

The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (Rheoliadau Gwasanaethau Rheoleiddiedig (Darparwyr Gwasanaethau ac Unigolion Cyfrifol) Cymru 2017)

1. Introduction

In this note, I consider two legislative developments in relation to the treatment of domiciliary care workers in Wales. These are workers who visit people in their own homes to provide care, such as help with cooking and eating or washing and dressing. Employers of such workers in Wales are now required to offer them a contract with guaranteed hours, where they have previously been employed on a zero-hours contract, if certain conditions are met, and to provide them with a ‘schedule of visits’, which details the time allowed for the visits themselves, travel time between visits, and rest breaks.

These developments are of interest from both labour law and devolution perspectives. From a labour law perspective, they seek to tackle two well-known problems afflicting the care sector in particular but, in the case of zero-hours contracts, other sectors as well. Thus, it is worth considering how they are drafted and whether they offer any more generalizable lessons for other sectors. From a devolution perspective, there is an issue about the Welsh Assembly’s ongoing interest in employment matters set against its limited competence to intervene, a problem made worse by the latest round of devolution legislation, which makes it clear that employment law is a reserved, or UK, matter. The strategy for tackling this has been to treat these two new entitlements for domiciliary care workers as matters for public enforcement by a regulator, rather than as individual rights for the workers themselves. This raises interesting questions about public and private enforcement of employment law.

2. Context

The past eight years or so have seen significant developments in the organisation and delivery of social services in Wales. In 2010, an independent commission set up by the (then) Welsh Assembly Government published its report, *From Vision to Action*.¹ The Welsh government followed this with a White Paper in 2011, which has formed the basis for subsequent legislation.² The framework for social services in Wales is set out in the Social Services and Well-being (Wales) Act 2014. This Act creates a statutory duty on various authorities to ‘promote the well-being’ of people in need of care, and of carers,³ and sets out certain principles to be observed in relation to this, such as having regard to the wishes of the individual, respecting their dignity and having regard to their culture and beliefs.⁴ Express reference is made to the UN Convention on the Rights of the Child and to the UN Principles for Older Persons.⁵

The Regulation and Inspection of Social Care (Wales) Act 2016 is a further component of the new approach and is intended to bring the regime of regulation and inspection of social care into line with the objectives of the 2014 Act. It replaces the arrangements laid down in the Care

¹ Independent Commission on Social Services in Wales, *From Vision to Action* (November 2010).

² Welsh Government, *Sustainable Social Services for Wales: A Framework for Action* (2011).

³ Social Services and Well-being (Wales) Act 2014, s. 5.

⁴ *ibid* s. 6

⁵ *ibid* s. 7.

Standards Act 2000.⁶ The 2016 Act has two main elements: to make provision for the regulation of social care providers, and to make provision for the regulation of social care workers.

Part 1 details the new regulatory regime for providers of care homes (for children or the elderly), secure accommodation, residential family centres and, importantly for present purposes, domiciliary care. Providers must apply for registration under the Act, which may be refused if certain conditions, including a ‘fit and proper’ test, are not met. In relation to domiciliary care services in particular, one of the undertakings required as part of the application for registration is not to provide care by means of visits shorter than 30 minutes unless the conditions set out in s. 8 of the Act (explained in detail below) are met. Part 1 grants powers to inspect services, sets out the procedures to be followed when cancelling a registration, and provides for criminal offences to underpin the regime. Inspections are carried out by a body now known as Care Inspectorate Wales (CIW).⁷

Part 3 renames the Care Council for Wales as ‘Social Care Wales’ (SCW).⁸ This body is responsible for maintaining a register of social workers and social care workers, as defined in s. 79 and implementing regulations. The previous regulatory regime laid down by the Care Standards Act 2000 only required social workers and a small proportion of care workers (for example, managers of care homes) to register,⁹ but regulations may now provide for other categories of social care worker to be registered. There are two possible routes to enforcing the requirement to register. One is to protect job titles: in other words, to provide that it is a criminal offence to hold oneself out as being a particular type of worker unless registered. This is the route adopted in relation to the title ‘social worker’ under s. 111 of the Act.¹⁰ Under s. 111(2), this approach could be extended to other titles by regulations. The other is to include a requirement that staff should be registered as part of the ‘fit and proper’ test applied to *providers* when they are seeking registration under Part 1. This may be achieved via regulations under s. 27. Workers who are required by either of these routes to register must pass a ‘fit and proper’ test themselves and have appropriate qualifications for their role. Part 4 of the Act makes detailed provision about the maintenance of the register, and Part 6 sets out a fitness to practise regime applicable to registered workers.

Although it will not be the primary focus of this note, it is worth highlighting that domiciliary care workers will be required to register with SCW from April 2020 onwards.¹¹ The register opened to such workers on a voluntary basis in April 2018. Once registration becomes compulsory, social care workers will have to have a recognised qualification in order to register. However, anyone who has worked as a domiciliary care worker for at least three years can seek registration without qualifications prior to April 2020 if their current manager certifies that they are competent. While the attempt to ‘upskill’ the workforce is welcome, it is a cause for concern that only 546 domiciliary care workers had registered by November 2018, since it seems likely that a significant proportion of the current workforce will need to rely on the ‘certification’ route

⁶ This Act extended to England and Wales (s. 123) and some aspects remain in force in each country.

