

A temporary problem in Ireland

EDDIE KEANE

University of Limerick

Introduction

Professor Alain Supiot has argued that “the socio-economic regulatory model that had underpinned labour law since the beginning of the twentieth century is in the throes of a crisis”.¹ In Ireland, like most countries, this crisis can be attributed to the distinct “lack of fit” for traditional labour law to modern work relationships. Traditional tests used to determine employee status, and its concomitant protection, have been somewhat sidelined by modern hiring practices. There is little doubt that a change in hiring practices in Ireland is occurring at the time of writing and will continue to occur for some time to come. The incidence of Irish workers holding a contract of limited duration has risen from a low of 3.4 per cent of the total workforce in 2006 to 8.5 per cent in 2008.² Such a startling increase has led to a “dualisation” of the workforce between what are commonly referred to as “typical” workers, those working under a traditional work relationship, and “atypical” workers, those working in a type of work relationship that does not conform to the traditional model.³ The problem that arises is that traditional labour law does not apply easily to, and consequently serves to marginalise, temporary workers, leaving them vulnerable to exploitation.⁴ For reasons of expediency this paper does not address the European Union approach to modern labour markets. However, since the official launch of the “flexicurity” agenda in November 2006⁵ the concept of flexicurity is seen as the best response to changing global market conditions. Consequently, the European institutions are to the forefront in the “drive to make labour markets more flexible while at the same time

1 A Supiot et al., *Beyond Employment: Changes in work and the future of labour law in Europe* (Oxford: OUP 2001), p. 215.

2 Eurostat, Employees with a contract of limited duration [tps00073], available at http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_ifs/data/main_tables (accessed 9 March 2010).

3 See R Fahlbeck, “Flexibility: potentials and challenges for labor law” (1998) 19 *Comparative Labour Law and Policy Journal* 515 at 531

4 See D McCann, *Regulating Flexible Work* (Oxford: OUP 2008), pp. 7, 41, 51; See also S Deakin and F Wilkinson, *The Law of the Labour Market* (Oxford: OUP 2005), p. 310.

5 See *Modernising Labour Law to Meet the Challenges of the 21st Century*, Green Paper COM 2006/708 (22 November 2006).

not jeopardising the security of workers".⁶ With an impetus such as this, we can expect temporary workers to be an integral part of the future Irish labour force. This paper will examine the current situation in relation to temporary workers by addressing three fundamental questions. Why is temporary work in focus now? What are the problems encountered by temporary workers? What is the current regulation and, of more importance, does it address these problems? It is hoped that by focusing on these questions some conclusions can be drawn as to the direction future regulation should take.

Why is temporary work in focus now?

To suggest that temporary work relationships are a new phenomenon is not strictly accurate. Temporary work relationships have existed, for example, in the US, for over 50 years.⁷ Even though it is not a new concept, the dramatic increase in prevalence in the later stages of the twentieth century has highlighted the area. Ireland has not been alone in this development. Surveys conducted at the end of the twentieth century identified that flexible employment had grown over the previous two decades in most countries.⁸ It is noted that in Australia full-time and part-time casual employment accounted for 25 per cent of the workforce in 1999.⁹ These figures relate only to "official" work relationships, not counting those involved in the grey area of illegal or unofficial work. Consequently, the numbers involved may be significantly greater than the statistics suggest.

THE ROLE OF EMPLOYMENT AGENCIES

One contributing factor is the increase in employment agencies. Some modern enterprises consider it prudent to outsource their recruitment process, especially for lower-paid jobs. To meet this demand, and the demand of workers unable to identify a potential hirer, employment agencies have blossomed. The Irish Department of Enterprise, Trade and Employment notes that, in 2003, there were 541 licensed employment agencies operating in Ireland, as distinct from only 329 in 1998.¹⁰ This figure does not include agencies based outside of Ireland but operating within the jurisdiction. The abundance of such agencies suggests that an increasing number of workers are now operating through agencies or under temporary work relationships.

