk of calls received were from individuals. Acas’ findings highlight a number of issues relating to:

- employment status;
- the pros and cons of flexibility; and
- the application of employment protections to atypical arrangements.

## Employment status – lack of clarity and the challenge of resolving concerns

Acas' experience consistently finds that there is a great deal of uncertainty around employment status among both individuals and employers engaged in non-standard working arrangements.

### Scenario 1: Unclear status

A helpline caller asked for advice on his status, describing his employment situation as follows: "On paper it looks like I'm self-employed but I've worked for the company for five years, doing seven days a week. I didn't put any bids in for the work, I got an hourly rate, I was told what hours to work, when to take my own NI but they paid my tax. I didn't get holiday pay but was paid for hospital and dentist appointments. You know, treated like an employee."

For instance, calls to the Acas helpline often feature uncertainty around the differences between 'worker', 'employee' and 'self-employed' status and the different rights and obligations that may apply between these. Such uncertainty is especially evident in situations where an individual's contract states that it is of a 'zero hours' or 'self-employed' nature, but where the individual has been working for the same employer over a prolonged period of time with reasonably regular patterns of work. Other callers questioning their status reported how they did not 'feel' self-employed, despite having a contract that said so, because of the significant degree of control exercised over when, where and how they performed their work. Further confusion

was evident around the fact that a person may have a different employment status in tax law than for employment rights purposes.

These findings reflect, in one respect, the fact that a significant proportion of *all* calls to the Acas helpline involve queries about employment contracts and applicable rights and obligations. Confusion regarding these can be sparked for a range of reasons, commonly because people have not been issued with a written contract, or have not read it or fully understood it, or simply because it has not seemed particularly relevant to the day-to-day experience of getting on with their work.

However, a significant difference between calls relating to 'standard' and 'non-standard' forms of work is that, once they do enquire, those in 'standard' contractual arrangements can usually determine their status and applicable rights and responsibilities with relative certainty. In contrast, for many of those in non-standard arrangements, the applicability of the legal tests for employment status to their particular situation can appear very unclear. This means that assessing their status and its implications can remain a very uncertain endeavour even after they seek guidance. Where uncertainty around their status remains, such callers often face a more complex array of potential routes for addressing their concerns, given that tribunal and/or civil court options may be potentially appropriate depending on status.

While some such callers were considering making a tribunal claim to determine their status and corresponding rights

with certainty, many others were of the view that this seemed too arduous and confrontational a route to go down without having more certainty in advance of their likely status. Often callers simply wanted to understand their position clearly so that they could try to resolve their concerns in a straightforward manner. When faced instead with ambiguity, this appeared to hamper many callers' confidence even to discuss their concerns with their employer, for fear of being seen to be asserting rights they may not have, then looked on less favourably thereafter.

### Scenario 2: Uncertain options

A caller who had recently taken over a small business now faced a TUPE and unfair dismissal claim from an individual he had believed was self-employed. He had consulted various online resources about employment status and felt that he understood "the basics", but was struggling to understand how the rules applied in this particular situation. The specifics of the individual's working relationship did not clearly point towards one status rather than another. He expressed frustration that only a tribunal ruling could provide a definitive determination of the individual's status and clarify "the right thing to do".

### The trade-off between the benefits and risks of flexibility

While atypical arrangements can clearly offer flexibility for both organisations and individuals, evidence from the Acas helpline confirms wider research showing that the trade-off between the potential

benefits and risks of flexibility is not always understood, desired or shared equally between those engaged in these arrangements.

#### 'Reluctant' non-standard workers

It was clear, for instance, that many helpline callers were engaged in an atypical contract more out of necessity than by choice. One described her situation "not really self-employed" but rather "kept on freelance". Another said he was "treated as an employee but paid as self-employed", while a further caller was confused that she was "technically self-employed but with essentially the same working arrangement as my PAYE colleagues".

