LOW HOURS CONTRACTS- New Challenges for Legal Regulation.

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When the workers in a prominent Department Store went on strike in early 2015 protesting about ‘zero hours contracts’ the term first hit public consciousness. The strike occurred in April 2015 after many months of workers’ unrest where Unions complained that at least three quarters of staff were on flexible short term contracts. Workers complained of low pay and uncertain and precarious employment, which made it difficult for them to plan for the future. In circumstances where it looked like more than 6,000 employees of Dunnes Stores would be taking to the picket, zero hours contracts suddenly became a major public issue in Ireland, and extended media coverage.

Yet the problems raised by zero and low hours contracts, so called ZHC’s, are not new. Minister Gerald Nash TD, Minister for Business and Employment had in fact already announced on the 9th of February 2015 of the appointment of the University of Limerick personnel from the Business School to carry out a study into the prevalence and impact of zero and low hours contracts. The report issued at the start of November made a number of recommendations and findings, which are set out in an Appendix to this paper.

In popular parlance a ZHC is an employment agreement offered by employers to staff that does not guarantee any hours of work to the employee at all. The number of hours worked by the contracted employee can vary significantly, or in fact dwindle entirely. Work could be intermittent in time, depending on availability of other potential employees on a panel. ‘If and when’ contracts are similarly flexible, with work only being offered if and when it becomes available, with typically no obligation on the worker to accept. In fact, the relationship may be so loose that the worker may not in fact be an employee for the purposes of protective employment legislation. The University of Limerick found that pure zero hours contracts were not prevalent in Ireland, but that ‘if and when’ and other hybrid low hours and variable contracts were widespread in use in the areas of tourism and leisure industries as well as retail and other administrative services and are used generally to provide employers with huge flexibility in terms of the amount of expenditure on the cost of labour. Yet it could be said that such contracts are inconsistent with the dignity of the worker are precarious and prevent them from engaging in

¹ This paper is a shorter version of an article with Lisa Schmeck, Judge, Germany which will be published in the IELJ in Spring 2015.
any plans as to the future or managing their lives outside the workplace, especially if they are on call, or could be offered hours of work at short notice. In this context the ILO has noted in its report on the Diversity of Marginal Employment, and Zero Hours Contracts, that while flexible working may offer advantages to the economy and to some employees

“Nonetheless, “marginal” part-time employment, with very short and often highly variable hours—and thus also income insecurity—frequently makes it impossible to sustainably manage a household budget and meet family and other personal responsibilities. Moreover, not knowing when work begins or when it ends might have detrimental psychological and physical consequences, and may also result in a slower pace of recovery from work and more conflicts between paid work and personal life” (ILO INWORK Policy Brief No. 7, 2015, p 8)

This paper aims to consider the regulation of Zero hours contracts by considering the law in Ireland on the regulation of flexible work contracts, the existing limited legal constraints in Ireland on such contracts.

I. Definitions

In order to engage in legal analysis the concept must first be defined. However considered closely from a legal point of view ZHC’s do not comprise a defined set of work arrangements; the term ZHC is in fact simply a convenient shorthand for a wide variety of a-typical and precarious work patterns in a post-recession highly fragmented workforce. ZHC’s cover a wide variety of contractual arrangements over such categories as temporary part-time or self-employed work to even more precarious forms of work such as “reservist”, “on call”, “as and when contracts”, “regular casuals”, “key time workers” and intermittent or seasonal work. The use of such arrangements is not specific to Ireland but can be seen all over the world at EU level and indeed internationally, as can be seen by the report commissioned by the ILO.