THE ROLE OF CHANGING FAMILY STRUCTURES

Perhaps the main contributor to the increasing prevalence of temporary work relationships is the evolution of society's structure and expectations.¹¹ Modern society has seen a move away from the traditional family structure. Divorce, single-parent families and the return to work of married mothers have dramatically increased the female participation in the workforce. Such participation automatically creates a tension between the traditional role of caregiver to children and the role of worker outside the home. Most mothers try to balance

6 G Vermeylen and J Hurley, *Varieties of Flexicurity: Reflections on key elements of flexibility and security* (Dublin: European Foundation for the Improvement of Living and Working Conditions 2007), p. 1.

7 MA Moore, "The temporary help service industry: historical development, operation and scope" (1964–1965) 18 *Industrial and Labour Relations Review* 554, at 555

8 M Ozaki (ed.), *Negotiating Flexibility: The role of the social partners and the state* (Geneva: International Labour Office 1999), p. 7.

9 *Ibid.*

10 Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act 1971*, p. 7, available at www.entemp.ie/publications/employment/2004/agencyactdiscussionpaper.pdf (accessed 15 March 2010).

11 K Rittich, "Feminization and contingency: regulating the stakes of work for women" in J Conaghan, RM Fischl and K Klare (eds), *Labour Law in an Era of Globalisation: Transformative practices and possibilities* (Oxford: OUP 2000), p. 119.

these competing roles by streamlining their working hours or at least their hours spent away from the home. Consequently, temporary work relationships are more common amongst mothers or married women returning to the workforce.¹²

THE ROLE OF COMMERCIAL EVOLUTION

Commercial evolution has also brought the issue of temporary work into the limelight. Technological and managerial advances have significantly altered the organisation of production and employment.¹³ As educational standards improve, so does the level of skill and training that a worker receives both prior to joining the workplace and within it. The effect of this is that many workers are now highly skilled, and highly paid. Such highly skilled workers may be more inclined to exercise a level of autonomy and may not favour conforming to the traditional Fordist model of employment, eschewing one sole hirer in favour of working for many hirers in order to maximise the returns for their expensive training.

Linked to this is the fact that many lower-paid tasks, especially in manufacturing industries, are now performed mechanically. Thus, lowly skilled workers face the difficulty of obtaining long-term employment from a hirer, requiring them to offer their services to many hirers in order to gain work equalling a full working week. The combination of these factors has created an environment where modern workers utilise temporary work relationships as a means of maximising their earning potential.¹⁴

Evolution in the organisation of production has also had a significant impact on workers' working relationships.¹⁵ As technology develops, hirers are making more and more significant investments in plant and machinery, requiring prudent hirers to maximise the return from such investments. Twenty-four-hour production schedules, including weekend work, are becoming more prevalent. Consequently, hirers face a shortfall in the workforce to operate the plant and machinery outside of the "normal" working hours. This problem is exacerbated in Ireland by the impact of the Organisation of Working Time Act 1997.¹⁶ To meet this shortfall in personnel, hirers take on extra workers under temporary work relationships.

Prudent manufacturers have also adhered to the idea of not keeping finished goods on hand for delivery to customers. This practice is seen to have many advantages, such as manufacturing the product to match the individual customer's requirements and avoiding tying up money in used raw materials that have not yet been sold. This method of organisation has become known as a "just in time" manufacturing schedule. One of the ramifications of this system is that the product must be manufactured at short notice and the manufacturing schedule can be erratic with short bursts of frenetic production followed by periods of inactivity. Prudent manufacturers have developed the practice of also having their workforce employed on a "just in time" basis,¹⁷ thus avoiding the need to pay the worker during the periods of inactivity.

12 Supiot, *Beyond Employment*, n. 1 above, pp. 2 and 174

13 K Klare, "Horizons of transformative labour law" in J Conaghan et al., *Labour Law*, n. 11 above, p. 4.

14 Supiot, *Beyond Employment*, n. 1 above, pp. 2 and 184.

15 *Ibid.*, pp. 83-4.

16 No. 20 of 1997.

17 Fahlbeck, "Flexibility", n. 3 above, at 523.

THE CHANGING PERCEPTION BY REGULATORS

Perception by regulatory bodies of temporary work relationships has undergone a significant transformation in recent times. It has been argued that under the Fordist model temporary work was ancillary to the main work performed by the head of the household.¹⁸ As temporary work relationships were secondary, and not as prevalent, their importance was diminished to the level where regulatory bodies saw them as too insignificant to warrant attention. It is clear from the efforts of, in particular, the EU and its flexicurity agenda that modern thinking is not of the same opinion.

