The Employment Law Association of Ireland

Zero Hour Contracts

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At the start of this seminar let me make one thing plain. I am not today talking about legitimate Zero Hour Contracts. There are many situations where Zero Hour Contracts are legitimate. There are legitimate reasons to have "casual workers". However, Zero Hour Contracts are now being used to create what I will refer to as bonded labour. They are being used in situations which are inappropriate. They are being used in circumstances where they were never intended. What is also somewhat disturbing is that these contracts are being drafted for the very purpose of ensuring that employees have limited employment law rights. I despite what some may think am not on a crusade. I just do not like seeing employees exploited nor legitimate schemes which have a legitimate purpose being misused

What is a "Zero Hour Contract"?

This may seem a strange question to ask but it is at the very heart of the seminar today.

A Zero Hour Contract can be described as a relationship where there is no obligation on the work provider whom we can call the "employer" to provide work. Equally there is no obligation on the "employee" to accept work.

This in my view would be the classic definition of a Zero Hour Contract.

Does the Organisation of Working Time Act (OWTA) apply to Zero Hour Contracts?

The simple answer in my opinion is "NO".

The Act does not apply to a Zero Hour Contract which is properly drafted as regards to Section 18 of the Act.

Let me explain this point at the outset. Section 18 (1) only applies to a Contract of Employment which operates to;

"…require the employee to make himself or herself available to work…"

While the other provisions of the Act will apply to employees who have Zero Hour Contracts, the wording of Section 18 is very specific. Effectively the wording delimits the definition of an "employee" and "employer" in the definition section of the Act.

It effectively amends that definition as it applies to Section 18.

It is the classic employer/employee common law situation that an employment contract operates where there is mutual obligations. Namely an employer's obligation to provide work or pay combined with an employee's reciprocal obligation to be ready and available to do the work. This is commonly called the "mutuality of obligation".

By properly drafting contracts coupled with XXXXXXXXXXXXXXXXXXXXXX it is effectively childs play to create a situation where the employee under a Zero Hour Contract has no protection under Section 18. They do however retain the protection to under the remainder of the Legislation.

There is a common misconception that the Act applies only to Zero Hour Contracts. It actually applies only to Zero Hour Working Practices. Even if it was held to apply to Zero Hour Contracts where there are no hours XXXXXXXXX.

<u>Zero Hour Working Practices – Not Zero Hour Contracts – The Real Test</u>

The case of Ticketline Trading as Ticket Master and Sarah Mullen DWT1434 which issued on 10th April 2014 is an important decision clarifying the issue in relation to what are commonly called zero hour contracts.

The Court in this case set out a detailed overview of the legislation.

The Court held that the employee, in this case, had a contract which was operated as thought she was required to be available for work at all times. Being required to be XXXXXXXXXXXXX. This is in line with Section 18 of the Act which refers to contracts where there are a certain number of hours, or, as and when the employer requires him or her to be available for work, or, both a certain number of hours and when the employer requires him or her to be available for work.

The Court found that where the employer requires an employee to keep themselves available for work the employee comes within the scope of Section 18 of the Act.

This case has significant implications for both employers and employees. It goes further than the normal "zero hour contracts" situations.

If a contract of employment requires and employee to work say 40 hours per week and the employer does not provide work then the employee may bring a claim under the Payment of Wages Act but may also bring a claim under the Organisation of Working Time Act.

Under the Organisation of Working Time Act the employee would be entitled to claim 10 hours pay for each week. However, in addition, the Organisation of Working Time Act provides for compensation of up to 2 years wages.

A number of employers will have what are commonly called “Zero Hour Contracts”. However, the actual wording of same, and, the way they operate in practice will now be subject to review as to whether the employee does have rights under the Organisation of Working Time Act. Clearly if the employer requires the employee to be available, or, if the contract provides for a set number of hours or a combination of either of these two situations the employee will have a claim against the employer.

