Zero-hour contracts and labour law: An antithetical association?

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Abstract
As an introduction to the special issue, this article provides a common definition of the phenomenon studied, i.e. zero-hour contracts, and sets out the research goals pursued through the successive contributions that compose it. Zero-hour contracts are long-term relationships where the employer does not commit to providing a minimum number of working hours to the worker. Legal scholars often state that zero-hour contracts are antithetical to the de-commodification of work pursued by labour law. The special issue intends to explore this hypothesis through a legal doctrinal approach to European, international, and national labour law. First, it seeks to refine this hypothesis by examining, through three national case-studies, if (and how) national labour laws were designed to prevent zero-hour contracts and similar on-demand work arrangements. Second, taking the hypothesis seriously, it investigates whether there might be legal arguments in national labour laws and in European and international social law to oppose or to better protect zero-hour workers.

Keywords
Zero-hour contracts, on-demand work, non-standard forms of work, atypical work, commodification of labour

The use of zero-hour contracts is steadily increasing in Europe. Under these contracts, the employer can call upon the worker as and when he needs to, and no working hours are guaranteed to the worker. This work arrangement is intended to enable companies to handle peaks in activity when their workload is irregular and unpredictable. But the unpredictability of working hours raises important challenges for the protection of workers in terms of financial security and stability, the reconciliation of private life with work, and health and safety at work. Moreover, there are significant risks of deliberate misuse of such contracts by employers to avoid the application of certain protective labour law provisions.

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On 23 February 2020, the Centre for Public and Social Law of the Université libre de Bruxelles organised an international symposium on the regulation of zero-hour contracts under various national labour laws and under European and international social law. Despite the remote organisation of the conference, the presentations and exchanges were particularly rich. The participants therefore decided to expand on their findings and publish them in a special issue, which you are holding in your hands or, more likely, reading on your screen. In order to ensure coherence between the different contributions, we agreed on the scope of our study and on the objectives of this special issue.

This introduction first details the definition of zero-hour contracts that we have chosen. To ensure the feasibility and the robustness of the comparison between legal systems, the definition adopted is factual rather than legal. It is based on two criteria: first, the employment relationship is intended to be of long duration even if work will not be continuously provided; and second, no minimum number of working hours is guaranteed to the worker by the employer (1). After a brief review of the state of the art and identification of research gaps in the legal scholarship (2), the objectives of this special issue are set out and the different contributions are presented (3). Legal scholars often assert that zero-hour contracts contradict the historical functions of labour law to advocate for legislative reforms to improve the protection of zero-hour workers. This special issue aims to refine the assertion that labour law is incompatible with zero-hour practices through a doctrinal approach. It examines whether there are legal arguments on national labour law systems and/or international and European social law that oppose the development of zero-hour practices, or which could provide better protection for zero-hour workers.

1. Definition of the concept of zero-hour contracts

1.1 A specific form of on-demand work

In the special issue, we focus on the phenomenon of on-demand work, and more specifically, on zero-hour contracts. By on-demand work, we mean various work arrangements that ‘involve a continuous employment relationship maintained between an employer and an employee’, but whereby ‘the employer does not continuously provide work for the employee’. Rather, ‘the employer has the option of calling the employee in as and when needed’.1 Zero-hour contracts are a particular form of on-demand work in which no minimum working hours are guaranteed to the worker.2 They differ from other on-demand work arrangements in which the employer guarantees a minimum number of working hours per week or per month to the worker.

1.2 A factual rather than a legal understanding

In some countries, zero-hour contracts are a type of employment contract recognised by statute. This is the case in the Netherlands, for example. In other countries, zero-hour contracts are not a

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2. *Idem.*
specific form of contract recognised and organised by law. When such work relationships emerge in
these countries, their legality and legal meaning must therefore be considered in the light of general
contract law and general employment law. This is the case in the United Kingdom, for example. In
this second category of countries, the parties can legally organise their work relationship in different
ways. Depending on the national legal environment, either they characterise their work relationship
as an employment contract for which no minimum number of working hours is guaranteed, or they
choose instead to conclude a framework agreement or a pre-contract determining the remuneration
to be granted for the services, followed by short-term employment contracts each time the worker
provides the service at the employer’s request. Finally, in a third category of countries, the notion of
zero-hour contracts is not a legal concept as in the first category of countries, but the law organises
certain specific forms of contracts which meet the characteristics of zero-hour contracts as we have
defined them above (on-demand work and no-minimum hours guaranteed). This is notably the case
of flexi-jobs in Belgium, which can only be used in certain specific sectors.

