Acas Council response to the Government’s consultation on “Zero hours employment contracts: Banning exclusivity clauses: tackling avoidance”

1. Acas welcomes the opportunity to respond to the Government’s current consultation on banning exclusivity clauses in zero hours contracts.

2. Acas has considerable experience of the wide range of contractual arrangements used in the labour market and has sought to make an evidence-based contribution to the wider debates around zero hours contracts. This response draws on Acas’ experience and on the evidence provided in Acas’ response to the Government’s previous consultation on zero hours contracts.

3. Comments are provided on a number of specific question areas. However, our response is presented in a narrative form rather than through completion of the closed questions since Acas’ evidence points towards a broader and more nuanced consideration of the issues. We additionally provide comments on sector-specific codes of practice and information and guidance on using zero hours contracts, as discussed in the consultation document.

Questions 1 & 2: How likely or unlikely is it that employers would seek to avoid a ban on exclusivity clauses in zero hours contracts; and, if ‘very likely’ or ‘likely’, how do you think employers would avoid a ban on exclusivity clauses – by offering a minimal number of guaranteed hours, for instance 1 hour a week; by restricting the work opportunities of the individual because they have not made themselves available in the past or have taken on an additional job; or otherwise?

4. In the face of the limited available evidence on how contractual exclusivity clauses in zero hours contracts are used, it is difficult for Acas to estimate the extent to which employers may seek to avoid a ban on such clauses.

5. However, evidence from Acas’ analysis of helpline calls suggests it may be relatively straightforward, for any employer who so wishes, to circumvent a ban. This could be done either by reducing offers of work to those who take on an additional job, and/or by causing workers to have concerns that their work opportunities will be reduced should they choose to take on an additional job.

Question 6: One way for employers to get around the ban on exclusivity clauses would be to provide employees with a contract for only a small number of guaranteed hours. Which do you think would be most effective in dealing with this kind of avoidance: extending the scope of ban to include contracts defined in terms of an hours, income, or pay rate threshold?
6. Acas recognises that one strategy for employers to circumvent a ban on contractual exclusivity clauses would be to provide workers with a contractual arrangement that falls outside the scope of the relevant legislative definition. Acas would therefore welcome a focus on a more widely defined set of contractual arrangements here.

7. Acas notes that a range of recent commentary has focused on the possibility of using hours/income/pay thresholds to define fair and appropriate use of exclusivity clauses, rather than to define the scope of an outright ban on their use. Should the Government consider any of these approaches then this would benefit from further input from employers and unions.

8. However, even with regard to a more widely defined set of contracts, it is important to note that many of the issues highlighted by Acas’ evidence can also apply in such other forms of contractual arrangement. This includes the practice of restricting (or threatening to restrict) work opportunities to discourage workers from taking work elsewhere, which may be applied with equal effect in contractual arrangements based, for example, on a guaranteed minimum number of hours. In Acas’ view this practice will therefore remain a key issue to address even if the scope of a ban of exclusivity clauses is extended.

Questions 8 & 9: Should there be consequences for employers who restrict work opportunities to individuals simply because they have taken work elsewhere? If ‘yes’, what should these sanctions be: criminal penalties; civil penalties; or redress to Employment Tribunals, allowing individuals to make a complaint regarding detrimental treatment?

9. In Acas’ view, inappropriately restricting work opportunities is an issue that is of fundamental importance to consider – both in connection with the avoidance of a ban on exclusivity clauses, and also in connection with what Acas has termed ‘effective exclusivity’. The latter refers to evidence from the Acas helpline which indicates that workers on zero hours contracts can be concerned about having work opportunities restricted in a wide set of circumstances. These include not only taking work elsewhere, but also considering whether to turn down offered hours, to question or assert contractual or statutory employment entitlements, or to raise other types of grievances or concerns in the workplace.

10. This ‘effective exclusivity’ involves deep rooted challenges beyond the issue of contractual exclusivity clauses. In particular, if workers are discouraged from raising concerns, this is likely to have a negative impact on the effectiveness of basic statutory employment protections in those arrangements. Notably, in Acas’ analysis of calls to its helpline, instances of workers feeling unable to question or assert their employment rights, or to raise other types of questions, were far more common than concerns about being tied to an exclusive contractual arrangement.