The case is also important in that it confirms that the Labour Court will not look just at the written terms of any contract but will also look at what the relationship between the employer and the employee was. The Court will consider what representations and statements were made by or on behalf of the employer. In this case the Labour Court accepted that the statements were made on behalf of the employer which required the employee to be available for work. As a result of this the Labour Court awarded compensation of €3000. The experience in Ireland is different than that in the United Kingdom. In the UK, There is no obligation on an employer even if they require an employee to make themselves available, to pay the employee or to suffer the potential of a claim under the equivalent of Section 18 OWTA if work is not provided. The Irish legislation is different. There is some advice issuing from certain entities that the alternative is to provide a contract as a “casual worker”. Merely calling a contract a “casual employment” is not in itself sufficient. A Court in Ireland will look behind the title of any contract to find out what it actually says. The most recent decision of the Labour Court enables the Court to look at what the actual relationship between the employer and employee was. In addition the Court will look to see what was said to the employee by way of statements or representations. Employers who are considering either Zero Hour Contracts or casual contracts of employment need to carefully look at all documentation to make sure that there is no requirement whatsoever for the employee to be available to work.

In addition, employers must make sure that managers or supervisors do not say anything to such employees which could be deemed to be a requirement for the employee to be available or required to be available to work.

By judicious planning it is reasonably easy for an employer to avoid section 18 entirely by having a properly drafted contract. In addition the employer can have the added benefit of an exclusivity clause. Put another way an employer can have "bonded employees", who are not given any particular hours and cannot work for anybody else. As Section 18 is not a Directive provision there is no fall back to the Directive. This issue of Zero Hour Contracts is under review both in the United Kingdom and here in Ireland. It is widely open to abuse. It is therefore reasonable to believe that this Section might be amended into the future.

Who does Section 18 apply to?

Section 18 applies to an employer who requires an employee to make himself or herself available to work for the employer in a week;

(a) A certain number of hours (the contract hours), or
(b) As and when the employer requires him or her or
(c) Both a certain number of hours and as and when required.

Section 18(1)

Section 18 (1) does not apply to casual workers even when there would be a reasonable expectation that the employee would be required to do such work. See Contract Personnel Marketing Ireland –and – Buckley DWT45/2011.

The Section in subsection (2) provides an employee will have a right to claim for a particular week if the employee is not provided with work

(a) In the case of a contract providing for a certain number of hours 25% of those hours, or
(b) Where the employer requires the employee to be available as and when required or both a certain number of hours as and when required. Then when work of the type which the employee is required to make themselves available for has been done for the employer in that week at least 25% of the hours for which such work has been done in that week.

Who is a "casual worker"?

The term casual worker is not defined. Section 11 of the Protection of Employees (Part-Time) Work Act, 2001 does define casual worker and it refers to a worker not being a casual worker if they work for the employer for over 13 weeks and the work they do could not be regarded as regular or seasonal employment.

The Labour Court has not for the purpose of the OWTA defined who is a casual worker or the test to be applied. Because of some "schemes" currently in existence or under "construction" at some stage this issue will need to be addressed. The Labour Court with its specialist knowledge of the workplace is best suited to address this but if the issue of Zero Hour Contracts is to be seriously reviewed by the Department the issue of the definition of a "casual worker" will need to be addressed.

When is it allowed not to provide work for an employee ?

The provisions of Section 18 have exemptions. An employer will have a defence where there is a lay-off or the employee is kept on short time for that week. For there to be a lay-off the provisions of the Redundancy Payments Acts would need to apply. In the case of placing an employee on short-time the contract of employment would need to have such a provision. There is an argument, though it is not relevant to this seminar today, that where an employee is placed on short time that this can be a breach of the employees contract entitling the employee to claim Unfair Dismissal.

There is a complete exclusion for casual workers. The issue is who is a casual worker is discussed above.

Even where an employer is held to have breached Section 25 the maximum award is 25% of the contracted hours. The Act in this section would also not seem to apply to a worker who works during the week for an employer at least 25% of the contracted hours. Therefore if an employee has a contract to work 20 hours a week and receives 5 hours' work there is no claim.

When can an employee bring a claim?

