

## **GUIDANCE NOTE**

### **Casual Workers**

**March 2013**

#### **What is a casual worker?**

There is no legal definition of “casual worker”. The term encompasses a variety of different circumstances where individuals are engaged in a flexible way, often ad hoc. Casual workers are used in a wide variety of businesses where the need for workers fluctuates, e.g. agriculture, construction, healthcare, tourism.

Casual workers can be engaged in a number of different ways:-

- On a zero hours contract under which the employer is not obliged to provide any minimum amount of work, but the individual is required to be available for work when offered.
- As bank staff, where the employer can call on a pool of workers when work is available, but there is no obligation on the individual to accept it.
- Under an umbrella contract, where ostensibly there is a series of individual contracts, but the law implies an overarching contract which continues even when the individual is not working.

#### **Status**

One of the main issues relating to casual workers concerns their legal status and therefore their legal rights and protections. There are 3 broad kinds of employment status, so an individual may be:-

- An employee.
- A worker.
- Self-employed.

For employee status to apply, there must be “mutuality of obligation”, i.e. an obligation on the employer to provide work and an obligation on the individual to accept work if provided. The key issue is whether casual workers are employees during the periods when they are working and, if so, whether they can link those periods together during periods when they are not working in order to establish continuity of employment.

Status is important in establishing what rights and protections an individual has. At one end of the scale employees have a high level of protection. At the other end, the self-employed are in essence in business on their own account and have few employment rights, although they are protected against discrimination. In-between the two are “workers” who provide their services personally, but not by way of a business carried on by them. Workers have an intermediate level of protection whereby they have some important statutory rights, for example, to be paid the national minimum wage and under the Working Time Regulations, but not others, for example, unfair dismissal protection and redundancy pay rights.

### **Status whilst working**

The written agreement under which casual work is performed may describe the individual as self-employed or deny that he or she is an employee. However, the label is not conclusive. An employment tribunal may decide that a casual worker is an employee during periods of work if the individual carries out the work personally and the employer exercises a degree of control over the work. Even if full employment status does not apply, the individual may nevertheless have worker status.

### **Status between periods of work and continuity of employment**

Some rights, for example, to redundancy pay and unfair dismissal protection, require a qualifying period of continuous employment. In most cases a casual worker will not have employment status whilst not working because there is no mutuality of obligation. Nevertheless there have been cases where tribunals have inferred an implied umbrella contract overreaching gaps in employment where work has been provided on a regular basis, thus creating an expectation of being given work in future.

Further, even where there is no overarching contract, legislation provides for continuity of employment to continue to accrue during gaps between contracts in certain circumstances, including where there is a temporary cessation of work or where, by arrangement or custom, employment is regarded as continuing during the absence from work.

### **Written terms and practical arrangements**

The terms on which a casual worker is engaged should be set out clearly in writing. They will govern the relationship between the parties during the periods when the individual is at work. They should confirm that there is no guarantee of work from the employer and deal with whether the individual must accept work if offered or whether they have a choice to accept or decline a period of work if unavailable.

One practical problem concerns holiday entitlement. If it is not known how long the casual worker’s engagement will last or if the worker has an irregular pattern of work, it can be difficult to work out the amount of holiday to which the worker is entitled. The Working Time Regulations provide for holidays to accrue during the first year of employment at the rate of one-twelfth of the WTR entitlement (5.6 weeks per year), beginning on the first day of each month.

If the worker is employed on a series of discrete contracts, the worker will be entitled to a payment in lieu of holiday each time an assignment ends and no holiday will accrue between contracts. However if there is an overarching or umbrella contract, holiday may continue to accrue even when the worker is not working and holiday pay would be calculated on the basis of average wages during the 12 working weeks before the holiday.

Casual workers may qualify for SSP if they fall ill during an assignment. SSP is payable where the worker has had average weekly earnings of not less than the lower earnings limit for NI contributions within the previous 8 weeks.

*The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues*

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