One zero hours contract worker summed up the frustration expressed by many callers who were in long-term atypical working arrangements with a single employer: "I've been there three and half years working full time doing the same thing, but I'm on a zero hours contract – it's mad." Many such callers told how they felt taken advantage of in respect of their status and unfairly excluded from employment rights because of this.

#### 'One-sided' flexibility

Other callers appeared to be more willingly engaged in a non-standard arrangement but had found that the way their contract was operated meant that the flexibility in practice was "all on one side". These callers included:

- zero hours workers who felt they had no genuine option to turn down offers of work. For example, some had been told they were obliged to pick up extra shifts when their employer was short staffed, had been given verbal

warnings for refusing shifts, or been told that turning down shifts would result in them getting no further work;

- agency and zero hours workers routinely given very short notice – as little as one hour – to turn up for shifts;
- agency and zero hours workers subjected to frequently changing shift patterns without prior discussion and at very short notice, aggrieved that they were effectively “on call full-time” despite working part-time hours;
- zero hours workers frustrated by their employers’ processes for having to request leave, sometimes up to a month in advance, feeling that this ran against the principle that they should have no obligation to accept shifts;
- self-employed, agency and zero hours workers with lengthy notice periods – as much as 3 months – to reduce their ‘normal hours’ or to leave their job. Such callers were often looking to manage a transition to another job and were worried about their employer’s obligations to provide work and pay during the specified notice period. Some had seen colleagues provide the required notice and then not receive any further work or pay.

### *A false sense of security*

For some callers, the risks inherent in their flexible contract had not been clearly understood until an unexpected development brought home the precarious nature of their employment, sometimes after months or even years in the job. Triggers here included:

- a sudden change in employer behaviour (eg an unexpected change

to a previously regular shift pattern, or a sudden reduction in ‘established’ working hours);

- a change in the worker’s circumstances (eg falling sick and being told there was no entitlement to pay if unavailable to work, or being allocated different or fewer hours on returning to work);
- an attempt to raise a concern with their employer having an adverse impact on income (eg a complaint about bullying by a supervisor resulting in work no longer being offered).

### **Scenario 3: Available on demand**

An agency worker on a zero hours contract called to ask how much notice she “should” be given to turn up for work on an assignment. She explained she had previously been getting two hours’ notice ahead of being due on site, but this had been reduced to one hour’s notice, which she had found was not enough time to get ready and get to work. She had asked her agency to provide longer notice but had been told that the agency itself only got the same length of notice from the site. The caller had a written contract which she said was expected to be “available on demand.”

The surprise and distress experienced by callers in these types of situations made it clear that many had had a very limited advance appreciation of the insecure nature of their contract. For others, it seemed that a sense of insecurity may have lurked in the background, but that



while they were getting regular work they had assumed that their situation was essentially no different to that of a standard employee.

### The reach of employment protections and 'effective exclusivity'

Calls to the helpline further suggest a significant lack of awareness among individuals and employers about applicable rights and responsibilities in non-standard contracts. This included:

- *Holiday entitlement, maternity rights and sick pay:* individuals and employers with low awareness of whether those in atypical contracts are entitled to these statutory rights, and if so how to calculate the relevant details on pay or time off;
- *Working time:* uncertainty over aspects such as entitlement to pay while 'on call' and 'travelling time' between assignments;
- *Deductions from pay, unpaid wages and minimum wage:* self-employed workers enquiring about protection against changes to their remuneration package, such as sudden reductions in their rate of pay or the deduction of new fees or charges from their pay. Others, notably delivery drivers and couriers, concerned that they earned less than the National Living/Minimum Wage after accounting for necessary costs such as providing their own vehicle, insurance and fuel costs;
- *Variation of terms and conditions:* uncertainty about whether there is a right to be consulted or to be given a minimum notice period of changes to working hours or other terms and

conditions, especially for longstanding zero hours workers and agency workers;

