

## EMPLOYERS' E-GUIDE NO. 9

# A GUIDE TO THE LAW ON **CASUAL WORKERS**

June 2009, Employment Relations Unit

<b>Introduction</b>	<b>2</b>
<b>1 Worker v Employee</b>	<b>3</b>
<b>2 Mutuality of Obligation</b>	<b>4</b>
<b>3 Common types of "casual contracts"</b>	<b>5</b>
<b>4 Continuous Employment</b>	<b>6</b>
<b>5 Terms and conditions of employment</b>	<b>11</b>
<b>6 Worker or genuinely self-employed contractor?</b>	<b>13</b>
<b>7 Recruiting casual workers</b>	<b>14</b>
<b>8 Conclusion</b>	<b>14</b>
<b>9 Sources of information</b>	<b>15</b>
<b>Appendix – Employee and worker rights summary table</b>	<b>16</b>

# A GUIDE TO THE LAW ON **CASUAL WORKERS**

**June 2009, Employment Relations Unit**

## **Introduction**

Local authorities provide a wide range of services to the community. Many services can be delivered by a traditional workforce of full-time and part-time permanent employees. However where services have a seasonal demand or where there are fluctuating demands, for example educational and recreational courses, local authorities often rely on a further source of staff to:

- deliver non-permanent or intermittent services as and when required; and to
- prevent the disruption of permanent services by covering short-term staff absences or providing additional support to meet fluctuating demand or to clear backlogs.

Local authorities meet this requirement in a number of ways. In particular, it is common for authorities to use a pool of “casual workers”, who are prepared to accept work at short notice, who have often already shown that they have the necessary skills for the job and who are prepared to work on an irregular basis. Although such staff are considered to be “casual workers” with fewer employment rights, in fact they may well be entitled to a range of employment rights, which will have cost and operational implications for authorities.

Employment rights are primarily determined by employment status and different rights are afforded to different categories of employment status. Many statutory employment rights are only available to employees, as opposed to workers, and some of those rights further depend on a minimum length of continuous service.

Staff who are not employees may fall into two categories: workers, or genuinely self-employed, independent contractors. Workers have limited but significant rights, such as annual leave. Genuinely self-employed independent contractors have fewer rights and outside the scope of this guide. An overview of employees’ and workers’ rights is set out in the Appendix to this guide.

It is therefore important to identify correctly the employment status of individuals. This guide is designed to assist authorities to ascertain how many truly casual workers are engaged as workers, not as employees, and how many so-called casuals are more likely to be employees, and to understand the implications of the findings. This guide does not deal with temporary agency workers, who are engaged through temporary employment agencies to carry out work in authorities.

## 1 Worker v Employee

The definition of “worker” is deliberately wider than the definition of “employee”, relying principally on the requirement for personal service to distinguish it from other categories such as self-employed, independent contractors. It is notoriously difficult to define the status of so-called casual workers, however generally speaking, the term casual work usually applies to temporary work:

- which occurs only once, and for a short period of time, or
- which occurs more often but on an irregular or unpredictable basis, or
- where there is no obligation on the authority to offer work, and no obligation on the individual to accept it.

Section 230 of the Employment Rights Act (ERA) 1996 defines an “employee” as an *“individual who has entered into or works under (or worked under) a contract of employment”*. A contract of employment is defined as a *“contract of service or apprenticeship, whether express or implied, and (if it is express), whether oral or in writing”*.

A number of tests have been considered by tribunals in assessing whether or not an individual can be considered to be an employee, these include:

- whether the individual is required to perform the work personally and cannot send a substitute;
- mutuality of obligation, that is, whether the organisation is obliged to provide work and whether the individual is obliged to perform it when offered (see below);
- the degree to which the individual works under the control and supervision of the organisation;
- whether the individual has any responsibility for hiring additional staff to assist in performing the duties;
- whether the individual provides their own tools or equipment;
- whether the individual is paid through PAYE and makes National Insurance payments through the authority’s payroll;
- whether the individual is registered for VAT;
- whether the individual is required to take out and maintain professional indemnity insurance;
- whether the individual receives contractual benefits, such as sick pay; and
- whether the individual is subject to the organisation’s disciplinary procedures.