⁷ <https://careinspectorate.wales/> (last visited 12 December 2018).

⁸ <https://socialcare.wales/about> (last visited 12 December 2018).

⁹ For example, Care Homes (Wales) Regulations 2002 (SI 2002/324) r. 9(6), making provision for care home managers.

¹⁰ Previously Care Standards Act 2000, s. 61.

¹¹ <https://socialcare.wales/registration/domiciliary-care-workers-registration> (last visited 12 December 2018).

in order to obtain registration. The annual fee may, of course, be deterring some workers from registering early.¹²

The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 are made under various provisions of the 2016 Act, including ss. 27 and 28.¹³ They set out detailed requirements for service providers in relation to the standards of care to be provided, both generally and in relation to particular care settings.¹⁴ They also delineate the duties of the ‘responsible individual’, a person who must be designated as being in charge at each location in which a service is provided.¹⁵ It is important to emphasise that the principal purpose of the regulatory regime is to ensure high standards of care for service users, and that this is therefore the primary focus of the Regulations. To the extent that there are requirements in relation to staff, these are mainly concerned with ensuring that the provider’s staffing arrangements do not jeopardise the quality of the service. For example, there is a requirement to have a sufficient number of staff in place and to ensure that they are ‘fit and proper’ to work in the care sector.¹⁶ The provider must have a disciplinary procedure in place for staff and it must be a disciplinary offence to fail to report abuse within the service.¹⁷

Although the Regulations are not intended primarily to regulate the provider’s behaviour in its capacity as an employer, there is potential for overlap between measures intended to improve the quality of care provided, and measures intended to improve the lives of care workers.¹⁸ For example, service users often complain about seeing different care workers each day, and having no continuity in their care. While there may be a variety of reasons for this, one possibility is that the provider has many workers employed on temporary contracts who are not well-paid and soon move on to better jobs in other sectors. Thus, there may be a link between poor employment practices and poor experiences for service users. This note will focus on Part 11 of the Regulations, which contains two provisions with this ‘overlapping’ character. Part 11 applies only to providers of domiciliary care services.

3. *The Schedule of Visits*

There are well-documented issues within the domiciliary care sector about the way in which care is organised.¹⁹ One problem relates to travel time. It is inherent in the nature of domiciliary care that workers need to travel from one appointment to another, but some providers allow insufficient time for this, either to cut costs (because workers are entitled to the National Minimum Wage (NMW) for travel time between appointments) or because of poor management. Some agencies use unsophisticated computer systems to design their workers’ schedules which allocate travel time based on the ‘straight line’ distance between appointments on a map, rather than the real distance on the roads, for example. The other significant problem relates to the time allowed for the visit itself. This is usually determined by whoever is paying for the care, whether that is the local authority, the individual, or his or her family. There has been a

¹² The registration fee is currently £15. This will increase to £20 in 2019/20, £25 in 2020/21 and £30 in 2021/22.

¹³ SI 2017/1264.

¹⁴ *ibid* Parts 3-15.

¹⁵ *ibid* Parts 16-20.

¹⁶ *ibid* rr. 34-35.

¹⁷ *ibid* r. 39.

¹⁸ See, for example, Welsh Government press release, ‘New proposals to restrict zero hour contracts to improve quality of social care’, 19 January 2016, and C Atkinson et al, *Factors that Affect the Recruitment and Retention of Domiciliary Care Workers and the Extent to which these Factors Impact upon the Quality of Domiciliary Care* (Welsh Government, March 2016).

¹⁹ For rich socio-legal analysis, see LJB Hayes, *Stories of Care: A Labour of Law* (Basingstoke: Palgrave 2017).

long-running campaign by charities and others to persuade local authorities to stop commissioning 15-minute visits, which were described by the then Secretary of State for Health in 2014 as ‘completely unacceptable’.²⁰ Although 15-minute visits may well be a reflection of the severe shortage of funds in the sector, it is evident that they do not allow very much time to do anything at all. Thus, care workers may find themselves rushing from visit to visit, with no proper travel time allowed in between, and with insufficient time during each visit to complete all the assigned tasks. This is frustrating for carers, who feel they cannot do a good job under these conditions, and who may not be properly paid for their work. It is also frustrating for clients, who may find that carers arrive late for appointments and then have to perform intimate tasks (such as helping them to wash and dress) at an inappropriate pace.

Regulation 41 requires the service provider to give each of its workers a ‘schedule of visits’ addressing travel time, visit time and rest breaks (if applicable).²¹ This can be for the day or for the week.²² ‘Worker’ in this context has a broad meaning and includes individuals working for a domiciliary care agency under a contract for services as well as its employees or workers.²³ This avoids any problems with classification.

There are various conditions that the schedule of visits must meet. In relation to travel time, r. 41(3) states that:

The time allocated for travel time must be sufficient having regard to—

- (a) the distance between the location of one scheduled visit and the next scheduled visit; and
- (b) any other factors which might reasonably be expected to affect travel time, such as traffic congestion and the availability of parking at the location of the scheduled visits.

This requires agencies to undertake quite a detailed assessment of how long a care worker needs to get from one appointment to the next, including factors such as congestion and parking. It does not permit the unsophisticated ‘straight line’ approach described above.

