

24th John Lovett Memorial Lecture and Student Awards

**Thursday 3rd March 2016 @ 6pm Kemmy Business
School Lecture Theatre, University of Limerick**

**“Decent Work, Effective Labour Law and Zero
Hours Contracts”**

Professor Keith Ewing, King’s College London

Keith Ewing has been Professor of Public Law at King’s College London since 1989, having previously held positions at the Universities of Edinburgh (1978-1983) and Cambridge (1983-1989). Professor Ewing has held visiting appointments at universities in Australia, Canada and Japan. His research interests lie in Labour Law and Constitutional Reform, with special reference to the relationship between social rights and constitutional law. He has written extensively on Labour Law including recognition procedures and international standards, and is currently advising trade unions on the British government’s controversial Trade Union Bill. He is President of the Institute of Employment Rights and Vice President of the International Centre for Trade Union Rights. Professor Ewing drafted the Zero Hours Contract Bill, a private member’s initiative introduced into the House of Commons in 2014, but not passed.

**John Lovett Memorial Lecture
University of Limerick
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**Decent Work, Effective Labour Law
and Zero Hours Contracts**

By

**K D Ewing
King's College, London**

Introduction

It is a privilege and a pleasure to be invited to deliver the John Lovett Memorial Lecture at the University of Limerick. This annual event is a great tribute to the achievements of John Lovett, as is the long line of distinguished scholars and practitioners who have travelled to Limerick from different parts of the world in honour of his memory. I have taken as my themes three issues that I hope would have interested John, and which have been the subject recently of an important report by scholars at the University of Limerick.¹

The growth of zero hours contracts has been the cause of anxiety and debate in both Ireland and the United Kingdom, being the latest manifestation of what some see as a quickly mutating virus, with some employers constantly moving from one practice to another in order to avoid regulation.² It is hard to know how many workers are employed on these contracts, though the Office for National Statistics in the UK is now reporting 744,000 in 2015,³ while the CIPD estimated a higher figure of about 1.3 million.⁴ The problem appears to be getting worse, with these contracts being used by large prominent employers in both the public and private sectors.

It is of course claimed that many workers appreciate the flexibility and opportunities that ZHCs offer. But as British judges have recognized in the related context of sham 'self-employment', it is also the case that 'the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed', on the ground that 'organisations which are offering work or requiring services to be

¹ M O'Sullivan, T Turner, J McMahon, L Ryan, J Lavelle, C Murphy, M O'Brien and P Gunnigle, *A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees* (Department of Jobs, Enterprise and Innovation, Dublin, 2015).

² See most recently *The Guardian*, 9 December 2015 (report on investigation of employment practices of leading High Street retailer).

³ ONS, News Release, 2 September 2015. This is an increase on the previous year and accounts for 2.4% of all people in employment. It was also reported that 'there were around 1.5 million contracts that did not guarantee a minimum number of hours where some work was carried out in a particular fortnight in January 2015'.

⁴ CIPD, 'Zero Hours Contract Workers as Happy as Permanent Staff', *People Management*, 4 December 2015 – this is the figure given for 2014, said to represent an increase from 1.3 million in 2013.

provided by individuals are in a position to dictate the written terms which the other party has to accept'.⁵ In other words, workers have no choice.

What I plan to do is to examine the question of ZHCs in the context of international legal principles and obligations. I will begin by looking at the ILO's Decent Work Agenda, as expressed in the ILO's *Declaration on Social Justice and a Fair Globalisation*, picking out an important but neglected idea in that Declaration, namely the idea of an 'effective labour law'.⁶ In the second part of my lecture I propose to examine what this idea means and what obligations it imposes upon us in terms of the substance and procedures of our law, before moving in the third and fourth parts of my lecture to examine the ZHC problem as exposed with great sophistication by the University of Limerick study.

Decent Work

The ILO *Declaration on Social Justice and a Fair Globalisation* was adopted on 10 June 2008. So what, I hear the sceptics say. Here we have another pointless declaration by another unknown international agency. So let me begin by addressing the sceptics. The International Labour Organisation (ILO) is an agency of the United Nations, and may now be the oldest surviving international agency, having been created by the Treaty of Versailles at the end of the First World War, and refreshed by the Allied Powers at the end of the Second World War.⁷

The ILO is an agency in which Ireland has played a proud part. A lecture to the British TUC meeting in Dublin in 1880 by the Irish economist John Kells Ingram is said to be an influential source of the fundamental principle on which the ILO is based, the principle that 'labour is not a commodity'.⁸ Another influential Irishman, Waterford-born Edward Phelan, had an even more important role, playing a prominent part as a British civil servant in the creation of the ILO,⁹ later working assiduously to keep it alive in the 1930s and 1940s, becoming de facto Director General in 1941.

