Regulating for Decent Work

Combatting Unfair Terms in (Zero-Hour) Employment Contracts

An Address by Esther Lynch, Legal and Legislative Officer at the Irish Congress of Trade Unions and Honorary Senior Lecturer-in-Law at NUIM

6th May 2014

Decent Work Matters to People

'Decent Work' sums up the working life to which we all aspire. It means having a job and future prospects, it's about balancing work and family life; it's about a living wage, a decent income, a fair share of the wealth that you have helped to create. Decent Work is safe and healthy work, where you are not discriminated against and where you have a voice in your workplace.

For everybody, everywhere, decent work is central to human dignity.

Law, because of its' strong normative action, is an indispensable tool to making decent work a reality.

There are many ways of thinking about the role of employment law. Unfortunately the predominant narrative is a deregulatory one, focussed on a simple yet influential set of assumptions essentially that employment protection legislation is an undesirable distortion of the market creating inefficiencies and dragging the economy backwards. At best, proponents propose jobs first – decent work later.

But there is another more balanced approach. One that recognises the potential benefits of employment protection legislation to the individual, the economy and society; one that acknowledges a strong connection between the conditions of work and productivity; one that knows that progress hinges on an ethical economy, respect for human rights and work that is decent.

The aim of this paper is to contribute to the debate on decent work by proposing responses to decent work deficits in field of employment and labour law.

No discussion on decent work can credibility ignore the decent work deficits associated with the situation of thousands of zero-hours workers. Zero-hour contracts take workers back to a time when workers stood at a designated corner and waited for an employer to come by in the hope of being selected to work that day. The difference is today, is that instead of a corner, the modern zero-hour worker waits at home, for a text. Others have

their shifts cancelled or are sent home at a moment's notice. As such it is difficult to see how zero-hours practices are compatible with human dignity and decent work.

Decent Work Deficits Associated with Zero-Hours Contracts

Zero-hours contracts present huge drawbacks in comparison to permanent and regular work these include:

- The absence of a guaranteed level of regular earnings makes it difficult for the employee to have any certainty over meeting bills or planning for the future; Research carried out by Mandate Trade Union in 2013 found that 17 per cent of people living below the poverty line work in precarious jobs with zero-hours contract jobs;

- The need to respond to calls to attend work, frequently at short notice, disrupts life outside of work and places a particular strain on families and arranging care for dependants;

- The need to be available for work when required by the employer hinders the ability of the employee to be able to take up other employment;

- The variability of earnings throws into doubt an employee's eligibility to claim various state benefits. For example, the Family Income Supplement can only be claimed if an individual falls below the income ceiling and works for at least 19 hours a week, but whether an individual achieves these hours can vary from week to week under zero hours, creating even greater uncertainty;

- Uncertainty about hours offered each week can lead to fear among staff about complaining or raising issues of concern and deterring the likelihood of whistle-blowing due to workers' fears that they will be penalised through cuts in hours offered;

- Zero-hours contracts can be damaging for employers too. Zero hours contracts can damage an organisation's ability to attract and hold onto high quality staff and are associated with lower productivity.

This is not to suggest that all zero-hours contracts are inherently objectionable. Some zero-hours contracts may provide individuals with welcome choice and flexibility, allowing them to refuse work when it is unwanted, for example to fit in with studies or to achieve a better fit with family. However, the research strongly indicates that for the majority of employees, the flexibility is for the benefit of employer and the 'choice' to refuse the working hours is more apparent than real as employees fear that turning down hours will result in their employer withdrawing hours in the future.

Zero Hours Contracts Explained

When employees and their unions talk about 'zero hour' contracts they are generally referring to a cluster of practices that involve the employee having no guaranteed or very few guaranteed hours of work.

The zero-hour employee only receives payment in respect of the hours they have been required to be at work. The zero-hour employee's working hours can be subject to variation on a daily or weekly basis. Typically the employee receives very short notice that they are required for work, sometimes less than 24 hours and often by text message. Zero-hour practices also involve the worker being liable to be sent home from work, unpredictably and at very short notice, for example if it rains or business is quiet.