At a European level the Court of Justice attempted to adopt an appropriate terminology for these types of contracts which it defined as “working according to need, [where the employee] works under a contract which stipulates neither the weekly hours of work nor the manner in which working time is to be organised, but it leaves her the choice of whether to accept or refuse the work offered by [the employer]”. (Case C-313/02 Nicole Wippel v Peek and Cloppenburg GmbH & Co KG ECR i-9522, see also Peers, “Equal treatment of atypical workers: a new frontier for EU law” (2013) 32 Year Book of European Law 30/41.)
In the UK, following public consultation on the use of such contracts, provisions banning exclusivity clause in zero hours contracts were introduced into section 153 the Small Business Enterprise and Employment Act 2015, amending the UK Employment Rights Act 1996. Such contracts were defined as

“In this section “zero hours contract’ means a contract of employment or other worker’s contract under which—
(a) the undertaking to do or perform work or 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.”

The ban on exclusivity also applies to other workers contracts which will be specifically included by regulation and “non-contractual zero hours arrangements” which are defined as

“an arrangement other than a worker’s contract under which—
(a) an employer and an individual agree terms on which the individual will do any work where the employer makes it available to the individual and the individual agrees to do it, but
(b) the employer is not required to make any work available to the individual, nor the individual required to accept it, and in this section “employer”, in relation to a non-contractual zero hours arrangement, is to be read accordingly.”

This definition is unsatisfactorily vague and clearly may be extended to include other ‘workers contracts’ as yet undefined.

There are also difficulties with a working contract which states expressly that an employer does not guarantee work and the individual is not obliged to accept any work offered. In practical terms a person who wishes to be offered hours on an on-going basis may feel pressure to individual to accept any work offered- there may therefore be obligations in practice, but not in law. Indeed this was found in the UL report. As a matter of law, the absence of any mutuality of obligation would lead to the conclusion that there is in fact no employment contract at all but rather some other type of contract which is either *sui generis* or which might be better termed a contract for services. (*Minister for Agriculture and Food vs Barry and Ors*) Such a definition however takes employees/workers out of the protection of employment statutes when it is precisely workers who
are on precarious contracts where work and income are totally dependent on the invitation of the employer to offer hours of work, that are in the greatest need of protection. (S Deakin and G Morris, Labour Law) (6th edition hard 2012 (167 as quoted in Prassl, Adams, Freedland, and Brassil “The zero hours contract: regulating casual work, or legitimating precarity?, Legal research papers series paper number 00/215 February 2015).

It is important to realise, however, that other employment law statutes may cover a worker even if they are not an employee within the meaning of the traditional common law tests:- the scope of the Employment Equality Acts 1998 to 2011, the National Minimum Wage Act 2000 and the Payment of Wages Act 1991 are broader as the definitions of the individuals to whom they apply is wider than just employees with a contract of service. For example, the Employment Equality Acts 1998 to 2011 covers contracts whereby an ‘individual agrees with another person to personally execute any work or service for that person’.

Zero hours contracts are therefore better seen as a legal spectrum of contractual relationships which do not fit into existing legal relational categories in many cases. Provision in law for the protection of the employment rights of such workers is therefore fraught with difficulty.

II. Irish Law

The Protection of Employees (Part Time Work) Act 2001 is the main piece of Irish legislation establishing the employment rights of part-time employees. The purpose of the 2001 Act is to provide that part-time employees are not treated in a less favourable manner than a comparable full-time employee unless there are objective reasons for such treatment. For those who work full-time when they do work, but are not guaranteed ongoing permanent work, the Protection of Employees (Fixed Term Work) Act 2003, provides protection, in that it requires employers who employ a worker continuously for over four years, to provide the worker with a contract of indefinite duration, unless there are good objective reasons for not doing so.(For an up to date treatment of the reasons which will justify successive fixed term contracts, see Ger Shelly “Objective Justification of Successive Fixed Term Contracts” 2015 12(3) IELJ 77.) The Protection of Employees (Temporary Agency Work) Act 2012 provides rights regarding equality of treatment to temporary agency workers, many of who may be part-time workers.