As such, Phelan was responsible for the seminal *Declaration of Philadelphia* in 1944, which opens with Ingram's words 'labour is not a commodity'.¹⁰ This is thus a United Nations agency with two large Irish footprints. So of course it is important, especially in Ireland of all places. Ireland joined the ILO in 1923 and is now one of 186 Member States. As such, Ireland has ratified 73 of the 189 ILO Conventions produced by the tripartite International Labour Conference, giving rise to binding

⁵ *Autoclenz Ltd v Belcher* [2008] EWCA Civ 1046 (Aikens LJ, at para 92).

⁶ ILO, *Declaration on Social Justice and a Fair Globalisation* (2008), p 10. For an earlier discussion, see K D Ewing, 'Regulating for Decent Work and the Effectiveness of Labour Law' (2014) 39 *New Zealand Journal of Employment Relations* 3.

⁷ On the origins of the ILO, see B A Hepple, *Labour Laws and Global Trade* (2005), ch 1.

⁸ See P O'Higgins, 'Labour is not a Commodity' — an Irish Contribution to International Labour Law' (1997) 26 *ILJ* 225. Compare, S Evju, 'Labour is not a Commodity — A Reappraisal' (2012:6) Working Papers in Labour Law, University of Oslo.

⁹ On which see, E J Phelan, *Yes and Albert Thomas* (London, 1936). Thomas was the first Director General of the ILO.

¹⁰ For a tribute to Phelan, see http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/former-directors-general/WCMS_192711/lang--en/index.htm

obligations under international law, the nature of which were recently revealed by the ILO supervisory bodies following the decision of the Supreme Court in the *Ryanair* case.¹¹

Ireland is also a party to the *Declaration on Social Justice and a Fair Globalisation*, along with the other ILO member states, and party (as well as part author) of the *Declaration of Philadelphia* of 1944 and the *Declaration on Fundamental Principles and Rights at Work* of 1998. These three Declarations complement the principles set out in the ILO Constitution of 1919, and it is on the third that I propose to focus. Yet while the importance of the latter cannot be denied, its bad timing was spectacular, being adopted by the International Labour Conference only three months before the collapse of Lehman Brothers ignited the global financial crisis.

But although addressed to the problems of globalisation, the provisions of this most recent Declaration are just as relevant to crisis and austerity. Said to reflect ‘the wide consensus on the need for a strong social dimension to globalization in achieving improved and fair outcomes for all’,¹² the aim of the Declaration was to ‘place full and productive employment and decent work at the centre of economic and social policies’.¹³ The commitments and efforts of Member States were thus to be based ‘on the four equally important strategic objectives of the ILO’,¹⁴ through which the ILO’s Decent Work Agenda is partially expressed.

The latter was initiated in 1999, with a focus on:

- **Promoting jobs** – an economy that generates opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods.
- **Guaranteeing rights at work** – to obtain recognition and respect for the rights of workers. All workers, and in particular disadvantaged or poor workers, need representation, participation, and laws that work for their interests.
- **Extending social protection** – to promote both inclusion and productivity by ensuring that women and men enjoy working conditions that are safe, allow adequate free time and rest, take into account family and social values, provide for adequate compensation in case of lost or reduced income and permit access to adequate healthcare.
- **Promoting social dialogue** – Involving strong and independent workers’ and employers’ organizations is central to increasing productivity, avoiding disputes at work, and building cohesive societies.¹⁵

¹¹ *Ryanair v Labour Court* [2007] IESC 6. See ILO Freedom of Association Committee, *Case No 2780* (Ireland), *Report No 363* (2012) (Complaint by Irish Congress of Trade Unions (ICTU) on behalf of the Irish Airline Pilots Association (IALPA) and the Irish Municipal Public and Civil Trade Union (IMPACT) with the support of the International Trade Union Confederation (ITUC) and the International Transport Worker’s Federation (ITF). See M Doherty ‘When You Ain’t Got Nothin’, You Got Nothin’ to Lose.... Union Recognition Laws, Voluntarism and the Anglo Model’ (2013) 42 *ILJ* 369.

¹² ILO, *Declaration on Social Justice and a Fair Globalisation*, above, p 1 (Preface).

¹³ *Ibid*, p 2.

¹⁴ *Ibid*, p 9.

¹⁵ <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

Some of these themes, slightly adapted, were fleshed out in the *Declaration on Social Justice* of 2008. Particularly significant for present purposes in relation to the third of them is the need for

policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection.¹⁶

Note the reference to policies regarding hours of work. While traditionally this might have related to *excessive* hours, that can no longer be presumed to be the only concern, in the face of new problems about *shortage* of hours, *allocation* of hours, and *regularity* of hours.

Also significant in relation to the fourth of these themes is the need to promote social dialogue and tripartism, with a view among other things to ‘making labour law and institutions effective, including in respect of the employment relationship, the promotion of good industrial relations and the building of effective labour inspection systems’.¹⁷ Note here the reference to ‘making labour law effective’ *in contrast to* ‘effective labour inspection systems’. The two are distinct, suggesting that an effective labour law is about more than an effective system of labour inspection, important enough though that is.