There are also conditions to be met in relation to the time allocated for each visit, as set out in r. 41(4):

The time allocated for each visit—

- (a) must be sufficient to enable care and support to be provided to the individual in accordance with their personal plan; and
- (b) must not be less than 30 minutes unless either condition A, B or C, as described in section 8 of the Act, is met.

The ‘personal plan’ must be prepared by the provider for the individual in accordance with the requirements of r. 15, usually before the care commences. Most importantly, this provision seeks to ensure that the worker’s schedule reflects the limits placed by the 2016 Act on the use of 15-minute visits. These may only now be used where certain conditions are met.

²⁰ Paul Vallely, ‘Fifteen-minute home-care visits are indefensible, so why do we allow them to happen?’, *The Independent*, 31 January 2016, www.independent.co.uk (last accessed 12 December 2018).

²¹ The statutory right to a rest break is applicable only to employees and workers: Working Time Regulations 1998 (SI 1998/1833), r. 12.

²² Above n 13, r. 41(6). It is worth noting that although the right to a written statement (which includes information about hours) is set to be extended to workers under the draft Employment Rights (Miscellaneous Amendments) Regulations 2019, Part 3, and will therefore be much more widely available, the ‘schedule of visits’ is a much more detailed document.

²³ *ibid.*

The drafting of the three conditions is quite complex, but it is designed to distinguish between different ways in which the duration of the visit might be determined, and to address both objective and subjective elements of the decision-making process. The simplest of the conditions is C, in s. 8(6) and (7), which applies regardless of who has organised the visit and deals with the situation in which ‘the visit is curtailed at the request of the person being visited’. This allows for the individual receiving care to express a preference and avoids the conflict that would otherwise arise in the situation in which the carer is attempting to provide a longer visit against the individual’s wishes.

Conditions A and B create exceptions to allow for the organisation of a shorter visit in advance. Condition A applies where the care is organised by a local authority which is under a statutory duty to meet the needs of the individual or their carer and does so by providing or arranging domiciliary support.²⁴ The visit may be shorter than 30 minutes if the carer has visited the individual before under the local authority’s care and support plan, and either ‘the visit is conducted for the sole purpose of checking whether the person is safe and well’, or the tasks to be carried out ‘can reasonably be, and are’ performed to applicable standards in under 30 minutes.²⁵ The applicable standards are determined by the 2017 Regulations.

Condition B applies where the care is not organised by the local authority.²⁶ The most obvious example of this would be where the individual receiving care or his or her family make their own arrangements with the provider. In these circumstances, the visit may be shorter than 30 minutes if that is agreed between the provider and the person arranging the care, and either ‘the visit is conducted for the sole purpose of checking whether the person is safe and well’, or the tasks to be carried out ‘can reasonably be, and are’ performed to applicable standards in under 30 minutes.²⁷ Once again, these are the standards set out in the 2017 Regulations. Importantly, one of the consequences of Condition B is that, for example, a family paying privately for care for an elderly relative may not be able to specify 15-minute visits for complex tasks, even if that is all they can afford.

The 2017 Regulations set out a variety of broadly-framed standards for the provision of care. For example, under r. 21(1), the provider must ensure that ‘care and support is provided in a way which protects, promotes and maintains the safety and well-being of individuals’, and under r. 25(1), that ‘individuals are treated with respect and sensitivity’. There is obviously something of an interpretative challenge in getting from these standards to the detailed question of how long a visit should be, but it is clear enough that, for example, a 15-minute visit for helping a person to get up, wash and get dressed is unlikely to be sufficient to enable them to complete these tasks in a safe and dignified manner.

A question not wholly resolved by the Regulations, but which may turn out to be important in practice, is what happens when there is a difference of view between the provider and whoever is paying for the care – whether that is the local authority or the individual or their family – about how much time is needed for a visit. Under r. 14, it is arguable that the provider ought not to agree to an arrangement which it considers to be in breach of the Regulations, but there may be some tension here both in terms of the provider’s need to win contracts and the need of local authorities (and others) to secure the provision of care at an affordable price.

²⁴ Regulation and Inspection of Social Care (Wales) Act 2016, s. 8(2).

²⁵ *ibid* s. 8(3).

²⁶ *ibid* s. 8(4).

²⁷ *ibid* s. 8(5).

Under r. 41(5), the provider ‘must ensure that a record is kept of the time spent by each domiciliary care worker on travel time, visits and rest breaks’. This obligation is presumably intended to ensure that there is sufficient information to enable checks to be carried out on the relationship between the schedule set out by the provider and the reality on the ground. It offers some safeguard against the scenario in which the provider sets out a superficially reasonable schedule which cannot be met in practice. It may, however, also lead to a high level of monitoring of each care worker’s activities in ways that could prove intrusive.