In this special issue, our aim is to cover the phenomenon and the social reality of zero-hour
work, and then to determine how the law positions itself in relation to the phenomenon. From a
comparative perspective, rather than starting with legal concepts that vary from country to
country, it is preferable to start with a uniformly defined social phenomenon and then check
how this phenomenon is understood, authorised, prohibited, and organised by national and
European legal systems. In this special issue, we are thus interested in all personal work arrange-
ments in which the employer can call on the worker when needed without any minimum number of
working hours being guaranteed to the latter, regardless of the legal path taken by the parties to
characterise this relationship and whether or not it is a specific status organised by law. This
choice to focus on a factual rather than a legal understanding of the notion is also intended to
reflect the reality of history, in which fact preceded the law.

The term zero-hour contracts, with the use of ‘contract’, can be misleading and give the impres-
sion that we are discussing a specific form of contract recognised by the law. For this reason,
Adams, Freedland and Prassl prefer the notion of ‘no-minimum hours work arrangements’ (emphasis added)4. This notion of ‘work arrangements’ emphasises that the focus
is on the work relationship regardless of the legal qualification of this relationship. For their
part, Ryan et al. propose the term ‘zero-hour work’, as ‘it encapsulates more accurately the
reality of contemporary employment practices and is more appropriate for cross-national compar-
isons.’ In this special issue, we have decided to retain the notion of ‘zero-hour contracts’, taking
care to specify its factual meaning and defining criteria (see below), even if ‘zero-hour practices’
would be more accurate, because it is much more widespread in the literature and we want to con-
tribute to this body of literature and to participate in the critical discussion of the concept.

3. For a similar approach regarding casual work, see V. De Stefano, ‘Casual work beyond casual work in the EU: the under-
nr. 3, pp. 422-433.
4. A. Adams, M. Freedland and J. Prassl, The ‘zero-hours contract’: regulating casual work, or legitimating precarity?,
2507693, p. 19.
5. L. Ryan et al., ‘Defining and regulating zero hours work: lessons from a liberal market economy’, Nordic Journal of
working life studies, 2019, vol. 9, n°6, p. 77.
1.3 Two defining criteria: a long-term work relationship, even if not continuous, and no-minimum working hours

Zero-hour contracts are characterised first by the fact that the working relationship established between the employer and the worker is intended to be long-term, even if it is not continuous, since, by definition, the employer can call on the services of the worker when they need them. Therefore, the special issue will not examine one-off relationships but relationships that are intended to be long-term, while being irregular. We will focus on how the law positions itself in relation to the discontinuity of the employment relationship. This discontinuity affects both the quantity of work (variability of the number of working hours) and the distribution of work (variability of working schedules). The unpredictability of the number of working hours leaves employees in financial insecurity and instability. Employees also face difficulties in balancing work with personal life and endure health problems due to the potentially high variability of work schedules.6

The second characteristic of zero-hour contracts is that the employer does not commit to providing a minimum number of working hours to the worker. Zero-hour contracts are therefore the most insecure form of on-demand work in terms of remuneration. This feature is challenging for labour law, as the obligation of the employer to provide work to the employee is in principle at the heart of the notion of an employment contract, yet it seems to be lacking in these work arrangements.

Finally, we have taken the view that the possibility of the worker declining his employer’s calls is not a decisive feature of the zero-hour contract concept. This element is sometimes taken into account by the law to characterise a contract as a zero-hour contract. For example, in the Netherlands, zero-hour contracts are distinguished from preliminary contracts because there is no possibility for the employee in the former, unlike the latter, to decide whether they want to work when called upon to do so. In the same way, in Ireland, ‘If and When’ workers are not contractually required to be available for work, while zero-hour workers are. But this is not the case in all countries.

Furthermore, and more decisively, since we have decided to embrace the factual phenomenon of zero-hour contracts, it must be stressed that a ‘law in context’ analysis shows that workers may find themselves in similar situations of vulnerability whether or not they have the possibility, at least formally, of refusing calls from their employer. Firstly, this possibility does not address the instability of the employee’s quantity of work. Secondly, empirical studies show that in many cases workers do not dare to exercise their right to refuse the call, for fear that the employer will not call on them again later.7 The possibility to refuse calls thus appears insufficient to remedy the


instability of working schedules and the protection of workers’ private and family life. We can thus conclude that the formal possibility of declining employers’ calls is not a decisive feature in characterising the phenomenon of zero-hour contracts. Under our definition, zero-hour contracts therefore cover all situations of work relationships that allow the employer to call on the worker when needed, without guaranteeing a minimum number of working hours, and regardless of whether the worker has the possibility to decline the calls. Nevertheless, we will pay attention to this possibility and its repercussions in different countries when examining the national and international regulation of zero-hour contracts.

