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**Zero Hours Work in Ireland: Prevalence, Drivers and the Role of the Law**

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# **Zero Hours Work in Ireland: Prevalence, Drivers and the Role of the Law**

## **Introduction**

An important distinction in employment law is the contractual status of a person with respect to their employment. Traditionally in Ireland a person could be deemed to be either an independent contractor working under a contract for services or an employee working under a contract of services. In recent years the situation with regard to the contractual/employment status has become more complicated with the emergence of varying forms of contracts in the workplace. This has coincided with a demand by employers for more flexibility with regard to employment most notably in relation to numerical flexibility, i.e., the ability to increase/decrease workforce numbers in line with fluctuating demands. Thus, a wide range of contract types and categories of contractual status has developed over time. This led to the European Commission developing a Green Paper on modernising labour and it stated:

‘The traditional binary distinction between “employees” and the independent “self-employed” is no longer an adequate depiction of the economic and social reality of work’ (Commission of The European Communities Brussels, 2006: 10).

Zero hours contracts have become much debated particularly in the UK and Ireland in recent years as trade unions criticise their use by employers and have sought greater legal protection for people working such contracts. In 2015 the Irish government commissioned a study on the prevalence of zero hours contracts amongst employers and their implications for employees and the study was subsequently undertaken by the authors. This paper examines legal issues surrounding people working on zero hours. It begins by providing a summary of the methodology for the study and then outlines the differences between an independent contractor and an employee in the Irish legal system before explaining the law on zero hours. The law in Ireland has served to complicate the narrative around zero hours because the legal definition of zero hours does not reflect the reality of people working on zero hours arrangements. The difference between law and the reality of contractual arrangements has complicated the discussion on the prevalence of zero hours work and on public responses to zero hours work. The paper then discusses the dominant type of contract which provides for zero hours work in Ireland, the so-called If and When contract, and reports on the drivers for such contract. We follow this with a discussion on the legal protections available or otherwise to people on such contracts and consider the possible legal avenues for protecting people on If and When contracts.

## **Methodology**

The paper is based three sources. The first is a review of Labour Court, High Court and Supreme Court cases which focus on determining employment status. The second source is a set of interviews with informed stakeholder organisations. In total 32 interviews were

conducted with 30 bodies (13 employer/business representative organisations, 8 trade unions, 5 government departments/agencies and 4 NGOs) (Table 1) and an additional 2 interviews with legal experts. Prior to the interviews, an interview schedule was developed by the research team and pilot interviews were undertaken with one representative from an employer organisation and trade union. The interview data is supplemented by data on working hours from the Central Statistics Office Quarterly National Household Survey (QNHS) in 2014. The QNHS is a large, nation-wide survey which produces labour force data on a quarterly basis. Information is collected continuously throughout the year from households surveyed in each quarter using face-to-face interviewers. The total quarterly sample is designed to be 26,000 households. All usual residents in the responding household are surveyed. The actual achieved sample varies over time depending on the level of response. It provides a wide range of data on those at work including working hours, economic sectors, employment characteristics and demographics. There is no dataset in Ireland which measures the prevalence of zero hours contracts. However, the QNHS provides data on the number of hours usually worked by employees including those who report working irregular hours that change from week to week to the extent that there is no ‘normal’ pattern. A key commonality in definitions of contracts involving zero hours *work* is that employees work a variable number of hours per week. We therefore report on the number of employees in the QNHS (excluding self-employed and unemployed) who work constantly variable hours per week.

**Table 1 Interviewed Organisations**

<b>Employer/Business Organisations</b>	<b>Trade Unions</b>
Irish Business and Employers Confederation (IBEC) Irish Small and Medium Enterprises Association (ISME) National Recruitment Federation (NRF) Chambers Ireland Irish Hotels Federation (IHF) Restaurants Association of Ireland (RAI) Education and Training Boards Ireland (ETB) Joint Managerial Body (JMB) Irish Universities Association (IUA) Health Service Executive (HSE) Nursing Homes Ireland (NHI) National Federation of Voluntary Bodies (NFVB) Institutes of Technology Ireland (IoTI)	Irish Congress of Trade Unions (ICTU) Mandate Social, Industrial, Professional and Technical Union (SIPTU) IMPACT Association of Secondary Teachers Ireland (ASTI) Irish Federation of University Teachers (IFUT) Teachers Union of Ireland (TUI) Irish Nurses and Midwives Organisation (INMO)
<b>Non-Governmental Organisations</b>	<b>Government Departments and State Bodies</b>