Under the traditional model, security for the worker was achieved through longevity of employment with the same hirer. However, as economies evolve, modern-day regulators, at both national and international level, see security being achieved through the employability of the worker. Consequently, the emphasis is placed on training workers and increasing their “employability”.¹⁹ The effect of this change in approach to gaining security for workers automatically creates a pool of workers aimed almost exclusively at working for short periods for different hirers.

THE ROLE OF GLOBALISATION

It is important to note that the changes outlined above are, like most things, a reaction to the modern economic climate. For this reason, some of these temporary work relationships are creatures of the modern global economy.

The evolution of the global economy has seen a dramatic liberalisation of capital. The breakdown of barriers between nations with the emergence of regional economic blocks, such as the European Union and the North American Free Trade Agreement, has allowed for easier movement of capital. One impact of this reformulation on employment conditions is that “capital has spread throughout the world, opening the way for mass delocalisation and relocation”.²⁰ This liberation allows those investing capital to be selective in their choice of investment locations. It also allows them to move location easily, or at least threaten to do so if their demands are not met. As a result, states wishing to entice inward investment must have a suitably attractive workforce and regulatory model.²¹ Driven by the intense pressure between states to make their economies more enticing it is easy to see why skilled temporary workers and a low regulatory burden on hirers may be desirable from the point of view of policy makers. It also comes as no surprise that in some states regulation of the labour market is being discredited.²²

THE ROLE OF UNION DENSITY

As well as influencing the regulatory model, these new pressures are also having a significant effect on the collective strength of workers. Union density is decreasing in Ireland, shrinking from 37.4 per cent in 2003 to 31.5 per cent in 2007.²³ There can be no doubt that the rising tide of temporary workers has had a significant impact on these figures. In general, trade unions tend to foster workers’ power within a particular institution by monitoring the pay and conditions on that individual site. Membership of a trade union and

18 McCann, *Regulating Flexible Work*, n. 4 above, p. 59.

19 Fahlbeck, “Flexibility”, n. 3 above, at 523.

20 Supiot, *Beyond Employment*, n. 1 above, p. 50.

21 Klare, “Horizons”, n. 13 above, p. 25.

22 Rittich, “Feminization”, n. 11 above, p. 121.

23 Central Statistics Office, Quarterly National Household Survey, available at www.cso.ie/releasespublications/documents/labour_market/current/qnhunionmembership.pdf (accessed 10 March 2010).

exercise of workers' power is related to being employed on that specific site over a lengthy period of time. Therefore, it is easy to see why most temporary workers are, more often than not, outside the ambit of collectivisation.²⁴ Such a situation leaves these workers especially vulnerable as they have no effective means of coordinating their strength in order to improve their working conditions.

When all of these factors are combined it is easy to see why the profile, and problems, of temporary work in Ireland are topical.

What are the problems encountered by temporary workers?

LACK OF PROMOTION AND TRAINING

Temporary work relationships can pose significant problems for workers. By its very nature the relationship between the worker and the hirer is transient or at best fractured by lack of continuity. In most enterprises, promotion to a senior position is on the basis of ability displayed over a period of time. Under these circumstances, it is difficult for a temporary worker to gain promotion.²⁵ There is also the issue of receiving training from a hirer. Training can be an expensive process for hirers and is therefore usually only provided where there is a realistic chance of reaping the benefits over a sustained period of time. As a result, most hirers do not invest significant sums in training workers that are transient.²⁶ The combination of these factors creates a situation where temporary workers are in a perennial cycle that condemns them to lower-paid and lower-skilled jobs.

INSECURITY OF INCOME

Another significant impact of a temporary work relationship is the loss of income protection in the event of illness or retirement. Contributions by the worker or hirer to cover such situations can only be made over a sustained period of time, again automatically operating against transient workers.²⁷ Research shows that temporary workers tend to be disadvantaged in relation to their working conditions as they are more likely to report medical problems caused by a poor workplace environment.²⁸ Perhaps the most important ramification for temporary workers is the unpredictability of wages. Not having security of employment means that there is no security of income. As the work is unpredictable, so is the pay.²⁹ This can have knock-on effects, such as the inability to raise a mortgage thus causing dependency on social housing. Other effects may be poorer standards of living and healthcare due to infrequent, lowly paid work.