Although the intention of the parties and any written agreement is persuasive, it is not absolutely determinative of employment status; an employment tribunal will look beyond any such agreement or the label given by the parties, and consider what actually happens in practice.

## 2 Mutuality of Obligation

In practice, many casual workers will meet most of the tests of employment, and a failure to meet a particular test may not be fatal to an overall finding that there is a contract of employment. However, one test is crucial: the question of whether there is a reasonable degree of mutuality of obligation between the parties is a key factor to determine the distinction between an employee and a worker. Mutuality of obligation usually means that under the contract, the organisation must provide a reasonable amount of suitable work to the individual, who must perform all such work provided.

So essentially, a contract of employment cannot be said to exist unless there is an obligation on the organisation to provide work and a corresponding obligation on the individual to perform the work.

In the case of ***Nethermere (St. Neots) Ltd v Taverna and Gardiner [1984] IRLR 240***, the Court of Appeal stated that a contract of employment could only exist if there was this minimum obligation on both sides.

Also, in ***Clark v Oxfordshire Health Authority [1998] IRLR 125 (CA)***, Mrs Clark worked for a “nurse bank” as a staff nurse. There were no fixed or regular hours of work, which was offered as and when the need arose. There was no obligation to provide or to perform work, that is, no mutuality of obligation. Over three years Mrs Clark only took fourteen weeks off, other than that she always accepted work when it was offered. In this instance the Court of Appeal held that the lack of mutuality was fatal, and there was no contract of employment.

Other factors that might be relevant in assessing the mutuality of obligation between the parties include:

- the freedom of the individual to provide a substitute;
- the length of time the individual has worked for the authority;
- whether the individual has in practice worked for other authorities or businesses during that time;
- the existence of a notice period in the contract; and
- whether the working hours and patterns are set and regular.

It is also important for authorities to note that, in certain, circumstances, the nature of the relationship can change. This is a complex area but generally the most common reason this may happen is where the authority and the casual worker begin to regularise the days and times that work is done. Where this develops into an arrangement where the work is available on particular days and times of the week and both the authority and the casual worker develop an understanding (whether written or not) that the casual worker will present themselves for work on those days and at those times, then it is likely that mutuality of obligation will be established and the relationship has changed to that of employer and employee.

Thus, for an arrangement to be truly casual, an authority must not be under any obligation to provide work, and an individual must be free to refuse any assignment without fear of facing disciplinary action or jeopardising future job opportunities.

It is therefore important for authorities to monitor their use of casual workers and Human Resources should be alert to changing circumstances.

### **3 Common types of “casual contracts”**

The following are examples of arrangements commonly used when engaging casual workers. In each case, authorities should be aware of the potential pitfalls of such an arrangement.

#### **Single Assignment Contract (short-term, fixed-term contract)**

A single assignment contract is when the casual worker is offered work on a one off basis. These will probably be short, fixed-term contracts, or task or event contracts, where the worker joins the authority’s workforce. Such contracts typically have a start date and end point agreed before the work begins.

A casual worker may argue that a contract of employment exists for a single assignment they are undertaking. In such circumstances, the worker might be considered an employee for the duration of the assignment, but they would not necessarily be able to join different assignments together to accrue the continuous service necessary to qualify for many statutory rights or occupational benefits offered by the authority. It is generally accepted in these circumstances that there is no employment between contracts.

However where an authority offers a succession of short, fixed-term contracts, it may be possible for the employee to argue that even though there may have been breaks between the contracts, the apparently unrelated contracts are linked under an ‘umbrella’ or ‘global’ contract, depending on the degree of mutuality of obligation in undertaking these separate contracts (see above for mutuality of obligation and below for umbrella/global contracts).

#### **Zero-hours contracts**

A zero-hours (or nil-hours) contract is one in which a casual worker undertakes to work for an authority on a regular basis without any minimum amount of work being guaranteed. Sometimes referred to as ‘bank contracts’, generally a zero-hours contract will establish mutuality of obligation even though there may be no pattern of work, and therefore periods during which no work is performed will not break continuity of employment (see below).

The main difference between a zero-hours contract and a casual contract is that with the former an individual will usually be viewed as an employee of the organisation for whom they work. This is because the contract is viewed as continuing in force throughout the year even when there is no work available.

Therefore, an overriding or umbrella contract will exist during periods when the individual is not working.

