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

Introduction

This submission is made on behalf of the HSE and Section 38 Agencies.

The HSE is the largest employer in the state, with approximately 100,000 whole time equivalent employees employed by the Health Service Executive and agencies funded under Section 38 of the Health Act 2004. Given the nature of the services provided, many of which are provided on a 24 hour, 365 day basis, particularly in Acute Hospitals and community care residential settings for the elderly and persons with intellectual disability, the use of "if and when" contracts and hybrid contracts provide flexibility where hours of work may fluctuate in accordance with client needs.

A significant majority of staff in medical, nursing and support grades are contracted to provide their contracted hours at any time over a 24 hour period in accordance with accepted norms with regard to rostering arrangements.

It should be noted that within the health and social care sector, there are a significant number of staff who work less than the standard full time hours for their grade, by way of agreement at local level. It is estimated that in certain hospitals, as many as 40% of nursing staff avail of such arrangements. The HSE has, and continues to be, supportive of such arrangements notwithstanding challenges that present in particular circumstances.

It is our contention that the provisions of such flexible arrangements facilitate the continued retention of skilled, experienced staff who might otherwise be unavailable

to the system, especially at a time when it is proving difficult to recruit and retain staff in the Irish Public Health system.

Overview

In general, the HSE accepts the main findings set out in Section 5 in relation to the Health Sector. This sectoral report notes that zero hours contracts, within the meaning of Section 18 of the Organisation of Working Time Act 1997, are not evident in the health sector. It found that "if and when required" contracts, "hybrid" contracts (a combination of minimum guaranteed hours and additional hours) and part-time contracts with guaranteed (low) hours are prevalent in certain occupations and health and social care settings.

The health sector report (page 52) refers to the HSE/SIPTU collective agreement for **Home Helps** which was implemented in 2013. These negotiations arose as a result of the requirement to provide a home help service which is flexible and can accommodate clients' needs whilst providing employees with a minimum number of guaranteed hours. Employees may be assigned hours in excess of their contracted hours if work become available (e.g. an elderly client may temporarily require additional home help hours following a period of hospitalisation).
The HSE is of the view that the home help "hybrid contracts" are an example of how collective agreements within a sector can achieve working arrangements which reflect the particular service requirements and meet the aspirations of employees.

However, the HSE is concerned that the University of Limerick study, which was designed to examine the use of "zero hours contracts", has gone beyond its original terms of reference and therefore ***in general does not accept its recommendations and proposed legislative amendments***.

The Consultation document refers to Labour Court Determination DWT12148 which found that an employee who meets the following criteria is **not** deemed to be

employed on a “zero hours” contract for the purpose of availing of the protections under the Organisation of Working Time Act 1997. The HSE is of the view that these criteria would apply in general to health service employees who are engaged on an “if and when” required contracts:

- Not obliged to remain available for work during defined periods
- Not required to report to the employer on a daily basis or otherwise so as to be allocated work
- Not expected to be on stand-by in case work becomes available
- Offered work as and when it becomes available
- Able to refuse an offer of work
- Not subject to disciplinary proceedings for refusing an offer of work

The Consultation document highlights the following employment legislation as being of particular relevance to employees in the context of this study:

- The Protection of Employees (Part-Time Work) Act 2001
- The Protection of Employees (Temporary Agency Work) Act 2012
- The Organisation of Working Time Act 1997 (Section 18)

The HSE would also like to highlight the relevance of the following employment legislation:

The Protection of Employees (Fixed Term Work) Act 2003 – the 2003 Act

The HSE is of the view that the 2003 Act has played a significant role in establishing the employment rights and contractual status of employees who are engaged on “if and when required” contracts. In the health and social care settings, it was established practice to employ “if and when” staff on a succession of fixed-term contracts which were renewed at regular intervals (e.g. every 6/12 months). Following the emergence of caselaw under the 2003 Act (such as FTC/06/04 Determination No. 0611 *HSE West and 90 Named Complainants*), health service

employers no longer automatically view “if and when” required contracts as synonymous with fixed-term contracts. If there is an ongoing requirement for staff to provide services on an “if and when required” basis, the employee is issued with a permanent contract from the outset (albeit with no guaranteed hours) and the tenure of their employment is confirmed. If the employee establishes a regular pattern of attendance or if a suitable vacancy arises, consideration may be given to offering the employee guaranteed hours based on service requirements.