Migrant Rights Centre of Ireland (MRCI)	Department of Social Protection
National Women's Council of Ireland (NWC)	Department of Public Expenditure & Reform
Irish National Organisation for the Unemployed (INO)	Department of Education and Skills
National Youth Council of Ireland (NYCI)	Labour Relations Commission
	National Employment Rights Authority (NERA)

### **The Importance of Employment Status in Irish Law**

Traditionally a person could be deemed to be either an independent contractor working under a contract for services or an employee working under a contract of services. These distinctions have significant implications with respect to protections afforded by Irish employment law. An independent contractor would not normally be covered by much of the protective employment legislation (Cox *et al.*, 2009)

A person may sign a contract stipulating that they are an independent contractor or they may be labelled as such by a contracting company or agency but the reality of the situation may be that the individual is in fact very dependent upon work provided by a single employer. In some situations the designation of self-employed seems clear and accurate. For instance, an electrician may provide services to a large number of clients utilising his/her own equipment, be responsible for the economic risk and benefit from the profits and may provide a substitute when not available. In other situations the designation is not as clear-cut: another electrician might provide their own equipment and be responsible for their own tax and financial affairs but might for many years work only for one business and have to comply with instructions from that business, i.e., they may be economically dependent on that employer. In Ireland and other countries there is a growing cohort of workers who do not actually own a business but who are being classified as self-employed or contracting for services. The implication of such a situation is that such people sit outside the protection of much of the employment legislation. Commentators (Collins *et al.*, 2012; Barnard, 2012; Leighton and Wynn, 2011; Albin, 2013) and experts interviewed for this study (Kerr, Grogan, Deakin, Ewing) have questioned the idea that such individuals genuinely fit the category of 'self-employed'. In many cases they could not be said to be truly 'in business on their own account', for example, they do not possess business assets, they work under the 'control' of the employer, they pay tax through PAYE and they may not send a substitute to replace them. In some cases they are required to sign exclusivity clauses preventing them working for other companies. Thus the 'economic reality' is that they are in fact often very *dependent* upon the contracting employer. Indeed in Germany the nomenclature of 'dependent entrepreneur' has been used to describe this category of workers.

Problems arise when one of the contracting parties or indeed a third party<sup>1</sup> disagree with the ascribed employment status. In Ireland, as in other countries the question of employment

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<sup>1</sup> In Ireland many cases have been initiated by Revenue Commissioners or Social Welfare for tax and social insurance purposes see for instance *Henry Denny and Sons (Ireland) v Minister for Social Welfare* and *Castleisland Breeding Society Ltd v Minister for Social and Family Affairs*

status has generated much dispute/debate and has been the focus of many long drawn out court cases. In dispute situations courts have examined the reality of the relationship between the parties to determine status. There are a number of tests that have been developed over time through case law that are utilised in this regard. Examples of these are: the control test, integration test, economic reality test, entrepreneur test and test of mutual obligation. In Ireland there is also a code of practice for determining the employment or self-employment status of individuals<sup>2</sup>. A key test in this regard seems to be that of mutuality of obligation. In the 2008 case of *Minister for Agriculture and Food vs Barry and Ors*, Edwards J stated:

*‘The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. It was characterised in *Nethermere (St Neots) Ltd v Gardiner*, [1984] ICR 612 as the “one sine qua non which can firmly be identified as an essential of the existence of a contract of service”. Moreover, in *Carmichael v. National Power PLC*, [1999] ICR, 1226 at 1230 it was referred to as “that irreducible minimum of mutual obligation necessary to create a contract of service.” Accordingly the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further. Whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is found to exist the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further’.*

The above quote is important as sets down the importance of the mutuality test and notably it draws on key principles set down in two leading UK cases (the cases of *Nethermere* and also *Carmichael*<sup>3</sup>). The principle of mutuality was reaffirmed in the 2011 High Court case of *Brightwater Selection Ireland v Minister for Social and Family Affairs*<sup>4</sup>. In both cases the judgements consolidated an aspect of the earlier *Denny* case; that each case must be considered in the light of its particular facts and of the general principles which the courts have developed and that there is no ‘one size fits all’ test, thus the area of employment status remains complex.

The legal question of employment status has re-emerged as a contemporary and problematic issue alongside the development of more atypical employment forms. There are an increasing number of cases being taken by individuals or groups in such arrangements seeking to clarify their employment status from a rights point of view. This is particularly the case with respect to casual work arrangements and the emergence of contracts known as zero hours contracts.

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<sup>2</sup> Code of Practice for Determining the Employment or Self-Employment of Individuals. Available [<http://www.revenue.ie/en/practitioner/codes-practice.html>].