It is important to recognise that the schedule of visits is as much – if not more – about the quality of care being provided to individuals as it is about the employment situation of carers. It seeks to address the concern that, for example, a 15-minute visit may be a distressing experience for a vulnerable person who may not be able to do things quickly even with help. However, it does also serve important employment functions. First, it should help to create a realistic picture of each carer’s working day. This is important from the perspective of ensuring compliance with employment rights where the carer is an employee or a worker. For example, a failure to provide a rest break of 20 minutes after six hours’ work will be very apparent where it is not included in the schedule. Similarly, it is easier to calculate whether or not the worker is receiving the NMW against the background of clear information from the employer about the number of hours he or she is expected to work and has in fact worked on any given day. There have been a number of reported instances in which domiciliary care providers have failed to pay the NMW for travelling time between appointments, even though it is clear that the NMW is payable for this time.²⁸

4. *Zero-hours contracts in domiciliary care*

Another interesting feature of the Regulations is r. 42, which requires the provider to offer a carer a ‘guaranteed hours’ contract when he or she has been employed for three months on a zero-hours contract. This is more clearly focused on the situation of the care worker than on the individual receiving care, though it is arguable that there is an indirect connection between this type of employment and problems with care quality. There is a particularly high turnover of workers in the care sector, an issue which has been documented in some detail by the National Audit Office.²⁹ For obvious reasons, it is difficult to retain workers in a sector dominated by low pay and job insecurity. Turnover is also a problem from a care quality perspective because it makes it difficult to ensure continuity in the care received by individuals. Domiciliary care workers often perform intimate tasks for service users, such as helping them to use the toilet or wash, and while it would be impossible to guarantee that users will always have the same care workers, it is distressing if a different person attends every appointment. While it is difficult to determine what proportion of domiciliary care workers are on zero-hours contracts, a number of studies have suggested that this is the case for the majority of such workers in the private sector.³⁰

To qualify for this protection, the carer must be employed on a zero-hours contract as an ‘employee’ or ‘worker’. The definition itself is relatively straightforward:

²⁸ National Minimum Wage Regulations 2015 (SI 2015/621), r. 34. See, for example, *C & D DH Ltd t/a Elite Homecarers v Commissioner for Revenue & Customs* (UKEATS/0039/12/BI), unreported, 12 February 2013. Atkinson et al (above n 18) suggest that non-compliance remains common.

²⁹ National Audit Office, *The Adult Social Care Workforce in England* (HC 714, February 2018).

³⁰ For an overview, see Atkinson et al (n 18), 27-8.

‘domiciliary care worker’ (‘gweithiwr gofal cartref’) means a person who provides care and support to individuals as part of a domiciliary support service and includes a person employed by the service provider as an employee or a worker but does not include a person engaged by the service provider under a contract for services...³¹

Since the requirement is merely to make an offer of a contract, it might be questioned whether it is necessary to confine this to individuals who already have employee or worker status, even though this is, of course, very commonly the key to gaining access to employment rights. It is in marked contrast to r. 41, which includes individuals with contracts for services.

There are, however, two further areas of potential confusion with this element of the provision. One is the definition of ‘worker’, and the other is the interaction between employee or worker status and the idea of a zero-hours contract.

The definition of ‘worker’ is an unusual one:

‘worker’ (‘gweithiwr’) has the same meaning as in section 230 of the Employment Rights Act 1996, except that a person engaged under a contract for services is not a worker for the purpose of this regulation. Any reference to a worker’s contract is to be construed accordingly.³²

The s. 230 definition is, of course, the familiar ‘limb (b) worker’ definition requiring there to be a contract for personal performance and that the alleged ‘employer’ should not be the client or customer of a business being run by the alleged ‘worker’. But this definition purports to draw a further distinction between workers who are self-employed (‘engaged under a contract for services’) and other types of worker.

At first sight, this distinction seems to be superfluous, because it might be thought that being self-employed and having ‘clients or customers’ were one and the same thing. On that view, anyone who had clients or customers would fall outside s. 230 and would be self-employed, and anyone who did not have clients or customers would be a worker under s. 230 provided that the other elements of the worker test were satisfied. The decision in *Byrne Bros* appeared to suggest this straightforward binary approach.³³ But this is not the way in which the matter has been approached in some of the later cases.

In *Hospital Medical Group v Westwood*, the claimant was a doctor who provided his services to the NHS as a GP, to HMG as part of its hair restoration clinic, and to another firm as part of a service for transgender people.³⁴ The Court of Appeal found that the doctor was a ‘worker’ as regards HMG because it was not appropriate to describe HMG as a customer or client of his. Instead, he was integrated into HMG’s business, particularly in the way in which HMG advertised his services to prospective patients. It was argued on behalf of HMG that he could not be a worker because of a clear finding by the Employment Tribunal that he was self-employed. The Court of Appeal avoided this conclusion by taking a literal approach to s. 230. As Maurice Kay LJ put it: ‘If Parliament had intended to provide for an excluded category defined as those in business on their own account, it would have said so, rather than providing a more nuanced exception’.³⁵ This means, as Baroness Hale explained in the *Bates* case, that ‘the law now draws a distinction between two different kinds of self-employed people’: those running their own business providing services to clients or customers, and those ‘who provide their services as

³¹ Above n. 13, r. 42(3).

³² *ibid* r. 42(4)(b).

³³ *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT).

³⁴ *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, [2013] ICR 415.

³⁵ *ibid* [19].

part of a profession or business undertaking carried on by someone else’.³⁶ The line between these two categories can be very difficult to draw in practice.