2. Brief state of the art and research gaps

2.1 State of the art

Since the beginning of the 2010s, zero-hour contracts have gradually attracted the attention of labour law scholars. The literature consists mainly of national studies (particularly in Ireland, UK, Finland, New Zealand and Australia), but some recent studies use examples from different countries to show that in industrialised countries, new legal arrangements are being developed which permit and regulate on-demand work and forms of zero-hour contracts. While the designation ‘zero-hour contracts’ is a fairly new one, this type of practice – recorded in the literature and judicial proceedings - seems to have developed since the 1970s in several countries. Legal scholars place these practices within the trend of the development of atypical employment contracts, underlining the recent emergence of very atypical forms of work. In this context, they highlight the risk of normalising the precariat through law. Precarious work can be described as ‘employment that is uncertain, unpredictable and risky from the point of view of the worker’. They therefore argue for legal reforms at international and national levels to remove the exclusions of zero-hour workers from the scope of general labour law and to address the specific protection needs of these workers.

To support their argument de lege ferenda, they also point out that the development of zero-hour contracts contradicts the historical functions of labour law. In this regard, Adams, Freedland and Prassl point out that:

(….) as compared with the forms of contract for stable and secure employment which had in a still quite recent epoch been regarded as the standard ones against which ‘atypicality’ could be measured, these ‘no-minimum-hours work arrangements’ paradigmatically shift towards and locate upon the worker

8. Others have also concluded to the irrelevance of this feature to distinguish zero-hour-contrats from other arrangements (L. Ryan et al., o.c., p. 86).
9. J. Messenger and P. Wallot, o.c., pp. 3-7; V. de Stefano, o.c., pp. 432-439 (regarding casual work).
the whole set of risks of insecurity of work and income which, we argue, it has been one of the principal functions of labour law to distribute equitably and manageably between workers and employers.\textsuperscript{15}

Before the advent of modern labour law, entire sectors of the economy (such as mining or dock labour) functioned in the 19th century on the basis that workers had no guarantee as to the work they would be given the next day.\textsuperscript{16} Other authors specify that the legal recognition and framing of zero-hour contracts goes against the ‘decommodification’ function of labour law and thus contributes to the development of ‘commodified employment arrangements’ or the ‘legalised commodification’ of labour.\textsuperscript{17} In this regard, they emphasise that the decommodification of work through social law was not only supported by the state through the provision of social benefits, but also by employers through the guarantee of wage continuity.\textsuperscript{18} In contrast to the decommodification function of labour law, the institutionalisation of zero-hour contracts allows employers to transfer the burden of fluctuating customer demand for goods or services onto the labour force.\textsuperscript{19} Other authors speak of the ‘demutualisation’ of the employment relationship, to point this transfer of economic burden.\textsuperscript{20}

\subsection*{2.2 Research gaps}

Legal scholars seem to share the strong view that the objective of labour law is antithetical to zero-hour practices. In this context, their studies focus on the states’ regulatory responses to such practices that have been recently developed, or should be introduced, to avoid the commodification of the labour force. In our view, there are three gaps in the literature that could help refine the assertion that labour law is antithetical to zero-hour practices and improve the legal analysis of the zero-hour contract phenomenon.

From a historical perspective, some authors point out that such practices were the usual form of work organisation in certain sectors in the 19th century before the development of labour law. It would therefore be interesting to go back in time and investigate if and how labour law regulations were originally intended to prohibit or regulate these practices. This historical analysis of the construction of labour law would make it possible to verify whether labour law was really constructed to oppose such practices, and to identify the bodies of rules that were supposed to resist them (regulation of part-time work, regulation of fixed-term contracts, etc.). The results of the analysis will no doubt be different from one country to another.

In terms of comparative law, it should be noted that only one extensive comparative analysis of the legal regulation of zero-hour contracts seems to have been carried out to date.\textsuperscript{21} The six case studies concerned Anglo-Saxon countries which had liberal market economies and allowed, in

\begin{footnotesize}
\begin{enumerate}
\item A. Adams, M. Freedland and J. Prassl, \textit{o.c.}, p. 19.
\item A. Adams and J. Prassl, \textit{o.c.}, p. 4.
\item J. Rubery and D. Grimshaw, \textit{o.c.}, pp. 243-252.
\end{enumerate}
\end{footnotesize}
principle, the use of zero-hour contracts. Some authors have made an embryonic classification of
the variability of the degrees of regulation between states, and thus differentiate between states
that authorise zero-hour contracts (like Anglo-Saxon countries), states that authorise but heavily
regulate them (such as Germany, Italy, the Netherlands and Slovakia), and states that generally
do not authorise them (such as Austria, Belgium, the Czech Republic and France).22 To refine
this classification and the legal treatment of this phenomenon, it would be interesting to carry
out a more detailed comparative analysis of the legal framework for zero-hour contracts in countries
that fall into each of these three main categories.