<sup>3</sup> [1999] ICR 1226 (HL) and [1984] ICR 612

<sup>4</sup> *Brightwater Selection (Ireland) Limited -v- Minister for Social and Family Affairs* [2011] IEHC 510

### ***Zero Hours Contracts in Irish Employment Law***

In Ireland the interpretation of ‘zero hours contracts’ revolves around the provisions of The Organisation of Working Time Act 1997. Section 18 (provision in relation to zero hours working practices) states:

This section applies 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—

- A certain number of hours (“the contract hours”), or
- As and when the employer requires him or her to do so, or
- Both a certain number of hours and otherwise as and when the employer requires him or her to do so.

Under Section 18 an employee with a zero hours contract is entitled to compensation if the employer does not require them to work in a given week where they are required to be available. They are entitled to compensation amounting to 25% of the time they were required to be available or 15 hours pay, whichever is the lesser. The fundamental issue is that zero hours employees have an obligation to make themselves available to an employer. With respect to notice given by the employer regarding work, Section 17 of the Organisation of Working Time Act 1997 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 a minimum of 24 hours’ notice of his/her roster for the week, although Section 17(4) allows for changes as a result of unforeseen circumstances.

A person on a zero hours contract who comes under the scope of Section 18 (thus deemed an employee) should also be covered by other employment legislation. This is because of the existence of mutuality of obligation, i.e., the obligation of an employer to provide work and the obligation of an employee to perform work. This would also imply that such employees would be entitled to a contract of indefinite duration (CID) once they fulfil the criterion of length of service stipulated by the Protection of Employees (Fixed-Term Work) Act 2003. However, it would also seem to be open to the employer to give a CID with no guaranteed hours, as per the terms of the employee’s original contract. This could be in spite of the fact that the employee may in actuality work a regular number of hours.

Section 18 of The Organisation of Working Time Act has as led some confusion in the Irish context in terms of what constitutes a ‘zero hours practice’. The fact that very few employees have taken legal cases against their employer under ‘Section 18’ has given rise to a perception that such practices are not an issue in the Irish context. While we find that zero hours contracts within the meaning of the Organisation of Working Time Act 1997 are not extensively used in Ireland, zero hours work does exist under an alternative contract type, known as an ‘if and when’ contract.

### ***The Use of 'If and When contracts'***

Generally speaking a person employed on an If and When basis will be offered work if and when the employer requires them. The employer is under no obligation to offer work to an individual at any time and the individual can refuse or accept the work as they choose. Thus, the individual is also under no obligation. Such contracts usually stipulate the rate of pay that will apply when the individual does accept and perform the work but do not guarantee any set number of hours. Effectively this means that hours can fluctuate and an individual may be called upon for no hours or a number of hours in a given week. The available work can vary from day-to-day, week-to-week and month-to-month. The period between assignments can also vary. If an individual is not contractually required to be available for work, they are not entitled to any compensation for hours not worked. We also find evidence of hybrid contracts where employees have some guaranteed minimum hours and additional hours are offered on an If and When basis. A key feature of If and When arrangements is the variability in working hours on a daily, weekly or monthly basis. According to data from the QNHS, approximately 5.3% of employees in 2014 report that they work hours that vary to the extent that they cannot indicate a consistent or regular number of weekly hours. People with constantly variable hours can be full-time or part-time. At a sectoral level, accommodation/food has the highest proportion of constantly variable part-time hours, followed by 'other activities' and agriculture/forestry/fishing.

### **Drivers of If and When Contracts**

#### ***The Legal Context***

Legislation is often introduced in Ireland on foot of EU Directives for the purpose of extending employment rights. However, a number of unintended consequences can arise from the operation of legislation and interviewees highlighted examples of such consequences which has influenced the prevalence of If and When contracts. 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 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 cautious 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.

### ***Shift to Non-Standard Work***

A standard working week is usually taken to mean working an eight hour day and a regular Monday to Friday week. There has been a major move away from the standard working week towards working evenings, Saturdays and Sundays with little change in shift and night work. According to the QNHS, the proportion of employees regularly working evenings increased from 9% in 2001 to almost 14% in 2014; Saturday work from 19% to 28% and Sunday work from 10% to over 17%. These trends essentially began before 2007 but may have been accelerated by high levels of unemployment and the increase in part-time work after 2007. At a sectoral level, there were significant increases in non-standard working between 2001-2014 in the wholesale/retail, accommodation/food and health sectors, and to a lesser extent, in education. ‘Other services’ also experienced significant increases in non-standard working hours. Employees with constantly variable hours have the highest incidence of working nights, shifts, evenings, Saturdays and Sundays.