But whilst this establishes the point that a finding that an individual is self-employed does not preclude a finding that he or she is also a worker, it does not help us very much with the construction of r. 42(4)(b). This requires us to draw a distinction not between different types of self-employed people but between different types of worker: those who are workers whilst also being self-employed, and those who are workers but not also self-employed. Since this is not a distinction that the courts have needed to draw, there is no guidance to be derived from the cases. Indeed, the language of some judgments has tended to assume that it is appropriate to describe *all* workers as self-employed.³⁷

On the basis that there are two types of worker, how might we distinguish between them? Thinking about whether the alleged employer is a client or customer of the alleged worker does not help us here, because both types of worker must be able to show that the alleged employer is not their client or customer in order to fall within the category. The obvious starting-point is to look at the terms of the contract between the parties, and to see whether it is described as a contract for services (or, presumably, a ‘worker’s contract’). However, this approach is unlikely to be of much help given the need, applying *Autoclenz*, to determine the ‘true agreement’ between the parties in any case in which the labelling of the parties’ relationship in any documentation may be suspect.³⁸ Concepts such as dependence or subordination or integration may be of some use, but this would mean drawing distinctions between the level of dependence required to be an employee, a worker who is not also self-employed, and a worker who is self-employed, a level of subtlety that is bordering on the ridiculous.

In any event, there is a further, and possibly more profound, problem of classification. The provision is intended to address the situation of individuals who have ‘zero-hours’ contracts. These contracts are defined as follows:

‘non-guaranteed hours contract’ (‘contract oriau heb eu gwarantu’) means a contract of employment or other worker’s contract under which—

- (a) the undertaking to do work or perform services is an undertaking to do so conditionally on the employer making work or services available to the worker, and
- (b) there is no certainty that any such work or services will be made available to the worker.

For the purpose of this definition, an employer makes work or services available to a worker if the employer requests or requires the worker to do the work or perform the services...³⁹

For the provision to be applicable, therefore, the individual must have a zero-hours contract that is also a contract of employment or a worker’s contract. But the very idea of a zero-hours ‘contract’ may be something of a misnomer, given that zero-hours arrangements are inherently uncertain and may not involve much in the way of promises on either side. One of the key elements of a contract of employment is the presence of ‘mutuality of obligation’: a promise on the part of the employee to accept work in future, and a promise on the part of the employer to provide work or, more accurately, payment.⁴⁰ This latter promise is absent in a zero-hours

³⁶ *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730, [25].

³⁷ *ibid* [31].

³⁸ *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157, [35] (Lord Clarke), and see now *Uber v Aslam*, [2018] EWCA Civ 2748.

³⁹ Above n. 13, r. 42(3).

⁴⁰ For example, *O’Kelly v Trusthouse Forte Plc* [1984] QB 90 (CA).

arrangement as described in the Regulation. Thus, a zero-hours contract of employment is a logical impossibility as the law currently stands.

The position in relation to a worker's contract is unclear. On one view, espoused by a number of commentators, importing mutuality of obligation into what is intended to be a less onerous test is unhelpful.⁴¹ In most cases, individuals seeking to establish worker status are seeking rights that do not depend on a long-term working relationship, such as the NMW for hours actually worked. However, it was suggested in *Quashie* and accepted in *Windle* that an individual's status in between assignments might be relevant to deciding whether those assignments were undertaken as a worker or as a person running a business.⁴² There are hints in the Supreme Court in *Pimlico* that all that should matter is the worker's status during assignments, but the point was not decided because it had been possible in that case to find that there was an 'umbrella' contract between the parties: the employer was obliged to offer work when there was work available, and the worker's obligation was to make himself available for a certain number of hours per week, subject to the possibility of turning down some assignments.⁴³ It should be noted that while this is similar to the definition of a zero-hours contract in the Regulations, the finding of an obligation on the employer to offer work – albeit only when there was work available – was a crucial part of the lower courts' reasoning. In the recent case of *Addison Lee v Lange*, the EAT treated the 'assignments only' and 'overarching contract' routes as two alternative ways in which worker status might be established, but this does not (as, indeed, the EAT could not) entirely rule out the possibility that an individual who cannot use the 'overarching contract' route might also fail on the 'assignments only' route because of *Windle*.⁴⁴ In short, while a zero-hours 'worker' contract is a possibility, the case-law is in a state of flux and it may be difficult to establish in practice.

Even if it is possible to find some domiciliary care workers who qualify under r. 42, there are a number of weaknesses in the substance of the provision. A first weakness is that it simply requires the provider to offer the carer a 'choice' of a contract with guaranteed hours. There is nothing to stop the carer from agreeing to a different type of contract, including a further zero-hours contract. This is made clear in r. 42(1). Of course, it is difficult to be against choice, and it is arguable that some carers may prefer the flexibility inherent in a zero-hours contract. However, this claim deserves to be treated with a degree of suspicion. In some circumstances, the zero-hours arrangement may genuinely operate in the individual's favour, where he or she is able to pick and choose the hours worked from week to week, but in other cases, the arrangement may mean that the individual is at the employer's beck and call, potentially at short notice, making it difficult to plan other activities around work. Carers in the latter situation may feel unable to turn down offers of work in case the employer refuses to use them again. The obvious response to this is to say that a worker whose zero-hours contract is disadvantageous can exercise the right to choose a different type of contract, but there are many more or less subtle ways in which a provider may discourage this. Thus, the 'choice' may not be a free one in practice.

