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Mr David Lockhart
Employment Rights Policy Unit
Department of Jobs, Enterprise and Innovation
Davitt House
Adelaide Road
Dublin 2

23rd December 2015

Submission on the University of Limerick Study on the Prevalence of Zero Hour Contracts and Low Hour Contracts in the Irish Economy

Dear Mr Lockhart,

We write to you further to your recent invitation for representations on the matter of the University of Limerick Study on the Prevalence of Zero Hour Contracts and Low Hour Contracts.

Introduction to Peninsula Business Services

As you may be aware, Peninsula Business Services is Ireland's leading independent provider of professional Employment Law and Health and Safety advice, documentation, representation and consultancy to over 3,000 retained clients across Ireland. You may be aware that we regularly correspond with Government Departments outlining our views on upcoming legislation or amendments to existing legislation and we believe this is an important method of communication to ensure the voice of businesses is heard when implementing new laws.

Accordingly, I am writing to you representative of our clients (primarily small to medium sized businesses). We feel that our association with, and our ability to glean feedback from, our retained clients leaves us in a unique position to provide a professional viewpoint on the burdens faced by employers in respect of employment law and the appropriateness of the current position of zero hour contracts and 'if and when' contracts, particularly those from the SME sector.

In this respect, I am writing to you to outline our willingness to assist the Department in identifying the impact any future developments may have on small to medium enterprises. We would be more than willing to meet with the Department to discuss any aspect of this submission, as we have done in the past in respect of collective bargaining, and we would be very interested in being kept abreast of the different agenda items being considered by the Department throughout 2016 and beyond.

Thank you once again for taking the time to consider the above and we look forward to establishing a mutually beneficial working relationship with the Department.

Yours sincerely,

Alan Hickey
Employment Advice & Legal Services Manager

Submission on the University of Limerick Study on the Prevalence of Zero Hour Contracts and Low Hour Contracts in the Irish Economy

From the outset we would like to express our grave concern at the short timeframe for consultation on this extremely important matter, being just 8 weeks running from 09th November 2015 to 04th January 2016. It is our view that such a short timeframe, which encompasses the Christmas period, is insufficient as it limits the ability of key stakeholders, particularly employers, to enter their submissions on foot of an extensive 152 page Report.

Accordingly, we would request that the timeframe for consultation be extended further, particularly when you consider that the current closing date for submissions to the Low Pay Commission on the appropriateness of the National Minimum Wage is 11th March 2016.

A Measured Approach

As a general observation, it is our view that the position of zero hours contracts and 'if and when' in Ireland has been blown vastly out of proportion by both the employee representative bodies and by the UL Report. As such, we would implore the Department to adopt a measured approach to this matter, particularly as the UL Report does not appear to have adopted a measured approach in its Recommendations.

Zero Hour and 'If and When' Contracts are Necessary

The UL report seems to be focusing solely on "what is fair on the employee" and the Recommendations that follow, if implemented, would only serve to render such contracts entirely impractical. The fact that zero hour contracts and 'if and when' contracts are a necessary form of employment relationship in any functioning economy seems to have been completely overlooked. For example, such contracts are essential in the following scenarios:

- unexpected or last-minute events (e.g. a restaurant needs extra staff to cater for a wedding party that just had their original venue cancel on them);
- temporary staff shortages (e.g. an office loses an essential specialist worker for a few weeks due to bereavement);
- temporary increases in workloads (e.g. a retail store has a significant increase in business over the Christmas period which will not exist to the same extent for the rest of the year);
- on-call/bank work (e.g. one of the clients of a care-worker company requires extra care for a short period of time).

However, the UL Report makes a number of sweeping proposals which will ultimately render the application of zero hour contracts impractical, which would either (a) leave employers who require such working relationships in an extremely difficult position to meet demand, or (b) significantly increase the financial and administrative burden on employers, or (c) greatly increase the number of unemployed persons who would otherwise be employed on zero hour contracts or 'if and when' contracts (which has a knock-on effect on the Department of Social Protection), or (d) all of the above.