Effective Labour Law

So what do we mean by ‘making labour law and institutions effective’. What does ‘effective’ mean for these purposes? Manfred Weiss highlights the uncertainty and complexity when he says that

Effectiveness may be related to the functional effects labour law has for the labour market or for the society as a whole. This would be an extremely ambitious and complex approach. And it only could be fruitfully started in an interdisciplinary effort, it would go far beyond the competence of legal experts. And even then it would be doubtful whether reliable results could be identified.¹⁸

I agree with Weiss that this is not an appropriate starting point from which to judge whether labour law is effective: labour law is not simply an instrument of economic policy. But an effective labour law is also about more than enforcement.

So how do we assess the effectiveness of labour law for the purposes of the Declaration? In my view there are three essential elements of an effective labour law, the first of which relates to the **scope of the law**. As the *ILO Declaration on Social Justice* makes clear, an effective labour law is one that is universal in its application – no discrimination and no exclusions, by whatever means that discrimination and exclusion takes place. Yet one of the most intractable problems

¹⁶ ILO, *Declaration on Social Justice and a Fair Globalisation*, above, p 10.

¹⁷ *Ibid.*

¹⁸ M Weiss, ‘The Effectiveness of Labour Law: Reflections Based on the German Experience’ (2006) 48 *Managerial Law* 275.

of modern labour law is the gateway problem, relating to the classification of workers as ‘employees’. Most legislation applies only to ‘employees’ and sometimes to ‘workers’; but cynical lawyers have discovered that it is possible for their clients to hire labour that falls into neither of these categories, by creating bogus forms of self-employment on a more and more elaborate scale, designed deliberately to exclude the vulnerable from protection.

In exploiting these opportunities, cynical lawyers and their clients have been assisted by benignly negligent or malignly reckless governments and parliaments, which have conspicuously shirked their responsibility to define the scope of application of labour rights more clearly. Nowhere is this more spectacularly visible than in Britain, where the Employment Rights Act 1996 constructs an impressive edifice of employment rights, which generally apply to ‘employees’. An ‘employee’ is defined to mean ‘an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment’.¹⁹ A ‘contract of employment’ is defined in turn to mean ‘a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing’.²⁰ There is no definition of a contract of service.²¹

But of course the principle of universality implies that there will actually be labour rights in the first place. So a second feature of an effective labour law relates to the **content of the law**. In order to avoid unnecessary argument about what the substantive minimum content of an effective labour law should be in a politically contested terrain, I would simply point to internationally recognized standards as an incontestable starting point, a starting point to which we all notionally subscribe. Indeed, international treaties not only provide the substantive floor for an effective labour law, but also reinforce the view that an effective labour law must have such a substantive floor. The point is made forcefully by the European Social Charter of 1961, an international treaty ratified by Ireland in 1964. This commits the Contracting Parties to the attainment of conditions in which a number of rights and principles may be ‘effectively realised’.²²

It may fairly be said of course that the international standards are incomplete and that there is no international standard dealing expressly with ZHCs. It is nevertheless hard to see how such arrangements are consistent with the legal *principle* that ‘labour is not a commodity’: and hard also to see how they are consistent with the legal *standards* binding Council of Europe Member States ‘to provide for reasonable daily and weekly working hours’ as provided by the European Social Charter, Article 2(1); or the ‘right of workers to a remuneration such as will give them and their families a decent standard of living’, as provided by Article 4(1) of the same treaty. Irish

¹⁹ Employment Rights Act 1996, s 230(1). For the corresponding position in Ireland, see for example Unfair Dismissals Act 1977, s 1. Compare the Minimum Notice and Terms of Employment Act 1973 as originally enacted, s 1 defining an employee as ‘an individual who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, whether it be expressed or implied, oral or in writing, and *whether it be a contract of service or of apprenticeship or otherwise*, and cognate expressions shall be construed accordingly’. My emphasis.

²⁰ Employment Rights Act 1996, s 230(2).

²¹ It is thus necessary to fall back on old common law rules, developed in a different era.

²² Ireland renewed her vows in 2000 by ratifying the Revised Social Charter of 1996 (which includes additional rights as well as the Collective Complaints procedure, which supplements the supervision of Charter compliance by the European Committee of Social Rights).

unions have already used the Collective Complaints procedure of the Revised Social Charter successfully to challenge the restrictions in domestic law on the right of police associations to organize, bargain collectively and the right to strike.²³ Informed by the University of Limerick study, it is possible that a trade union based complaint relating to ZHCs (and IWCs) would be equally productive.

Turning from the need for universality and the content of the law, the third essential feature of an effective labour law relates to the **application of the law**. This brings us back to Weiss who emphasizes that the effectiveness of labour law requires us to judge ‘whether and in how far the normative framework of labour law is implemented in actual reality’,²⁴ in other words whether the law in the books is the same as the law in practice. Here there are a number of requirements if this objective is to be realized:

- The first is transparency of the laws, for the benefit of both employer and worker; people need to know what the law requires;
- The second is acceptance of the law by both employer and worker, and a sense of obligation if not a willingness to comply with its terms; and
- The third is effective enforcement of the law and remedies for breach of the law, in the event of its violation.

