



Citizens Advice Scotland response The future world of work and rights of workers inquiry Business, Energy and Industrial Strategy Committee

November 2016

- 1. Citizens Advice Scotland (CAS), our 61 member Citizen Advice Bureaux (CAB), the Citizen Advice consumer helpline, and the Extra Help Unit, form Scotland's largest independent advice network. Advice provided by our service is free, independent, confidential, impartial and available to everyone. Our self-help website Advice for Scotland provides information on rights and helps people solve their problems.*
- 2. In 2015/16 the Citizens Advice network in Scotland helped over 310,000 clients in Scotland alone and dealt with over one million advice issues. With support from the network clients had financial gains of over £120 million and our Scottish self-help website Advice for Scotland received over 4 million unique page views.*

Summary

3. The emergence of so-called new forms of employment relationships between workers and employers has put a strain on existing employment protections. In particular, the misuse of zero hours contracts has been a major concern for CAS over the past three years.
4. There is some ambiguity over whether some individuals are classed as 'workers' or 'employees'. One possible solution may be to remove this distinction in employment law.
5. Alternative approaches include extending the rights of 'workers' to include protection from unfair dismissal and the right to parental leave and pay.
6. There are a number of cases where CAB clients have been inappropriately classed as 'self-employed' by employers or agencies in an apparent attempt to deny them rights or make deductions from pay. These individuals should be entitled to full rights as employees.
7. Use of zero hours contracts should be considered inappropriate where a worker would prefer a more secure part-time or full-time contract; if it causes hardship to individuals due to regularly changing patterns of work; if it denies individuals basic employees' rights; if it acts as a deterrent to workers asserting their basic employment rights.

8. CAS recommends that a new statutory body, an Employment Commission, should be created to oversee the enforcement of employment law, with the legislative teeth to target rogue employers.
9. CAS recommends that the Government continue to invest additional resources in the enforcement of payment of the National Minimum Wage to ensure that its payment is promoted and all reports of underpayment can be actively investigated.

Introduction and context of response

10. Citizens Advice Scotland welcomes the opportunity to provide evidence to the Committee's inquiry. Scotland's CAB network provides a substantial amount of advice relating to problems at work. In 2015/16, citizens advice bureaux in Scotland advised clients on 48,530 new employment issues.
11. The emergence of so-called new forms of employment relationships between workers and employers has put a strain on existing employment protections. Misuse of zero hours contracts, bogus or unwanted self-employment, as well as reliance on agency or temporary contracts instead of permanent contracts are situations where CAB clients have been poorly treated at work with very few practical options for redress.
12. Whilst in some cases, these arrangements may suit workers, CAB evidence has shown that in many cases these arrangements have been misused by employers to restrict people's basic rights at work, such as payment of the national minimum wage, not be unfairly dismissed, to expect proper disciplinary processes to be followed, to not be discriminated against, and to receive paid holiday and sick pay. These arrangements have also caused issues with the tax system and prevented people receiving support from in-work benefits.
13. Over the past three years, Citizens Advice Scotland has published extensive evidence of the problems caused by some employers who treat their workers unfairly. This response builds on reports such as 'Fair Enough – Protecting Scotland's Workers from Unfair Treatment'¹, 'Seeking Decent Work – An Analysis of Employment Advice Provided by Scotland's CAB Network'², 'Working at the Edge: Zero Hours Contracts'³, together with evidence provided to the UK Government⁴, Scottish Government⁵ and Scottish Parliament⁶.

¹ Fair Enough? Protecting Scotland's Workers from Unfair Treatment – Citizens Advice Scotland, February 2015 <http://www.cas.org.uk/publications/fair-enough>

² Seeking Decent Work – An analysis of employment advice provided by Scotland's CAB network – Citizens Advice Scotland, April 2016 <http://www.cas.org.uk/publications/seeking-decent-work>

³ Working at the Edge: Zero Hours Contracts – Citizens Advice Scotland, July 2014 <http://www.cas.org.uk/publications/working-edge-zero-hours-contracts>

⁴ Consultation response – Banning exclusivity clauses in zero hours contracts – Citizens Advice Scotland, November 2014 <http://www.cas.org.uk/publications/consultation-response-banning-exclusivity-clauses-zero-hours-contracts>

Q1. Is the term ‘worker’ defined sufficiently clearly in law at present? If not, how should it be defined?