Zero-hour practices also refer to short-hours contracts (where an employee is guaranteed a small number of working hours per week, for example 6 or 8, with scope for further working hours (should they be available and offered) and differ from zero-hours only in that they provide a fixed but minimal number of working hours per week.

Typically Zero-Hours Type Terms are framed along the following lines:

'You are required to be available to work an 8 hour week, including Sundays and Public Holidays at the Company's discretion. Rosters shall be established as appropriate'

'The Company is under no obligation to provide work to you at any time and you are under no obligation to accept any work offered by the Company at any time.'

As will be discussed later these terms have an undermining effect on the legislative safe guards against abuse of zero-hours contracts.

Prevalence of Zero-Hours Contracts in Ireland

The precise number of employees on zero-hour contracts in Ireland is unknown.

The Office of National Statistics (ONS) in Britain recently (2014) reported that 1.4 million employees are on zero hours contracts. The most prevalent use was in Tourism, Catering and Food Sector (371,000); followed by Admin and Support Services (357,000); Health and Social Work (191,000); Transport, Arts and Other (158,000); Wholesale and Retail (140,000); Education (68,000); Construction (47,000); Production and Agriculture (45,000); Information, Finance and Professional (28,000); and Public Administration (13,000). The same study showed that women and those under 25 and over 65 were more likely to be on zero-hour contracts. Interestingly, larger employers, rather than smaller employers were more likely to use these contracts.

There is a strongly likelihood that the situation in Ireland is similar. In an interview with the Irish Examiner on Tuesday 13th August 2013 a spokesperson for Domino's Pizza stated that "The stores operate the same in the [Republic] as they do in the UK — so the majority of the non-managerial or supervisory positions in a store are on zero-hours contracts".

While precise numbers of employers offering zero-hour contracts is not available for Ireland, some estimates about the number of workers can be interpreted from statistics compiled by the Central Statistics Office (CSO). Employees on zero-hour contracts are likely to be a significant component of the group categorised as *underemployed*.

The picture painted by the statistics is concerning. Ireland has the highest level of *underemployment* in the EU, bar Spain. In Ireland 7.4 per cent of employees are seeking additional hours; the EU average is 4.4 percent. The increase in the numbers of *underemployed* has been substantial. Since the 3rd quarter of 2008 (the first year Ireland has data), the number of underemployed has increased by 50.5 percent. This compares to an average growth of 31.9 percent in the EU during this period.

A behaviour and attitudes survey commissioned by Mandate Trade Union in 2012 sought to generate information to fill the gap on the issue of "precarious work" and "underemployment". The survey revealed that a majority of their members are employed on part time contracts, and are working an average of just 22 hours per week yet over half of them work over 5 days. Working hours were frequently subject to change with only a third having stable working hours. A significant amount of MANDATE members wanted greater certainty from their employers about the number of hours/days they work.

It would be wrong though, to conclude that this is a problem at the fringes of the job market or confined to the low paid sectors. Individuals on zero-hours type contracts work in all sectors across the economy, and in occupations throughout the pay range.

Collective Bargaining as a response to Zero-Hours Contracts

Trade Unions in Ireland have responded directly to the problem of zero-hour contracts and have negotiated collective agreements that aim to address the abuses of zero-hour contracts.

SIPTU ran a successful campaign in respect of more than 10,000 home helps and secured a collective agreement that guarantees a minimum of seven to ten hours work each week, ending the practice of zero hour contracts in the HSE (Health Service Executive)

MANDATE have negotiated collective agreements that guarantee minimum hours in the form of 'banded hours' that reflect the employees' actual

working hours along with providing mechanisms to allow for an increase in these hours.

'Banded Hours'

The Banded Hours system means that the employee is aware of their minimum guaranteed weekly working hours and the likely maximum number of hours they will be required to work. Banded hours are rostered in accordance with the collective agreement and typically are constructed along the following lines:

Band A	11.5 -14 hours per week
Band B	15-19 hours per week
Band C	20-24 hours per week
Band D	25-30 hours per week
Band E	31 -35 hours per week
Band F	36-37 hours per week

Banded hours mean that employees are guaranteed working hours that do not fall below the minimum of the band that applies to them.