A significant piece of legislation is the Organisation of Working Time Act 1997, section 18 of which provides some compensation for workers who
work less than 25% of their contracted hours in a week. The section applies both to an employee whose contract of employment operates to require the employee to make himself or herself available to work for the employer in a week for a certain number of hours (“the contract hours”), or as and when the employer requires him or her to do so. Where an employee suffers a loss by not working hours they are required to be available to work, the provisions of the Act require that the worker must be compensated for 25% of the time which he or she is required to be available or 15 hours whichever is the lesser. For those engaged an ‘as and when’ basis, the contract hours are calculated by reference to the hours actually worked by a comparative employee doing the same type of work. Under Section 17 of the Act, the employer must notify the employee of the starting and finishing times at least 24 hours before the first day or the day of each week the employee is required to work. However, where there is no legal obligation to do the work, the section is not breached.

Section 18, in reality is of limited assistance to employee, in that it guarantees such a limited amount of the actual total amount of contracted hours. Time on call is excluded from the time on which the contracted hours are based, as is time on layoff or short time. Casual workers are also excluded. Furthermore, the precise application of the section is unclear, particularly as regards “as and when” employments, where there are no specified contract hours. If an employee is not expected to be on stand-by and is offered work from time to time as it becomes available, and has the option of decline such work and such refusal is not the subject of disciplinary proceedings, then the section 18 provisions do not apply. (Contract Personnel Marketing Ireland v Buckley DWT11/45) referred to in Frances Meenan Employment Law: 2015 at page 473. In Ocean Manpower v MPGWU [1998] ELR 299, section 18 was successfully enforced by unions on behalf of casual dock workers.) The legislation can also have what the University of Limerick study call ‘unintended consequences’. The authors write

“Section 18 of the Organisation of Working Time Act 1997 provides for some payment to a zero hours employee for hours not worked. As IBEC noted, there is no advantage to an employer offering a zero hour contract if they do not know what hours they need employees

\[\text{\footnotesize \cite{note1}}\]

\[\text{\footnotesize \cite{note2}}\]

2 the Labour Court deemed her not to be an employee on a zero hours contract as defined by the working time legislation but to be in ‘casual employment’. There was a clause in the contract which indicated that she was under no obligation to accept work offered by the company and the company did not undertake to guarantee any hours to her. Thus, she was deemed not to be covered by Section 18 of the Organisation of Working Time Act.
for. If an individual is not contractually required to be available for work i.e., If and When, then they are not covered by Section 18 and are not entitled to receive pay for hours not worked. It is more economically advantageous for an employer to have a panel of people on If and When contracts, who can be called upon when work is available and they are only paid for hours worked. Unintended consequences also appear to have emerged as a result of the introduction of the Protection of Employees (Fixed-Term Work) Act 2003. Interviewees in education claimed this Act has made education employers more careful in their recruitment decisions and suggested it was one of the factors contributing to more temporary positions with low working hours and If and When hours in second and third-level education.“(at page 18)

The manner in which the 2003 Fixed Term Work Act operates, can also fail to protect the workers who are called up from a panel from time to time, but have no guaranteed months or weeks. This can be seen in Kerry County Council v James Walsh, Maurice Carmody, Charlie Farrelly, Richard Pollard, Tom Ahern, Michael Clifford and Tony McMahon (FTC/13/21 Determination No FTD154) which illustrates the problem. Workers on a panel to perform road services when called upon by Kerry County Council to do so, which work had taken place over a number of years usually in summer months, sought a contract of indefinite duration. They had been working on a seasonal basis from time to time generally from about March or April each year until October, sometimes as long as December from 1988 until in or around 2010. Along with a number of others he brought a claim to the Rights Commissioner and then on the Labour Court seeking the protection of the Protection of Employees Fixed Term Work Act 2003.

At the Labour Court Kerry County Council accepted that all seven of the claimants were entitled to a contract of indefinite duration. The issue between the parties then centered on the precise terms of the contracts, with the Council claiming that it was a permanent contract to be on a panel and to be called when required.