The HSE wishes to make the following observations in relation to the case of *HSE West and 90 Named Complainants* as the 2003 Act may be misconstrued as conferring an entitlement on employees to guaranteed hours after 4 years’ continuous service. The HSE also wishes to dispute the notion that there is no “mutuality of obligation” between an employer and an individual with “if and when hours” (finding number 17 page 13).

This case involved a claim by SIPTU under the *Protection of Employees (Fixed Term Work) Act 2003* on behalf of support workers in the HSE West. The claimants were employed on an “if and when” basis on a succession of fixed term contracts. The union claimed that by not specifying minimum contracted weekly working hours of attendance to the claimants when they became entitled to contracts of indefinite duration under the provisions of Section 9 of the legislation, the HSE had breached the equal treatment provisions of the Fixed Term Work Act.

In its determination (FTC/06/04 Determination No. 0611) the Labour Court held that in order for a contract of employment to exist there must be offer and acceptance, consideration, an intention to create a legal relationship and **mutuality of obligation**. The Labour Court found that as the contract expressly stated that there is no obligation on the employer to offer work and the employee to accept it, it could not see how there is mutuality of obligation necessary to find that a contract of employment exists. As it was accepted by both parties that the complainants were entitled to contracts of indefinite duration, the Court found that for such contracts to exist the HSE West must be obligated to offer work and the complainants must be

obligated to accept it. The Court found that until the HSE West specified a guaranteed number of working hours they would continue to breach their duties under the Act.

The Labour Court stated that "in order to meet its obligations under the Act the Respondent should provide each of the complainants with a contract of indefinite duration specifying a number of normal weekly working hours which is not less than those specified in their final fixed term contract". In the case of employees whose weekly working hours varied, the Court determined that "the Respondent should be required to provide these Complainants with contracts of indefinite duration based on their normal weekly working hours in the previous 12 months."

In our view the Labour Court in this particular determination proposed an industrial relations solution as opposed to making a determination on the legal issues. The HSE would contend that the Labour Court erred in its finding that no contractual relationship exists between the parties. While the employees concerned were not entitled to specified guaranteed hours of work, their continuity of service was not broken during periods of non employment and they had a legitimate expectation to be offered work in accordance with the established system for allocating such work to employees on the relief panel. In our view a requirement to provide employees who have been employed on an "if and when required" basis with guaranteed weekly working hours goes beyond the provisions of section 9 of the Act.

In subsequent cases under the 2003 Act, the Labour Court acknowledged that if and when required contracts are valid contracts having regard to the European Court of Justice ruling in ***Wippel v Peek & Cloppenburg GmbH & Co KG*** [2005] IRLR 211. This case involved a part-time worker, who had no fixed working hours and worked only on demand, and the ECJ noted that such "work on demand" contracts are valid employment contracts. Notwithstanding the fact that the legal validity of if and when required / work on demand contracts has been acknowledged, the HSE is concerned that some of the recommendations of the UL report may be predicated on the notion that after a period of time an employee must be provided with

guaranteed hours of work irrespective of the employer's service requirements. In some services (such as home helps services) a hybrid contract which provides for a minimum number of guaranteed hours and additional hours meets the needs of both the employer and the employee. In some services, however, it may not be practicable to impose a requirement for minimum guaranteed hours.

Notwithstanding our view that section 9 of the 2003 Act does not confer an entitlement on employees who are employed on an "if and when required basis" to specified guaranteed hours of work upon acquiring indefinite duration status, health service employers in general give due consideration to providing guaranteed hours in circumstances where an employee has already established a pattern of attendance over an extended period of time and there is a requirement for the employee to continue to work these hours for the foreseeable future.