Banded hours also mean that in circumstances where employees consistently work in excess of the upper end of their band they will be considered to have moved up to the relevant band. In practice this means that an employee in Band A will be paid no less than 11.5 hours. If they consistently work for 16 hours a week they will move up to Band B.

The collective agreements set out the exact details of operation and provide for flexibility to deal with specific business requirements such as the 'trough' month of February.

Places where banded hour arrangements have been negotiated include Tesco, Penney's, and Supervalu. In addition Mandate Trade Union has secured increases on basic rates of pay in a number of companies in recent

times; including Argos 3%, Marks & Spencer 2.5%, Tesco 2%, Boots 2%, 'Superquinn' 2% & Penney's 3% these include some improvements in guaranteed hours for all the members employed at these companies.

What these collective agreements demonstrate is that collective bargaining through a trade union can result in a fairer form of flexibility – one that promotes 'Decent Work'.

However not all employers recognise their employees right to collectively bargain through a trade union and worse, there is no legal protection for employees from penalisation by their employer for example, having their hours cut – "being zeroed down" when they organise in a trade union.

For these workers the terms in their employment contract are the default position.

Problematic Zero-Hour Terms in Employment Contracts

Speaking in reply to a Dáil question [17430/14] on the use of zero-hour contracts the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton, stated 'zero-hour contracts are matters of contract law. They must be entered into freely by the employer and employee and cannot be forced on the employee'. (Dáil Debates 15th April 2014).

The Minister's answer is accurate in the abstract but it is very wide of the mark in practice. Only in very limited circumstances are zero-hours contracts freely chosen by the employee. Individual employees are not in a position to bargain on equal terms with their employer. Unemployed workers anxious to secure work are unlikely to discuss the fine print of their employment contract. For the vast majority of employees there is such a significant imbalance in the bargaining power between them and their prospective employer that in the main, employment contracts are written by employers, on terms primarily to their advantage and offered on a "take it or leave it" basis.

This is a problem because terms can be inserted into employment contracts that have the effect of undermining the safeguards against abuse of zero hour contracts provided in legislation and giving rise to decent work deficits.

Some protection for employees against abuse of zero-hour contracts is afforded under the Organisation of Working Time Acts 1997-2012. The OWT Act (section 18) gives the zero-hour employee an entitlement to receive compensation in respect of the hours they are not required to work. It does this by providing that in circumstances where the employee has not been required to work their contract hours they are still entitled to some remuneration. The entitlement is calculated on the basis of 25 per cent of the 'contract hours' or 15 hours which-ever is lesser. The entitlement applies to employees contracted hours and hours they are required to be available for work.

Examples of the Legislation in Practice

Mary works for a financial services firm. Her contract states that her 'normal working week is 09.00 to 17.00 or as and when the employer requires'. Last week Mary was only called into work for one day (7.5 hours). The legislation provides that she is entitled to be paid as if she worked 25% (or 15 hours whichever is the lesser) of her contract hours (39) so she is entitled to be paid for 9.75 hours.

John works for a building supplier. His terms and conditions of employment state that his normal hours of work are from 10.00 until 13.00 five days a week i.e. a total of 15 hours a week. John was sent home early, at 11.00 on Thursday and Friday meaning that he only worked 11 hours. As John worked more than 25% of the contracted hours he has no further entitlement.

Of course an equal sharing of risk would suggest that the zero-hour employee would be compensated for at least half of the time they were contracted to be available for work. I am unaware of any zero-hour contract that provides for this.

The reality is that the terms in zero-hour employment contracts are as likely to create problems for the workers than solve them. A good example is the inclusion of short-hour terms in zero-hour contracts.

To avail of the compensatory payment the zero-hour employee must establish the 'floor payment' by reference to the number of hours that the employee may be required to work in a week. However terms in zero-hour contracts can understate these hours by providing a minimum number of hours, for example 8 hours a week. Typically the short-hours contract provides that additional hours may be available but the employee is not 'required' to work the additional hours nor are they required to be available to work these hours 'y*ou have the right to refuse or accept these hours. You are not expected to be on call for work and will not be paid an allowance for same. The refusal of hours on your behalf will have no negative consequence on hours being offered to you in the future.'*

The problem with this contract term is that it can be used to create a false basis for calculating the floor payment.