The Labour Court determined that the Council should comply with the Act by recognising the permanency of the nature of the complaint’s employment. However, it ruled that this did not mean the claimants were entitled to a permanent full time job. It reached this decision on the basis of applicable law that provided that a fixed term worker could not get a better contract than that which he or she held on a fixed term basis. As the claimants had a fixed term contracts for seasonal work only, the
permanent contract did not entitle the claimants to any fixed or pre-determined amount of work in any year - their employment was determined purely by the seasonal needs of Kerry County Council. The Labour Court did not accept the complainants’ argument that they should get a contract which gave them a definite amount of work every year on the basis according to the Labour Court that this would be a significantly superior contractual arrangement than the one which they had at present which was for seasonal work. The Court did state that it was mindful that in effect the complainants were on a panel and that they were entitled to first refusal of any seasonal work that there was from time to time. At that level at least there was an obligation on Kerry County Council to offer work if and when it had a need for such seasonal work.

The practical problem for the workers such as those in Kerry County Council is much the same as those employed on contracts where hours of work vary upwards or downwards from week to week, namely the precarious nature of the employment and the practical effects on the workers and their families of the insecurity of employment. As it is often up to the employer to decide when and to who it offers work, workers can feel constrained or reluctant to seek the benefit of other employment law rights, such as proper breaks, rest periods, notifications of hours or work, etc., for fear that they may be "zeroed out’ of employment.

III. Comparison with German Case law regulating part-time and fixed term work.

In a decision of 07/12/2005³ the German Federal Labour Court decided a case regarding a contract with flexible hours on basis of the applicable german legislation, the TeilzeitsBefristungungsGesetz (TzBfG). § 12 TzBfG implies a contractual term providing a minimum number of hours 10 hours of working time where the contract provides for no fixed hours. The case illustrates the detail national legislation can be evaded, and thus be of little assistance or protection for workers faced with zero hours contracts and unpredictable working patterns. It is of interest in the context of the reforms proposed by the University of Limerick study.

The Federal Labour Court, found however, other legal means based on general principles of law, to provide legal relief to the workers in question. This case is interesting from an Irish perspective, as it illustrates how the general principles in the EU Charter or in Union law, might be called in aid to interpret or expand existing protections in Irish law.

³ Case BAG 5 AZR 535/04
The case concerned a workplace dispute regarding the amount of working hours. The claimant was an employee of the respondent with a salary based on working time. The original contract from 1998 provided a working time of 35 hours a week. In 2002 the employee agreed to a contract which changed to a new working time agreement in which the minimum working time was set at 30 hours a week with an option to work up to 40 hours if the employer requested it at least one week in advance. The employee had no right to decline the additional working hours of more than 30 hours. At the time of introduction the employee did not foresee any difficulties with the operation of the changes, as she had generally been provided with work in excess of 35 hours. However, following an absence due to her illness, she found that on her return to work her working hours had dropped to 30 hours, and that she suffered the loss of the additional 5 hours of work. Following this reduction of her working hours the claimant sought a guaranteed working time of 40 hours a week, based on her argument that she regularly worked 40 hours a week and that this was agreed on by implication.

The Court found that there was no proof that a regular working time of 40 hours had ever been agreed on. It did not accept the arguments of the claimants that the contractual working times had in law become 40 hours due to ongoing custom and practice of employees working those hours, as it found that the regular working time was only 35.02 hours before the reduction. It therefore rejected her claim for a contractually guaranteed 40 hours. It found, however, that the new contract was void in so far as it set out the working time as 30 hours, which could be compulsorily extended to 40. On a proper construction of the contract it found that what was now in place was a regular weekly working time of 35 hours with an extension option to 40 hours as agreed.

While the Federal Labour Court were satisfied that the complaint came within the scope of § 12 TzBfG, it held that there was no breach thereof, because the contract set out the weekly minimum time and the Court found that such contractual provision on a minimum working time was sufficient to meet the requirements of § 12 TzBfG. Moreover the employer undertook himself to inform the employee at least one week prior to any request to work additional hours.