The last is particularly difficult, because we encounter the same problems relating to the enforcement of the law, as we find in the nature of the employment relationship, that makes law necessary in the first place. That is to say, the power imbalance in the work-place is carried forward into the court-room, where we encounter new problems of power, manifesting in questions of access to justice and inequality of arms.

It is thus not good enough to leave the responsibility of law enforcement to the worker alone. If the State assumes the responsibility to make the law, the State ought also to assume the responsibility to enforce it. This is a question not only about the effectiveness of labour law, but a question more widely about the rule of law. These problems have been compounded in the United Kingdom by new rules that increase the procedural burdens on those seeking to enforce their rights, and by the introduction of prohibitive fees as a condition of access to employment tribunals.²⁵ These have led to a sharp decline in the number of tribunal applications, not because people are less likely to be underpaid, suffer discrimination, or be unfairly dismissed, but because they don't have the £390 or £1,200 necessary to bring claims,²⁶ in a world where the courts tell workers that enforcing their rights is about personal priorities and budget management:

The question many potential claimants have to ask themselves is how to prioritise their spending: what priority should they give to paying the fees in a possible legal claim as against many competing and pressing demands on their

²³ *European Confederation of Police v Ireland*, ECSR Complaint No 83/2012.

²⁴ Weiss, above.

²⁵ For a critique of these fees, see K D Ewing and J Hendy QC, ‘Unfair Dismissal Law Changes – Unfair?’ (2012) 41 ILJ 115.

²⁶ The amount of the fee depends on the size of the claim, with the higher fees being applicable in dismissal and discrimination cases.

finances?²⁷

So if the ambitions of those who drafted the ILO *Declaration on Social Justice* are to be met, labour law must address three simple themes: **its scope, its content and its application**. But while the themes may be simple, we know that their execution is hard. This is partly because of the nature of labour law as a discipline, which has been described as a ‘political law’ in the sense that it (a) seeks to be transformative, and (b) aims to contain resistant economic power.²⁸ Legal anthropologists tell us that these are not propitious conditions for the effectiveness of any law.²⁹ Nevertheless, the fact that labour law is hotly contested and strongly resisted is no excuse for failure or ineffectiveness – in a democratic society governed by the rule of law, the scope, content and application of labour law (or any branch of the law) cannot be made conditional on the willingness of companies to comply.³⁰

Zero Hours Contracts

Which brings us to the question of ZHCs, the modern symptom of the ineffectiveness of our labour law. As already suggested, the ZHC is the latest form of an irrepressible virus that continues to mutate, the modern symptom of a continuing problem that has seen the use of undeclared, short term, casual, agency and other forms of precarious employment. The University of Limerick study points out that the ZHC problem is a more complex one than perhaps had been previously thought, and therefore not capable of easy resolution. One of the most important findings of the Limerick study is that the term ZHC is a mask that hides several forms of employment relationship, including ZHCs as properly defined, and what they refer to as If and When Contracts – IWCs:

The fundamental difference between the two is that individuals with a zero hours contract are contractually required to make themselves available for work with an employer, while individuals with an If and When contract are not contractually required to make themselves available for work with an employer.³¹

This distinction between ZHCs on the one hand and IWCs on the other is an important one, though because of legal developments it is a distinction that may be uniquely significant to Ireland.³² That apart, IWCs in particular expose the

²⁷ *R (UNISON) v Lord Chancellor (No 2)* [2014] EWHC 4198, [2015] ICR 390, para 61, rebuffing a claim that the fees violate the ECHR and/or EU law.

²⁸ P Auvergnon, ‘Some Lessons Drawn from a Comparative Approach to the Issue of the Effectiveness of Labour Law’ (2006) 48 *Managerial Law* 288.

²⁹ A Allott, ‘The Effectiveness of Law’ (1981) 15 *Valparaiso Law Review* 229: ‘the major reason for failure caused by non compliance is resistance caused by the unacceptability of the law; and this unacceptability is traceable mainly to the lack of an appropriate consensus. There are two major arguments for a consensus approach to law-making: the first is a pragmatic one, that this is the best way to get effective laws which people will comply with; the other is a moralistic one, that it is wrong in principle to impose laws on people against their will, if at the same time one subscribes to a “democratic” thesis of political organisation’ (p 242).

³⁰ It is also not to be overlooked that in limited liability companies enjoy one of the greatest privileges States have ever been known to bestow.

³¹ O’Sullivan, et al, above, p 121.

³² See the Organisation of Working Time Act 1977, s 18, which has no parallel in the United Kingdom.

ineffectiveness of labour law on all three fronts identified above. The first relates to the **scope of the law**. Not only do IWC workers have no security of working time, but the nature of the relationship is such that they may not be regarded as employees for the purposes of other rights, from many of which they will be excluded. So at least in the United Kingdom, there will be no entitlement to unfair dismissal and no redundancy payments. One of the stumbling blocks is the requirement that in order to be an ‘employee’ it is necessary to demonstrate a ‘mutuality of obligation’ between the parties:

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.