The Labour Court having determined [No.DWT981 (WTC/98/1)] that the floor payment 'should be calculated by reference to the number of hours which the employee may be required to work in a week and not to the number of hours over which they are required to be available to undertake that work'. The case involved the Marine Port and General Workers Union. The union argued on behalf of their members that the 'floor payment' should be calculated by reference to the number of hours over which the employees were required to make themselves available. The union claimed this was a period from 7.00 to 24.00, Monday to Friday (a total of 85 hours). On that the basis their claim was for a floor payment of 15 hours.

However the Labour Court referred to the contract (collective agreement) providing for 'normal working hours' from 08.00 to 17.00 for a five day week (a total of 39 hours). The labour court held on this basis that the floor payment of 9.75 hours applied.

Amending the legislation to provide for the 'floor payment' to be calculated (i) by reference to the hours' stated in the employment contract /written statement or (ii) by using a reference period of the hours worked during the last 13 weeks and (iii) the hours that the employee might be called into work – whichever is greater – would align more closely with the intention of the legislation, it would encourage employers to be more realistic in their expectations and it would also assist with addressing problems that have arisen when calculating holiday pay.

To avail of the protections, the zero-hour employee must also bring themselves within the scope of the Organisation of Working Time Act. Section 18 of the OWT Act specifically excludes employees engaged 'to do work of a casual nature'. The legislation does not provide a definition of 'casual' worker.

Other problems arise in relation to what it means to be 'required to be available for work'. In the case of 'Contract Personnel Marketing Ireland v Marie Buckley [DWT1145] a case taken by the Independent Workers Union the Labour Court found the worker in this case could be offered work from time to time, but had no obligation to accept this offer of work, a fact which was central, and fatal, to her claim under section 18.

Lack of Transparency in the Employment Contract

Unquestionably, one of biggest problems encountered by employees is getting their employment contract in writing. The Terms of Employment (Information) Acts 1994–2012 oblige an employer to provide an employee with a written statement of their terms of employment. The obligation to provide the employee with a written statement does not apply from the first day of employment instead the legislation gives employers 2 months to comply.

The sanctions for employers who ignore this obligation are minimal. In most cases, when discovered, the labour inspectorate will request the employer to provide the statement. Fines are very rare for breaches of this right.

Arguably, the most significant pitfall with the Terms of Employment (Information) Act is the somewhat ambiguous obligation to provide '*any details*' to the employee about their working time, crucially there is no specific requirement for employers to actually provide specific details. What is needed is an obligation on employers to provide a statement of the minimum hours, the days on which the employee will work, the length of the working day and a statement of the hours during which the employee may be called on to work. It is worth noting here that the EU Directive (91/533/EEC) on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship provides that the employee is to be provided with details of 'the length of the employee's normal working day or week' Article 2 (i).

Inadequate notice is also part of the zero-hours story. Section 17 of the Organisation of Working Time Act, sets out the requirements regarding notification to the employee of the times at which he/she will be required to work during the week. Generally, an employee is entitled to 24 hours' notice of his/her roster for the week, although section 17(4) allows for changes as a result of unforeseen circumstances. 24 hours is hardly fair notice, but many zero-hour employees are even denied even this notice.

These examples highlight the existence of 'unfair terms' in the employment contact, undermining legislative protection.

Unfair Terms in Employment Contracts

Unfair terms in employment contracts have a great deal in common with unfair terms in consumer contracts. The EU Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts sets out indicators and characteristics of unfair terms these include: '*terms that have been drafted in advance and the consumer has not been able to influence the substance*

of the term, particularly in the context of a pre-formulated standard contract'. Terms that causes a '*significant imbalance between the parties… to the detriment of the consumer'*. The Annex to the Directive includes a non-exhaustive list of terms that may be considered to be unfair among these are terms that '*inappropriately exclude or limit the legal rights of the consumer'.*

Employment contracts are specifically excluded from the Directive, however a straightforward comparison would suggest that zero hour type contracts would fail any number of the Consumer Directives' tests. I am not arguing for employment contracts to fall within the ambit of the Directive rather that legislators could take inspiration from the Unfair Terms in Consumer Contract Directive as a basis for enacting legislation prohibiting unfair terms in employment contracts.