This was confirmed *in Circular Distributors Ltd v Wilson [2006] IRLR 38 EAT*. Mr Wilson had a contract as a relief manager which stated that he had to do the work that the business required but that “there will be occasions when no work is available”, and “there is no payment when work is not available”. Circular argued that this meant that it did not have to provide work. However the EAT disagreed and said that it meant only that there might not always be work, but when there was Circular would provide it to Mr Wilson. This was mutuality of obligation and Mr Wilson was therefore an employee.

Zero-hours contracts can be designed in the following ways:

- a contract under which the individual is obliged to work whenever the authority demands it (subject to certain times of the year when, for example, the individual may be on holiday); or,
- a contract under which the individual is obliged to come into work subject to a minimum notice period being given, but otherwise not obliged to work; or,
- an arrangement under which the individual is free within reason to accept or reject any offer of work (although if this were the arrangement, it would be unlikely that the individual could claim to be an employee of the organisation due to the lack of mutuality of obligation).

A zero-hours contract in its purest form is a very one-sided arrangement in which an authority can elect how much work to offer the individual work depending on their requirements whilst at the same time they can demand that the individual should make themselves available within reason whenever they are called upon. The advantage to the individual is that they have continuity of employment from the date the contract commenced.

#### **4 Continuous Employment**

Statutory rights are frequently based on a period of continuity of employment, which is defined in the Employment Rights Act 1996, Part IV, Chapter 1.

A person employed under a contract of employment is said to be in continuous employment. This period of continuous employment begins on the day that the employee starts work and ends on the day that the employment relationship is established as having terminated.

The basic provisions of calculating continuous employment are that:

- every week that is worked under the contract counts towards the employee’s total period of continuous employment; and
- an assessment of whether or not employment is continuous is determined week by week so long as the employee has worked for part of that week (a “week” being the period of seven consecutive days that begins on a

Sunday and ends at midnight on the following Saturday, this can mean that if an employee works on a Monday and then again on the Friday in the following week, there will be no break in continuity because the break was less than one calendar week).

However gaps between periods of employment are included in the calculation in certain circumstances. The ERA s.212 (3)b states that any week during which an employee is absent from work because of a temporary cessation of work will count in calculating the employee's period of continuous employment. A worker engaged on a succession of short-term, casual contracts may be able to build up continuity of service if the gaps between contracts could reasonably be seen as temporary cessations of work.

### **Temporary Cessation of Work**

Essentially, a temporary cessation of work occurs where an employee's contract is suspended as a result of there being no work available, and the employee is re-employed at a later date.

There is no definition of what constitutes a temporary cessation of work in statute, but the House of Lords held *in Fitzgerald v Hall, Russell & Co. Ltd. [1969] 2 All ER 1140* that it means a period during which an employee would have been at work but for the fact that the business could not find any work for the employee to do.

A temporary cessation of work could occur for many reasons, for example:

- a down-turn in the authority's business due to market conditions;
- a lessening of the authority's work at the end of a particular season or peak period;
- the loss of a major contract;
- a gap in time between the completion of one contract and the start of another; and/or
- a temporary shut down.

The law does not place any limit on the length of a temporary cessation of work in relation to an employee's right to have continuity of employment preserved, although this is more likely to be measured in weeks rather than months. The only rules are as follows:

- there must be a cessation of work (and not simply a redistribution of work amongst fewer employees);
- the cessation of work must be genuinely temporary (although it does not matter whether the parties knew if the break would be permanent or temporary at the time it began – instead the tribunal or court will look back, take all relevant factors into account and adopt an objective approach);
- the reasons for the employee's absence from work must be the temporary cessation of work, and not some other reason;

- the reason for the employee's re-employment must be that the amount of work has returned to its pre-existing level.

In ***Cornwall County Council v Prater [2006] EWCA Civ 102*** (see *LGE Advisory Bulletin 504*), Mrs Prater had a number of individual teaching contracts with the council over a period of 10 years with short gaps in between. She argued that all of her separate contracts were individual employment contracts and that the gaps between them were temporary cessations of work, which would give her continuity of employment from the first day of her first contract, even in the absence of a single, overarching contract. The Court of Appeal agreed that these were successive contracts under section 212 of the ERA 1996. The Court of Appeal found that each separate engagement had operated under the mutuality of obligation to offer work and to accept work when that work arose. The council contacted Mrs Prater whenever there was work and Mrs Prater accepted that work and the time between the contracts therefore became temporary cessations of work as defined by the ERA 1996.