These are the words of Kennedy J in the Irish High Court,³³ applying a requirement that first appeared in the English Court of Appeal in 1983 to deny a group of ‘permanent casuals’ the right to bring a complaint for unfair dismissal on the grounds of anti-union discrimination.³⁴ But even if they manage to persuade a court that they are employees, IWC workers (at least in the United Kingdom) will commonly encounter a second problem, which is that many employment rights require a minimum level of service before they apply.³⁵ So in one of the cases referred to by Edwards J,³⁶ the workers in question were tour guides at a power station, denied even the right to a written statement of their term and conditions because they had not been continuously employed for 8 weeks.³⁷ Although they had been on the books for many years, every new engagement as a tour guide would be regarded as the beginning of a

³³ *Minister for Agriculture and Food v Barry* [2008] IEHC 216, [2009] 1 IR 215 for a good account of which see C Kennedy, ‘Cat Among the Pigeons: *Minister for Agriculture and Food v Barry: Employed or Self-Employed*’ (2009) *Irish Tax Review* 70.

³⁴ *O’Kelly v Trust House Forte plc* [1983] ICR 728.

³⁵ For Ireland, see O’Sullivan et al, above, pp 102 – 104.

³⁶ *Carmichael v. National Power plc* [1999] ICR 1226.

³⁷ For the corresponding Irish provisions (based in part on EU law), see Terms of Employment (Information) Acts 1994 – 2014.

new period of continuous employment, terminated when the job was done only a few hours later. So there would be no period of unbroken continuous service.

The second problem with IWCs of course about the **content of the law**, relating to the precarious nature of the employment, the lack of guaranteed hours, and consequently the lack of a guaranteed income. It is true that by virtue of the Organisation of Working Time Act 1997, s 18, ZHC workers in Ireland at least have certain minimum statutory rights. But there is no such protection for the larger group of workers on IWCs, workers who are used only when they are needed, the employer hiring their labour but taking no responsibility for their welfare. As the University of Limerick study points out:

The main advantage of IWCs to employers is flexibility, which allows them to increase or decrease staff numbers when needed. A second benefit is reduced cost, as organisations only pay people on If and When hours for time actually worked and these individuals may not build up enough service to attain benefits such as sick pay.³⁸

This is the ultimate commodification of labour: IWC workers are ‘a commodity, like every other article of commerce, and are consequently exposed to all the vicissitudes of competition, [and] to all the fluctuations of the market’.³⁹

To compound the mischief, while ZHCs and IWCs are often portrayed as offering flexibility as a benefit to both parties, the reality suggests that workers often have little choice but to jump when the employer snaps his or her fingers. Although denied the status of employees because of a formal lack of mutuality of obligation, workers on IWC contracts are in practice often required to work as if they were engaged on a ZHC contract as defined by the 1977 Act. They get none of the limited benefits of ZHC workers, while for all practical purposes they are required to work when called upon to do so. According to the Limerick study one of the negative features of IWCs identified by trade unions and NGOs is ‘a belief amongst individuals that they will be penalised by their employer for not accepting work’.⁴⁰ This was supported by evidence from SIPTU that ‘people on If and When hours are penalised if they refuse work, get inferior terms and conditions and ‘do not get a chance to build up skill or expertise’.⁴¹ It appears that the fabled flexibility is a one-way benefit.

Turning from the scope and content to the **application of the law**, ZHC or IWC workers are perhaps the most vulnerable of all dependent workers, dependent not on the employer for a job, but for a shift. They will often have no information about the terms of their engagement, there is no sense of obligation on the part of the employer to comply with labour law (indeed these arrangements are forged to avoid regulation), and there are major disincentives in seeking to enforce whatever rights are available. After referring to the power that IWCs confer on employers, the Limerick study continues in a very telling passage:

³⁸ O’Sullivan, et al, above, pp x-xi.

³⁹

⁴⁰ Ibid, p xi.

⁴¹ Ibid, p 77.

A number of interviewees claimed that If and When hours inhibited employees' propensity to speak up in the workplace. The [National Women's Council of Ireland] argued that some women on low or non-guaranteed hours have a fear that raising grievances about working conditions will result in being penalised with reduced hours, which can have wider consequences if the adjustment in hours prohibits access to social welfare benefits like FIS. [The National Employment Rights Authority] commented that people working low hours may be unlikely to take a case against an employer "after appraising the consequences for their continuing employment relationship". Similarly, the [Irish Nurses and Midwives Organisation] argued that nurses' fear of speaking up could influence their decision on whether to whistle-blow on safety concerns.⁴²