The choice on offer is between:

⁴¹ For example, Guy Davidov, 'Who is a Worker?' (2005) 34 ILJ 57, 64.

⁴² *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99; *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721.

⁴³ *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1511.

⁴⁴ *Addison Lee Ltd v Lange* (UKEAT/0037/18/BA), 14 November 2018, [50].

(a) a contract of employment where the number of hours required to be worked per week is at least the average number of hours worked per week during the preceding three months;

(b) a contract of employment where the number of hours required to be worked per week is less than the average number of hours worked per week during the preceding three months.⁴⁵

As noted above, the worker does not have to take either of these options and can continue to work for the employer under ‘any other type of contractual arrangement’ including another zero-hours contract. The choice is a slightly curious one, between ‘at least the average’ hours previously worked by the worker, and fewer hours than the average. It is not entirely clear from the published materials why this approach was adopted, but one possible option might be that while some workers on zero-hours contracts might want both certainty and more hours, others might be happy with fewer. The presence of the first option is an important safeguard against the possibility that the employer offers a standard contract but *only* on the basis of fewer hours.

A significant feature of the ‘offer’ is that in both cases the contract is a ‘contract of employment’.⁴⁶ As explained above, it is inherently unlikely that anyone with a zero-hours contract is an employee, so by accepting the offer, the individual will get access to the full range of employment rights, particularly if he or she remains in employment for long enough to fulfil applicable qualifying periods.

However, under r. 42(2), we find the conditions that must be met in order for the employer to come under an obligation to offer the zero-hours worker a choice of contract. These conditions are highly problematic because of the level of discretion they place in the hands of the employer and therefore the ease with which they might be evaded. It is worth quoting them in full:

(a) the domiciliary care worker has been employed by the service provider under a non-guaranteed hours contract for the qualifying period,

(b) the domiciliary care worker has worked regular hours during the three months preceding the end of the qualifying period,

(c) the provider has decided that there is a continuing need for the hours to be worked on an ongoing basis, and

(d) the domiciliary care worker has performed satisfactorily during the qualifying period.

The qualifying period for these purposes is three months from the start of the employment or from the last date on which the worker made a choice.⁴⁷ This means that, if the worker does not opt for a guaranteed-hours contract of employment, the offer must be repeated at three-monthly intervals.

Sub-paragraph (b) requires a determination that the worker has worked ‘regular hours’ during the qualifying period. The guidance describes these as ‘the hours that a worker consistently works’. This notion exists in some tension with the underlying idea that the worker is one who is on a zero-hours contract, since it is hard to see how a contract could have zero hours and regular hours at the same time. If there is a written zero-hours contract between the parties, but an offer of regular hours in practice, it is arguable (again using *Autoclenz*) that the written agreement does not reflect the ‘true agreement’ between the parties.⁴⁸ The only scenario in which this situation might arise is where the individual is hired on a genuine zero-hours contract but it turns out in

⁴⁵ Above n. 13, r. 42(1).

⁴⁶ *ibid.*

⁴⁷ *ibid* r. 42(3).

⁴⁸ Above n. 36.

practice that there is plenty of work available and they end up working regular hours contrary to what was anticipated at the outset.

Sub-paragraph (c) requires the provider to decide that there is a ‘continuing need’ for the hours. It is difficult to see how this could have been avoided, because if the worker accepts the offer of a contract with guaranteed hours, the employer is committed to providing (or at least paying for) those hours until it can lawfully terminate the contract. It would not be appropriate to force the employer into this situation in a case where, for example, it is already known that a surge in demand has come to an end and there will be no further work available. However, it is readily open to abuse, since the employer can simply declare that it does not need the hours and avoid detection by assigning some of the work to others.

Finally, sub-paragraph (d) requires that the worker should have performed satisfactorily during the qualifying period. It is easy to see how this requirement might have been introduced into the Regulations out of a concern not to force the employer to hire someone who was not good at their job. However, it seems to muddle different considerations: if the worker is not good at their job, the employer should not be giving them work on any kind of contract, zero-hours or otherwise. A zero-hours contract should not be regarded as some kind of substitute probation period.

5. Enforcement

In relation to enforcement, the employment lawyer’s working assumption is likely to be that a worker who did not receive a schedule of visits or an offer of a contract with guaranteed hours from the employer would be able to seek redress in a court or tribunal. However, these two requirements are in fact intended to be enforced by the public body responsible for the regulation of domiciliary care providers.

During the Assembly proceedings, the minister presenting the Regulations was asked what would happen if a worker was unhappy with the schedule of visits proposed by the provider, and responded by saying:

...if [the schedule of visits] is not in place, then there is the ability of the regulator here to actually step in, and if there isn’t a proper model in place then the regulator will take a dim view of this, and has the powers within here.⁴⁹

It appears that the same enforcement method was envisaged for r. 42. The regulator in this case is the CIW, which has the power to cancel a provider’s registration as a last resort, thus leaving it unable to operate. When the CIW identifies a problem, it works with the provider to secure compliance in the first instance, and may take intermediate steps, such as increasing the frequency of its inspections or suspending a provider’s registration, if persuasion does not work. It has a programme of routine inspections of services but also responds to complaints or concerns, for example, from members of the public.