Finally, the studies carried out are mainly socio-legal research, describing the state of the law and
its concrete consequences on working conditions, and then advocate for legal reforms. ‘Black letter’
legal studies, however, are almost non-existent. Given authors often point out that the normalisation
of zero-hour contracts through the law seems antithetical to labour law, it is surprising that they
rarely query the conformity of these new legal arrangements with existing national and
European labour law. Therefore, it is instrumental to carry out in-depth legal analyses of the
labour law resources that would make it possible, in countries that do not generally allow zero-hour
contracts, to legally oppose reforms aimed at permitting them and, in countries that do allow them,
to obtain, through legal arguments, better protection for these workers. This could occur through
analysis of regulatory texts, their preparatory work, and case law. Through doctrinal legal research
methodology, it would allow - depending on the country - assessment of the robustness of the assertion
that labour law is antithetical to zero-hour practices, and thus refinement of analysis of the
phenomenon.

3. Objectives of the special issue and presentation of the different articles
3.1 Objectives

The special issue intends to explore the hypothesis that labour law and zero-hour contracts are anti-
thetical, through a legal doctrinal approach to European, international, and national labour law. In
doing so, it pursues a double objective.

First, it aims, from a scientific point of view, to verify the robustness of this hypothesis and to
elaborate upon the first attempts to classify states according to their legal regulation of zero-hour
practices. We will investigate whether the affirmation of antithesis materialises in the rules of
general labour law. These rules include: (i) formal statements of the rules, as well as their prepara-
tory work and interpretation by case law, (ii) rules regarding the application of labour law to zero-
hour contracts, as well as material rules of labour law concerning, for example, minimum working
hours or successive short-term contracts which make it possible to limit the development of zero-
hour contracts or to ensure minimum protections for all workers. We will verify whether certain
national labour law systems have been more specifically constructed in opposition to zero-hour
practices or have, on the contrary, never closed the door to the development of such practices.

Second, the special issue is intended to put an end to the ‘delegalisation’ of the debate surround-
ing zero-hour work. Currently most literature – including the work of legal scholars – has focused
on the socio-economic consequences of zero-hour work. Legal arguments that could jugulate the

22. M. O’Sullivan et al., o.c., University of Limerick, 2015, pp. 113-116; A. Broughton, I Biletta and M. Kullander, Flexible
forms of work: ‘very atypical’ contractual arrangements, o. c.
development of zero-hour work, or at least limit the precariouslyness of the workers concerned, have rarely been investigated. Through the different articles, we seek to determine whether the current legal framework - more specifically the international, European, and national labour law frameworks – can prevent the normalisation of the precariat. In addition to the already well documented socio-economic arguments, we try to identify legal arguments in national labour law and in European and international social law to oppose national reforms aimed at authorising a wider use of zero-hour contracts, or securing better protection for zero-hour workers.

3.2 Presentation of the articles

We first look at three national cases – the UK Netherlands, and Belgium - and examine in detail how these three national labour law systems position themselves with regard to zero-hour contracts. Each of these three countries falls into one of three ideal-typical categories of state regulation of zero-hour contracts. Joe Atkinson focuses on the UK case, where zero-hour contracts are generally allowed. Anja Eleveld presents the situation in the Netherlands, where zero-hour contracts are allowed, but are heavily regulated. Finally, Elise Dermine and Amaury Mechelynck look at Belgium, where zero-hour contracts are generally not allowed, but where a specific form has recently been organised by law. In these national contributions, specific attention is also paid to the question of whether European social law may offer greater protection for those who are working under those arrangements. More specifically, the perspectives offered by three instruments are explored: the Directive on fixed-term work, the Directive on part-time work, and the new Directive on transparent and predictable working conditions. These national contributions are followed by a commentary from Virginia Mantouvalou, who looks at a new European trend, implemented in the UK and the Netherlands and considered in Belgium, to force social benefits recipients to accept work under a zero-hour contract. It is an emblematic example of the normalisation of precarious work through the law. She examines the conformity of this trend with various international and European human rights standards. In a final contribution, Auriane Lamine returns to the starting hypothesis and points out the main insights of the special issue.

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