11. As regards how this practice might be addressed, Acas’ view is that the availability of redress to an Employment Tribunal, allowing individuals
to make a complaint regarding detrimental treatment, might provide a level of reassurance to affected individuals in all these circumstances.

12. Further, where individuals’ confidence is undermined by a fear of having work opportunities restricted, Acas notes that there will be particular challenges in ensuring that they feel able to voice concerns and to use the routes for redress that are available to them. For example, workers who believe that they have suffered a detriment by having their work opportunities restricted might nevertheless be reticent to make a claim of detriment to an Employment Tribunal, or to seek Acas Early Conciliation, for fear of further reductions in their hours. An associated protection against victimisation might go some way to addressing this.

13. A further consideration is the challenge of appropriately defining 'detriment'. Not every circumstance in which offers of work are reduced in response to an individual taking work elsewhere would necessarily be unreasonable. An example might be an employer offering less hours to a worker because that worker has repeatedly turned down offered shifts in order to work for another employer.

14. Acas also notes that the Small Business, Enterprise and Employment Bill would provide a power for the Secretary of State to make regulations requiring employers to pay compensation to zero hours workers in some circumstances if work is not offered, to further ensure that those workers are not restricted from working for another employer. In Acas’ view, the introduction of such a requirement might well be effective in providing individuals with a further sense of protection and reassurance.

Sector-specific codes of practice

15. The Government’s consultation document comments that: “Business representatives and unions should consider working together, with the support of Government, to develop industry-led, industry-owned, sector-specific codes of practice on the fair use of zero hours contracts.”

16. At an Acas seminar in July (see footnote 1), a broad appetite was evident for developing a better understanding of the ways in which zero hours (and other atypical) contracts are used in different sectors. Contributors proposed that it may be feasible to develop a common set of principles of good employment practice in the use of these contracts, and that there should be scope to identify sectoral variations.

17. Where employers and unions in a sector agree to develop a sector-specific code, Acas would be very willing to assist the parties if they wished us to do so. Acas is widely trusted by employers and unions across all sectors for its impartiality and has a wealth of expertise in facilitating discussions and assisting parties towards reaching agreements on their own terms. Acas’ involvement would also have the added advantage of facilitating the sharing of expertise and experience across sectors.
Improving information and guidance

18. The current consultation document reports an appetite from business representatives, unions and employees for improved information, advice and guidance with regard to zero hours contracts, and that the Government will therefore review its existing guidance to individuals and employers on using these contracts.

19. As Acas commented in its response the previous consultation, it is clear that new guidance on zero hours contracts would be of benefit to both employers and individuals. Acas believes that good practice guidance could help tackle problems relating to lack of awareness and clarity regarding zero hours contracts, as well as a range of other issues of good practice identified in the wider debates around zero hours contracts. Guidance might also usefully incorporate material on best practice in relation to achieving and sustaining good one-to-one relations between managers and individuals and how this contributes to good employment relations.

20. Acas is currently in process of further developing its guidance resources on zero hours other types of employment contracts and would welcome working with the Government and relevant stakeholders in this process.

Notes

1 In particular, calls to the Acas helpline regarding zero hours contracts were analysed for a four month period in the summer of 2013. A discussion of the findings can be found in an Acas policy discussion paper, *Give and take? Unravelling the true nature of zero-hours contracts* (http://www.acas.org.uk/media/pdf/6/n/Acas-Policy-Discussion-Paper-Zero-Hours-May-2014.pdf). Acas’ view has also been informed by views gathered from a range of stakeholders at a seminar on ‘atypical contracts’ hosted by Acas in July this year. An overview of contributions at this seminar can be found in an Acas Employment Relations Comment, *Zero hours contracts: clarifying the problems and looking for solutions* (http://www.acas.org.uk/media/pdf/l/e/ER-Comment-Aug-2014-Zero-Hours-Contracts.pdf).