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EXAMINING THE IMPLICATIONS OF ZERO-HOUR CONTRACTS IN THE CONTEXT OF LOADSHEDDING IN SOUTH AFRICA

by

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Submitted in partial fulfilment of the requirements for the degree of

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Date: 1 October 2024

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DECLARATION

I, 1354962, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

This essay critically analyses the rise of zero-hour contracts in South Africa, particularly in the context of economic instability and persistent loadshedding. These contracts offer flexibility to employers but leave workers exposed to significant risks, including income insecurity, exploitation, and a lack of employment rights. The essay evaluates the limitations of existing legislation, particularly the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA), which fail to provide adequate protection for zero-hour workers. Recommendations for legislative reform are presented, including the formal recognition of zero-hour contracts, guaranteed minimum working hours, compensation for standby time, and fair notice periods for scheduling changes or termination. The essay also explores foreign models from New Zealand, Ireland, and Germany, offering insights into balancing worker protection with employer flexibility. The unique challenges faced by small and medium-sized enterprises (SMEs) due to loadshedding and high operational costs are addressed, with suggestions for financial support mechanisms, such as tax incentives and phased regulatory implementation. The essay concludes by emphasising the need for a more inclusive labour framework that safeguards workers' rights while maintaining the adaptability businesses require to navigate South Africa's volatile economic landscape.

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I INTRODUCTION

Precarious work has emerged as a global trend over the past few decades, driven largely by the shift towards more flexible labour markets and the rise of the gig economy.[1] In many economies, non-standard forms of employment, such as temporary, part-time, and zero-hour contracts, have replaced traditional, full-time employment relationships.[2] This shift is seen as a response to globalisation, technological advancements, and economic uncertainty, where employers seek to reduce costs by employing workers on more flexible terms.[3] According to the International Labour Organisation (ILO), precarious work is defined as low-paid, insecure employment that offers minimal protection against termination, lacks benefits and social security, and allows limited worker control and exercise of rights.[4]

In the United Kingdom (UK), zero-hour contracts and gig work are now entrenched in industries such as retail, hospitality, and logistics.[5] The rise of companies like Uber and Deliveroo, which rely on gig workers, has further highlighted the blurred boundaries between self-employment and dependent employment.[6] In developing countries like South Africa, this trend is further complicated by high unemployment, a large informal sector, and economic instability.[7] The introduction of precarious work arrangements like zero-hour contracts in such contexts raises concerns over deepening inequality and exploitation, as these workers often lack the protections afforded to permanent employees.[8]

While flexibility can be beneficial for some, especially students, caregivers, or those who prefer part-time work, lack of security, benefits, and stable income presents serious risks.[9] This

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[1] Adrian Todoli-Signes 'The "Gig Economy": Employee, Self-employed or the Need for a Special Employment Regulation?' (2017) 23(2) *Transf*er 193 at 193.
[2] Kgomotso Mokoena 'Are Uber drivers employees? A look at emerging business models and whether they can be accommodated by South African Labour Law' (2016) 37 *ILJ* 1574 at 1574.
[3] Ibid.
[4] International Labour Organisation - ILO (2016),'Non-standard employment around the world: Understanding challenges, shaping prospects', Geneva: ILO - https://www.ilo.org/wcmsp5/ groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf (accessed 01 November 2024)
[5] Simon Best 'The U.S. Gig economy: economic imposition or economic choice?' (2017) 8(4) *The Business and Management Review* 60 at 60.
[6] Darcy du Toit & Kelle Howson 'Protecting platform workers: options and challenges' (2022) 43 *ILJ* 711 at 712.
[7] Ibid.
[8] Ibid.
[9] Michael Quinlan *'The effects of non-standard forms of employment on worker health and safety'* (Geneva, ILO, 2015) (Conditions of Work and Employment Series No. 67) at 2.

global phenomenon sets the stage for a more in-depth analysis of South Africa's specific challenges with zero-hour contracts and loadshedding, where the added strain of energy instability exacerbates worker vulnerability.

Zero-hour contracts have seen a marked increase in South Africa, particularly within sectors such as construction, manufacturing, and agriculture.[10] These contracts, characterised by a lack of guaranteed working hours, offer employers the flexibility to adjust their workforce based on fluctuating demand.[11] Given South Africa's historical context of labour exploitation and systemic inequality, the rise of zero-hour contracts raises critical concerns. The legacy of Apartheid's discriminatory labour practices still influences the contemporary labour market, where many workers, particularly those in low-skilled positions, continue to struggle with unstable and unfair working conditions.[12] This report aims to evaluate whether stricter regulations are necessary to ensure that zero-hour workers receive comparable rights and protections to their permanent counterparts. Additionally, it will explore the impact of South Africa's persistent loadshedding on temporary employment, considering how power shortages contribute to decreased productivity and economic instability.