It is noted that on page 52 of the main report, reference is made to employers in the Intellectual Disability sector applying different practices with some organisation automatically granting contracts of indefinite duration (CI) to employees following 4 years' continuous service and others requiring such employees to apply for CIDs. The HSE wishes to clarify that its advice to health service employers is that employees acquire an entitlement to a contract of indefinite duration by virtue of the operation of section 9 of the 2003 Act. It is not within the "gift" of the employer to grant a CID to an employee who comes within the scope of section 9 subject to applying for the post or fulfilling other conditions which the employer may seek to impose (e.g. medical clearance).

The Protected Disclosures Act 2014 – the 2014 Act

The sectoral report indicated that the unions raised concerns that employees on if and when required contracts may be reluctant to report concerns regarding client welfare / service delivery due to fear of the risk of "penalisation" (i.e. not being offered work as a direct consequence of making the disclosure). The HSE would suggest that the existing legislation governing "whistleblowing" is relevant in the

context of this finding. An employee who wishes to make a disclosure which comes within the definition of "relevant wrongdoing" as set out in the 2014 Act may refer a claim to the Workplace Relations Commission for penalisation in the event of the allocation of work to him/her being adversely affected due to the disclosure.

Observations on Key Findings

In general the HSE does not dispute the key findings outlined in the Consultation Document but wishes to make the following comments in respect of the following:

No. 8 Employees with constantly variable working hours are more likely to work nonstandard hours (i.e. evenings, nights, shifts, Saturdays and Sundays) than those with regular hours.

In the public health service, employees who work "non standard" or unsocial hours are entitled to premium payments e.g. night duty premium of time and a quarter, Saturday allowance, Sunday allowance of single time extra for each hour worked. These unsocial hours shifts are considered to be desirable by some employees due to the extra financial payments which they attract. It should not be assumed that staff who are rostered to work these shifts are being treated less favourably or that staff who are employed on an if and when required basis are more likely to be rostered to work unsocial hours.

No. 14 The main advantage of if and when contracts 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.

The HSE concurs with the finding that flexibility for deploying staff is the main advantage to employers of utilising if and when contracts. Health and social care settings operate on a 24/7 basis and require employees to be rostered on shifts to

delivery services on a continuous basis. The HSE also requires the flexibility to cover at short notice staff who are absent due to sick leave or who take planned leave e.g. annual leave, parental leave, maternity leave and other types of statutory leave.

The HSE wishes to clarify that employees on if and when contracts in the public health service who work less than wholetime hours receive the same terms and conditions of employment as full-time employees in accordance with the Protection of Employees (Part-Time Work Act) 2001. For example, such employees are covered by the 2014 public service sick pay scheme and in general are entitled to sick pay from commencement of their employment.

No 17 We find that there is a lack of clarity over the employment status of individuals who work only if and when hours. As there is no mutuality of obligation between an employer and individual with if and when hours (i.e. there is no obligation to provide work or perform work)) there is a strong likelihood that individuals in this situation are not defined as employees with a contract of service. Consequently, questions arise on the extent to which they are covered by employment legislation.

The HSE strongly disputes this finding. In the introduction to this submission, we have highlighted the employment legislation which is relevant in the context of this study. The Protection of Employees (Part-Time Work) Act 2001 and the Protection of Employees (Fixed Term Work) Act 2003 apply to employees regardless of whether or not they have guaranteed hours. We also highlighted that there is **mutuality of obligation** between employees on if and when required contracts and their employer and the employee's continuity of employment is not broken during periods of non employment. For example, an employee on an if and when relief panel who has a legitimate expectation of being allocated work may successfully refer a claim under the Unfair Dismissals Acts 1977 to 2007 if the employer seeks to terminate the employment relationship by no longer assigning work to the employee (i.e. effectively "dropping" him or her from the panel).