THE INCLUSION PROBLEM

Klare describes the issues listed above as the "inclusion problem" in that many temporary workers are outside the ambit of traditional labour law protection.³⁰ In fact, the adherence to the Fordist model when imposing regulation serves to exclude many modern workers³¹

24 Klare, "Horizons", n. 13 above, p.13.

25 Supiot, *Beyond Employment*, n. 1 above, p. 185.

26 I Regalia, *Regulating New Forms of Employment* (Abingdon: Routledge 2006), p. 12.

27 P McGovern, D Smeaton and S Hill, "Bad jobs in Britain: non standard employment and job quality" (2004) 31 *Work and Occupations* 225 at 235.

28 European Foundation for the Improvement of Living and Working Conditions, *Employment Status and Health* (Luxembourg: Office of the Official Publications of the European Communities 1999).

29 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 12

30 Klare, "Horizons", n. 13 above, p. 7.

31 Supiot, *Beyond Employment*, n. 1 above, p. 181.

and may potentially lead to a situation where “small high-performance sectors will be surrounded by oceans of insecure, low-wage work and unemployment”.³² The provision of some form of security for temporary workers is therefore crucial as a means to combat poverty and promote social inclusion.³³

THE ‘DISPLACEMENT’ PROBLEM

In an ideal world the balance of power between capital (hirers) and labour (workers) would be even, as, clearly, each side requires the other. However, in most economies there is an imbalance between capital and labour. The liberalisation of capital, as mentioned above, coupled with the over-availability of labour means that capital holds the upper hand in any negotiation of pay and conditions for workers. Consequently, ameliorating and constraining domination by capital “is a necessary condition of establishing a democratic and tolerably egalitarian society”.³⁴ However, should one state take such a route, it would be anti-competitive in relation to other states. Such a position might well spark a “race to the bottom” described as the “displacement problem”³⁵ where capital moves to the most favourable location, i.e. the state that imposes the least burdens.³⁶ It is this credible threat that restricts the ability of any individual state to legislate for balance between labour and capital. It is obvious that for some such regulation to be introduced it would have to be on a global basis, or at least effective in any potential haven for capital.

GENDER EQUALITY ISSUES

The regulation of temporary work not only impacts on equality between capital and labour but also on equality between the genders. Under the traditional regulatory model, the worker operating in the Fordist system – in general, the male worker – had the benefit of whatever protection was available. As mentioned above, a high percentage of temporary workers are female,³⁷ attempting to balance their caregiver responsibilities with participation in the workforce. In fact, much of the work available for temporary workers seems to be designed specifically for females with these dual roles.³⁸ Considering that, due to their temporary status, female workers’ problems are compounded by lack of trade union membership,³⁹ the current regulation serves to exclude the majority of female workers and, as such, discriminates against them.

It is axiomatic that any attempts to create equality between the genders must create equality between the different types of work relationship. Any society that aspires to equality between the genders must address this imbalance as, without such effort, true equality between the genders is impossible. Central to the current inequality is the historic perception of the role of women, in particular mothers, in the workforce. Traditionally, a mother’s participation in the workforce was ancillary to the male breadwinner’s role and, as such, somewhat ignored by regulators. As the amount of working mothers increases, the scale of the problem has long passed the point where it can be ignored. Nor can temporary work performed by mothers be considered ancillary because, quite often, the working

32 Klare, “Horizons”, n. 13 above, p. 6.

33 J Conaghan, “Women, work and family: a British revolution?” in J Conaghan et al., *Labour Law*, n. 11 above, p. 53.

34 Klare, “Horizons”, n. 13 above, p. 13.

35 *Ibid.*, p. 7.