IBEC's response was perhaps just as telling, denying that it would be 'good business to control people over hours', while not noticing 'a trend of people on low hours or non-guaranteed hours taking cases against employers for unfair treatment or dismissal'.⁴³ I wonder why that might be? The absence of cases proves nothing. While some will see it as evidence that there is no problem, others will see it as evidence that there is no opportunity. It may that both are correct. But although I am not an expert in Irish labour law, I can see that there would be difficulties for a worker on an IWC contract bringing a claim for constructive dismissal against an employer who had reduced the number of shifts, after the worker had declined a call to work at short notice. The concerns expressed in the Limerick study about mutuality of obligation might help to ensure that such a claim would not get off the ground.⁴⁴

So here we have clear problems of **scope, content and application** of the law. The question of course is what to do about it? While the Irish government commissioned the impressive University of Limerick study, the British government responded in a wholly ineffective and potentially counter-productive way, which was to prohibit exclusivity clauses in ZHCs and to render these unenforceable.⁴⁵ Although perhaps well-intentioned, this is no solution and the response has rightly been the subject to excoriating criticism.⁴⁶ At a time when the abuses associated with ZHCs are becoming clearer, it seems hardly appropriate to take steps to enable workers to be trapped by even more ZHCs. Even less impressive is the strategy of regulation by advice, the government responding to concerns about abuse with website guidance that ZHCs 'should not be considered as an alternative to proper business planning and should not be used as a permanent arrangement if it is not justifiable'.⁴⁷

⁴² Ibid, p 42.

⁴³ Ibid.

⁴⁴ See the *O'Kelly* case above on precisely this point.

⁴⁵ Employment Rights Act 1996, s 27A(1), inserted by the Small Business, Enterprise and Employment Act 2015, s 153. Implemented by Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015, SI 2015 No 2021.

⁴⁶ M Freedland and J Prassl, 'Zero Hours – Zero Solutions', *IER Blog*, 23 February 2016.

⁴⁷ BIS, *Zero Hours Contracts: Guidance for Employers* (October, 2015):

<https://www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers>.

The Way Forward

There are those who counsel concern about regulation, worried that it would be a form of endorsement of an iniquitous practice, and an acknowledgement that it is permissible to continue under controlled circumstances.⁴⁸ One option might be thus to ban ZHCs and IWCs altogether. We would do this by a simple amendment to working time law to say that

- All workers must be engaged on ‘defined hours contracts’, which set out the minimum number of hours that the worker in question will be required to work each week or month;
- A ‘defined hours contract’ must prescribe the permitted percentage (up to a statutory maximum of 10-20%) of the defined hours that workers can be on call, with anyone on call entitled to be paid a retainer while on call.⁴⁹

This would be my preferred position, which if adopted would I suspect lead to a sharp improvement in personnel management.

In the current political climate, however, outright prohibition is an implausible option, and the best that is likely to be achieved is that the use of ZHCs or IWCs will be tightly regulated rather than prohibited. That being the case, we need to return to our three questions about the effectiveness of labour law. To this end, the starting point on the scope of the law is the recommendation in the University of Limerick study 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’.⁵⁰ It is crucial that this point is taken seriously, otherwise the regulation of IWCs will be wholly ineffective. Not only would IWC workers continue to be shut out of existing labour laws, but they would be denied the very protections recommended by the University of Limerick study.⁵¹ If the latter are to apply only to ‘employees’ they will apply to no one.

In some respects this is the Holy Grail of modern labour law, not only in Ireland but throughout the common law world.⁵² As one commentator suggested in response to the *Barry* case,⁵³ it is now time for legislatures to accept responsibility for determining the crucial question of who is entitled to labour law protection.⁵⁴ We need a new statutory definition to replace the existing common law tests. To this end the ILO recommended in 2006 that

For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the

⁴⁸ A Adams, M Freedland and J Prassl, ‘The Zero-Hours Contract: Regulating Casual Work or Legitimizing Precarity?’, University of Oxford Legal Research Paper (2015).

⁴⁹ K D Ewing, ‘Zero Hours Contracts: Some Policy Proposals’ IER Blog, 13 August 2013: <http://www.ier.org.uk/blog/zero-hour-contracts-some-policy-proposals>.

⁵⁰ O’Sullivan et al, above, p xiv.

⁵¹ *O’Kelly v Trust House Forte plc*, above.

⁵² See the seminal M R Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (2012).

⁵³ See Kennedy, above.

⁵⁴ See Zero Hours Contract Bill 2014, cl 11.

national policy referred to in this Recommendation, consider the possibility of the following:

- (a) allowing a broad range of means for determining the existence of an employment relationship;
- (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
- (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.⁵⁵

This is a start, though I think we could do better.⁵⁶ But we also need to look at the content of the law itself and the nature of the protection it provides in relation to ZHCs and IWCs. It is here that the University of Limerick report is very welcome, wisely proposing the repeal of the Organisation of Working Time Act 1977, s 18, and its replacement with a new statutory framework.⁵⁷ This framework would be based on a very detailed set of recommendations, the need for which serves to expose the nature of the abuse and the complexity of the steps needed to deal with it. The key recommendations in a very rich report cover (i) better information, (ii) regularisation of the contract after 6 months, (iii) better notice to workers of when they are required to work, and (iv) compensation when work is not provided. The core recommendations include:

Information

- Employers should provide the written statement on the terms and conditions of the employment on or by the first day of employees' commencing their employment.
- Employers should 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.