The Fairness of Zero Hour Relationships

As stated above, the UL report seems to be focusing solely on "what is fair on the employee" and does not seem to give adequate consideration to the fact that flexibility is essential in some industries, such as retail, hospitality, care, etc. It is quite concerning to see consistent references to the fact that zero hour and 'if and when' relationships can be "exploitative" without any empirical data to show that such workers are actually being exploited.

In addition, the level of flexibility afforded by such relationships are also of benefit to employees, who voluntarily and freely sign up to such working relationships in circumstances where they are entitled to free movement of persons, and who wish to have such flexibility and an improved work-life balance. Such relationships:

- Provide flexible employment on same basic terms as most employees;
- Have no ongoing requirement to accept offers of work and no consequences for failure to accept same;
- Allow for employees to glean valuable employment experience and skills;
- Allow individuals to engage in gainful employment who might otherwise be unemployed.

In light of the above, the following excerpt from the UL Report, at page 40, is noteworthy: "*In the view of trade unions and NGOs, the majority of individuals accept If and When and hybrid contracts because of a lack of alternatives...*" Such contracts are essential for employers and without them you will find that levels of unemployment in Ireland, and accordingly the volumes of unemployed persons claiming social welfare, will increase as, in the view of trade unions and NGOs, there is "*a lack of alternatives*".

UL Report: Recommendations

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

We do not agree with this Recommendation.

The current Irish position is in keeping with the general position across Europe and is in keeping with Council Directive 91/533/EEC.

This Recommendation, if implemented, would be unnecessarily onerous on employers and does not appear to have any practical benefit. It is extremely doubtful that employees would not become aware of their contractual hours throughout the recruitment process and the issuing of a contract of employment on or by day one would therefore not affect the working relationship. Accordingly, such a proposal is simply an administrative burden for employers on the illusory premise of some perceived benefit to zero hour and 'if and when' employees (bearing in mind that such workers are not prevalent in Ireland).

It must also be noted that an employee could be entitled to claim up to 4 weeks' pay for any breach of the Terms of Employment Act, 1994 to 2001, should an employer fail to issue a contract of employment by the requisite date. Should the day one requirement be implemented then such claims would be open to all employees, and not just zero hour or if and when employees. The following claims could therefore easily arise from day two of employment (bearing in mind the strict liability burden of issuing the contract rests on the employer):

- An administrative error could result in a contract being given a few days late.
- A dispute over contractual terms could result in the contract being given after day one, such as where an employee is re-negotiating elements of the contract being put to them and this continues beyond their commencement date.
- If an employer requires someone for an immediate start, and an employee is willing to start on that basis, there is quite possibly no time to negotiate terms before the employment relationship commences. This would be quite common in retail and hospitality industries, particularly with casual staff, students, etc.

It is respectfully submitted that the current two month requirement be retained.

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

We do not agree with this recommendation in so far as it pertains to zero hour employees and 'if and when' employees.

As outlined above, the UL report seems to be focusing solely on "what is fair on the employee" and this Recommendation, if implemented, would only serve to render such contracts entirely impractical and defunct. As stated previously, it is respectfully submitted that such contracts are entirely essential in some industries, that the current requirements set out in the Terms of Employment Acts be retained, and accordingly this Recommendation should not be implemented.

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

We do not agree this Recommendation, for the reasons set out at points 4 to 8 below.

4. We recommend that legislation be enacted to provide that:

(i) For employees with no guaranteed hours of work, the mean number of hours worked in the previous 6 months (from the date of first hire or from the date of enacting legislation) will be taken to be the minimum number of hours stipulated in the contract of employment.

(ii) For employees with a combination of minimum guaranteed hours and If and When hours, the mean number of hours worked in the previous 6 months (from the date of first hire or from the date of enacting legislation) will be taken to be the minimum number of hours stipulated in the contract of employment.

(iii) A mechanism will be put in place whereby, after the minimum number of hours is established, employers and employees can periodically review the pattern of working hours so that the contract accurately reflects the reality of working hours.