36 B Langille, “Seeking post-Seattle clarity-and inspiration” in J Conaghan et al., *Labour Law*, n. 11 above, p. 144.

37 McCann, *Regulating Flexible Work*, n. 4 above, pp. 10 and 56.

38 Rittich, “Feminization”, n. 11 above, p. 119.

39 Supiot, *Beyond Employment*, n. 1 above, p. 187.

mother is the only parent in the family. Thus, we see a changing demographic in the workforce reflecting the changing structure of the family in society. The regulatory changes that are occurring⁴⁰ in modern times are attempting to deal with the phenomenon of working mothers and the “feminisation” of the workforce.⁴¹ The pace and import of these changes must be increased if the regulatory authorities are to achieve the stated goal of equality between the genders. It is to be noted that such recognition of the role of mothers in the workforce may not necessarily be a burden on hirers. Walby argues “improving justice for women can go hand in hand with increasing economic efficiency, instead of their being a trade-off between the two”.⁴² A happier, more flexible workforce can be far more committed to the workplace, leading to increased productivity by a more settled group of people.⁴³ Such a workforce requires less training and is also far less likely to take any form of costly industrial action against the hirer. So it seems that all sides may benefit from regulating for the protection of female workers in temporary work relationships.

WORKER DEMAND FOR TEMPORARY WORK

Reading the preceding pages may have given the reader the impression that the growth of temporary work relationships is almost entirely driven by the demands of hirers or the global economic situation. However, data compiled by the Organization for Economic Cooperation and Development (OECD) suggests that the incidence of involuntary part-time work in Ireland represented only 0.9 per cent of the labour force in 2008.⁴⁴ This suggests that the prevalence of temporary work is also driven by worker demand as distinct from the lack of available full-time employment. Even if amongst temporary workers there are some who would prefer full-time employment if it were available,⁴⁵ some temporary workers hold that status through choice. The most obvious reason for this is the dual role performed by single parents in the workforce. Some willingly choose to spend more time in their caregiver role even if it means a reduction in wages or living standards⁴⁶ creating a workable marriage of economic necessity and social need.⁴⁷

Such a career choice fits well with the goal of creating a society where a true work/life balance can be achieved.⁴⁸ In modern times, more and more workers are seeking more varied and fulfilling working and personal lives.⁴⁹ More workers are seeing the benefits of increased time for personal interests while also maintaining a fulfilling career. As the Fordist model of employment did not cater as effectively for this desire, many workers see multiple temporary work relationships as being the best format for varying their working life while still having time to spend pursuing personal interests. Temporary work is also a popular choice with students who are trying to balance conducting their studies with the economic necessity of earning a means of paying for their education.⁵⁰ Finally, in times of high

40 Conaghan, “Women, work and family”, n. 33 above, p. 66.

41 G Standing, “Global feminisation through flexible labour” (1989) 17 *World Development* 1077.

42 S Walby, “Introduction” in S Walby (ed.), *New Agendas for Women* (London: Macmillan 1999), p. 3.

43 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 13.

44 OECD Stat Extracts, Incidence of Involuntary Part-time Workers available at <http://stats.oecd.org/Index.aspx> (accessed 15 March 2010).

45 Supiot, *Beyond Employment*, n. 1 above, p. 186.

46 M D’Antona, “Labour law at the century’s end: an identity crisis?” in J Conaghan et al., *Labour Law*, n. 11 above, p. 44.

47 Conaghan, “Women, work and family”, n. 33 above, p. 57.

48 DTI, *Full and Fulfilling Employment* (London: HMSO 2002), p. 41.

49 Fahlbeck, “Flexibility”, n. 3 above, at 522.

50 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 11.

unemployment, many workers will choose a temporary job rather than face unemployment, in the words of the old proverb “half a loaf is better than none”.

The combination of these factors means that there are both a demand side and a supply side impetus for temporary work relationships. Considering that workers, hirers and national economies can all benefit from regulation of this area, it seems to be imperative that such regulation should occur.

The current regulation in Ireland

While some Irish statutes tangentially impact on temporary workers, the two leading statutes are the Protection of Employees (Part-Time Work) Act 2001 and the Protection of Employees (Fixed-Term Work) Act 2003. The similarity between these statutes is noticeable to such a point that the Irish Labour Court has suggested that the 2003 Act should be construed *in pari materia* with the 2001 Act, “as they both form part of the same legislative scheme”.⁵¹ Thus, it is of no surprise that many of the provisions of the initial 2001 Act are replicated in the 2003 Act.