14. The status of those who are defined as ‘workers’ has become increasingly blurred in recent years, due to the emergence of different types of contractual arrangement, most notably zero hours contracts. This has been misused by some employers to create ambiguity around the status of employment rights for people who work for them, particularly around whether mutuality of obligation exists. In practice, this has caused barriers for CAB clients in asserting or enforcing their rights.⁷
15. One possible solution may be to remove the distinction between ‘employees’ and ‘workers’ in law, given this overlap. This was one of the suggestions being considered in a review by the previous Government, the findings of which have never been published.⁸
16. Alternatively, CAS would recommend that there are other approaches that the Government should consider to clarify the status of workers employed on zero hours or casual contracts and protect them from being unfairly treated:
 - Legislate to ensure that where mutuality of obligation for the employee to undertake work provided by the employer is present, an individual is classed as an employee rather than a worker regardless of what may be stated in their written contract
 - Give workers a statutory ‘right to request’ a contract that guarantees hours, without fear of dismissal
 - Extend protection from unfair dismissal to workers as well as employees
 - Extend rights to parental leave and pay to workers as well as employees

Q1a. What should be the status and rights of agency workers, casual workers and the self-employed (including those working in the ‘gig economy’), for the purposes of tax, benefits and employment law?

Q4. What differences should there be between levels of Government support for the self-employed and for employees, for example over statutory sick pay, holiday pay, employee pensions, maternity pay?

⁵ Response to the Scottish Government’s consultation on changes to the public procurement rules in Scotland – Citizens Advice Scotland, April 2015 <http://www.cas.org.uk/publications/cas-response-scottish-government%E2%80%99s-consultation-changes-public-procurement-rules>

⁶ Submission to Scottish Parliament Economy, Energy and Tourism Committee Work, Wages and Wellbeing in the Scottish Labour Market inquiry – Citizens Advice Scotland, August 2015 <http://www.cas.org.uk/publications/work-wages-and-wellbeing-scottish-labour-market-inquiry>

⁷ Working at the Edge: Zero Hours Contracts – Citizens Advice Scotland, July 2014 <http://www.cas.org.uk/publications/working-edge-zero-hours-contracts>

⁸ Employment review launched to improve clarity and status of British workforce – Department for Business, Innovation and Skills, October 2014 <https://www.gov.uk/government/news/employment-review-launched-to-improve-clarity-and-status-of-british-workforce>

Q4a. How should those rights be changed, to ensure fair protection for workers at work?

17. People employed through agencies and casual workers (e.g. those employed on a zero hours or flexible hours basis) should be entitled to basic employment rights as a minimum. This should include those rights currently given to 'employees' in employment law, including:

- Protection from unfair dismissal
- A minimum notice period
- Statutory redundancy pay
- Collective redundancy consultation
- Coverage under TUPE regulations
- Paid maternity, paternity and adoption leave
- The right to have flexible working requests considered by their employer
- Protection from less favourable treatment than permanent employees
- The right to request time off for training or study

18. People employed on this basis should have equivalent access to in-work support from the benefits system, through Universal Credit, tax credits or JSA as people who are employed on permanent and fixed hours contracts. Citizens advice bureaux have advised clients who have had difficulty claiming benefits due to the unpredictable and fluctuating nature of their working hours.⁹ Whilst the introduction of Universal Credit will help with this to an extent, in some early CAB cases problems have been caused in determining clients' Universal Credit entitlements due to their employers incorrectly recording their pay in the HMRC Real Time Information system.¹⁰

19. In terms of self-employed people, a distinction should be drawn between people who are genuinely self-employed, and those who are deemed to be 'self-employed' or 'independent contractors' by their employers. In the case of those whose self-employment is bogus then they should be entitled to full employment rights and access to benefits as set out above.

20. In addition to instances of bogus self-employment in the so-called 'gig economy'¹¹, false or bogus self-employment is used by some employers to deny their employees basic rights and to avoid paying Income Tax or National Insurance, by declaring their staff to be 'self-employed' or 'independent contractors' when in practice they are paid employees. The practice has been

⁹ Working at the Edge: Zero Hours Contracts – Citizens Advice Scotland, July 2014 <http://www.cas.org.uk/publications/working-edge-zero-hours-contracts>

¹⁰ Learning from Testing Times: Early Evidence of the Impact of Universal Credit in Scotland's CAB Network – Citizens Advice Scotland, June 2016 <http://www.cas.org.uk/publications/learning-testing-times>

¹¹ Mr Y Aslam, Mr J Farrar and Others v Uber <https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/>

particularly prevalent in the construction industry¹² and whilst not totally illegal, the rules in this area were tightened in 2014.¹³

21. The practice has spread beyond the construction industry, however, with a number of CAB clients in different sectors reporting being declared as 'self-employed' against their wishes – or even without their knowledge.