Legislating for Fair Terms in Terms in Employment Contracts

Arguing for legislative protection for fair employment rules is not a new idea. Ireland had legislation on Fair Employment Rules, on the Statue Book until 1990. Enacted under the Industrial Relations Act 1969, section 11 of that Act, provided for the Labour Court, after consultations with employers and employee organisations to make rules – Codes – to provide for 'fair employment conditions'. However I have been unable to find any evidence of use being made of this provision before it was removed from the Statute books in 1990.

A statutory obligation on employers to have 'Fair Employment' rules would include a requirement for: *Transparency,* in the sense that workers should be fully informed of the terms of the contract (see Professor Keith Ewing '*Zero Hours: Some Policy Responses to Zero Hour Contracts*', IER 2014). *Certainty*: in the sense that the employee should, with a reasonable degree of accuracy be able to predict their hours of work and the days and times of these hours throughout the week.

The legislation would also prohibit 'unfair terms' such as: *terms that are significantly weighted against the employee* such as giving the employer the right to make sweeping changes to the contract. Other unfair terms could include those that *put an unfair burden on the employee*; such as terms that allow short notice of working time arrangements (less than one week) or practices whereby the employee is called into work for periods that are unfairly short (a fair employment rule could stipulate that, once called into work the zero-hour employee should be entitled to at least a half day of work).

This list is not exhaustive and the legislation could provide for further elaboration in Codes of Practice.

Fair employment rules would also address other areas of vulnerability such as rights that are capable of being waived by 'consent 'in the employment contract. It is questionable whether 'consent' in the employment contract can be genuinely valid given the significant imbalance between the parties. Employees do not leave their human rights at the door of the workplace and practices such as searching the employee and their belongings, excessive and inappropriate monitoring and surveillance, unnecessary requests for health information and background checks are all areas that would benefit from a fair term rule.

It must be recognised that some terms that fit into the unfair category may be fair, according the circumstances. The legislation can allow for necessary flexibility by providing an 'objective justification' test whereby an employer can demonstrate the necessity for the inclusion of the term or zero-hour practice. In certain limited circumstances the term or practice may then be deemed to be fair, having regard to appropriate safeguards such as collective rather than individual consent.

As with the Consumer Contracts, when a term in the contract is found to be unfair, the remainder of the contract will still be legally binding. This means that while one term or condition of the contract may be unlawful, the remainder of the contract remains in force.

By proposing these protections for zero-hour workers I do not mean to suggest I am in in favour of zero-hour employment practices.

Limiting the use of zero-hours contracts to situations where they are genuinely needed is desirable for the employee, economy and society. This could be achieved by requiring the employer to objectively justify the needs for a zero-hour contract or setting a limit on the proportion of the employees that an employer can have on zero-hours. Both would help to send a clear message that zero-hour contracts are not an acceptable business model. Likewise limiting the period of time that a post could be filled (for example 6 months) on zero-hour contracts would also send out a message.

An additional approach could be to provide a right for zero-hour (and other part-time) employees to request full-time work and place a corresponding obligation on the employer to seriously consider the employee's request and only where there are serious reasons can the employer justify the refusal. A close examination of the Part Time Work Directive (Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC) suggests that such a measure is necessary to full that Directive's requirements.

Of course zero-hour employees in Ireland are at a further disadvantage as they do not benefit from a legal entitlement to an overtime pay premium in respect of hours worked in excess of their 'normal hours'. If employees were legally entitled to an overtime premium, for example an entitlement to be paid at a rate of time and a half, in respect of the hours worked in excess of the 'normal' hours stated in the contract, the practice of short- hours understating hours could be addressed.