### **Arrangement or Custom**

Continuity of employment may also exist during weeks when no contract of employment exists. The ERA s.212(3)(c), provides that any week during the whole or part of which an employee is "absent from work in circumstances such that, by arrangement or custom, the employee is regarded as continuing in the employment of his or her authority for any purpose", counts in calculating continuity.

This covers work that is not required on a permanent and ongoing basis, such as seasonal work and providing leisure and education courses, where both parties expect that the employee will resume work at a certain date.

So an employee's continuity of employment may be preserved during non-working periods if, by arrangement or custom he or she is regarded as continuing to be employed. For example, this may be the case where there is a pre-arranged agreement that the employee will return to work when demand increases.

The implication of this is that a deliberately engineered gap between fixed-term contracts which was not related to the availability of work will not normally be enough to break continuity of employment. It also means that annual leave or breaks taken under the Working Time Regulations 1998 will not break continuity of service.

### **Umbrella/Global contracts**

If a casual worker wishes to argue that they are an employee of an organisation for whom they work in order to assert continuity of employment, they would have to demonstrate that there was either a temporary cessation of work (see above) or that there was an overriding 'umbrella' or 'global' employment contract that spanned the periods during which they were not working.

Courts and tribunals have been fairly unwilling to-date to find that such a contract of employment exists between periods of casual employment. However, it may be possible for an individual to argue that an umbrella contract of employment exists if either there is evidence to suggest that the parties have expressly agreed that the individual's work will be on a regular, defined pattern or if a continuing mutuality of obligation can be implied from the circumstances of the case. The umbrella contract spans any period during which the individual is not working, and may exist if:

- the working relationship is a long-standing one; **and**
- the working hours and patterns of the casual worker are set and regular; **and**
- the authority relies on the casual worker to work at set times; **and**
- the worker expects to attend work at those set times.

In these circumstances, the status of 'employee' could be argued, thus potentially entitling the person to a wide range of statutory employment rights and benefits.

This can be shown in the case of ***St Ives Plymouth Ltd v Haggerty*** **UKEAT/0107/08/MAA**, Mrs Haggerty was able to show that she was employed under an umbrella contract, even though she had turned down offers of work. Although this was a borderline case, it is important to note that the EAT considered that even where there was no duty to work any particular shift or a minimum number of shifts, the relationship had developed over time to a point where the expectation of being given work resulted in a legal obligation to provide some work. Crucial to the EAT's findings were the lengthy period of the employment relationship, the fact that the work was important to the authority and evidence that the work was regular even though the hours varied.

It is often the case that a working arrangement which begins as irregular, non-committal and casual develops over time into one where the individual works a regular pattern, with the authority relying on the worker to be available at set times of the week and the individual expecting the work to continue on the regular pattern that has evolved. Under these circumstances it can sometimes be argued that mutuality of obligation has been created as a result of the conduct of the parties and the employee can therefore contend that a contract of employment exists.

Again, in ***Nethermere (St Neots) Ltd v Gardiner and another [1984] IRLR 240***, the Court of Appeal took the view that expectations and mutual convenience that are fulfilled over a period of time may harden into legal obligations.

However, the fact that a casual worker's working pattern is set and regular will not on its own be sufficient to establish that there is an overriding umbrella or global contract of employment unless there is also some concrete evidence that some mutuality of obligation exists in an overall sense, i.e. that the obligations

between the parties continue during the periods when the casual is not actually working. This will be the case even when it can be shown that each separate short-term engagement constitutes a contract of employment.

Even if it can be argued that a worker is an employee of the organisation when they are actually working, it may still be difficult to prove the existence of an umbrella contract. In the absence of such an umbrella contract, the casual employee's working arrangements will, in effect, be regarded as a series of short-term contracts of employment with no continuity of service in between.

Each case will need to be determined on its own facts, but in each case an authority will need to assess:

- the working periods themselves;
- their length and regularity (or absence thereof);
- the length of gaps between them;
- any understanding between the parties (either express or implied) that the casual worker will resume work after a period during which no work was done, or will always be available on a fixed pattern or arrangement.