The Federal Labour Court then considered the complaint more broadly, taking the view that it fell under the provisions of wider civil code known as the BGB rather than specific employment legislation, in particular §§ 305 to 310 BGB governing contracts which impose ‘general terms and conditions’ on a contract party. Such contracts comprise pre-formulated
boiler plate contracts which are presented by one party as opposed to for example business contracts where parties are negotiating from equal power. According to § 307 subsection 3 BGB the content of a provision of such a contract can be examined to assess whether it is in conformity with law to include fundamental basic principles of law. In case BAG 5 AZR 535/04 the German Federal Labour Court held that there had been a breach of the principle that agreements are to be kept (pacta sunt servanda), on the basis that working time is a fundamental term of an employment contract. A provision allowing the employer the option of constantly change of the working time and salary would breach the binding effect of the contract.

In this regard, pursuant to § 307 subsection 1 BGB a provision of a contract is void if it unreasonably disadvantages the party to which the contract is presented. Such an unreasonable disadvantage is assumed to exist, if the provision is not compatible with main purpose or principle of the law (§ 307 subsection 2 number 1 BGB). Whether or not there is in fact such an unreasonable disadvantage has to be resolved by a weighing of interests. In the opinion of the Federal Labour Court the disputed provision was inconsistent with the principle that the commercial operating risk of a business has to be carried by the employer and not the worker, one of the essential principals in the German Labour Law. (§ 615 BGB). An employer in general has to bear the risk of a decrease in the demand for labour due to decreasing orders or other economic changes. If the employer can simply reduce the working time of employees in such circumstances, it devolves a part of this risk to employees.

In terms of weighing interests, while the Court found a clear interest in the desire of the employer to arrange the working time of his employees as flexibly as possible, the employees had a clear need for reliable employment, including a salary that is more or less foreseeable and working time that allows the planning of other employment or free time around it.

To resolve this conflict of interest the German Federal Labour Court simply limited the flexibility allowed to the employer. It ruled that a contract which contained regular working hours together with flexible compulsory additional hours was compatible with law if the additional on-call working time did not add up to more than 25 % of the regular working time.

Thus in the contract at issue in the case before it, as the potential on-call working time of an additional 10 hours was 33.3 % more than the minimum working time of 30 hours the disputed provision was void. Considering the former contract and the former average working time the
Federal Court ruled that on a proper construction of the contract a minimum working time of 35 hours had been agreed on. The proposed change of the contractual working time of 30 hours with compulsory expansion to 40, at the election of the employer, was void and of no effect, not however, because it was a violation of the TzBfG, but on the basis that it was contrary to general principles of German Law.

Cases from other jurisdictions are of great interest from an Irish perspective due to the consideration of zero hours contracts and the variation of contract hours as a breach of prohibitions against unfair dismissal, and in the context of broader legal principles of fairness in the construction of contracts and breach of contract. As will be discussed below, this type of general principle may by of more direct application in Irish law due to the impact of the Charter of Fundamental Rights and Freedoms and general principles of Union law.

2. On-call work with a right to decline

In addition to the above cases, it is worth considering case law on other kinds of contracts that are similar to zero-hour-contracts, but have been determined not in fact to be contracts of employment but in fact a kind of a freelancer contract. German law here mirrors the problems which arise in the common law world where there are zero-hour-contracts with no mutuality of obligation, and show how legislation could be easily evaded if not looked at in the wider context of general principles relating to the dignity of the worker, such as are contained in the EU Charter.

The German Federal Labour Court dealt with such a contract in the decision BAG 10 AZR 111/11 from the 15th of February 2012, which arose from a dispute about an entitlement to contract of indefinite duration. In this case the parties had signed a framework contract in December 2000 concerning supporting of events and other types of public relations activities of the German Bundestag. The framework contract commenced in January 2001. The contract terms provided that the claimant would work for the respondent based on individual agreements for each event as a freelancer. The claimant had no entitlement to a definite number of assignments and had the right to decline service before each individual agreement. The salary was determined by the number of working days.