Where the employee has been required to work for the employer for less than 15 hours in a week the employee is entitled to have his or her pay calculated on the basis that he or she worked for the employer in that week, the percentage of hours referred to in subsection 2 (a) or subsection (b) which would be 25%. The provisions of Section 18 will not apply where an employee is absent due to illness or for any other reason. Section 18 (3) (b). If 25% of the contracted hours would be less than 15 hours the maximum

financial loss is 25% of the contracted hours. Compensation of two years wages can be awarded for any breach, in addition.

Calculating the entitlement

Where an employee is requited to work as and when required or a set number of hours and as and when required the reference in subsection (2) (b) to the hours for which work of the type referred to in that provision is to be construed as a reference to the number of hours done by another employee or two or more employees in that week then the employee may effectively seek to rely on the employee who does the greatest number of hours subsection (4).

In practice this means that if an employee would normally work 40 hours a week and is not provided with work and another employee during that week works 30 hours doing the same work as the employee who is bringing the claim would have done then the employee bringing the claim can claim 25% of 30 hours. However, how does an employee prove this? They will rarely have the evidence. Unless the Labour Court applies the "peculiar knowledge rule" to the employer effectively the Section is toothless.

An employee will not be covered in situations where the employee is required to be on call to deal with emergencies or other events which may or may not occur by subsection (5).

How to avoid Section 18

The Labour Court has held that the section operates on the basis of "Zero Hour Practices". However, it is worth looking at the Section as to how an employer can avoid the Section. The first is that even where the contract provides for 40 hours a week and the employee is not given any work in that week the Labour Court has in cases held that the Act does not apply. That appears to be contradicted by the Ticketline case.

While the Labour Court recently has referred to "zero hour working practices" the Act refers to "any week". There is a difference between a zero hour working practice and it happening in any week. This issue is likely to arise by way of legal argument into the future. Can you have a "working practice" in just one week? Or is it a week by week analysis? I believe it is a week by week calculation.

The second is to simply structure a contract to evade the Act and I do not use the words "avoid". I purposely use the word "evade". It appears to the writer reasonable easy to evade the Section. It appears there is little that a Rights Commissioner, an Adjudication Officer in the future, or, the Labour Court can do about it.

The basis of structuring matters is to provide a contract which provides for zero hours. The second is to provide that it will be a casual contract to work as and when offered. The third is to provide that the employee can refuse any work assignment or decline work for any reason and that there would be no disciplinary action as a result of doing so.

The above structure would appear to be possible because of the strict wording of the legislation. Effectively no protection. The difficulty is that it will require managers to fully understand the scheme and not to place any pressure on a worker to come to work. A slight variation would be to;

1. Provide that the employee will work XXXXXXXXXXXXXXXXXXXX
2. To provide that further hours XXXXXXXXXXXXXXXXXXXXXXXX
3. To include an exclusivity clause.

Now it is reasonably easy to "mess up" an employee who does not comply with whatever hours the employer wants the employee to work. By calling the employee to work at short notice, but at least 11 hours, then if the employee does not come to work the employer does not have to pay for that period. Calling an employee for one hour a day means the employee cannot claim Social Welfare for that day. In addition, and we have seen where the employee is called and cannot get to work when the employer is contacted by Social Welfare the employer will say that they offered work to the employee and the employee refused it. In such circumstances Social Welfare will not pay for that day.

In such situations the employee cannot claim more than 1.25 days' pay per week under Section 18 at best. It would appear possible to the writer to structure matters so that it is still a Zero Hour Contract with everything else XXXXXXXXXXX. In such circumstances 25% of zero is zero. However, having a requirement to work 1 hour a day taking it out of the Zero Hour Contract is actually a better tool for creating bonded labour.

At the present time the use of exclusivity clauses is under review in the United Kingdom. The current position is that colleagues, whom I know in the UK, are already working on schemes to avoid the proposed UK review.

There is little that a Rights Commissioner or the Labour Court can do to unwind such schemes, unless the definition of XXXXXXXXXXXXXXX.

However, it would appear to the writer that there is little comprehension on just how these schemes are being used to create effectively a bonded labour workforce.

How has the Section been applied in practice?