IBEC noted that because the business ‘week’ has lengthened, organisations require flexibility of staffing. This flexibility requirement is reflected not just in part-time and variable hours contracts but also in full-time contracts. For example in retail, a full-time contract historically consisted of hours from Monday to Friday, 9am to 5pm, whereas a full-time contract now means potentially being scheduled at any time over seven days. As the standard working week gives way to the possibility of a seven-day working week, particularly in service sectors of the economy, employers require a pool of workers whose hours can expand and contract depending on market demand to facilitate shifts during peak business times. Having a more flexible workforce over a seven-day week also means costs savings in some sectors in terms of over-time payments, which might otherwise be paid. Chambers Ireland commented *“maintaining flexibility throughout the working week is important. If staff need to be on Saturday or Sunday or whenever, you need to have them available without being tied into double time or triple time on Sundays as a consequence of being on a full-time employment contract”*. The Labour Relations Commission commented that the challenge with increasingly flexible employment arrangements is achieving business requirements for flexibility while also *“ensuring non-exploitative employment activity”*.

### ***Demand-led Services***

According to interviewees, If and When hours are more prevalent in demand-led services where either the quantum of work or funding source may be difficult to predict. Employer organisations refer to unpredictable demand in retail, hospitality, health and social services and certain parts of education. Chambers Ireland noted that *“if the business model allowed for accurate planning of staffing needs over a week or month, employers would opt for that. If the nature of demand of the business doesn’t allow for that, there has to be flexibility of staffing arrangements. Where employers can offer fixed or firm contracts they do”*. Some trade unions groups like ICTU commented that there *“may be bona fide situations when zero*



*hour practices are used where an employer genuinely has no idea when they need them*” but it, along with other trade unions, dispute the extent of unpredictability of demand. For example, in retail, Mandate highlighted the extensive monitoring by retailers of consumer purchasing trends which can be used to predict demand.

### ***Childcare***

An issue frequently raised by interviewees is the extent to which employees with caring responsibilities require flexible working hours. According to the QNHS, 8% of employees in 2014 who work constantly variable hours do so because of caring responsibilities. Many interviewees noted that women require part-time work to accommodate their caring responsibilities and the lack of an affordable, accessible childcare system contributed to this need. Similarly, the Department of Social Protection stated that *“for certain cohorts, childcare costs may be a barrier to moving to full-time hours”*. The lack of affordable childcare has resulted in families juggling childcare responsibilities between parents or extended family. The National Women’s Council of Ireland (NWC) argued that the rate of women’s participation in the labour market drops significantly once they have children and that a lack of affordable accessible childcare makes women more *“vulnerable to working low hours”*. An increase in affordable childcare would be expected to give greater choice to women with regard to their participation in the labour market.

### ***Public Sector Resourcing***

In interviews, the Department of Public Expenditure and Reform stated that it has influence over pay policy and the number of employees in the public sector but does not have significant influence over types of employment contracts. Trade unions and NGOs argued that If and When contracts, hybrid contracts and low hours as a growing feature of public sector employment. Increased privatisation, they argued, has led to downward pressure on terms and conditions of employees as tenderers seek to reduce costs. For example, they compare community care jobs in private organisations with more If and When contracts and lower pay (e.g., not being paid for travel time between clients) while the same community care jobs in the Health Service Executive (HSE) have a floor of minimum hours and better conditions. The pressure on costs, combined with the fluctuation in demand for community care services, has contributed to If and When contracts becoming more prevalent, trade unions argued. The public sector moratorium on recruitment during the economic recession was also noted by interviewees in the health sector as restricting the ability of organisations to recruit permanent positions and led to more If and When contracts and agency work. In education, interviewees argued that the resourcing model used by the State means that some occupations in second-level education are not funded as full-time jobs and are employees therefore more likely to have low hours and If and When hours. Third-level employer institutions argue that the delivery of a wide range of programmes can only be delivered through more ‘flexible’ employment contracts due to fluctuating demand and funding.

## Implications of If and When contracts in the Irish legal framework

While employment status issues have not been tested extensively in Ireland specifically with respect to If and When contracts, legal cases highlighted earlier establish the fundamental principles by which any contract is assessed. The principles suggest that an individual on an If and When contract will almost certainly not be deemed an ‘employee’ within the accepted legal definitions that exist. This is because If and When contracts fall short of fulfilling the mutuality of obligation test. This has already been presented above in relation to the case of *Minister for Agriculture and Food vs Barry and Ors* and the *Brightwater* case. Thus an ‘employee’ will be covered by employment legislation such as unfair dismissals and redundancy payments whereas someone not deemed to be an employee, on the basis of an If and When contract, will have no such protection. This in turn raises the question as to whether individuals employed in this way can truly be said to be ‘independent contractors, or in business on their own account when in most cases they are clearly dependent on a single employer. It is interesting to note, however, that in the Irish context some Acts go beyond the ‘binary’ employment classification: The Employment Equality Acts 1998 to 2011, the National Minimum Wage Act 2000 and the Payment of Wages Act 1991 utilise wider definitions and thus confer rights to a broader spectrum of individuals 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’.