The 2001 statute was enacted in order to transpose Directive 97/81/EC and consequently “is concerned with preventing unfavourable treatment of part-time workers”.⁵² Interestingly, the Act has a reasonably broad scope of application. It applies to any employee whose normal hours of work are less than a comparable employee.⁵³ Even though it refers only to “employees” the Labour Court has been quite progressive in its interpretation of the application of the Act, including such categories as seasonal workers⁵⁴ and agency workers where the end user exercises sufficient control over the worker.⁵⁵ The definition of a comparator is also quite broad, allowing for a person involved in the same industry or sector of employment to suffice.⁵⁶ Consequently, the problems faced by an employee where all of their co-workers are also part-time workers are avoided by reference to employees in another enterprise in the same industry.

A definition for casual workers can be found in s. 11 of the Act where:

he or she has been in the continuous service of the employer for a period of less than 13 weeks, and that period of service and any previous period of service by him or her with the employer are not of such a nature as could reasonably be regarded as regular or seasonal employment, or if he or she fulfils, at that time, the conditions specified in an approved collective agreement (as defined in section 11(5) of the Act) that has effect in relation to him or her, and regards him or her for the purposes of that agreement as working on a casual basis.⁵⁷

This definition seems broad enough to cover quite a lot of workers when one considers what may be meant by “reasonably be regarded as regular”. Pro rata workers with irregular hours and no guarantee of future work could well be considered casual workers. Significantly, s. 11(2) of the Act allows “less favourable treatment” of these workers where it can be justified on objective grounds. The limits of these objective grounds are a matter for interpretation but, considering the 2003 Act is to be considered *in pari materia* with the 2001 Act, the Labour Court definition of objective grounds in relation to the 2003 Act may

51 *ESB v McDonnell*, PTD 081 (6 March 2008).

52 D Ryan, “Part time work” in M Regan (ed.), *Employment Law* (Dublin: Tottel Publishing Ltd 2009), p. 283.

53 S. 7(1).

54 *ESB v McDonnell*, PTD 081 (6 March 2008).

55 *Diageo Global Supply v Rooney* [2004] ELR 133.

56 S. 7(3).

57 S. 11(4)(a) & (b).

prove instructive.⁵⁸ Essentially, the grounds as approved by the Labour Court are derived from the European Court of Justice (ECJ) ruling in the *Bilka-Kaufhaus* case:⁵⁹ that there is a real need on the part of the hirer and the measures are appropriate and necessary. Of more fundamental importance in the European ruling was that “promoting full-time work” was seen as a suitable ground for discriminating against part-time workers. The ramifications of such a low threshold cannot be underestimated.

In relation to pensions, s. 9(4) of the 2001 Act allows for discrimination if the employee works less than 20 per cent of the normal hours of the comparator. When combined, these derogations can significantly impact on the application of the equality dimension of the Act.

Following in the footsteps of its progenitor, the Act operates on the principle of *pro rata temporis* where benefits are concerned.⁶⁰ With one interesting exception, s. 10(2) provides that the *pro rata temporis* approach is only to be used for benefits that are directly linked with hours worked, e.g. pay or holiday entitlements. Benefits such as maternity leave or parental leave may not necessarily be subject to the same approach. However, it is important to note that these benefits are the subject of separate legislation.

As mentioned above, the Fixed-Term Employees Act 2003 is somewhat similar in approach to the 2001 Act. Based on Directive 99/70/EC, the statute has the same primary objectives, i.e. the prohibition of discrimination and the excessive use of successive fixed term contracts. Section 2 of the Act provides that it applies to any holder of a contract of employment where such a contract is determined by an objective event, for example, the completion of a task or a specific date. This may prove problematic for a temporary worker where their contract is not determined by a specific event. If the contract is constructed to be deliberately open-ended but not of a full-time or permanent nature, then an unscrupulous hirer can avoid the legislation by merely being vague about the determination of the contract.