The issue arose in the case of Anora Commercial Limited and Regina Stasytiene DWT13119. In that case the employee had a contact to work 39 Hours per week. The employee was not provided with work for the week starting the 5th January 2013. The Labour Court rejected the claim on the basis that the employee was not employed on a zero hour contract. This is despite the fact that the Court quoted Section 18 (1) which refers to;

(a) A contract of employment
(b) Which operates to require the employee to make herself available to work, and
(c) That the contract provided for a certain number of hours.

The employee in that case complied with the three tests yet the Labour Court held against the employee. The argument of a Zero Hour working contracts is not relevant to the provision of Section 18 in the writers view. A contrasting position then was taken in the case of Twenty Four Seven Recruitment Services Limited and Kozak DWT12148 in 2012. In that case the Labour Court held the contract of employment did not assist the Court as the contract was drafted as a contract for services not a contract of service despite being subsequently accepted as a contract of service. i.e. an employment contract. The Labour Court in that case confirmed that there was no evidence to the Court that the employee was a casual worker. The claim of the employee succeeded.

These are contradictory Decisions of the Labour Court. The Decision in Anora Commercial Limited DWT 13119 and the Ticketline DWT1434 appear contradictory. I may be wrong on this point.

In this writers view Section 18 does not apply to Zero Hour Contracts just Zero Hour Working Practices. Unless an employee has a contract with a certain number of hours or a requirement to be available to work in a combination of hours and availability then Section 18 does not avail an employer. A proper Zero Hour Contract is unaffected by Section 18.

Conclusion Concerning Section 18

It is my view, and it is only my view, that the issue of Section 18 is only now beginning to become important because some employers are structuring matters in a particular way. The issue as to whether the provision applies to situations where an employee has a contract to work a set number of hours per week and is not provided with work is still entitled to claim under Section 18 will need to be addressed by the Court to deal with the possible contradictions in decisions. It is my view that an employee could bring a claim under Section 18 for 25% of their hours and subsequently a Payment of Wages claim for breach of contract either in the Courts or under the Payment of Wages Act for the difference. In addition, Section 18 of the Act allows the Labour Court to award compensation for any breach of up to 2 years wages. It will be interesting to see how the jurisdiction of the Labour Court develops in relation to Section 18.

It will be equally as interesting to see how some employers will seek to structure arrangements going forward to avoid Section 18. A considerable amount of legal expertise is currently being utilised to create robust structures which will be impregnable to attack. Employers who have a form of "bonded worker" who is exclusively tied to them but with no guarantee of work are particularly vulnerable and open to abuse. Those wishing to maintain this control will certainly agitate to retain same. The only viable way to give some protection is to utilise the definition in the Protection of Employees (Part-Time-Work Act, 2001 or to specify what type of arrangements are "casual" and when does "casual" working cease to be "casual

Time and Pay for Annual Leave – Section 20

The calculation of Holiday pay for Zero Hour Employees

The calculation of an employee's pay for holiday pay purposes is a combination of Section 20 of the Act and the Organisation of Working Time Act (Determination of Pay for Holidays Regulations) 1997 S.I. 475/1997.

Subsection (2) provides that pay in respect of an employee's Annual Leave shall

(a) be paid to the employee in advance of his or her taking the leave,
(b) At the normal weekly rate or proportionate to the normal weekly rate and

(c) Where the pay includes board or lodging or both then compensation for same at the prescribed rate must be paid. This will be the rate, in effect, in the National Minimum Wage Act.

The normal weekly rate is determined in accordance with S.I. 475 of 1997 by subsection (4). Where the salary or wages is determined wholly by reference to a term or fixed rate or salary or any rate which does not vary the normal weekly rate of pay shall be the sum (including any regular bonus or allowance the amount of which does not vary in relation to the work done but excluding any pay for overtime) which is paid in respect of a normal weekly working hours last worked by the employee before the annual leave.