The alternative would have been to provide that a domiciliary care worker whose entitlements under r. 41 or r. 42 had been infringed could bring a case before the Employment Tribunal. It is necessary to make express provision for this because the ET’s jurisdiction is statutory.⁵⁰ When

⁴⁹ Huw Irranca Davies AM (Minister for Children and Social Care), responding to questions put by Suzy Davies AM, National Assembly of Wales, record of proceedings, 12 December 2017, para 364.

⁵⁰ Employment Tribunals Act 1992, s. 6. It is generally assumed that jurisdiction cannot be implied: *Biggs v Somerset CC* [1995] ICR 811, 826 (Mummery J (EAT)). Leading texts reflect this by listing the ET’s jurisdiction. See, for example, *Harvey on Industrial Relations and Employment Law*, Division PI, Practice and Procedure, Section 1C, Jurisdiction.

the Regulations were enacted, it was arguable that the Assembly had the competence to pursue this option. Under the Government of Wales Act 2006, employment law was a so-called ‘silent’ subject. It was not devolved to Wales, but nor was it expressly excepted from the Welsh Assembly’s legislative competence over devolved matters. This meant that if the Assembly had competence to legislate on a particular topic, such as social care, and passed legislation that could properly be characterised as ‘relating to’ that topic, it did not matter if it also related to a ‘silent’ subject such as employment law. This follows from the Supreme Court’s decision on the validity of the Agricultural Sector (Wales) Bill 2013 which sought to preserve the regulation of agricultural wages in Wales.⁵¹ The Bill was upheld because it ‘related to’ agriculture even though it could also be seen as relating to employment law.

However, under the new devolution settlement put in place by the Wales Act 2017, which came into force on 1 April 2018, employment law is a ‘reserved’ matter. It is difficult to argue that the creation of a new employment right enforceable in the ET is anything other than a central case of what we mean by ‘employment law’ and therefore now outside the Assembly’s competence. As commentators have been quick to point out, despite the general assumption that a shift from a devolved powers model of devolution to a reserved powers model would increase the Assembly’s legislative powers, this is not necessarily the case and employment law is a good example of where a new limitation has been introduced.⁵²

Thus, it may be the case that although the Welsh Assembly could have taken a different approach to the enforcement of the employment rights under the Regulations, which were made on 12 December 2017, under the previous constitutional settlement, ministers chose not to push the point.⁵³ Although the Wales Act 2017 does not operate retrospectively, there is always the threat that the UK Parliament might legislate to overturn some of the Assembly’s prior forays into the employment field, a threat that has been made – though not yet carried out – in relation to the Trade Union (Wales) Act 2017.⁵⁴ Of course, it may also have been the case that ministers considered as a matter of policy that the provisions were best enforced by a regulator rather than by individual litigation, a point to which I return below.

Although r. 41 and r. 42 do not give rise to rights enforceable in the ET, it is worth pausing to consider any other ways in which they might have a role to play in litigation. The first and most obvious possibility, as noted above, is that the schedule of visits under r. 41 might supply evidence of non-compliance with the NMW or with certain rights under the Working Time Regulations 1998, such as the right to a rest break, by providing a detailed statement of when and for how long the worker is expected to be working. Another option is that the provisions might serve as an aid to construction where the tribunal’s jurisdiction was already clearly established. For example, it might be arguable that an employer’s failure to offer a schedule of visits or, perhaps more likely, a reasonable schedule of visits, could be evidence of a repudiatory breach of contract on the part of the employer sufficient to found a constructive dismissal claim. However, this seems unlikely in practice, not least because the claimant would need to be able to fulfil the other requirements of the unfair dismissal jurisdiction, including employee status and two years’ continuous employment.

⁵¹ *Attorney General for England and Wales v Counsel General for Wales* [2014] UKSC 43, [2014] 1 WLR 2622.

⁵² For example, Richard Rawlings, ‘The Strange Reconstitution of Wales’ [2018] PL 62.

⁵³ They entered into force on 2 April 2018.

⁵⁴ Letter from the Secretary of State for Wales to the Chief Executive and Clerk to the Assembly, 10 August 2017.

One final possibility worth considering is whether a court might be willing to treat either or both of the provisions as implied contractual terms in their own right, following the approach taken to the 48-hour limit on the working week in *Barber v RJB Mining*.⁵⁵ It will be recalled that, in that case, the employees were granted a declaration that the employer could not require them to work additional hours until their average hours came within the statutory limit. *Barber* is, however, a somewhat unusual case: the statutory provision was formulated in precise terms but with no obvious means of enforcement, individual or otherwise.⁵⁶ The provisions under consideration here are drafted imprecisely and there is a regulator with responsibility for enforcing them, making the conclusion that they were not intended to be enforced by individuals much more plausible.

Of course, it is arguable that, in any event, it may be preferable as a matter of policy to have a system of enforcement by a regulator rather than by individual litigation, for several reasons. Despite the removal, at least for now, of tribunal fees, and despite the effective use of strategic litigation by trade unions, there are still a number of significant barriers for vulnerable workers to bring a claim in a tribunal, particularly if that claim relates to an ongoing employment relationship. The use of public enforcement is now a well-recognised method in respect of certain employment rights, particularly the NMW. Moreover, many of the concerns about imprecise drafting raised in the previous section are perhaps less concerning given that enforcement will involve dialogue between a regulator and providers. The regulator may be able to focus on the spirit of the provisions rather than getting bogged down in interpretive details, though of course the regulator's decisions may be the subject of legal challenge, particularly from providers faced with the threat of losing their registration.