A recent illustrative case is that of *Contract Personnel Marketing Ireland vs Marie Buckley* (DWT1145)<sup>5</sup>. In this case Ms. Buckley sought to take a claim under Section 18 of the Organisation of Working time Act 1997. Her trade union argued on her behalf that, contrary to the Act, she was not paid for a period when she was required to be ‘on call’. However, 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. The implication of this is that individuals working under contracts in Ireland that have a specific clause indicating a lack of ‘mutuality of obligation’ will not be covered by the Organisation of Working Time Act 1997. There are also many illustrative cases in which the mutuality test has been applied in cases involving If and When contracts in the UK. For instance, the *O’Kelly and Others v Trusthouse Forte plc*<sup>6</sup> and *Carmichael and Leese v National Power plc*<sup>7</sup>. In the latter, Carmichael was deemed not to be an employee due to the absence of ‘that irreducible

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<sup>5</sup> 2011 *Contract Personnel Marketing Ireland vs Marie Buckley* (DWT1145)

<sup>6</sup> [1984] QB 90 (CA)

<sup>7</sup> [1999] ICR 1226 (HL)

*minimum of mutual obligation necessary to create a contract of service*' (Lord Irvine of Lairg in Carmichael).

The issue of testing contractual status has already been discussed above with respect to those people who are contractually defined as self-employed. In Ireland, this also has relevance for If and When contracts. Thus, if a court can determine that, notwithstanding the If and When element, mutuality *actually* exists in the relationship, then the person may be deemed to be an employee. It would seem from the decision in *Barry* and *Brightwater* that to establish mutuality is the first hurdle and once this is established then a court would apply the other relevant tests to determine status. For instance, a person may contractually agree that they must make themselves available for an agreed minimum of hours even if it transpires that no work becomes available, or they may contractually agree that they will not undertake to work for anyone else in an agreed period and will only be available for work for the particular employer with whom they have the contract. In such an instance the person may be deemed to fulfil the test of mutual obligation as they are displaying an obligation to take the work.

A recent illustrative Irish case is *Ticketline trading as Ticketmaster v Sarah Mullen*<sup>8</sup>. In this case the Complainant Sarah Mullen commenced working for Ticketline trading as Ticketmaster as a box office assistant in June 2012. She signed a contract stating that she was working under an If and When-type contract. She continued working until January 2013 after which she was assigned no further work. The claimant appealed a Rights Commissioner decision to the Labour Court and there was a hearing in November 2013. The complainant alleged that the respondent infringed Section 18 of the Organisation of Working Time Act 1997 in not giving her compensation for hours she maintained she was required to be available. She alleged that although there was no requirement to be available in her written contract, the actuality of the situation was that there was a verbal condition agreed between her and a Ms. Anderson that she was required to be available. She had records of correspondence between herself and the company in which she cited the alleged verbal agreement and in which she queried why work was not been provided to her. Ms. Anderson never replied to her. Instead a Mr. Kavanagh replied and contradicted her assertion of a requirement to be available. At the Labour Court hearing Ms. Anderson was not present. Mr. Kavanagh represented the company and contradicted the claimant's assertion of a verbal agreement that she was required to be available. In finding for the claimant, the Labour Court held that Mr. Kavanagh was not party to the discussions between the claimant and Ms. Anderson and was therefore not in a position to give evidence contradicting the claims. The Labour Court held that on the basis of uncontroverted evidence, it accepted that the claimant's contract was administered as though she was required to be available for work at all times. Thus she was covered by the Act.

Another useful case is the 2012 UK case of *Pulse Healthcare Ltd v Carewatch Care Services Ltd & 6 Others*<sup>9</sup>. In this case Carewatch Care Services were contracted to provide a 24-hour

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<sup>8</sup> Labour Court, *Ticketline trading as Ticketmaster v Sarah Mullen* DWT1434 10<sup>th</sup> April 2014

<sup>9</sup> Appeal No. UKEAT/0123/12/BA

critical care package for a lady with severe physical disabilities. The contract with Carewatch was then terminated and taken over by Pulse Healthcare. The claimants' services were dispensed with. Pulse argued firstly that the claimants were not employees of Carewatch as there was no mutuality of obligation. Secondly, they did not have sufficient continuity of employment to claim unfair dismissal. The claimants had signed an If and When-type contract agreement with Carewatch. However, on appeal to the UK Employment Appeals Tribunal (EAT), it was determined that the contract did not reflect the true nature of the relationship and there was mutuality. On subsequently applying other tests to determine status, the EAT determined that the claimants were in fact employees.