- *Notice and dismissal:* uncertainty among individuals and employers about rights to notice of termination, redundancy pay and protection against unfair dismissal for longstanding zero hours, agency and self-employed workers. In some cases workers had fallen out of favour with their manager and were then left uncertain if they had been dismissed or simply left off the rota temporarily. A further recurring theme was some atypical workers' contracts being simply terminated rather than affording them the opportunity of a disciplinary procedure or performance management process;

#### Scenario 4: Employed or unemployed?

A care worker with 2 years' service on a zero hours contract explained that she had 'fallen out' with her supervisor after refusing to visit a particular client she'd had difficulty with. She then found she had been taken off the rota without any notice or explanation: "They haven't given me any notice, they haven't written anything down, they haven't contacted me, nothing. I've been trying to ring them but my calls haven't been answered. It's just a nightmare. I don't know whether I've got a job or whether I haven't. I don't whether they've sacked me, or whether I'm going to have any hours in the future. I don't know whether I'm unemployed. I don't know anything and I can't get no answer from them. I feel really intimidated."



- *Discrimination*: offers of work drying up after an employer was made aware of a change in a worker's personal circumstances. For instance, one caller told how she had "fallen off the rota" after disclosing that she was pregnant, while another found he was offered no further work after he informed his agency that he had been diagnosed with a serious illness.

### *Zeroing down and 'effective exclusivity'*

Even where there is clarity and understanding about applicable rights and responsibilities, a further issue that can undermine the reach of employment protections to these arrangements is the extent to which individuals have the confidence to question and assert their rights in practice.

Acas' experience repeatedly finds that some zero hours, agency and self-employed workers can feel they have no genuine flexibility to turn down shifts, or to look for work elsewhere, *in case* their employer responds by restricting future work opportunities – a practice sometimes referred to as being 'zeroed down'. While new legislation was introduced in 2015 rendering explicit 'exclusivity clauses' in zero hours contracts unenforceable, helpline evidence suggests that 'zeroing down' can be used to essentially the same effect as such clauses. The threat of being 'zeroed down', explicit or implied, can also cause anxiety and apprehension when it comes to asking questions about contractual or statutory entitlements, or raising other types of concerns or grievances about treatment and conditions at work. Acas has previously labelled this predicament a form of 'effective exclusivity'.

### **Scenario 5: Zeroing down**

A call centre worker on a zero hours contract with the same company for 4 years called the helpline after she was told there was no longer work available. She had recently raised a formal grievance about bullying by her supervisor and explained: "The manager who is dealing with it [the grievance] is the one who's withholding the work from me ... I know there is work available, they're even giving agency staff work but not me. Is there anything I can do?"

With little or no recourse open if their hours are reduced, many workers understandably experience feelings of insecurity about the potential consequences of any actions they may take and therefore refrain from asserting their rights. In Acas' experience, this can contribute to deep feelings of unfairness on the part of workers about the way they are being 'effectively excluded' from perceived rights and freedoms, in some circumstances exacerbated by the fact that individuals have been working for their employer for many years.

### *Atypical contracts as a means for avoiding obligations and workplace discussions*

Calls to the helpline further provide some evidence of organisations citing self-employed status as a reason not to discuss or specify clear terms and conditions of the working arrangement. For example, one caller told how, on enquiring about his rights to his manager, he had been dismissively told, "you don't have a contract, you're self-employed".

In other cases, Acas' findings appear to confirm wider evidence suggesting that some employers may be choosing to use non-standard contracts directly as a means to reduce or avoid the costs of employment obligations. For instance, some helpline callers – notably working in construction, hairdressing, cleaning and driving/delivery jobs – related how their employer had recently told them that they would need to 'go self-employed', without any substantive change in the working relationship itself, to enable the employer to reduce the costs of sick pay, holiday pay, maternity pay or other obligations.

**Scenario 6: Reticence to raise concerns**

An agency worker called to ask about pay parity with employee colleagues after 12 weeks in his assignment. He explained that there were agency workers in his workplace with several years' service, all paid at the National Minimum Wage rate, while equivalent employed staff were paid £8+ per hour. When asked if he had yet raised the matter with his agency, he replied: "I'm a bit scared to do that to be honest, because they can just turn around and say 'we've got no hours for you this week'. If I rock the boat then they'll just let me go."