An East of Scotland CAB reports of a client who was employed in a takeaway for nine months in 2011-12. She was paid a grand total of £1,260 cash in hand and assumed that tax and National Insurance were deducted. The client could not confirm this because she never received a payslip, and on leaving the job was not given a P45 or P60. Now, it appears that her employer declared to HMRC that the client was self-employed, had worked for him for 12 months, and was paid around £6,000 in total. Being self-employed (which she was not, and never has been), HMRC assumed that she was liable to self-assessment and PAYE on this. Consequently, the client received an Income Tax demand from HMRC for £1,583, which was the first she learned of the bogus 'self-employment' arrangement from two years ago.

A North of Scotland CAB reports of a client who had worked in a beauty salon. She has now left, as her employer insisted that the client was actually 'self-employed' and consequently not entitled to the rights and protections that an employee has. The client engaged the CAB's help to come to a settlement with the employer over unpaid wages and to clarify her tax status with HMRC.

Q2. For those casual and agency workers working in the 'gig economy', is the balance of benefits between worker and employer appropriate?

22. If both employer and worker are content with a more flexible employment arrangement, then the arrangement can be appropriate. However, in a number of cases, the balance of benefits between the worker and employer is not appropriate, as workers have no choice in the matter.

¹² What is false self-employment? – UCATT <http://www.ucatt.org.uk/false-self-employment>

¹³ Bogus self-employment: new government measures on false self-employment – Unite the Union, June 2014 <http://www.unitetheunion.org/how-we-help/list-of-sectors/construction/constructionnews/new-government-measures-on-false-self-employment/>

23. Citizens Advice Scotland has recommended that the following could be used as a definition of inappropriate zero hours contracts for the purposes of creating statutory guidance, which has since been adopted for use in the Scottish Government's Business Pledge¹⁴. However, this could equally apply to agency workers, or other 'gig economy' workers.
24. A zero hours contract, or other similar form of employment relationship should be considered inappropriate:
- Where a worker would prefer a more secure part-time or full-time contract
 - If it causes hardship to individuals due to regularly changing patterns of work
 - If it denies individuals basic employees' rights
 - If it acts as a deterrent to workers asserting their basic employment rights
 - If an exclusivity clause is used (although this is now banned by the Small Business, Enterprise and Employment Act 2015)¹⁵

Q3. What specific provision should there be for the protection and support of agency workers and those who are not employees? Who should be responsible for such provision – the Government, the beneficiary of the work, a mutual, the individual themselves?

25. As detailed in our response to question 1 above, one possible solution should be to remove the distinction between 'workers' and 'employees' in law, or other changes to the law to strengthen the employment rights extended to agency workers and those who are not employees.
26. The Government could also play a greater role in enforcing employment law and promoting fair employment. CAS recommends that a new statutory body, an Employment Commission, should be created to oversee the enforcement of employment law, with the legislative teeth to target rogue employers.¹⁶
27. This body could bring together a number of existing functions, such as the HMRC Pay and Rights Helpline and Tax Evasion Helpline, and could roll out the same approach to tackle other unfair employment practices. The Commission could allow workers to confidentially report unfair treatment such as breaches of their maternity, holiday, sickness, pay, dismissal, redundancy and other rights. They could bring this information together with outcomes of employment tribunal judgements, non-payment of the National Minimum Wage and tax and reports from other agencies, such as Acas, citizens advice bureaux, trade unions and other advice and representation agencies.
28. Legislation could give the Commission power to investigate these reports, and identify rogue employers who ignore their legal responsibilities and treat their

¹⁴ Scottish Business Pledge - <https://scottishbusinesspledge.scot/contracts/#ffs-tabbed-15>

¹⁵ Response to the Scottish Government's consultation on changes to the public procurement rules in Scotland – Citizens Advice Scotland, April 2015 <http://www.cas.org.uk/publications/cas-response-scottish-government%E2%80%99s-consultation-changes-public-procurement-rules>

¹⁶ Page 45 of Fair Enough? Protecting Scotland's Workers from Unfair Treatment – Citizens Advice Scotland, February 2015 <http://www.cas.org.uk/publications/fair-enough>

employees extremely unfairly. They could have the power to require unfair employers to undertake training on basic employment rights and to compensate employees who have suffered poor treatment. For the worst offenders, the Commission could have power to levy fines and 'name and shame' unfair employers, in the same manner as those who underpay the Minimum Wage currently can be.

Q4b. What help should be offered in preparing those people who become self-employed (with, for example, financial, educational and legal advice), and who should be offering such help?