The claimant took the view that this framework contract was a contract of employment, and following a certain period of time, sought a contract of indefinite duration. The lower courts ruled that the contract was not one which was a contract of employment. The claimant appealed ultimately to German Federal Labour Court, which dismissed the appeal as unfounded.
In the opinion of the Court the framework contract was not a contract of employment as the claimant was not obliged to work for the respondent based on this contract; the obligation to work is a central requirement for the existence of contract of employment.

Moreover the German Federal Labour Court found that there was no unlawful contract design. It found that there was no legal prohibition on the agreement of a combination of a framework contract and individual contracts instead of a contract providing on-call work in accordance to § 12 TzBfG, as such an agreement was no circumvention of this regulation. It ruled that § 12 TzBfG was created to protect part-time workers with permanent positions because they are obliged to work for their employer. By contrast in situations with a contract design like the disputed framework contract for PR services, the working party was able to freely dispose of his or her time and schedule and for that reason there was no need for similar protection to that provided to part-time employees who were obliged to work when so required by the employer.

The German Federal Labour Court did address the issue of whether the particular arrangement could give rise to a contract of indefinite duration. It noted that each individual contract was indeed a contract of employment. Due to the fact that the individual contracts all only covered a short working period of a few days each individual contract was a fixed-term contract and therefore rules for fixed-term work had to be satisfied. For example the provision of a contract limited by time requires a written contract (§ 14 subsection 4 TzBfG) and in addition a proper reason justifying the limitation; several fixed-term contracts without a reason with the same employer are prohibited (§ 14 subsection 2 sentence 2 TzBfG). While the first condition obliging a contract in writing was not fulfilled, the Court did not consider the matter further as the time limit for a complaint on this ground had expired. (§ 17 TzBfG).

Therefore in German law, notwithstanding the adoption of § 12 TzBfG which is designed to offer at lease a minimum guaranteed number of hours to those on variable and flexible contracts, it is possible to design very flexible contracts which do not attract the protection of § 12 TzBfG. This sort of legal experience is highly relevant in considering the proposed reforms of the University of Limerick study.

**Solutions in EU law?**

**Gender equality**
The EU charter of fundamental rights aims to ensure the equality of men and women, article 23. Part-time work is much more common for female workers than it is for men (ILO INWORK Policy Brief No. 7, 2015, p 2, figure 1) and this is one of the reasons for the salary gap between women and men. This was a significant feature of the findings in the UL study.

In fact, therefore, while championed as a tool to address the enabling of the employment of women in workplace, the promotion of part-time-work can operate to promote or perpetuate the inequality of men and women in work life (WSI Report Nr. 19 2014, "Arbeitszeiten in Deutschland. Entwicklungstendenzen und Herausforderungen für eine moderne Arbeitszeitpolitik", Absenger et al, p.40). There is clearly a tension between two perspectives. On the one hand it cannot be denied that there are many women who wish to be able to work part-time, however on the other hand the problem of marginal work among women should not be neglected. Furthermore, marginal work is not confined to females. Therefore, the focus on marginal zero-hour contracts requires an improvement of the working conditions for the part-time-workers regardless of their sex. Thus while gender equality must be considered, and should be relied upon in appropriate cases, an attempted legal solution from this legal basis may be under inclusive.

**Discrimination against part-time workers**

The application of European directive on part-time-work as a guideline for national law in this area must be considered. One of the main goals of this directive was to prohibit discrimination of part-time workers and to ensure that although they had different working-times, such workers should be treated equally in every other aspect. However, with regard to financial security, the ability to plan a life around work, workers with zero-hour-contracts are in fact treated differently. Fulltime employees generally know when they will work and can make appropriate plans for leisure time outside working hours. Furthermore such workers can generally rely on a certain salary and accordingly plan and budget for rent, mortgage, any other life purchases which require a fixed salary. Marginal workers have no such financial security.