10 measures that could be adopted to reinforce existing legal protection for employees on zero-hours type contracts

1. Require employers to provide the employee with a written statement of 'normal working hours' no later than the first day of employment;

2. Increase the period of 'compensated time' so that employees are compensated for half of unworked time – currently employees are compensated for only a quarter of unworked time or 15 hours whichever is the lesser;

3. Provide that 'normal working hours' can be calculated using the hours' (i) stated in the employment contract /written statement or (ii) by using a reference period of 13 weeks and (iii) the hours the employee may be called into work, whichever is greater – this would also assist with addressing problems that have arisen when calculating holiday pay;

4. Provide a right to request full-time work and a corresponding obligation on employers to seriously consider the request; allow refusals only where the employer can demonstrate the need for zero-hours type practices;

5. Consideration should also be given to limiting the proportion of the workforce that can employed on zero-hour type practices; or

6. Limit the length of time a post can be filled with workers on zero-hours type arrangements;

7. Provide a right for employees to an overtime premium (e.g. time and a half) for hours worked in excess of the 'normal hours' in the employment contract/written statement;

8. Provide that employees cannot be called into work for excessively short periods such as periods of less than four hours;

9. Increase the notice period for rosters to at least a week – only in genuinely unforeseen circumstances should shorter notice of working time apply;

10. Protect employees from penalisation for example, having their hours cut – "being zeroed down" when they stand up for their rights including organising in a trade union.

Human Rights obligations require action on the Decent Work deficits inherent in zero-hour practices

Finally it is worth stressing that human rights obligations underpin the above call for action on zero-hours contracts. Human Rights obligations require States to respect, protect and fulfil the right to just and favourable working conditions –Decent Work. The obligation to protect requires States to prevent violations by taking appropriate legislative, administrative, budgetary, judicial measures. Failure to prevent violations by third parties, i.e. employers, can amount to a violation too.

Decent Work – The Right to Just and favourable Conditions of Work

The Universal Declaration of Human Rights (Article 23) guarantees 'just and favourable conditions of work' and the 'right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented if necessary by other means of social protection'.

The EU Charter of Fundamental Rights, specifically guarantees, 'fair and just working conditions' (article 31) and the right to defend interests through trade union collective bargaining (article 28) echoing the provisions in the European Convention on Human Rights.

The European Social Charter (revised) guarantees the 'right to just and favourable conditions of work' and 'a right to fair remuneration sufficient for a standard of living for themselves and their families.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes numerous articles relating to decent work: The 'Right to Work' in Article 6, includes the right to gain a living through work and a right to full and productive employment and Article 7 on the 'Right to Just and Favourable Conditions of Work', includes the right to fair wages, and the right to a 'decent living' for the worker and their family.

The Committee on Economic and Social and Cultural Rights (CESCR) monitors States implementation of the Covenant. The CESCR has specified that the right to work in Article 6 means the right to Decent Work and has explicitly asserted that Articles 6, 7 and 8 on trade union rights of the Covenant are interdependent (CESCR General Comment 18).

The Constitution of the International Labour Organisation (ILO) acknowledges the strong relationship between conditions of work and social justice and expresses the undesirability of States (and employers) attempting to secure competitive advantage on the basis of labour conditions that do respect human dignity. The Preamble to the ILO Constitution declares that 'universal and lasting peace can be established only if it is based upon social justice …whereas the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries'.

As a result the ILO Constitution commits Members to 'improve conditions of work'. Among the conditions of work mentioned in the Constitution are 'the regulation of the hours of work' and the 'provision of an adequate living wage' both of which are relevant to a consideration of the compatibility of zero-hours contracts with the achievement of decent work.

The 2008 Declaration on Social Justice for a Fair Globalisation commits ILO members 'to place full and productive employment and decent work at the

centre of economic and social policies'. The 2008 Declaration recognises the 'four equally important strategic objectives' of the Decent Work Agenda 1: promoting employment 2: enhancing social protection 3: promoting social dialogue 4: realising rights at work. The Declaration recognises that these four pillars are 'inseparable, inter related and mutually supportive'.

In conclusion, Decent Work is not a slogan, the first step to achieving Decent Work is recognising where there are decent work deficits and the second is to call on decision makes to promote Decent Work through policies, laws and practices. The third is to put forward realistic suggestions to address these deficits.

It is in this area, of identifying solutions that students of law play a crucial role.

I wish everyone well with their studies and look forward to further discussions.

Ends
6th May 2014
Esther Lynch