The analysis will be divided into four parts.

- Part 1 introduces the concept of zero-hour contracts, examining their prevalence and impact within South Africa's contemporary labour market. This section also connects zero-hour contracts to South Africa's history of labour exploitation and inequality, drawing parallels between past and present forms of precarious work. Legal challenges related to zero-hour contracts, as well as a discussion of relevant case law, will also be covered.
- Part 2 investigates the phenomenon of loadshedding, tracing its historical development in South Africa and analysing its effects on workers employed under zero-hour contracts. This section highlights how power shortages contribute to decreased productivity and job insecurity, particularly in industries where zero-hour contracts are prevalent.

[10] Lewis Silkin, Chartered Institute of Personnel and Development *'Zero-hours contracts: Understanding the law'* Guide (June 2021) available at www.cipd.co.uk (accessed 11 October 2021) at 9-10.
[11] Ibid at 1.
[12] Neva Makgetla 'The challenge of employment and equity in the workplace' in *South African Human Rights Commission (SAHRC), Reflections on Democracy and Human Rights: A Decade of the South African Constitution* (Johannesburg, SAHRC, 2006) 37-53 at 38.

- Part 3 presents a comparative analysis of how other jurisdictions, such as the United Kingdom, New Zealand, Ireland, and countries facing power shortages like India and Pakistan have addressed similar challenges. This analysis offers insights into potential policy reforms for South Africa and evaluates the effectiveness of different regulatory approaches.
- Part 4 concludes by offering proposals for improving protections for vulnerable workers, considering both the economic challenges faced by employers and the ongoing energy crisis. Recommendations for policy reforms that strike a balance between worker protection and employer flexibility are presented.

PART 1

II THE PREVALENCE AND IMPACT OF ZERO-HOUR CONTRACTS

A zero-hour contract is an agreement where an individual may be required to perform work for another party without a guaranteed minimum number of hours.[13] The contract specifies payment terms for work performed and conditions under which work may be offered and potentially declined.[14] Workers under such contracts face uncertainty about when they will be called to work and are only compensated for the hours they actually work.[15] Employers control the scheduling, summoning workers as needed, often leading to periods of no work and no income, despite being technically employed.[16]

In the UK, zero-hour contracts have garnered significant attention, particularly due to their marked increase between 2010 and 2018.[17] These contracts are estimated to constitute about 6% of all employment contracts and cover 3% of the workforce.[18] The available evidence indicates that employers leverage the flexibility of zero-hour contracts to shift the burden of fluctuating demand onto employees.[19] Workers on zero-hour contracts tend to work fewer hours on average, face greater variability in their weekly schedules, and are more likely to be underemployed compared to those on traditional contracts.[20]

Despite the uncertainty that zero-hours contracts introduce, they reflect a degree of worker preference for flexibility.[21] Standard, fixed, full-time employment contracts may not be suitable for certain groups, such as students, older workers, and women with caregiving responsibilities.[22]

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[13] Akima Hamandia-Güldenberg 'On-call work and zero hours contracts' (International Labour Office Geneva) at 1 – 2.
[14] Will Pickering 'Zero-hours contracts: A UCU briefing' 2014 *University and College Union* at 2.
[15] Ibid.
[16] Susan N. Houseman 'Why employers use flexible staffing arrangements: Evidence from an establishment survey' *Industrial and Labor Relations Review* 2001 Vol. 55 (1) 2001 at 149 - 151.
[17] Silvia Avram 'Zero-hours contracts: Flexibility or insecurity? Experimental evidence from a low-income population' 12 Labour Economics 45 at 4.
[18] Abi Adams & Jeremias Prassl (2018). Zero-hours work in the United Kingdom. Report, International Labour Organisation at 4.
[19] Joe Atkinson 'Zero-hours contracts and English employment law: developments and possibilities' *European Labour Law Journal* 13 (3) at 347 – 348.
[20] Adams & Prassl op cit note 18 at 2.
[21] Ernestine Gheyoh Ndzi 'An Investigation on the Widespread Use of Zero Hours Contracts in the UK and the Impact on Workers' *International Journal of Law and Society* Vol. 4 (2) 2021 at 141-143.
[22] Juan J. Dolado, Etienne Lalé & Hélène Turon 'Zero-hours contracts in a frictional labor market' (2022) Discussion Paper 22/763 University of Bristol at 9.