Minimum Number of Hours

- 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.
- 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.

⁵⁵ ILO Employment Relationship Recommendation 2006 (ILO Recommendation 198), para 11. See also ILO, *The Employment Relationship: An Annotated Guide to ILO Relationship No 198* (2007).

⁵⁶ See Zero Hours Contract Bill 2015, cl 11(1): 'A person s employed for the purposes of this Act if he or she is engaged by another to provide labour and is not genuinely operating a business on his or her own account',

⁵⁷ O'Sullivan et al, above, p xiii.

Minimum Periods of Notice

- 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.
- 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.

Minimum Terms and Conditions

- Where after 6 months an employee is provided with guaranteed minimum hours of work but is contractually required to be available for more, the employee should be compensated in any week where additional hours are not required.⁵⁸
- There should be a guaranteed 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.

But as we have seen, effective labour law is not just about scope and standards, but also about application of the law. It is here that I was left wondering when drafting the Zero Hours Contracts Bill - which was introduced in the Westminster Parliament in 2014 - whether it would have any regulatory effect and whether it would not be better to switch the balance of regulation and enforcement from legislation to collective bargaining.⁵⁹ Here it is important to recall the ILO *Declaration on Social Justice*, which not only proposed developing and enhancing 'policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress',⁶⁰ but also reminded ILO Member States that 'freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives'.⁶¹

In this regard, the University of Limerick report has important recommendations:

We recommend that employer organisations and trade unions which conclude a sectoral collective agreement can opt out of the legislative [recommendations], and that they can develop regulations customised to their sector....

When negotiating at sectoral level, we recommend that employer organisations and trade unions examine examples of good practice which can

⁵⁸ Drawing on the Organisation of Working Time Act 1977, s 18, it is proposed that 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.

⁵⁹ See HC Debs, 21 November 2014, col 603.

⁶⁰ ILO, *Declaration on Social Justice*, above, p 10.

⁶¹ *Ibid*, p 11.

provide flexibility for employers and more stable working conditions for employees, such as annualised hours and banded hours agreements.⁶²

These are recommendations that were not included in the Zero Hours Contracts Bill in the United Kingdom. But they are recommendations I would strongly endorse,⁶³ and the question now is how far the institutional infrastructure is in place at the sectoral level to enable these latter recommendations to be implemented on a wide-scale basis.⁶⁴ As such, this is a proposal that raises questions about the role of trade unions, which are bigger than the question of ZHCs or IWC contracts.

A compelling lesson of the University of Limerick study, however, is that short of prohibiting ZHCs and IWCs altogether, it is necessary for an approach to regulation that is as far-reaching and wide-ranging as possible. That message would seem to be reinforced by the Organisation of Working Time Act 1977, which as already suggested contains some safeguards for ZHC workers. But the definition of a ZHC is such as to exclude IWCs who are unlikely to be employees and unlikely to be able to show that their contract requires them to be available for work at the employer's request, whatever the situation in reality may be in practice.⁶⁵ This would seem to suggest that insufficiently thoughtful regulation will simply lead to a switch to other

⁶² O'Sullivan et al, above, p xiv.

⁶³ The general principle is one with which we are familiar in EU law on working time, with the Working Time Directive unusually allowing standards to be set by collective agreements, as well as implementation by collective bargaining, and for derogation by collective agreements. The Directive deals with maximum working hours; but there is no reason why a similar device could not be used for the purposes of minimum working hours. Yet while very permissive, the Directive also highlights some of the problems increasingly likely to be encountered in relying on collective bargaining in the modern era. In facilitating these arrangements throughout the EU, it has been necessary to acknowledge that sector wide bargaining is not the reality of all workers in all EU member states, so that derogations may be made 'by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level'. In the British case this may mean agreements concluded by non – union based representatives elected specifically for this purpose..

⁶⁴ The challenge for trade unions in many EU countries is the gradual decline in the levels of collective bargaining, a feature of modern industrial relations no more prevalent than in the United Kingdom. There collective bargaining coverage has fallen sharply from 82% on the eve of the Thatcher counter-revolution to what is predicted to be about 23% today, and falling. There are many explanations for this, but the key in my view has been the shift in the focus of collective bargaining, away from sector wide agreements sustained by Joint Industrial Councils (sustained by the administrative power of the State) and wages councils (sustained by the legislative power of the State). The new paradigm is exclusively US style enterprise based bargaining whereby single employers negotiate with a trade union about terms and conditions for their employees. This is no longer a British problem, with EU policy which was once sustained such arrangements - in the Posted Workers Directive and the Working Time Directive in particular - now moving to undermine them and to follow the US example of decentralised collective bargaining. Under new rules of economic governance adopted in 2010 with a view to harmonizing national economies, the talk is not now of the European Social Model but of greater wage flexibility and the deregulation of collective bargaining closer to the enterprise. These are developments reinforced in turn by the austerity measures 'agreed' with a number of countries, as a condition of financial assistance following the collapse of the Euro. The latter measures led to a major de-centralisation of collective bargaining arrangements, which in the case of Greece were condemned by the ILO as leading to the destruction of the entire collective bargaining system in that country. This tide needs to be turned and institutions rebuilt. See in more detail, K D Ewing, 'The Death of Social Europe' (2015) 26 *King's Law Journal* 76.