For many workers who are paid a salary or a fixed number of hours per week at a fixed rate it is relatively easy to calculate the entitlement. If the salary or wage includes any regular allowance which does not vary that is easy to calculate also. However, overtime is excluded by Regulation 3 (2). Where the pay is not calculated wholly by reference to the matters in Regulation 3 (2) it is necessary to look at the average weekly pay (including any pay for overtime, calculated either

(a) In the period of 13 weekly immediately before the Annual Leave or the cessor of employment, or
(b) If no time was working in these 13 weeks, then 13 weeks ended on the day the employee last worked before the Annual Leave. This will cover a situation where an employee had been on lay-off Regulation 3 (3) or on sick leave.

If the employee is on short time there would at first sight appear to be a difficulty for the employee getting their proper entitlements to their normal weekly wage although it is arguable that it would be the normal weekly wage not the short time wage which will apply.

<u>Overtime</u>

The Labour Court has held in MCM Security Limited and Power DWT95/2008 that even where an employee is contractually required to work overtime failure to include such overtime in holiday pay cannot give rise to a complaint under the Act. The issue however is whether the Lock –v- British Gas Trading Limited Case C-539/12 of the ECJ, can be interpreted as applying to overtime.

Assuming the Labour Court is correct the following structure would appear to enable an employer to pay €50 per week as holiday pay or €10 per day for a public holiday not worked. Even where an employee would normally work 40 hours a week and earn €400 per week. This structure will be;

(1) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
(2) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
(3) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
(4) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

The requirement to be available to work and the obligation to do so create a contractual entitlement to XXXXXXXXXXXXX, being €50 a week. XXXXXXXXXXXXXXXXXXXXXXXXX then for Public Holidays the rate of pay will be €10 per day and for holidays €50 per week.

The "overtime" is regular. It is daily. It is rostered. It is not a contractual provision. Effectively it is a disguised form of normal working hours. Section 18 is powerless to address same. When an employee is contractually obliged to do overtime and the employer contractually obliged to provide it then it is possible the Labour Court may revisit this issue but even if contractual, the Labour Court will not count overtime towards either Holiday or Public Holiday Pay. The example given may be extreme but I can envisage a variation which will be less extreme but would clearly reduce the liability of an employer to pay Holiday Pay or pay Public Holidays at the "real" rate of pay. Having a contractual obligation to work overtime would bring the employee within Section 18 only.

<u>The Interaction of Zero Hour Contracts and Social Welfare and Tax</u>

In looking at the structures which are sometimes put in place in respect of Zero Hour Contracts it is useful to look at the profile of a number of such workers.

For the purposes of creating effectively bonded labour it is important to consider the interaction between Tax, Social Welfare and Zero Hour Contracts.

Take an employer who has a requirement for an employee to work 8 hours a day, 5 days a week being a forty hour week. By splitting the workforce into two groups at 20 hours each assuming the employer pays the National Minimum Wage rate only or even sometimes a figure in excess of this the employee will be in a position to claim

1. Social Welfare on the days the employee is not working, and
2. Family Income Supplement (if the employer employs the right "class" of employee)

Both the issue of Social Welfare and Family Income Supplement provide a significant advantage to an employer in being able to control that workforce.

The question is how is this done?

If the employer reduces the hours below 40 hours over aa two week period the employee loses their Family Income Supplement. ("FIS"). For FIS the employee needs to work a minimum of 20 hours averaged over a two week period. If the employee works for less than 20 hours per week averaged over a 2 week period then they receive no FIS. This can be significant.

If the employer when dealing with a "recalcient" employee spreads the work, being 20 hours a week over 5 days instead of 2 days or 3 days then the employee loses Social Welfare Payments for the days he or she would not have worked. Combine a five day week and less than 20 hours average over a 2 week period and such employees are in serious financial difficulties. They lose 2 to 3 days Social Welfare and FIS.

These place significant pressures on employees to be compliant with the requirements of their employer. Further with the employer for example calls the employee to work for just one hour on a particular day would the worker earning €8.65 then assuming the employee has to get a bus to and from work at say €2.50 per journey the employee is going to work for €3.65 that day. If the employee refuses to go to work the employer can simply advise Social Welfare that work was offered and was refused. The result is no Social Welfare for that day.