**From challenges to solutions: what lessons for the world of work?**

Given the nature of Acas' role and the customer interactions from which Acas' evidence is largely drawn, the picture presented above is one that

focuses primarily on complications and problems. It should be emphasised again that evidence from the helpline does not provide a means for gauging how common or widespread such issues are in atypical arrangements as a whole.

However, it is clear that atypical forms of working do pose some real, and in some cases distinct, challenges and the analysis of Acas' evidence base is useful in pointing to where some of the difficulties lie. In particular, the data shows challenges around:

- lack of clarity around status and applicable rights and responsibilities, and how best to achieve certainty on these;
- uncertainty and a sense of precariousness giving rise to lack of confidence in asserting rights and voicing concerns; and
- the implications for the 'psychological contract' – that is the unwritten expectations and promises that anchor both positive and negative relations at work.

**Improving clarity and understanding around status, rights and responsibilities**

One very clear issue highlighted by Acas' evidence is that understanding employment status and the relevant associated rights and duties is a crucial area of difficulty in many atypical working arrangements. This impacts on the ability of individuals and employers to objectively establish and assess their positions when disagreements arise, and consequently to resolve concerns pragmatically and satisfactorily in the workplace.

These findings reinforce longstanding concerns around the complexity of UK law on employment status. As a Government review of employment status in 2015 noted, for instance, “determining whether you are an ‘employee’, a ‘worker’ or genuinely self-employed is not a simple calculation for some, requiring familiarity with complex legislation and decades of case law”. Echoing the experiences of many Acas helpline callers, that review found a number of specific issues around status in relation to atypical working arrangements. These included a lack of confidence to assert certain basic rights where atypical workers are unsure whether they have sufficient ‘continuous service’; as well as risks to employers in using what they believe to be self-employed individuals and volunteers who might be found to be ‘employees’ or ‘workers’ by an employment tribunal at a later date. While the review considered a number of options for reform, it concluded that “most are highly complicated, would take years to deliver and could create new issues of their own” – placing an emphasis in the meantime on ensuring both individuals and employers have the clarity they require up front.<sup>17</sup>

While the Government, Acas, trade unions and other stakeholders have all played an important role in recent years in improving the availability and quality of guidance on these types of contracts, the ongoing frustrations experienced by many Acas helpline callers suggests there is still room to improve the currently available resources and signposting between them. The value of guidance will always remain more limited, however, in those ‘grey area’ arrangements, which

form the subject of many helpline calls, where the applicability of the legal tests on employment status is less than clear. This perhaps suggests a need to enable individuals and employers to access some form of upfront *determination* of status without the need for recourse to a lengthy court or tribunal process.

A related issue here is the extent to which people have ready access to the information they need to make informed choices about atypical arrangements *before* they enter them. There are, of course, many wider labour market issues affecting the choices that individuals and organisations have and the options they take when entering working relationships. However, clear and easily accessible guidance could play a part in helping improve these choices, by increasing awareness in advance of the potential risks and benefits involved in different types of contractual arrangements. How to encourage individuals and employers to engage with such guidance, though, before they take or offer a job, is a wider issue that is far from straightforward.

Regulation may also have a role to play here. For instance, an appropriate extension of the statutory obligation to provide a written statement of terms and conditions, to workers as well as employees, is a proposal that has been put forward for some time by business and worker representatives alike. There are also grounds to argue for an extension to workers of the statutory right to paid notice. While the latter may not be appropriate in short gig work engagements, which can last a matter of minutes or hours, in other cases it might be deemed practicable and fair – at least as a *quid pro quo* where a contract

stipulates that the worker must give the employer notice to leave. This might also help ensure that workers – as well as tribunals, social welfare institutions and others – are clearer whether an absence of hours signals a fluctuating requirement for labour or a termination of contract.