In all those aspects employees with flexible working hours are treated less favourably. However, it could be argued that this difference of treatment is the inevitable result of the fact that the employee is working part-time. A zero-hour-contract could be seen as a type of part-time work, such that the insecurity of working time is just part of this concept. In this understanding the different treatment is only caused by the fact that the employee is working part-time and contains no further discrimination. In
this regard, although it was brought under the Fixed Term Workers Act, the type of contract awarded to the claimants by the Labour Court in the Kerry County Council case had no certainty of work, and subjected the employees to all of the problems of precariousness and uncertainty highlighted in this article, the Fixed Term Work Act was of no assistance to them.

**Minimum working time**

Another starting point could be a legislative solution based on a legal minimum working time. This way a certain minimum salary would be secured and more social security could be provided. This approach was recently adopted in law in France with the Job Security Act in 2013 (ILO INWORK Policy Brief No. 7 2015, p 4). The University of Limerick study has recommendations which go in this direction, as it calls for the provision of a minimum number of contractual hours, to be established after a 6 month period at which a mean number of hours would be established.

At first glance it is clear that the difficulty with such regulation is that it is likely to give rise to other problems as it is rather inflexible. For some employees flexibility in working time is necessary, for others only few hours at work is manageable or desirable and sometimes having a job with little working time is better than having no job. Therefore the provision of a minimum working time necessarily has to be combined with many different provisions allowing for exceptions. This would make the law complex, complicated, hard to enforce and could perhaps stand in the way of those who want or even need to work part-time.

**Comparison with fixed-term contracts**

A concept for a legislative approach could also be found in the regulation of fixed-term work. The EU Directive has the need for fixed-term contracts in mind, but aims to make sure that contracts of indefinite duration are the ultimate goal and therefore limits their long-term use.

This idea could be applied to the regulation of zero-hour-contracts. Contracts with a certain definite weekly working time could be the preferred employment contract, while allowing for the need for flexible or variable contract hours. A regulation that would allow flexible working time only for a certain period or for an objectively justified reason could help to solve this dilemma. It would help individual employees to avoid getting stuck in a permanent zero-hour contract, but on the other hand
permit the employer to have flexible working time agreements where needed.

**Higher remuneration**

Finally, a legal entitlement to have flexible manpower could be tied to a financial reward. This reward could be designed in two ways: One solution would be a higher hourly minimum wage for the actual working time. The other way to deal with it would be to remunerate the waiting time (WSI Report Nr. 19 2014). In Australia, for example, casual workers are paid 20-25% higher hourly rate. (ILO - INWORK Policy Brief No 7, May 2015). The University of Limerick proposals add an element of higher remuneration, in that they provide for a longer notice period of 72 hours for being offered work, and in the absence of this notice period, payment of 150% of wage.

In either of these scenarios the pay of workers would get an increase in remuneration, which would be an improvement in financial security. Of course the attractiveness of zero-hour-contracts to employers would decrease and perhaps serve as a deterrent. Such a solution in and of itself would not fully deal with the problems of precarious work, and the planning of non-work commitments around flexible working hours.

**Fair and just working conditions**

In the final analysis, zero hours contracts are an increasing problem of modern times. It may be appropriate to consider the potential opened up by the EU charter of fundamental rights for dealing with the problem and in particular article 31 which guarantees fair and just working conditions. More precisely, Article 31(1) it provides the every worker has the right to working conditions which respect his or health, safety and dignity. If low hours contracts are considered in this legal context there is a clear question: is the dignity of a worker really respected if they are badly and irregularly paid, have no idea how much they will work this week, month or year and must be on call all the time? It is likely that any new legislation to regulate low hours contracts may be some time in coming – and in the meantime, lawyers may have to resort to much creative thinking, including a reliance on more broadly applicable legal principles to try to fill the existing legal gaps.
“RECOMMENDATIONS

The recommendations of the research team are listed below and set out in detail in Section 8 of the report.