29. As detailed above, a distinction should be drawn between people who are genuinely self-employed, and those who are defined by their employers as 'self-employed' on a bogus basis. For those whose 'self-employment' is unwanted or bogus, then statutory rights should be strengthened as detailed above.
30. For those who are considering self-employment, independent financial, educational and legal advice is available from citizens advice bureaux and other services. Increased promotion of these services and signposting to them by other organisations would help people considering self-employment to decide whether this step is right for them.

Q5. Is there evidence that businesses are treating agency workers unfairly, compared with employees?

31. Issues related to agency workers in particular include requiring workers to class themselves as 'self-employed' when this is unwanted, and in some cases treating them very unfairly, including illegal deductions and ending employment without notice.

An East of Scotland CAB reports of a client who had recently recovered from a heart operation and applied for a job as a delivery driver with an agency subcontracted to a major retail firm. The client had a two day induction period in a Portakabin, where he signed various documents but was not given any copies, except the results of a blood alcohol test. The client was told he would be classed as self-employed but expected to work six days per week for an average of 12 to 16 hours per day. He was not given a statement of basic terms and conditions. The client was also told he would have to pay £180 per week for use of the van. After training, the client worked two days on his own as a driver and found the workload (90 parcels in a day), and expectations on him, wholly excessive and decided to leave after four days. The client felt that the company owed him wages, and after eventually contacting the agency, was told by them that he owed them money for training and blood tests. The client has had no further contact with the company and has since signed on for Jobseekers Allowance (JSA). He came in for advice about claiming the unpaid wages.

An East of Scotland CAB reports of a client who worked for around 12 weeks as a picker for a major retail firm, employed through a recruitment agency. The client was paid off on Boxing Day for not turning up to work despite having filled in an exemption sheet for that day but this had not been taken into account. The client attempted to contact the agency on that day after receiving a text from them asking why he was not at work, but was unable to get through. The client subsequently received payslips detailing deductions which he disputes, such as fares for the company bus from his home 40 miles away to the warehouse amounting to £80 for two weeks. The client signed a contract with the agency but was never given a copy. The client has applied for JSA and is awaiting a decision on this in two weeks - he explained the circumstances of his dismissal to Jobcentre Plus.

Q6. Should there be steps taken to constrain the use by businesses of agency workers?

32. What matters most are the practices related to the employment of agency workers rather than the numbers involved in themselves. If businesses are utilising agency workers because they believe that it will be harder for the workers to assert their basic rights, to pay them less than they would for an equivalent directly-employed member of staff, or if it causes hardship to individuals due to regularly changing patterns of work then this should be considered misuse, rather than a genuine business need.

Q7. What are the issues surrounding terms and conditions of employees, including the use of zero-hour contracts, definitions of flexible contracts, the role of the Low Pay Commission, and minimum wage enforcement?

33. As detailed above there are a number of issues relating to the misuse of zero hours (or low hours) contracts by employers. These have caused hardship to individuals through unpredictably changing patterns of work, and have been used as a 'discipline tool' by employers – rather than dismissing a worker or making them redundant, employers have simply stopped giving CAB clients any work and leaving them in a state of uncertainty of whether they are still employed or not.¹⁷

34. Despite some increased activity in this area over the past two years, CAB clients regularly seek advice because they are paid less than the National Minimum Wage.¹⁸ This is not restricted to workers in the 'gig economy', though payment by 'piece rates', such as per parcel delivered, or by the volume of fruit picked, has caused particular issues for some clients.

35. Citizens Advice Scotland recommends that the Government continue to invest additional resources in the enforcement of payment of the National Minimum Wage should be provided to ensure that its payment is promoted and all reports of underpayment can be actively investigated.

Q8. What is the role of trade unions in representing the self-employed and those not working traditional employee roles?

36. Trade unions have an important role in representing workers in all roles, and have a vital role in ensuring that workers can assert their statutory rights and secure levels of pay that can lift people out of in-work poverty.

37. Independent advice can also help workers secure their rights. The Citizens Advice service is the most common source of advice on employment issues

¹⁷ Working at the Edge: Zero Hours Contracts – Citizens Advice Scotland, July 2014
<http://www.cas.org.uk/publications/working-edge-zero-hours-contracts>

¹⁸ Fair Enough? Protecting Scotland's Workers from Unfair Treatment – Citizens Advice Scotland, February 2015 <http://www.cas.org.uk/publications/fair-enough>

for people who are not members of a trade union¹⁹ and is well placed to provide information and advice about problems at work. As noted above, citizens advice bureaux in Scotland advised clients on 48,530 new issues related to employment in 2015/16.

¹⁹ Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings - N. Busby and M. McDermott in *Industrial Law Journal*, July 2012.