(iv) Where after 6 months an employee is provided with guaranteed minimum hours of work as per subsection (i) and (ii), but is contractually required to be available for additional hours, the employee should be compensated where they are not required by an employer in a week. The employee should be compensated for 25% of the additional hours for which they have to be available or for 15 hours, whichever is less.

We strongly disagree with this Recommendation. As a general point, the concept of taking the mean number of hours that an employee has worked in the last 6 months, and making that the guaranteed minimum hours for the employee, seems devoid of reality.

If we once again consider a retail industry at Christmas; this industry would commonly utilise zero hour employees in general and over the Christmas period they will no doubt require such employees to work increased hours due to increased demand. If the Christmas shopping window (roughly two months of increased activity) is factored into the 6 month average then no doubt it will bump up the employee's average working hours for the period.

If this is then the guaranteed minimum during periods of low activity then you will find employers in an extremely difficult position. If they don't give the new guaranteed minimum hours then it would be a breach of contract/statute. This could potentially result in a Payment of Wages claim, or even a constructive dismissal claim.

Accordingly, the introduction of a guaranteed minimum rule would no doubt result in employees being placed on lay-off or short time working hours during periods of low activity. This may also lead to increased redundancies with such employees becoming indefinitely unemployed or, alternatively, employees claiming redundancy through the RP9 process, thus causing an additional financial burden to employees, employers and to the Exchequer.

5. We recommend that an employer shall give notice of at least 72 hours to an employee (and those with non-guaranteed hours) of any request to undertake any hours of work, unless there are exceptional and unforeseeable circumstances. If the individual accepts working hours without the minimum notice, the employer will pay them 150% of the rate they would be paid for the period in question.

We strongly disagree with this Recommendation.

The requirement to give 72 hours' notice of working shifts is entirely impractical and the additional requirement to give time and a half if the employee accepts working hours without such notice is even more impractical.

- This requirement would apply to "*any request to undertake any hours of work*" and thus applies to working hours for all employees, and not just zero hour or 'if and when' employees.
- As such, if an employer wanted an employee to work overtime this evening then they can opt to do it and get paid time and a half automatically or alternatively simply refuse to do it, despite signing a contract (possibly by or on day one of employment commencing) which requires such flexibility. This is, in effect, proposing a statutory entitlement to a minimum overtime rate.
- If this were to be introduced then no doubt there will be extensive legal wrangling before the WRC and Labour Court as to what amounts to "*exceptional and unforeseeable circumstances*" for not giving 72 hours' notice. For example, if an employer is regularly in a position where they cannot give 72 hours' notice due to the nature of their industry, client demand, etc. then can this be reasonably deemed as "*exceptional and unforeseeable*" when it is a weekly occurrence?
- It is important to bear in mind that such a proposal would require an amendment to section 17 of the Organisation of Working Time Act, 1997, which currently requires 24 hours' notice of working hours. By virtue of section 27, a breach of section 17 can result in employee compensation of up to 2 years' pay.

It is therefore being recommended that (a) employers provide 72 hours' notice of work, and (b) if this can't be provided then there is a threat of a claim up to 2 years' pay, and (c) the employer would have to pay time and a half should the employee choose to work, and (d) every employee can choose not to work, therefore leaving the employer in a position where they cannot meet business and customer demands. This is wholly unfair on employers and entirely unreasonable in the circumstances.

6. We recommend that an employer shall give notice of cancellation of working hours already agreed to employees (and those with non-guaranteed hours) of not less than 72 hours. Employees who do not receive the minimum notice shall be entitled to be paid their normal rate of pay for the period of employment scheduled.

We strongly disagree with this Recommendation.

Again, this is a recommendation being promulgated in order to protect an infinitesimal number of employees but being applied to every employee in Ireland. Employers are being asked to provide 72 hours' notice of the cancellation of any working hours and continue to pay the employee their normal rate of pay for the cancelled work period. Essentially, employers are being asked to pay all

employees in circumstances where the employee has not performed any work which is entirely illogical.

Furthermore, how does such a recommendation sit with periods of temporary lay-off due to a temporary shortage of work, or a closure of a business due to flooding or other inclement weather, etc.