Similar to its progenitor, the Act specifically excludes agency workers and employees on training or apprenticeship contracts.⁶¹ However, the Act (like the 2001 Act) provides a broad interpretation for comparators in s. 5, allowing employees in the same industry to suffice where the conditions specified in s. 5(2) are met. Essentially, these conditions are the same as those describing the concept of “like work” under the Employment Equality Act 1998 to 2004. It is therefore not that difficult for an employee to identify a suitable comparator.

Protection from discrimination for fixed-term employees is dealt with by s. 6 which provides that fixed-term employees cannot be treated less favourably than their permanent comparators. However, there are some significant exceptions to this blanket rule. Discrimination can occur in relation to pensions where the normal hours worked by the employee in question are less than 20 per cent of the hours worked by a permanent comparator.⁶² Significant also are the provisions of sub-ss 6(6) and (7) that apply the *pro rata temporis* principle to benefits. That is that a fixed-term employee is only entitled to benefits in direct proportion to the hours worked.

Derogation is also allowed where objective reasons are proposed for the discrimination.⁶³ In interpreting the application of this derogation the Irish Labour

58 *Health Service Executive v Prasad*, FTD 062 (7 April 2006).

59 [1986] ECR 1607.

60 S. 10(1).

61 S. 2.

62 S. 6(5).

63 S. 7.

Court⁶⁴ has followed the ECJ ruling in the *Bilka-Kaufhaus* case,⁶⁵ as discussed above. So, if discrimination is found, the burden of proof is placed on the employer to show that the measure is permissible.

Section 8 of the Act places the onus on employers to provide information in writing to the employees of the event that will determine the contract but only where that date/event is predictable and envisaged by the employer. Just as significant is the onus on the employer, where renewal of a fixed-term contract is concerned, to provide the employee with a written copy of the reasons for not offering permanent employment.⁶⁶

The second aim of Directive 99/70/EC, the prohibition of overuse of successive fixed-term contracts, is addressed in s. 9 of the Act. Essentially, sub-ss 9(1) and (2) provide that the aggregate duration of one or more fixed-term contracts cannot exceed four years of continuous work for the same employer. If an employer exceeds this four-year time limit then the relationship between the employer and employee is deemed as a contract of indefinite duration.⁶⁷ However, there is an important caveat to this provision. Where the employer can show that objective grounds exist for extending the term beyond the four-year limit then such an extension is permitted. Unfortunately, the Act does not suggest what may constitute objective grounds. The Labour Court has attempted to clarify this situation, suggesting that a restructuring programme for economic viability may suffice.⁶⁸

Of equal importance in relation to successive renewals is the meaning of “continuous employment”. Once again, in *Department of Foreign Affairs v Group of Workers*,⁶⁹ the Irish Labour Court took a broad approach to the impact of breaks in service on the interpretation of continuity. The court held that where the employee had a genuine expectation of returning to work the interim period between contracts would not serve to break the continuity of employment. It is submitted that this test may raise more questions than it answers, such as whether it is a genuine expectation if viewed from a subjective or objective view. Nevertheless, the approach of the Labour Court suggests a willingness to extend the application of the Act as far as possible.

The Act also provides two other basic rights for fixed-term employees in s. 10. Fixed-term employees must have equal access to training and developmental opportunities as their permanent comparators and they must be made aware of any opportunities for permanent employment with the enterprise.

In general, both of the statutes are essentially the means of implementing the European Directives. Unfortunately, the ramification of this is that the protection of workers at state level in Ireland suffers the same shortcomings as its European progenitor. Such an approach can be viewed as indicative of Ireland’s policy on temporary workers. When it comes to imposing burdens on hirers for the benefit of temporary workers, Ireland has sternly refused to go beyond the basic requirements of the European Directives. The underlying motives for this may also serve to illustrate the current tensions in this area at state level.

64 *Health Service Executive v Prasad*, FTD 062 (7 April 2006).

65 [1986] ECR 1607.

66 S. 8(2).

67 S. 9(3).

68 *Aer Lingus v Group of Workers* [2005] ELR 261.

69 [2007] ELR 332.