The Advantages to the Employer

There is a significant advantage to an employer by ensuring that the rate of pay, paid to particular employees is below the limit at which the higher rate of employer PRSI applies. Instead of paying the top PRSI rate the rate reduces to 8% PRSI.

The employer can currently impose an exclusively clause in any arrangement with the employee. If the employee breaks the exclusivity clause this is a breach of contract. This enables the employer to terminate the employment. The employee cannot claim Unfair Dismissal in such circumstances as the employee will have been in breach of a condition of their contract. The effect of an exclusivity clause is that the employer can effectively ensure that an individual working for them can have no guaranteed hours and cannot work for anybody else. The law currently allows such situations to be put in place.

Is it possible to have a contract which looks like a Contract of Employment with hours but has no guarantee?

The simple answer to this is YES.

The first this that must be done is that instead of providing that the employee will work a certain number of hours they are instead told, in the contract, something along the lines of the following;

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

To many people who will read such a contract it would look as if they are getting 10, 20, 30 or 40 hours a week. It will look like a contract to work certain hours. It however not such a contract. It is a straight Zero Hour Contract.

Is it better to have a pure Zero Hour Contract which is not covered under the provisions of Section 18 or is it better to have a contract which will be covered under Section 18 but has very limited hours?

There are advantages to both for an employer. By having a limited number of hours with the rest being classified as voluntary overtime, the employer has a method of ensuring that the employee must turn up on particular days for at least the minimum hours. If they are extremely limited then the failure by the employee to turn up is a disciplinary matter and will therefore warrant in certain cases disciplinary action. It allows the employer control Social Welfare Payments and FIS. It very much depends on the business model of the particular employer.

The arguments raised by those seeking the Casual Workers/Zero Hour Contract model

Employers who wish to avail of the Zero Hour Contract will often cite flexibility as a justification. Casual Workers are an important source of flexible staff for employers. That is accepted. Certain employers would have to deal with seasonal fluctuations in work or to provide cover for key staff who are absent, sometimes unexpectedly.

Saying this, there are a number of employers using the Zero Hour Contracts who do not require such flexibility where there is no such fluctuation in work or no need for urgent cover.

A fast food outlet which is open seven days a week from 8am until midnight clearly has predictable minimum levels of workers whom they will require. Distribution centres distributing product to supermarkets around the country will have predictable working situations.

Of course, even in examples as set out above there may be situations where certain workers need to be engaged under Zero Hour Contracts or as Casual Employees. The issue however is why would such entities require their entire staff at particular levels to be on Zero Hour Contracts.

Some unscrupulous employers perceive the lack of minimum hours as allowing savings in a number of ways.

Firstly, by not providing work to a particular employee this is not a ground for an Unfair Dismissal claim as there is no obligation to provide work so failing to provide work cannot be a breach of the Unfair Dismissal Legislation.

Secondly, Casual/Zero Hour Workers are perceived as easier to manage.

Thirdly, even where the employee may have claims under other provisions of the OWTA or other pieces of Legislation once the employee becomes aware of their precarious position they may be slow to seek to protect their entitlements for fear of losing hours or fear of losing Family Income Supplement or Social Welfare Payments.

Fourthly, despite the argument that flexibility suits the employees effectively many workers would feel obligated to accept work when it is offered particularly because of the interaction of our Social Welfare system and therefore the reality is that the flexibility is primarily at benefit to the employer not to the employees.

<u>Is statutory Regulation needed?</u>

Least there be any misunderstanding I am not proposing a prohibition on the use of Casual/Zero Hour Contracts. There are legitimate business needs for such contracts in certain circumstances. However, they do need Statutory Regulation.

In the case of Saha –v- Viewpoint Field Services Limited UKEAT/0116/13/DM His Honour Judge Shanks in the UK EAT stated;

"…this is an area which is crying out for some legislative intervention…"

The issue is how could this be done without impacting on legitimate business requirements by legitimate businesses. I believe that there is a middle ground which protects the employee while still utilising the requirements by employers flexibility.