Where working periods are short, irregular, with lengthy gaps between them then it is less likely that the worker will succeed in a claim of continuity of employment.

Another instance of where an umbrella contract might exist is where the authority pays a retainer to a worker. In ***Younis v Transglobal Projects [2006] All ER (D) 227*** an individual working on a retainer plus commission contract but with no obligation to work was held to be a worker, though not an employee.

A common example of where an umbrella contract will exist is in a zero-hours arrangement because a zero-hours contract is designed to continue throughout the year irrespective both of whether the employee is at work and of the number of hours worked. In this arrangement the employment relationship will continue during periods in which no work is done, thus making such an arrangement equivalent to an umbrella or global contract. Moreover, the periods during which the zero-hours contract continues to exist but no work is being done are likely to be viewed by tribunals as periods of continuous employment.

## **Ex-employees**

Casual workers may often be ex-employees. Local authorities should be aware that where the employment has terminated but the individual was instantly re-engaged by the same authority as a casual worker, even if this was in a different role or department, it is likely that continuity of employment will be maintained and therefore the individual will have employment rights and service-related benefits already in place that will carry over to this casual work. Authorities should also be aware that such arrangements may impact on the tax implications of any payments given to the individual on the original termination of employment that are related to loss of office.

Authorities should also be aware of the effect of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, guidance on which can be found on the LGE website at: [www.lge.gov.uk/eru](http://www.lge.gov.uk/eru).

It is beyond the scope of this guide to consider in full the complex issue of continuity of employment and authorities can find further details on the LGE website at: [www.lge.gov.uk/eru](http://www.lge.gov.uk/eru).

## 5 Terms and conditions of employment

Authorities should note that even though casual workers are entitled to receive pay and benefits only for actual work done, these workers may be able to claim many of the same terms and conditions as permanent employees of a local authority on a pro rata basis.

It is unlikely that truly casual workers will be able to build up the necessary continuity of employment required for the protections available under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. However authorities should note that the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 apply to workers without any qualifying service. Also, traditionally many casual workers are women and authorities may be at risk of indirect sex discrimination if they provide their casual workers with less favourable terms and conditions.

In ***Buckle v Abbey National plc [1998] ET/13647/96***, a female employee who was unjustifiably excluded from appraisals and the benefits of a profit-share scheme and a one-off share issue because she was a casual worker was indirectly discriminated against on the grounds of sex.

In reality, it may be difficult for a female casual worker to find a comparator to establish such a claim but local authorities are advised to include an assessment of these workers in their Equality Impact Assessments of their pay and reward policies to establish which terms and conditions these workers should receive and which benefits they could justifiably be excluded from.

It is also worth noting that all workers, including casuals, are entitled to protection under UK discrimination law (i.e. prohibiting discrimination on the grounds of sex, race, religion or belief, sexual orientation, disability and age). As workers, they also have rights under the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999 and these rights must be reflected in their contract.

### Holiday Pay

On a pro rata basis, casual workers accrue statutory annual leave under the Working Time Regulations 1998, and in some cases may be entitled to receive any additional contractual annual leave provided by the authority. Many authorities provide this accrued annual leave in the form of 'rolled-up holiday

pay', i.e. they pay the workers a compensatory amount of money paid while they are engaged for work in addition to their hourly rate in substitution for actual paid time off.

However following the decision of the European Court of Justice (ECJ) in **Clarke v Frank Staddon Ltd and Caulfield and others v Marshalls Clay Products** and **Robinson-Steele v R. D. Retail Services Ltd (C-257/04 and C-131/04)** on rolled up holiday pay, authorities will have to consider whether their current arrangements are lawful. (See *LGE Advisory Bulletin number 512*).

The ECJ held that payment for holiday pay should be made at the same time as leave is taken, as the provision is for paid holidays. The only exception to this is on termination, for any leave accrued but untaken at that time. This would suggest that rolled up holiday pay is unlawful. However, the ECJ went on to say that if rolled up holiday pay is paid, it would be set off against any claim for arrears of wages in respect of unpaid holiday pay, provided the payment was made "transparently and comprehensively". The ECJ did add that Member States should take measures to prevent practices inconsistent with the Directive.