### **Affording opportunities and enabling confidence to voice concerns**

The problem of ‘effective exclusivity’ perhaps presents a more intractable policy challenge, and certainly one that goes beyond that of improving transparency and awareness. After all, here it is where people *do* have some appreciation of the nature of their contract, and the insecurity of their position, that their confidence to assert their rights or challenge unfair treatment can be lacking.

Whether as the result of an explicit or implicit threat, or simply due to an individual’s awareness of the precariousness of their situation, where workers are discouraged from raising concerns and asserting rights at work this is likely to have a negative impact on the effectiveness of basic statutory employment protections in those arrangements. This creates a deep-rooted, fundamental challenge not only for those individuals but for the effectiveness of the regulatory framework as a whole – a challenge that, without effective solutions, is only likely to grow in significance alongside further growth in atypical work.

In terms of a potential regulatory response, the availability of redress to an employment tribunal, allowing individuals to make a complaint regarding detrimental treatment in these circumstances, might provide some level

of reassurance. Defining ‘detriment’ here would itself present a challenge – as not every circumstance in which offers of work are reduced in response to an individual taking work elsewhere, or being unavailable for certain shifts, would necessarily be unreasonable. A further challenge is that, even with such a protection, individuals who believe that they have suffered a detriment by having their hours reduced might still be reticent to make a complaint of detriment for fear that their hours may be further reduced if they do so. An associated protection against victimisation might therefore provide a further level of reassurance.

There is also a broader question here about how to ensure that atypical workers are afforded fair opportunities to voice their views in the workplace. One element of this is access to disciplinary and grievance procedures. As Acas’ has found, in contractual arrangements that do not guarantee hours it can sometimes seem simpler to drop someone off the rota than to investigate issues and offer the benefit of a disciplinary hearing. Yet the right to a fair and impartial hearing where there are grounds for concern has been recognised as a cornerstone of employment regulation and good workplace relations for decades.

In addition to any potential regulatory responses, discouraging the practice of ‘zeroing down’, and encouraging good practice and fair treatment more broadly, is also a matter of influencing micro-level management behaviours within the workplace. A well-established point from Acas’ and wider research is that individuals are more likely to feel confident to raise concerns – and to be listened to – where there is a positive culture of trust in the workplace. This



points to a need to ensure that, in organisations that make use of atypical contracts, there is a better understanding of the many benefits of encouraging voice in the workplace, and its central role in building and maintaining good employment relations at both an individual and collective level.

### **Building a strong 'psychological contract'**

The fact that many atypical workers can feel 'effectively excluded' from voicing concerns at work is one example of how an imbalance in power in many atypical arrangements can impact negatively on the 'psychological contract' between the organisation and the worker. Strained working relationships can also be evident where an atypical contract has been entered into for reasons other than a well-informed choice for flexibility, so that the insecurity in the arrangement is felt more acutely.

While such situations are by no means confined to any particular sector, in Acas' experience they do appear to create particular stresses in jobs which are generally associated with high degrees of professional and emotional commitment. For instance, Acas' analysis has repeatedly found that helpline callers in non-standard contracts in the caring and teaching professions can experience a heightened sense of frustration that their considerable commitment to their role, and to the people they care for or teach, is not reflected in a less precarious form of contractual status.<sup>18</sup>

This juxtaposition of 'high commitment jobs' with perceived 'low commitment contracts' also points to a potential impact on those who depend on

services that may be provided by those in atypical arrangements. In the care sector, for example, the conclusion of the independent Kingsmill Review in 2014, that zero hours contracts can "cause instability for workers, for care recipients and for the care that is delivered"<sup>19</sup>, resonates with the picture that emerges from some calls to the Acas helpline. This raises questions about where the balance lies between flexibility and the scope for building an experienced, skilled and committed workforce that delivers high quality services to clients and consumers.