Recommendations

Recommendations 1 & 2:

The HSE rejects the proposed changes to the Terms of Employment Information Acts 1994 to 2012. The HSE is of the view that the existing provisions provide adequate protection to employees and the rationale for these proposed amendments in the context of this study is unclear. In this submission, we have highlighted that individuals on if and when contracts are considered to be employees and confirmed that their employment status does not lack clarity.

It may be that some employers are not complying with existing legislation but this is not a sufficient reason to propose amendments to legislation. The HSE is concerned that the proposal that employers should provide a "statement of working hours which is a true reflection of the hours required of an employee" fails to recognise that an employee's weekly working hours may fluctuate in accordance with service requirements. Under the Organisation of Working Time Act 1997, employers have a legal obligation to keep an accurate record of the hours worked by an employee.

Recommendations 4-6

We do not accept the proposed changes to the Organisation of Working Time Act 1997 as outlined in recommendations 4 to 6. As previously outlined, the nature of the services provided by the HSE requires the provision of many of these services on a 24 hour, 365 day basis. There will be many instances whereby staffing difficulties/shortages arise on a short-term basis. For example, sick leave absences will often occur at short notice. Other emergency situations may require immediate action by managers in order to ensure the uninterrupted delivery f the service to patients/cients.

If short notice staffing absences arises in a night duty situation, this will almost always require to be filled. Clearly, in such a situation, it is not possible to give 72 hours' notice of such a request to undertake work during these periods.

The HSE is also of the view that a proposal to pay staff 150% of the normal rate for such periods is not appropriate and would pose very major additional cost on the employer at a time of challenging budgetary circumstances in the health sector and wider public services. The rationale for same – other than limited notice of liability for work – is unclear and there is potential for significant increase in public sector pay costs were this to be extended to workers on full-time contracts.

It should be noted that currently, an employee who is requested at short notice to undertake duties at night time, receives the appropriate additional premium of 25%. Hence, if the provisions of recommendation 5 were to be implemented in the health sector, an individual satisfying these circumstances set out in the report would receive 175% of pay for such duty periods.

Recommendation 7

The HSE does not envisage that this recommendation would affect health sector employers in general as it would be unusual for an employee to be rostered to work less than 3 hours.

Recommendation 8 and 9

If the proposed legislation were implemented, it would be difficult for public service employers to seek to "opt out" and conclude a "sectoral collective agreement".

Recommendation 10

The HSE contends that the recommendation to examine further "the legal position of people on if and when contracts with a view to providing clarity on their employment status" is predicated on the assumption that these individuals are not recognised as employees and are being denied employment rights. In this submission, we have highlighted that in the public health sector these individuals are recognised as employees and are covered by the full range of employment legislation.

Conclusion

The HSE acknowledges that the University of Limerick study has incorporated the information provided by the HSE in its sectoral report and has clearly distinguished between zero hours contracts and "if and when required" contracts which are prevalent in the health sector. However, the UL has gone beyond its original remit which was to examine the prevalence of zero hours contracts in Irish employment, the impact of same on employees and to make policy recommendations to government as part of this. The findings clearly conclude that instances of zero hour contracts are not widespread amongst Irish employers but the study, incorrectly and inappropriately in our view, then proceeds to examine and make recommendations in respect of 'if and when contracts'. The HSE contends that the proposed legislative recommendations lack a clear rationale given the study's original terms of reference and would impose unnecessary additional costs and an administrative burden on health service employers.

The HSE in its submission has sought to address some of the misconceptions which may exist in relation to the employment status and rights of individuals who are engaged on "if and when required" contracts in the public health sector and shown that the existing employment legislation provides sufficient protection. It may be that in some other sectors (outside the HSE and Section 38 Agencies) there is a lack of understanding and compliance with existing employment legislation but this does not warrant making significant changes to current legislation which may simply need to be enforced more rigorously. The HSE also wishes to highlight the 2013 collective agreement for home helps (cited in the main report on page 52) as an example of how a sector can negotiate contractual arrangements which reconcile the employer's need for flexibility in service delivery to clients (home care packages) and the employees' aspirations for stability and security of tenure within the existing legislative framework.