As a result of this, the [BERR guidance on the Working Time Regulations](#) advises employers that rolled up pay is unlawful and authorities must therefore consider their current arrangements for holiday pay. For truly casual workers on short-term engagements this is unlikely to be a problem, as holiday pay will be paid at the end of the engagement at the same time as any wages. The problem is where workers receive multiple payments. Authorities may wish to consider withholding holiday pay until the end of the engagement, and making a lump sum payment at that time, although with such a system authorities would be advised to ensure that there is a provision to consider requests for unpaid leave during the period of engagement.

### **Trade union recognition**

Authorities should remember that under the terms of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) trade union recognition applies to workers as well as employees. Under TULR(C)A, an employer must disclose to union representatives information requested for the purposes of collective bargaining on the matters affecting all workers for which the union is recognised. Therefore workers are capable of falling into the collective bargaining processes of the authority and may have the right to be represented by the relevant trade union.

This was demonstrated in the Central Arbitration Committee's (CAC) decision to include journalists working on casual contracts for the *Daily Telegraph* and *Sunday Telegraph* in the collective bargaining process for a particular bargaining unit. The CAC panel was satisfied that where there were very few differences in the management arrangements relating to workers and employees, casual workers should be included in the same bargaining unit for the purposes of trade union representation.

## Pensions

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 affected the ability of casual workers to join or retain membership of the LGPS in England and Wales.

The main change to the eligibility criteria from 1 April 2008 is that a person can only be an active member of the Scheme if they have a contract of employment of three months or more duration. This requirement effectively excludes some employees, particularly casual workers, who would previously have enjoyed the right to membership of the Scheme.

Authorities are advised to consult the [LGE Local Government Pensions Committee Circular number 218 \(October 2008\)](#) to assess whether an individual casual worker is eligible to enter or retain membership of the Scheme.

### 6 Worker or genuinely self-employed contractor?

If, having reviewed the records of casual workers, an authority determines that an individual is not deemed to be an employee, it should then assess whether that individual is a worker or genuinely self-employed contractor. As can be seen from the Appendix, workers enjoy some important employment rights, such as the right to paid annual leave, whereas an independent contractor has no such rights and no statutory employment protections.

Workers are an intermediate class who are not employees, but who are not in business on their own account either. A worker's degree of dependence is essentially the same as that of employees, whereas an independent contractor is expected to operate at arm's length and to look after themselves. Drawing a distinction in any particular case will involve many of the same considerations that arise when considering whether an individual is an employee or a worker. However, the key difference is likely to be whether an individual is required to deliver the services personally, or if they can provide a substitute, or sub-contract work to another party. If the individual can provide a substitute or sub-contract the work then it is likely they are a self-employed contractor.

Authorities who have a policy of treating all workers as self-employed contractors should be aware that the actual practice of how the relationship operates may contradict this policy. This type of situation was examined in ***Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365 CA***, where the Court of Appeal held that a supposed contract for services, that was entered into by the individual as a prerequisite for being given work, was a sham because it did not represent the parties' true intentions and expectations. Mr Szilagyi was found to be an employee, not an independent contractor, solely because the contractual document did not represent or describe the true legal relationship between the parties. Tribunals will look behind the contract and policy and will examine the parties' true intentions and the actual practice of the relationship to determine whether there is an employment relationship.

Genuinely self-employed contractors are workers but have few statutory rights, however it is worth noting that, like all workers (including casual workers), contractors are entitled to protection under UK discrimination law (e.g. prohibiting discrimination on the grounds of sex, race, religion or belief, sexual orientation, disability and age). As workers, they also have rights under the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999 and these rights must be reflected in the contract for service.

## **7 Recruiting casual workers**

Casual workers are often recruited through informal 'word of mouth' recommendations. This approach may risk an indirect discrimination claim against an authority if these methods deprive minority groups of the opportunity to work for the organisation. To minimise this risk, departments who rely on casual workers to provide services should place an advert for casual workers on a regular basis.

Authorities should take the same care when taking on casual workers as they do in selecting permanent staff, although this does not necessarily mean using a carbon copy of the selection procedures used when filling permanent posts. Where the work brings the worker into contact with children or vulnerable adults, local authorities must carry out disclosure checks on that worker prior to them beginning work with the council.