Such a recommendation would open a floodgate of problems and lead to significant and disproportionate increased costs for employers.

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

We disagree with this Recommendation.

There will be extremely limited circumstances where an employee is called to work for fewer than three hours. Accordingly, if this were to occur then it must be reasonably concluded that the request was made of employee in exceptional circumstances due to some business need.

It must also be noted that in some industries there will be a requirement for an employee to work shifts of fewer than 3 continuous working hours. For example, in the contract cleaning industry it would be common occurrence that an employee will be required to clean a client site and that such cleaning would be complete within a 3 hour period. To require every employer in such scenarios across all industries to remunerate an employee for 3 hours when they have not worked that many hours is entirely unfair.

As outlined previously, we would strongly object to any scenario whereby employers are obliged to pay employees for more hours than the employee has actually worked, other than the existing provisions of section 18 of the Organisation of Working Time Act, 1997.

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

As we disagree with the Recommendations set out at 4 to 7, we deem this Recommendation unnecessary.

In addition, the inclusion of this Recommendation appears to be a recognition by the drafters of the UL Report that Recommendations 4 to 7 are unnecessarily onerous on the employer but that an employer or industry may buy their way out of such onerous requirements where they enter into a sectoral collective agreement. This is deemed an unfair encroachment of an employer's constitutional right to disassociate.

Furthermore, presumably it can be concluded that if a sectoral agreement could exclude Recommendations 4 to 7, resulting in employees falling within the remit of such sectoral agreements not being afforded such protections, then such Recommendations are entirely unnecessary in the first place?

9. When negotiating at sectoral level, we recommend that employer organisations and trade unions examine examples of good practice which can provide flexibility for employers and

more stable working conditions for employees, such as annualised hours and banded hours agreements.

As this is a matter of negotiation between consenting parties, we do not object to this Recommendation.

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

Due to the current position set out by the High Court in *Min. for Agriculture v Barry* [2009] 1 IR 215 in respect of mutuality of obligation, we would greatly welcome further clarity from the Government on the employment status of If and When contracts and casual contracts.

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

We do not object to this Recommendation, provided sufficient time for consultation is afforded to key stakeholders.

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

We strongly agree with this Recommendation.

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

We agree with this Recommendation.

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

We agree with this Recommendation.

The Irish Position

It very much appears that the recent focus on zero hour contracts has occurred on the back of developments and criticisms levied at the position of such contracts in the UK. Indeed, if you look at the announcement on the DJEI website from 14th November 2014, it seems quite obvious that the commissioning of the UL Report was influenced by the recent furore that surrounded the prevalence of zero hour contracts in the UK:

> "*The key objective of the study is to fill the gap that currently exists in terms of hard data on zero hour and low hour contracts. It is expected to collect information on the extent of these contracts, the manner in which they are used and also to look at recent developments in other jurisdictions, particularly in the UK.*"

There are a number of key reasons why the furore that took place in the UK is unjustified in Ireland, namely:

Exclusivity clauses:

In the UK, employers would often apply exclusivity clauses to zero-hours workers (although this practice is now banned as of May 2015). Clearly this practice is inherently unfair and open to abuse and was a major motivating factor behind the reform that recently occurred in the UK. However, as the UL Report rightly stated, "*[i]nterviewees indicated that exclusivity clauses are not a feature of employment contracts in Ireland.*"

Employment Status:
It is noteworthy that the UL Report identifies one of its three key objectives being "*To assess the impact of zero hours contracts on employees.*" It is equally noteworthy that most UK material will refer to such individuals as "*zero hour workers*". This is a very important distinction because in Ireland you are generally either (1) an employee or (2) you are self-employed. In the UK, however, you may also be (3) a worker. There is no definition of a "worker" in Ireland but in the UK a worker is only entitled to certain employment rights and generally speaking may not be entitled to:

- minimum notice periods
- protection against unfair dismissal
- the right to request flexible working
- time off for emergencies
- Statutory Redundancy Pay

Given the legal distinction that exists in the UK, it is distinctly possible that the individual will be deemed a "worker" in the UK and not an "employee". If this is the case then they are not entitled to all employment rights and, therefore, reform and increased protection was necessary in the UK.

