



Variety is the Spice of a Workforce!

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New and growing businesses often face a degree of uncertainty about the expected level of demand for their product or service. This in turn can make it difficult to anticipate staffing needs. Ideally, businesses will want to control headcount and associated costs in the most flexible manner whilst monitoring the quality of their offering. There are a variety of different ways in which a business can structure its workforce to help achieve these aims.

Engaging contractors/consultants can be an excellent way to acquire specialist skills and expertise, particularly on a short term or flexible basis. Genuine contractors have no employment protection and can, therefore, be removed quickly and without legal risk as and when their services are no longer required. Another advantage is reduced administrative costs as there is no requirement for PAYE or payment of employers' national insurance contributions. However, the Courts will look at substance rather than form in determining the true nature of such a relationship. If the parties to a contract have mistakenly or deliberately mischaracterised their relationship under a written contract, this will not prevent the Courts from finding that there is in reality an employment relationship. This risk can be mitigated in some circumstances through the use of a personal services company.

Alternatively, where an individual is required for a limited time or for a specific project, a business may use a fixed-term contract, which automatically terminates on expiry of the fixed-term. A fixed-term employee is still an employee with all the same rights as any other employee, including the right to commence proceedings for unfair dismissal if they have a sufficient period of unbroken service (this is now two years). Additional protections also apply to provide equality of treatment with permanent employees. However, a business may sometimes find it easier to demonstrate a fair reason (usually redundancy) for dismissing an employee on the expiry of a fixed-term than dismissing a permanent employee engaged for an indefinite period. Moreover, the use of a fixed term contract can also be an effective way of managing an individual's expectations as to their long term future with the business.

Temporary agency workers may be especially useful where a business has an exceptional work requirement or where the flow of work is irregular. However, this approach may not be cost effective or convenient for small businesses because, in addition to certain information requirements, they: (a) will need to ensure compliance with the Agency Workers Regulations (which provide additional rights for agency workers); and (b) pay agency fees in addition to any other salary or benefits.

Another option is to use "zero hours contracts". This is a colloquial term applied to a range of different arrangements. In all cases, a hirer is under no obligation to guarantee a minimum number of hours work (and therefore pay) to an individual. However, whereas in some cases there is a requirement to accept some or all of the work offered, in other cases there is no such requirement. Where an individual is under an express obligation to work when asked to do so, that person is very likely to be an employee. In the absence of such an obligation, that person may be a worker. This is significant because a worker

does not have the right to bring a claim for unfair dismissal or to receive statutory notice.

However, even indefinite contracts offer flexibility during the period prior to employees obtaining the right not to be unfairly dismissed. Such employees can still potentially be removed immediately although they must be given, or paid in lieu of, their minimum notice entitlements. Careful handling may be needed to avoid other potential claims, such as those relating to "whistle blowing" and unlawful discrimination.

A more radical approach is to make a job offer conditional on a candidate agreeing to surrender certain employment rights, such as the right not to be unfairly dismissed, in exchange for shares in their employer with a value of at least £2,000. The employee is not required to pay any income tax and national insurance contributions on the shares and any gains made on their sale are free of capital gains tax up to £50,000. A business must meet strict requirements before effecting such an agreement, including providing an employee with: (a) certain written information; (b) the reasonable costs of independent legal advice; and (c) a seven day cooling off period after receiving that advice. These "employee shareholders" still have many employment rights, including protection from unlawful discrimination. This model is still proving popular with management teams in fast growing companies (often owned by private equity houses) who are keen to exploit the tax advantages. Moreover, any scheme which gives employee shares in the business is a useful way to motivate that employee by ensuring they benefit directly from the business' future success.

Many businesses will not for good business reasons want to generate churn through a "hire and fire" policy. But, by using one or more of the options demonstrated above, it is possible for a new or growing business to operate a flexible and cost-effective approach to managing its workforce.