## **8 Conclusion**

Local authorities are recommended to monitor and regularly review their use of casual workers as mutuality of obligation (and therefore employment status) can by default be very easily established. This often occurs when a casual worker who was initially engaged to provide ad-hoc cover starts to be used on a regular basis for an extended period of time with the emergence of defined working hours. This issue is compounded in the absence of any formal written contract outlining the terms of the workers relationship with the authority. The benefit of having a clear and unequivocal contract that reflects actual practice has been emphasised in most of the case law examples provided in this guide.

If, taking into account the circumstances of a particular worker, an authority believes that the worker may be an employee they may need to confirm the new employment status of the worker, while ensuring that all necessary employment checks are in place.

## 9 Sources of information

LGE website: [www.lge.gov.uk/eru](http://www.lge.gov.uk/eru)

The *LGE Advisory Bulletins* (available at [www.lge.gov.uk/advisorybulletins](http://www.lge.gov.uk/advisorybulletins)):

- *Advisory Bulletin 407* – Casual Workers
- *Advisory Bulletin 442* – Definition of Employee
- *Advisory Bulletin 504* – Employment Status of Casual Workers
- *Advisory Bulletin 506* – Employment Status of “bank” Workers
- *Advisory Bulletin 510* - Rolled-up Holiday Pay – Advocate General’s opinion
- *Advisory Bulletin 512* - Working Time Regulations: Rolled-up Holiday Pay (ECJ)

The Department for Business, Enterprise and Regulatory Reform (BERR) website for employers: [www.businesslink.gov.uk](http://www.businesslink.gov.uk)

## Appendix – Statutory Rights

### Statutory rights from first day of work

Employee	Worker
To receive national minimum wage	To receive national minimum wage
To receive an itemised pay statement (if there is a holiday pay component this should be clearly identified in writing)	
Not to have unauthorised deductions made from pay	Not to have unauthorised deductions made from pay
To receive statutory sick pay (subject to SSP rules)	
Protection under TUPE	
Equal pay	
Not to be discriminated against, e.g. on the grounds of sex, race, disability, sexual orientation, religion or belief, or age	Not to be discriminated against, e.g. on the grounds of sex, race, disability, sexual orientation, religion or belief, or age
Not to be treated less favourably if they work part-time	Not to be treated less favourably if they work part-time
Not to be treated less favourably if they work under a fixed-term contract	
Paid annual leave, a maximum 48-hour working week and rest breaks under the Working Time Regulations	Paid annual leave, a maximum 48-hour working week and rest breaks under the Working Time Regulations
To take Ordinary and Additional Maternity Leave (subject to other qualifying conditions)	
Time off for ante-natal care	
To be accompanied by a colleague or trade union official in disciplinary or grievance proceedings	To be accompanied by a colleague or trade union official in disciplinary or grievance proceedings
To receive statutory notice of	

termination	
To claim unfair dismissal	
To belong (or not) to a trade union	
To take part in trade union activities	To take part in trade union activities
To take time off work to carry out public duties	
To take time off to care for a dependant	
To work in a safe workplace, and other rights under health and safety legislation	To work in a safe workplace, and other rights under health and safety legislation
To be safeguarded when making a protected disclosure (whistle blowing)	To be safeguarded when making a protected disclosure (whistle blowing)

**Employees' statutory employment rights requiring a minimum period of continuous service**

<b>Statutory right</b>	<b>Qualifying service required</b>
To receive a written statement of particulars	One month
To receive medical suspension pay	One month
To receive guaranteed lay-off pay	One month
To receive Statutory Maternity Pay	Six months, calculated as at 15 weeks before the baby is due
To take two weeks paid paternity leave (at the rate of Statutory Paternity Pay)	Six months, calculated as at 15 weeks before the baby is due
To take up to one year's adoption leave and pay	Six months, calculated as at the week in which notification of matching is given
To request flexible working in order to	Six months

care for a child under 16

To take 13 weeks' unpaid parental leave for each child under 5      One year

To not be unfairly dismissed      One year

To receive written reasons for dismissal on request      One year

To receive a statutory redundancy payment      Two years

To take paid time off to look for work while under notice of redundancy      Two years

© Local Government Employers 2009