1. We recommend that the Terms of Employment Information Acts 1994 to 2012 be amended to require employers to provide the written statement on the terms and conditions of the employment on or by the first day of employees’ commencing their employment. This requirement should also apply to people working non-guaranteed hours on the date of first hire.

2. We recommend that the Terms of Employment Information Acts 1994 to 2012 be amended to require employers to provide a statement of working hours which are a true reflection of the hours required of an employee. This requirement should also apply to people working non-guaranteed hours.

3. We recommend repealing Section 18 of the Organisation of Working Time Act 1997 and introducing either a new piece of legislation or a new section into the Organisation of Working Time Act 1997 to include the provisions in recommendations 4-8 below.

4. We recommend that legislation be enacted to provide that:
   (i) For employees with no guaranteed hours of work, the mean number of hours worked in the previous 6 months (from the date of first hire or from the date of enacting legislation) will be taken to be the minimum number of hours stipulated in the contract of employment.
   (ii) For employees with a combination of minimum guaranteed hours and If and When hours, the mean number of hours worked in the previous 6 months (from the date of first hire or from the date of enacting legislation) will be taken to be the minimum number of hours stipulated in the contract of employment.
   (iii) A mechanism will be put in place whereby, after the minimum number of hours is established, employers and employees can periodically review the pattern of working hours so that the contract accurately reflects the reality of working hours.
   (iv) Where after 6 months an employee is provided with guaranteed minimum hours of work as per subsection (i) and (ii), but is contractually required to be available for additional hours, the employee should be compensated where they are not required by an employer in a week. The employee should be compensated for 25% of the additional hours for which they have to be available or for 15 hours, whichever is less.

5. We recommend that an employer shall give notice of at least 72 hours to an employee (and those with non-guaranteed hours) of any request to undertake any hours of work, unless there are exceptional and unforeseeable circumstances. If the individual accepts working hours without the minimum notice, the employer will pay them 150% of the rate they would be paid for the period in question.
6. We recommend that an employer shall give notice of cancellation of working hours already agreed to employees (and those with non-guaranteed hours) of not less than 72 hours. Employees who do not receive the minimum notice shall be entitled to be paid their normal rate of pay for the period of employment scheduled.

7. We recommend that there shall be a minimum period of 3 continuous working hours where an employee is required to report for work. Should the period be less than 3 hours, for any reason, the employee shall be entitled to 3 hours’ remuneration at the normal rate of pay.

8. We recommend that employer organisations and trade unions which conclude a sectoral collective agreement can opt out of the legislative provisions included in recommendations 4-7 above, and that they can develop regulations customised to their sector. Parties to a sectoral collective agreement should be substantially representative of the employers’ and workers’ class, type or group to which the agreement applies.

9. When negotiating at sectoral level, we recommend that employer organisations and trade unions examine examples of good practice which can provide flexibility for employers and more stable working conditions for employees, such as annualised hours and banded hours agreements.

10. We recommend that the Government examine further the legal position of people on If and When contracts with a view to providing clarity on their employment status.

11. We recommend that the Department of Social Protection put in place a system that provides for consultation with employer organisations, trade unions and NGOs, with a view to examining social welfare issues as they affect people on If and When contracts and low hours.

12. We recommend that the Government develop a policy for an accessible, regulated and high-quality childcare system that takes into account the needs of people working If and When contracts and low hours.

13. We recommend that the Government establish an interdepartmental working group to allow for greater cooperation between government departments on policies which affect patterns of working hours.

14. We recommend that the Central Statistics Office have a rolling Quarterly National Household Survey Special Module on Non-Standard Employment which would include questions on non-guaranteed hours.”