The context here is complex, of course, with the increasing use of these contracts in some sectors fuelled by a number of factors including changes to the funding landscape and the ongoing drive to outsource services. This suggests there may be value in looking at the way that different sectors use atypical contracts, and indeed the idea of sector-specific codes of practice was mooted by the then Coalition Government in a consultation on zero hours contracts in 2014.<sup>20</sup>

An Acas seminar at that time found broad appetite for the idea of identifying and sharing good practice in managing good workplace relations, how to build worker commitment and engagement, and ensuring the delivery of high quality services, in environments that share similar challenges in using atypical contracts.<sup>21</sup> A collective effort which would see employers, unions, consumer groups and other key stakeholders working together to develop a common set of principles, with scope for sectoral variation, may well be an initiative worth revisiting.



## Concluding thoughts: 'good work' in atypical contracts and for all

Finally, it is worth reflecting that many of the challenges discussed above are neither particularly new nor necessarily confined to atypical forms of work. The thorny issue of ambiguous employment status has been around for many years. The issue of varying levels of employment protections is also by no means a feature only of new forms of work. Nor are feelings of exclusion and unfair treatment within the workplace.

While non-standard forms of work undoubtedly present some unique challenges and require some tailored solutions, as the debate around atypical work has intensified there has been a growing sense that it is essential to reframe some of the narrative surrounding these arrangements towards a consideration of the challenges they share in common with other 'standard' forms of employment. Indeed, a notably optimistic perspective has begun to emerge that the lasting legacy of the current focus on atypical working – and the widespread interest in the gig economy in particular – may perhaps be that it will bring broader debates about the quality of work and the benefits of good workplace practice out of the margins and into the spotlight.

As the head of the government-commissioned review on modern employment practices, Matthew Taylor, has recently written: "The question now is whether some of the problems with modern work, combined with changing social attitudes and political alignments might be taking us into a new period" –

a new phase of employment policy with new assumptions, which he along with many others have been terming "fair work" or "good work". The vision here, broadly shared in many respects by both business and worker representatives, is for a strong policy focus on the quality of work and the importance of good workplace relations. This would bring together an emphasis on the crucial role of workplace trust and commitment; achieving the right balance between flexibility, autonomy and income security; recognising the significance of worker voice both on individual and collective matters; and developing the link between individual wellbeing and organisational productivity. It is perhaps significant that Taylor has from the outset seen his review, focused primarily on 'non-standard employment', as "part of that shift in thinking".<sup>22</sup>

As the publication of Taylor's report is eagerly awaited, the direction in which it may help drive the policy debate forward remains to be seen. But there is already much well-established ground to build on here. Promoting the benefits of good work, good workplaces and good working lives – for individuals, for organisations and for the economy – lies at the heart of what Acas and others have been trying to achieve for many years. A report from Acas in 2015, for example, set out the case for the role of good workplace practices in tackling the UK's productivity challenge. Amongst the drivers for increased productivity, it highlighted the value of high-trust working environments where: rights and responsibilities are understood; jobs and work are organised in a way that increases efficiency and makes the most of people's skills; managers have the confidence and

training to manage and lead effectively;  
workers feel valued and treated fairly;  
and the everyday potential for workplace  
disagreements and conflict is managed  
proactively.<sup>23</sup>

If there is one key message from Acas' findings on atypical contracts it is perhaps that these general principles of good working relations must also be at the heart of any vision for good work in atypical arrangements. This is not to say that positive and trusting employment relations can solve all issues that atypical workers can face – such as access to certain employment protections. But it is clear that, where relationships are strained or break down in these arrangements, the inherent insecurity in them can weigh far more heavily and quickly become the defining feature of a relationship that can impact negatively on individual wellbeing, wider workforce relations, workplace culture and organisational productivity.

It remains important not to overlook that there is still much we have to learn about the specifics of what drives good working relationships in atypical working arrangements, how individual and collective relations in them are formed and can be sustained, and how value and meaning within these relationships can be fostered and protected. There are many distinct challenges here. But the current prominence of a shared sense that answers to questions like these are important for all of us is encouraging.