As well as the fundamental issue of employment status If and When-type contracts have elicited a substantial debate here in Ireland, in the UK and other jurisdictions and there has been interesting analysis of such contracts. Some of this is summarised here.

### ***The 'Umbrella Contract' and Continuity of Service***

Many people on If and When contracts work exclusively but intermittently for one employer. This has given rise to some complexity from a legal point of view. A number of important UK decisions have established that such individuals may actually satisfy the tests to be under a contract of service each time they take up work for an employer (Adams *et al.*, 2015; Keane, 2014). However, in the intervening period between working, they may not satisfy the test for mutuality, or as Deakin (2014) comments, there is no contractual nexus with the employer between assignments. The implication here is that if such individuals can establish a satisfactory level of obligation or a 'contractual nexus' for the periods between the actual work, they may be working under what has been termed an 'umbrella' or 'global' contract. This is important as many rights conferred by employment legislation require a minimum length of service. However, due to the often intermittent nature of the work and breaks in employment, such continuity can be difficult to establish (Keane, 2014). The leading UK case of *Carmichael and Leese vs National Power plc* is a useful example. In this case tour guides were employed on an If and When basis. The reality of the situation was that they regularly worked on average up to 25 hours a week and rarely, if ever, refused work offered. The House of Lords found that there was an absence of an 'irreducible minimum of mutual obligation' to create a contract of service. The House of Lords did accept, however, that the tour guides may have been under a contract of service each time they performed work (i.e., each assignment), a phenomenon subsequently termed a 'spot contract' (Adams and Deakin, 2014) The House of Lords nevertheless concluded that there could be no overarching or 'umbrella contract' linking the assignments and granting them continuity of employment. Contrast this with the case of Pulse Healthcare Ltd which has already been referred to. In this case, the UK EAT examined the reality of the employment relationship, and having found that the claimants were in fact employees, it also determined that they had global contracts and thus continuity for the purposes of claiming protection under relevant legislation.

### ***Contracts of Indefinite Duration***

An interesting potential implication of continuity in the Irish context is the possibility that individuals who could establish continuity under the ‘umbrella’ or ‘global’ contract principle might then be entitled to contracts of indefinite duration under the terms of the Protection of Employees (Fixed-Term Work) Act 2003 providing they met the length of service criteria within that Act (see *HSE vs 90 Named Complainants*)<sup>10</sup>. However the contract of indefinite duration would be based on the hours worked by the individual and this may be no hours or a low number of hours. There is thus the potential that people would get tied into a zero or low hours contract of indefinite duration.

### ***‘Boilerplate’ Clauses***

Adams and Deakin (2014) refer to the use of ‘boilerplate’ clauses which might be inserted in contracts with the intention of refuting any mutuality of obligation or the existence of an umbrella contract. Indicative of such clauses would be those which make it clear that the employer is under no obligation to provide work and the individual is under no obligation to accept. Similarly clauses can be inserted to indicate that the individual may provide a substitute when they are not available, implying there is no obligation on the individual to provide their personal service. However, it should be noted that the mere existence of a written term does not preclude courts from examining the reality of the relationship to establish status regardless of the written contractual terms. A good example of this is in the Irish High Court case *Electricity Supply Board v Minister for Social Community and Family Affairs and Others*<sup>11</sup>. In this case a group of meter readers had contracts explicitly stating that they were engaged as independent contractors. In finding that the meter readers were in fact employed under contracts of service, Gilligan J. stated:

*‘In the circumstances the fact that the written document describes meter readers as “independent contractors” cannot be regarded as determinative’.*

In this case (among other factors taken into account) a written statement in the contract allowing the meter readers to provide substitutes was not accepted by the Appeals Officer or the High Court. Among the reasons for this decision were the facts that substitutes had to be approved by the ESB and provided with an ESB ID card by the ESB. A similar case in the UK context is that of *Autoclenz Ltd v Belcher & Ors*<sup>12</sup>. Mr Justice Smith in the UK Supreme Court placed more emphasis on the ‘*actual intentions between the parties*’ and concluded that the written clauses allowing for substitution were in fact ‘sham’ clauses. In this case the claimants, who worked in car valeting, were found to be employees.