The two main concerns about using public enforcement are resources and expertise: does the CIW have the resources and expertise it needs to do a good job of enforcing these provisions? There are 432 domiciliary care agencies regulated by the CIW, of which it inspected 369 in 2016-17.⁵⁷ While this is an impressive record, it also received 997 complaints or concerns about domiciliary care during the same time period, which seems to be a relatively large number. However, it is difficult to know how to interpret this figure in the absence of more detailed information about the types of concern being raised. In terms of expertise, it is important to remember that the CIW is not an employment regulator and has a primary focus on the quality of care provided to individuals. Thus, it may not pay much attention to the situation of workers unless this is having a negative impact on people in receipt of care. It remains to be seen whether, and if so how often, action is taken against a provider because of non-compliance with the provisions relating to domiciliary care workers.

6. Conclusion

I want to conclude by making two broader points, one about employment law more generally, and the other about devolution.

In December 2018, the government indicated its intention to legislate to provide a right to request a 'stable contract'⁵⁸ in response to a recommendation from the Taylor Review.⁵⁹ At the

⁵⁵ *Barber v RJB Mining (UK) Ltd* [1999] ICR 679.

⁵⁶ There was no means of enforcing r. 4(1) Working Time Regulations 1998, but an employer who breached r. 4(2) committed a criminal offence.

⁵⁷ Care and Social Services Inspectorate Wales, *Chief Inspector's Annual Report 2016–2017* (2017).

⁵⁸ HM Government, *Good Work Plan* (December 2018), 13.

time of writing, no detailed proposals have yet been published, but the indications are that the right will be for employees and workers (not just those with zero-hours contracts), that it will be available after a 26-week qualifying period (not the twelve months suggested by Taylor), and that it will be formulated as a right to 'request'. The drafting of r. 42 highlights some important points that should be borne in mind in developing such a right.⁶⁰ First, while there is an understandable reluctance to impose potentially more onerous contractual arrangements on employers without safeguards, not least because this increases the risk of evasion, it is important that any such right is framed in a way that acknowledges the inequality of bargaining power between workers and their employer. The Welsh example is positive in this respect, since it requires the employer to be proactive in making the offer and in repeating the offer at regular intervals, rather than expecting the worker to take the initiative to request a different arrangement. Workers with precarious employment arrangements are likely to be especially reluctant to jeopardise what work they have by requesting a more permanent contract. Second, it is important not to overcomplicate the qualifying conditions for the right. There are several problems of this nature with r. 42, such as the requirement of satisfactory performance, but the most obvious one is the requirement to show employee or a particular type of worker status in order to qualify. It is well-known that working people with zero-hours arrangements face difficulties in establishing that they are within the personal scope of employment law, so it seems particularly unhelpful to draw up a provision that is intended to help them in a way that makes it unlikely that they will benefit. It remains to be seen how the UK government will address this issue, and of course there is also an intention to review employment status more generally as part of the 'Good Work' agenda. More positively, it is worth noting that the Welsh legislation only requires a twelve-week qualifying period to trigger the offer, rather than the 26 weeks being suggested for the right to request a stable contract.

In terms of devolution, it is clear that the Welsh Assembly is interested in addressing labour law matters despite the limitations on its competence to do so. This raises some important questions about the design of devolution and the choices that have been made about reserved matters. It is often assumed that employment law should be reserved because of the potential for a 'race to the bottom' among units within a larger entity, or because of the practical difficulties for firms of accommodating different labour standards whilst operating across the whole of that larger entity.⁶¹ However, the Welsh example shows that the 'race to the bottom' is by no means inevitable, because an entity which has a strong social agenda for political reasons may wish to experiment with setting higher labour standards. From this perspective, a model in which the role reserved to the UK Parliament would be the setting of minimum standards is, arguably, much more attractive. While change on this front seems highly unlikely, there are still a number of options open to the Welsh Assembly and government to set social standards despite the competence problem. These include applying labour standards within regulatory regimes over which there is competence, as we have seen in this case; acting as a 'good employer' when directly engaged in the provision of public services, and using social clauses in public procurement. One shared feature of all of these approaches, however, is that they exist within what we might loosely term a public law framework. It is too early to make any normative comment about this, but it is worth noting that as Welsh public law begins to develop a

⁵⁹ Matthew Taylor, *Good Work: the Taylor Review of Modern Working Practices* (July 2017); HM Government, *Good Work: A response to the Taylor Review of Modern Working Practices* (February 2018), 39.

⁶⁰ Of course, it is arguable that a better option would be to ban zero-hours working altogether, since the supposed benefits for workers are questionable, but space precludes further exploration of this here.

⁶¹ For example, Otto Kahn-Freund, 'The Impact of Constitutions on Labour Law' (1976) 35 CLJ 240.

distinctive identity of its own, one aspect of that distinctiveness is that it may start to include significant elements of employment law, and thus have a much broader scope than might be expected.

A.C.L. Davies*

* Professor of Law and Public Policy, Faculty of Law, University of Oxford.