1. The Protection of Employees (Part-Time Work) Act 2001 has a format which;
   (i) Limits Casual Working to 13 weeks, and
   (ii) Provides protection to employees to ensure they received the same protection as full time employees.
   (iii) By bringing Zero Hour Contracts under the 2001 Act this would provide for a level of protection for such employees.
2. There may be situations where employers may require a Zero Hour Contract or casual working for longer than 13 weeks. The National Minimum Wage Act ("NMWA") allows for applications to the Labour Court for paying less than the National Minimum Wage. Therefore, there is no reason why with 26 new Adjudicators that an application could not be made to an Adjudicator and on appeal to the Labour Court to have a situation where an employer could have his employees on a Zero Hour Contract or as Casual Workers for an extended period of time. It would mean that the employer would have to be in a position to justify a business reason for same.
3. Let Section 18 be amended by amending Subsection (1) (b) to delete the word "requires" and insert instead "requests and/or offers" and Subsection (1)(c) is amended in a similar format.
4. I would not be in favour of a situation where an employer cannot have their entire work force on Zero Hour Contracts. There may actually be situations where that is warranted. However, if the employer is going to have any particular group or category of workers within the organisation in their entirety on Zero Hour Contracts then it would appear that the employer, in my view, should be in a position to justify why that is required. If having 100% of a particular categories of workers on Zero Hour Contracts was something that an employer had to justify and if they could not justify it that the employees automatically became part time workers then the protection in the 2001 Act would apply. Where the employer had less than 100% of the workforce on Zero Hour Contracts, in a particular category of worker, then again by bringing the Zero Hour Contracts under the Act of 2001 there would be protections for the workers.
5. That employees using such contents would have to pay an hourly rate in excess of the National Minimum Wage, unless otherwise sanctioned by the Labour Court. This would protect these using seek contracts properly and fairly and be dissuasive of others.

Are there schemes in place to create effectively bonded labour?

The sad reality of matters is that there are such schemes in place. Some of the schemes are legally robust. There are a number of bargain basement schemes which are less than robust and with a reasonably competent solicitor or barrister it is relatively easy to unwind them but some of them may, in fact luckily, backfire on the employer.

In a lecture such as this which is to be published it would be inappropriate for me to set out in the written format of this seminar how some of these schemes operate in practice as regards to the robust schemes or the failings of those which are less than robust. These however will be dealt with as part of the presentation but will not be recorded in writing. There are two schemes currently which I am aware of which "work". One "works" in practice the other because of certain triggers which are absent does not but may most of the time. There are other bargain basement schemes one of which is being trotted out to some employers. It is cheap and those setting it make it sound great but really it is dreadful and does not work.

Implementing a Zero Hour Contract in practice to create bonded labour- the schemes

This section on purpose will not be recorded here, in writing.

It is however necessary to explain the mechanisms being used by some of those seeking to create bonded labour. These are not the legitimate schemes. These are those schemes which abuse legitimate business cases for such contracts.

Conclusion

Minister Nash has announced an overview of our Employment Legislation as it applies to Zero Hour Contracts. There is a roll for legitimate Zero Hour Contracts. There is a role for IBEC and the other Employer Representative Bodies along with Trade Unions to work as part of this process to create a workable solution which is fair to both employers and employees. It does however also involve the interaction of the Revenue and the Department of Social Protection. The Social Welfare Code and particularly FIS and the benefit systems for employees who are not on full time work need to be particularly looked at where schemes are put in place to effectively have the tax payer fund the employment schemes. A number of the schemes to "work" require the employees to be in receipt of Social Welfare benefits and not to be available to work elsewhere. We do need a considered and fair debate on this issue. Absolute prohibition on Zero Hour Contracts is not a solution. Equally the current system being operated is not a situation which can be allowed develop further.

I would like to thank the Employment Law Association of Ireland for the invitation to speak here this evening and I hope those who have attended the seminar this evening have found my contribution as being of some value to the discussion. I believe it is a discussion which is only starting and it will be interesting to see how it develops.

Members of ELAI wishing to obtain a copy of the non redacted lecture notes may contact ELAI and a copy will be provided. The writer does not believe it appropriate to place on a website schemes disagreed to create bonded labour.