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<sup>10</sup> *HSE vs 90 Named Complainants*. Labour Court Determination no FTD0611, 16<sup>th</sup> January 2007. In this case the HSE had accepted that the complainants were employees. The issue in dispute was the hours on which the CIDs should be based.

<sup>11</sup> [2006] IEHC 59

<sup>12</sup> [2011] UKSC 41

## **Legal Options for Extending Rights to People on If and When Contracts**

As well as analysing the current situation pertaining to If and When/zero hours contracts and the overarching issue of employment status, a number of commentators have put forward possible ways of encapsulating a wider cohort of people within protective legislation. Some such as Davidov *et al.* (2015) examine the possibility of an intermediate category, others (Keane, 2014; Freedland, 2006) explore the possibility of re-conceptualising what constitutes a contract of employment, while other commentators identify the possibility of regulatory changes limiting contractual freedom with respect to If and When-type contracts (Collins *et al.*, 2012). These are discussed briefly in the following sections.

### ***An ‘Intermediate Status’***

In recent times the ‘blunt’ or binary distinction between a person being deemed an independent contractor or an employee has been examined by commentators (European Commission, 2006; Adams *et al.*, 2015; Davidov *et al.*, 2015; Leighton and Wynn, 2011; Freedland, 2006). The concept of a category of worker that falls between employee and independent contractor has been also recognised by the European Commission (2006) in its Green Paper:

‘The concept of ‘economically dependent work’ covers situations which fall between the two established concepts of subordinate employment and independent self-employment. These workers do not have a contract of employment. They may not be covered by labour law since they occupy a “grey area” between labour law and commercial law. Although formally ‘self-employed’, they remain economically dependent on a single principal or client/employer for their source of income’.

European countries that have recognised an ‘intermediate’ category (to varying degrees) in national legislation include Germany, Italy, Canada, Spain and the UK. Davidov *et al.* (2015:14) comment

‘Instead of an ‘all or nothing’ approach, it is acknowledged in these legal systems that some workers present only some characteristics of ‘employees’ but not others, and that it is justified to apply only some labor laws to them’.

In the UK, for example, the concept of ‘worker’ is recognised through the Employment Rights Acts 1996. A worker in this instance is defined in Section 230(3) as:

*‘An individual who has entered into or works under (or where employment has ceased worked under)*

*A contract of employment; or*

*Any other contract whether express or implied and (if it is express whether oral or in writing, whereby the individual undertakes to do or perform work personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or undertaking carried on by the individual’.*

Individuals categorised as ‘workers’ in the UK are covered by limited aspects of protective employment legislation such as the minimum wage and holidays but are excluded from protection relating to unfair dismissals, redundancy and minimum notice. In Ireland there is no specific ‘intermediate’ category.

### ***Implications of Creating an Intermediate Group***

It could be argued that in the countries, such as the UK, that have adopted some form of intermediate status there is an attempt to separate those ‘dependant entrepreneurs’ from genuinely self-employed, to recognise that they may be more reliant on a particular employer and to confer them with a certain amount of rights.

‘The "targeted approach" adopted in the UK to establishing differing rights and responsibilities in employment law for "employees" and "workers" is an example of how categories of vulnerable workers involved in complex employment relationships have been given minimum rights without an extension of the full range of labour law entitlements associated with standard work contracts’ (European Commission, 2006).

However, other commentators have argued that such an approach could well render a vulnerable group more vulnerable in the long-term. By statutorily creating a separate group with fewer rights than those with ‘employee’ status, an incentive might be created for some employers to siphon recruits into this intermediate tier. Thus a ‘grey zone’ (Burchell *et al.*, 1999) in relation to employment rights would be copper-fastened. A further criticism of such an approach would be that it could have the effect of rendering a complex area of law with even more complexity (Collins *et al.*, 2012).

### ***Reconceptualising the Employment Relationship***

Some commentators examine the possibility of redefining the legal tests used for determining status. Freedland (2006) presents the idea of simplifying the issue around a single concept such as a ‘personal employment nexus’ (such as that already used in Irish employment equality legislation). Such commentators assert that while the category of ‘worker’ in the UK may have limited the size of this group, determining the difference between a genuinely independent contractor and a dependent entrepreneur remains difficult. They conclude that while the test of personal performance of work remains important, the issue of economic dependence on a single employer should also be regarded as ‘critical’ (Collins *et al.*, 2012: 224). These authors also raise the question as to whether the solution is to abandon the concept of ‘employee’ and extend the scope of laws such as unfair dismissal to all ‘workers’.