Conclusions

It is clear from the foregoing that Ireland is a bleak environment for temporary workers. The legislation that does exist for their protection is scarce and somewhat easily circumvented. A situation that reflects the International Labour Organisation suggestion that there seems to be a “loss of focus” in legislation aimed at protecting workers.⁷⁰ As a result, it behoves labour lawyers to find a way of protecting vulnerable members of the workforce.

One clear point is that the approach adopted in Ireland seems to be to identify specific categories of vulnerable workers and attempt to raise the standard of their protection to a level equivalent to “typical” workers. While this approach is to be commended for extending protection to formerly vulnerable workers, it unfortunately inevitably falls short of reaching all such people. As soon as a definition is coined, a means of circumventing it will spring from the imagination of the unscrupulous. As has been suggested:

every time the law manages to regulate an employment relationship, another atypical employment relationship immediately comes into being, frustrating the restraints envisaged by the regulations and thus maintaining the condition of obscurity in which they currently exist.⁷¹

Therefore it is submitted that a different approach must be contemplated.

One potential avenue of dealing with this problem may lie in providing strong social welfare security for those who do not have job security, thus following the Danish example of flexicurity.⁷² However, there are two basic problems with this approach. First, it is an expensive process and one that, in the opinion of the OECD, should not be undertaken in times of high unemployment.⁷³ Secondly, it may well provide income security but does not, by itself, address the fundamental “inclusion” problem exemplified in issues such as working conditions or gender imbalance.

What is required is a fundamental readjustment of how we regulate our labour force. That such an overhaul is necessary seems clear when one considers the current circumstances. Regalia goes so far as to say “the changes currently in progress are so fundamentally different with respect to the past that it is difficult or even almost impossible to envisage solutions or remedies”.⁷⁴

In the opinion of this author, one element can be borrowed from the Danish system, the “governance without much government as to labour law and regulation”.⁷⁵ If Irish labour law is ever going to be all inclusive then it must be based on an attribute of the worker that is unrelated to their employment status. An obvious suggestion is membership of a trade union. If union density were to be as high in Ireland as it is, for example, in

70 ILO, *Report of the Meeting of Experts on Workers in Situations Needing Protection* (Geneva: ILO, 15–19 May 2000), p. 4.

71 Y Kravaritou-Manatakis, *New Forms of Work: Labour law and social security aspects in the European Community* (Dublin: European Foundation for the Improvement of Living and Working Conditions 1988), p. 23.

72 For further information, see T Bredgaard, F Larsen, P Kongshoj Madsen and S Rasmussen, “Flexicurity and atypical employment in Denmark”, CARMA Research Paper 2009:01, p. 4, available at www.epa.aau.dk/fileadmin/user_upload/conniek/Dansk/Research_papers/2009-1-Kongshoej_m-fl.pdf (accessed 15 March 2010).

73 OECD, *Employment Outlook 2009 – How does Ireland compare?*, available at www.oecd.org/dataoecd/61/55/43707134.pdf (accessed on 16 March 2010).

74 Regalia, *Regulating New Forms of Employment*, n. 26 above, p. 5.

75 H Jorgensen and P Kongshoj Madsen, “Flexicurity and beyond – reflections on the nature and future of a political celebrity” in H Jorgensen and P Kongshoj Madsen (eds), *Flexicurity and Beyond: Finding a new agenda for the European social model* (Copenhagen: DJOF Publishing 2007), p. 14.

Denmark (estimated at 68 per cent in 2007)⁷⁶ then it would significantly strengthen the negotiating power of the workers' representatives. Direct negotiations at all levels of the market could see progressive regulation developed that would be suitable to both sides of industrial relations. Problems, at local and national level could be remedied through negotiation between the stakeholders at that level and, as a result, an era of industrial peace could be achieved through acceptable compromise.

One of the fundamental pre-requisites for this model, based on negotiation and compromise, is a strong sense of trust between the social partners, and between the members and their representatives. Whether sufficient trust exists in Ireland in times of economic hardship is, unfortunately, difficult to say with any degree of confidence. This may well prove to be our Achilles heel when it comes to rethinking how we structure our labour market regulation.

⁷⁶ Worker-participation.eu, available at www.worker-participation.eu/National-Industrial-Relations/Countries/Denmark (accessed on 16 February 2010).