In Ireland, however, there is no such distinction and such employees for all intents and purposes would be deemed an employee and therefore are entitled to full employment rights (notwithstanding the views outlined above in respect of Recommendation 10). Indeed, section 18 of the Organisation of Working Time Act,1997, consistently refers to such individuals as "employees".

Remuneration:
It is commonly accepted that zero hour employees in Ireland are significantly more protected in respect of remuneration than is the case in the UK. In essence, if a zero hour or 'if and when' worker does not get either (a) 25% of their contractual hours, or (b) 25% of the weekly working hours dedicated by the employer to the duties that the individual is contracted to perform, then the employee is entitled to the lesser of either (i) 25% of the contracted hours, or (ii) 15 hours pay.

In the UK, if such a worker is not provided with any work, let alone 25%, then the employee is not entitled to any remuneration. As such, there is a clear disparity in the remuneration rights afforded to zero hour employees in the UK as compared to Ireland.

Prevalence:
In the UK, zero-hour contracts are significantly more prevalent. The Office for National Statistics in the UK released figures to suggest that, as of June 2015, 2.4% of workers in the UK, or 744,000 individuals, were employed on zero-hour contracts (such a figure would amount to roughly 32% of the Irish workforce). Therefore, reform in the UK, bearing in mind the foregoing points, was necessary as a matter of public policy given the prevalence of zero hour contracts and the potential for abuse in respect of exclusivity clauses, remuneration, etc.

Conversely, the UL Report states, "*[w]e find that zero hours contracts within the meaning of the Organisation of Working Time Act are not extensively used. In the course of this study, different employment contracts used in the four sectors (hospitality, retail, health and education) were examined. None of the contracts could be defined as zero hours within the meaning of the working time legislation.*" Furthermore, whilst the UL Report at page 12 suggests that 5.3% of employees

cannot indicate a consistent or regular number of weekly hours, the table on page 141 suggests only 1.7% of workers would usually only work less than 9 hours per week.

Accordingly, zero-hour contracts and 'if and when' contracts are not prevalent in Ireland.

A Measured Approach - Distinguishing Ireland from the UK

We would stress the importance of clearly distinguishing the current practice in Ireland from the practices historically adopted in the UK. As outlined above, and as outlined in the UL Report, zero-hour contracts and 'if and when' contracts are not prevalent in Ireland. It is therefore rather confusing that sweeping changes in Ireland to all typical and atypical employment relationships are being proposed on foot of issues that may or may not arise for an infinitesimal number of employees.

Therefore, a measured approach to reform in this area in Ireland is necessary, rather than the scatter gun approach being proposed by the UL Report which would have the effect of unduly burdening employers and employees across the board through unnecessary and onerous requirements.

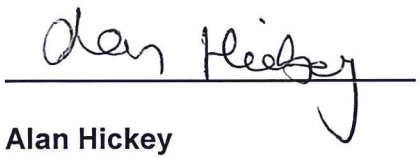
Conclusion and Summary

As has been outlined above, it must be noted that there is already a significant suite of employment legislation protecting all employees, including zero hour and 'if and when' employees. The introduction of additional regulation to try and offset the illusory "exploitative" risks associated with zero hour and 'if and when' contracts, particularly where such changes impact all employees and employers, is unnecessary and is somewhat akin to using a sledgehammer to crack a nut.

Rather than overly regulating an already overly regulated field of law, the focus should be more on challenging employers over bad practices, through industrial relations, through the WRC Inspectorate or through the WRC/Labour Court tribunal system, rather than placing unnecessary obligations on every employer in the country. In this respect, it is again noted that the UL Report found no evidence of exploitation and, indeed, found no evidence of zero hour contracts.

Thank you once for taking the time to consider the above and we would be more than willing to meet with the Department to discuss any aspect of this submission.

Yours sincerely,



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