Keane (2014) suggests that a possible way forward is that evidence of a commitment to an ongoing relationship should be the key test rather than evidence of an express promise that underlies the test for mutuality. He cites L.J. Stephenson in *Nethermere (St Neots) Ltd v Gardiner*<sup>13</sup>

*'I cannot see why well founded expectations of continuing (work) should not be hardened or refined into enforceable contracts by regular giving or taking of work over periods of a year or more'.*

In other words, where there is a realistic expectation based on a continuing and consistent ongoing situation over a period that work will be provided, and that work will not be refused, then this should be used as a test for an ongoing mutual understanding of commitment/expectation.

### ***Limiting Contractual Freedom***

A further option is for legislation to place contractual limits on the extent an individual or company can use zero hours work. Space restrictions limit a comparative review but limitations exist in other European countries, in the form of restrictions on the length of time someone may work on a zero hours, restrictions on the groups of workers who can be employed on zero hours work or requirements for companies to justify the use of zero hours work.

### **Conclusion**

The European Commission (2006) asserts that

‘the emergence of diverse forms of non-standard work has made the boundaries between labour law and commercial law less clear. The traditional binary distinction between ‘employees’ and the independent ‘self-employed’ is no longer an adequate depiction of the economic and social reality of work’.

The distinction has certainly given rise to greater complexity with respect to newer forms of contract especially If and When/zero hours contracts. A key implication of the uncertainty in this area is that there may be many individuals in the labour force who erroneously think they are employees with access to a raft of legal rights and conversely there may also be individuals who may have employment rights though they think they do not (Burchell, Deakin and Honey, 1999). Collins *et al.*, (2012), in considering the question of status, conclude that there is a substantial group of people who work under contracts that transfer the economic risks to them and they accept the work because they are vulnerable and have no alternatives. This view is echoed by other commentators (Lambert, 2008; Barnard, 2014). The issue for Government is balancing the need to protect such workers against the demands for more flexible forms of work.

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<sup>13</sup> *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612,629 (CA)



## References

- Adams, Z and Deakin S. (2014) *Reregulating Zero Hours Contracts*, Liverpool, The Institute of Employment Rights
- Albin E., (2013), *The Case of Quashie: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work*, *Industrial Law Journal*, Vol. 42 Issue 2, pp180-191
- Adams, A., Freedland, M. and Prassl J. (2015) *The zero hours contract: Regulating Casual work, or legitimising Precarity*, University of Oxford Legal research paper Series, *Paper No 00/2015*
- Barnard, C (2012) *EU Employment Law*. Oxford, Oxford University Press
- Barnard, C. (2014) *Non Standard Employment; What Can the EU Do?* Keynote paper, European Labour Law Network-7<sup>th</sup> Annual Legal Seminar, New Forms of Employment and EU law, 27<sup>th</sup> and 28<sup>th</sup> November, Hilton, The Hague, Netherlands
- Burchell, B., Deakin, S., and Honey, S. (1999) *The Employment Status of Individuals in Non Standard Employment* , Department of Trade and Industry, EMAR Series No. 6.
- Collins, H., Ewing, K.D., and Mc Colgan, A. (2012), *Labour Law*, Cambridge, Cambridge University Press
- Commission of The European Communities, (2006), Green paper, *Modernising Labour Law to Meet the Challenges of the 21st Century*, Brussels, COM(2006) 708
- Cox, N., Corbett, V and Ryan, D (2012) *Employment Law in Ireland*, Dublin Clarus Press
- Davidov, G., Freedland, M., and Kountouris, N. (2015) The Subjects of labour Law: Employees and Other Workers in Matthew Finkin and Guy Mundlak eds) *Research Handbook in Comparative Labor Law*, London, Edward Elgar.
- Deakin S. (2014), *New Forms of Employment, Implications for EU law, The Law as it Stands*, Keynote paper, European Labour Law Network-7<sup>th</sup> Annual Legal Seminar, New Forms of Employment and EU law, 27<sup>th</sup> and 28<sup>th</sup> November, Hilton, The Hague, Netherlands
- Freedland M (2006) From the Contract of Employment to the Personal Work nexus, *Industrial law Journal*, Vol 35, No 1 march 2006 pp 1-29
- Feedland, M. (2003) *The Personal Employment Contract* Oxford, Oxford University Press
- Keane, E. (2014) *Providing Access to Job Security Legislation for Intermittent Workers* , *Kings Law Journal*, 25 pp 332-339
- Lambert, S (2008) *Passing the Buck: Labor flexibility practices that transfer risk onto hourly workers*, *Human Relations*, Volume 61 (9): 1203-1227

Leighton, P and Wynn, M. (2011), *Classifying Employment Relationships—More Sliding Doors or a Better Regulatory Framework?*, *Industrial law Journal*, Vol 40, issue 1 pp 5-44