If atypical contracts are to become increasingly typical in the future, it may be key to grasp the opportunity that this turn in the policy debate presents.

## Notes

1. See for example the ILO's definition of non-standard forms of employment: [http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS\\_354090/lang--en/index.htm](http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS_354090/lang--en/index.htm)
2. <http://www.bbc.co.uk/news/business-37605643>
3. See for example Brinkley (2016), Huws and Joyce (2016), CIPD (2017), Balaram et al (2017).
4. *UK labour market statistical bulletin, May 2017* (reporting figures for January to March 2017) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/may2017>
5. <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/may2017>
6. <http://www.resolutionfoundation.org/app/uploads/2017/02/Self-employment-presentation.pdf>
7. *Contracts that do not guarantee a minimum number of hours: May 2017 (ONS)*. Figures are for October to December 2016, compared with the same period in 2015. <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/may2017>
8. <http://www.resolutionfoundation.org/media/blog/britains-labour-market-has-passed-peak-insecurity/>
9. Balaram et al (2017). Note that the results show that some gig workers are providing more than one type of service.
10. <http://www.cbi.org.uk/news/cbi-submission-to-matthew-taylor-s-independent-review/>
11. For instance, analysis by the Resolution Foundation has found that tax incentives have driven much of the growth in self-employment in recent years (Tomlinson and Corlett 2017). Similarly, an international study by NIESR for the TUC concluded that the rise of atypical forms of work is not an inevitability of macroeconomic change, but rather that "policy decisions play an essential role in determining the level of non-standard work arrangements [in a given country] and the insecurities associated with them." (Hudson-Sharp and Runge 2017).

12. On the latter point see e.g. "Work, Wages and Monetary Policy", speech by Andy Haldane, Chief Economist, Bank of England, 20 June 2017  
<http://www.bankofengland.co.uk/publications/Documents/speeches/2017/speech984.pdf>
13. On the impact of new workplace technologies on work intensification, worker autonomy and employee wellbeing, see a recent Acas research report, *Mind Over Machines: New technology and employment relations* (Acas, June 2017).  
<http://www.acas.org.uk/media/pdf/i/9/Minds-over-Machines-New-Technology-and-Employment-Relations.pdf>
14. As reported in Recruitment and Employment Confederation (2016), p.18
15. See for example <http://www.acas.org.uk/media/pdf/6/n/Acas-Policy-Discussion-Paper-Zero-Hours-May-2014.pdf> and <http://www.acas.org.uk/media/pdf/5/7/The-effects-of-Agency-Workers-Regulations-on-agency-and-employer-practice.pdf>
16. This recent exercise was undertaken with the aim of informing the Acas Council's submission to the Taylor Review. Further details on the analysis can be found in that submission which is available at [www.acas.org.uk/consultations](http://www.acas.org.uk/consultations)
17. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585383/employment-status-review-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585383/employment-status-review-2015.pdf)
18. See for example <http://www.acas.org.uk/media/pdf/6/n/Acas-Policy-Discussion-Paper-Zero-Hours-May-2014.pdf>
19. [https://www.policyforum.labour.org.uk/uploads/editor/files/The\\_Kingsmill\\_Review\\_-\\_Taking\\_Care\\_-\\_Final\\_2.pdf](https://www.policyforum.labour.org.uk/uploads/editor/files/The_Kingsmill_Review_-_Taking_Care_-_Final_2.pdf)
20. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/347034/bis-14-992-zero-hours-employment-contracts-exclusivity-clause-ban-avoidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/347034/bis-14-992-zero-hours-employment-contracts-exclusivity-clause-ban-avoidance.pdf)
21. <http://www.acas.org.uk/media/pdf/l/e/ER-Comment-Aug-2014-Zero-Hours-Contracts.pdf>
22. <https://medium.com/@thersa/work-in-progress-86177cea2746>
23. <http://www.acas.org.uk/media/pdf/7/9/Building-productivity-in-the-uk.pdf>

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