⁶⁵ See also the discussion in O'Sullivan et al, above, pp 97 – 111 for a discussion of the complex legal issues.

forms of contractual arrangement. Comprehensive regulation is thus necessary to anticipate the risk of mutation, whether that mutation is deliberate or accidental.

Conclusion

It is important of course not to exaggerate the problem of ZHCs and IWCs. As the CIPD said in response to the University of Limerick study, we are talking about 5.3% of employees in Ireland who have constantly variable working hours, and we are also talking about data not linked to particular types of employment contracts.⁶⁶ But if we should not exaggerate the problem, equally we should not under-estimate it, with no sign of matters likely to improve. We are dealing with a symptom of the precariousness and insecurity of many working lives,⁶⁷ and an example of the willingness of employers to use employment practices that avoid regulation. If that is not one of the motives of these practices, it is certainly one of the consequences.⁶⁸ It is true of course that many workers are said to welcome arrangements of this kind, which they have little option but to accept. But if so, there are few who are likely to object to flexibility underpinned by security.

My own sense is that this is what happens when the regulatory space once filled by strong trade unions is left exposed. It is in that space that bad practice takes root and flourishes, a space in which there is insufficient management accountability and in which labour is treated as a commodity, to be used and disposed of at will. This is a long way from the vision of Ingram and Phelan, as well as the values that inspired the *ILO Declaration on Social Justice*. And it is a long way from our shared obligation in that Declaration to promote social justice, decent work and an effective labour law. As already said, ZHCs and IWCs are a symbol of the ineffectiveness of labour law, and of our failure to address (i) the scope of the law, (ii) the content of the law, and (iii) the application of the law (though the last is not the problem in Ireland as it is now in the United Kingdom).

Ireland looks set for a period of political uncertainty following the general election on 26 February. It is to be hoped nevertheless that political space will be found to implement the Limerick recommendations. But the concern is that in doing so, we will be addressing only one symptom of a bigger problem, and that as a result we will see the emergence of a new regulatory challenge as employers adapt to the new regime. It is for this reasons that we need also to address the institutional context within which any legislation will operate. The point is alluded to by Weiss writing about the effectiveness of German labour law generally, where he highlights the important role of labour inspection, government agencies, labour courts, works

⁶⁶ <https://www.cipd.co.uk/global/europe/ireland/resources/cipd-ireland-news/zero-hours-if-when-contracts-ireland.aspx>

⁶⁷ Z Adams and S Deakin, 'Work is Intermittent but Capital is Not: What to do about Zero Hours Contracts'. IER Blog, 1 May 2014: <http://www.ier.org.uk/blog/work-intermittent-capital-not-what-do-about-zero-hours-contracts>.

⁶⁸ The other problem with ZHCs and IWCs is that they are often associated with other alleged abuses by employers. Although this is unlikely to be true in all cases and although it is not an inevitable feature of these arrangements, they do nevertheless attract a bad press partly because they appear to be associated with poor practice generally. A campaign by Unite the Union against a leading British company is driven not only by the use of ZHCs in High Street stores, but also the alleged 'harsh working conditions' in the company's warehouses, with claims of 'low pay, agency work contracts, named and shamed by your bosses for 'not working hard enough' and body searches after every shift'.

councils, and trade unions in determining the effectiveness of German law, albeit in the narrow context to which he referred, namely enforcement.⁶⁹

As suggested also by the ILO *Declaration on Social Justice*, there can be no effective labour law without effective trade unions.⁷⁰ Strong trade unions are necessary for three reasons:

- Their political voice is needed to ensure that any regulatory framework is as strong as possible, to counteract the political power of employers;
- Their regulatory muscle is needed to ensure that the legislation is implemented and developed properly; and
- Their services to members are needed to ensure that the legislation is enforced in the event of non-compliance.

While this seems to me to be true generally, it will also be true in relation to ZHCs and IWCs, as we move towards what I hope will be the speedy implementation of the Limerick report.

⁶⁹ M Weiss, 'The Effectiveness of Labour Law: Reflections Based on the German Experience', above.

⁷⁰ ILO, *Declaration on Social Justice and a Fair Globalisation*, above, p 10, where reference is made to the need to promote social dialogue and tripartism with a view among other things to 'making labour law and institutions effective, including in respect of the employment relationship, the promotion of good industrial relations'.