These groups, who either do not want or cannot work full-time, are thought to benefit from the flexible nature of zero-hours contracts.[23] However, evidence supporting the benefits of such flexibility for workers is limited and often contradictory.[24] For example, a 2013 survey found that zero-hours workers in the UK reported slightly higher job and work-life balance satisfaction compared to permanent employees.[25] Conversely, qualitative studies highlight that zero-hour contracts can create significant instability, complicating the management of budgets and family commitments.[26] The unpredictability of work hours, schedules, and pay can hinder financial planning, childcare arrangements, and long-term commitments.[27] Furthermore, there is evidence suggesting that employers may exploit the instability inherent in zero-hour contracts as a means to control and ensure employee compliance.[28]

Statistics on zero-hour workers in South Africa are sparse, but the practice predominantly affects casualised and precarious employment sectors.[29] Currently, it is estimated that 40% of workers in the formal sector are engaged in precarious employment.[30] The Commission for Conciliation, Mediation and Arbitration (CCMA) has deemed zero-hour contracts unfair in cases like the 2020 *Ferrero*[31] factory dispute, where it was found that the majority of the plant's workforce, 73%, were casual workers.[32] Although this case highlights the prevalence of zero-hour work within a specific company, it does not necessarily reflect the overall use of these contracts across South Africa.

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[23] Ibid.
[24] Ibid.
[25] Hamandia-Güldenberg op cit note 13.
[26] Avram op cit note 17 at 2.
[27] Lonnie Golden 'Irregular work scheduling and its consequences' *Economic Policy Institute* 2015 available at https://www.epi.org/publication/irregular-work-scheduling-and-its-consequences/ (accessed 06 September 2024).
[28] Ibid.
[29] Dieketseng Damane & Clement Marumoagae 'Zero-rated contracts in South Africa' (2021) De Rebus available at https://www.derebus.org.za/zero-rated-contracts-in-south-africa/ (accessed 29 August 2024).
[30] Lynford Dor and Carin Runciman 'Precarious Workers and the Labour Process: Problematising the Core/Non-core' (University of Johannesburg, South Africa) 2022 at 20; E Webster and D Francis (2018) The Reproduction of Inequality in Post-apartheid South Africa. Paper presented to a seminar at the Southern Centre for Inequality (SCIS), University of the Witwatersrand, 13 February 2018.
[31] *Lupindo and Others v Ferrero SA (Pty) Ltd and Adcorp Blu* (CCMA) (GAVL 3153-18, 22-10-2020).
[32] Ferrero workers challenge zero-hours contracts. (2020) Mail & Guardian, 27 January. Available at: https://mg.co.za/article/2020-01-27-ferrero-workers-challenge-zero-hours-contracts/ (accessed 27 September 2024).

The standard economic theory suggests that individuals tend to avoid uncertainty, displaying risk-averse behaviour.[33] However, the specific role of risk aversion in labour market decisions, and how it shapes worker behaviour, remains less understood.[34] The theoretical expectation is that workers prefer stable and predictable employment and will generally seek to avoid situations where the availability of work is uncertain.[35]

III THE LEGAL DIMENSIONS OF ZERO-HOUR CONTRACTS

Zero-hour contracts are non-standard and present significant challenges in safeguarding and enforcing employee rights.[36] In South Africa, the Labour Relations Act[37] (LRA) does not specifically address zero-hour contracts, creating a legislative gap that leaves workers under such arrangements vulnerable.[38] Due to the uncertainty surrounding their working hours, employees on zero-hour contracts struggle to rely on the Basic Conditions of Employment Act[39] (BCEA) for protection.[40] While the BCEA sets a maximum limit on working hours, it does not establish minimum working hours, allowing employers to exploit this ambiguity by not defining the actual hours during which employees are expected to work.[41]

This legislative gap permits employers to impose contracts that do not stipulate regular working hours, depriving employees of the certainty required by the BCEA.[42] This BCEA mandates that employers provide employees with details regarding ordinary working hours, days of work, remuneration, and the frequency of payment, ensuring a degree of certainty in employment terms.[43] However, zero-hour contracts undermine this certainty, allowing employers to manipulate work schedules to their advantage, potentially withholding work to punish employees or avoid statutory fair dismissal procedures.[44] By not scheduling an employee to work,

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[33] Investopedia. (n.d.). Prospect theory https://www.investopedia.com/terms/p/prospecttheory.asp (accessed 12 September 2024).
[34] Daniel Kahneman & Amos Tversky 'Prospect theory: An analysis of decision under risk' *Econometrica* 47(2) 1979 at 263–265.
[35] Ibid.
[36] Elmarie S. Fourie 'Non-Standard Workers: The South African Context, International Law and Regulation by the European Union' (2008) 11(4) *PER/PELJ* at 111 - 112.
[37] 66 of 1995.
[38] Damane & Marumoagae op cit note 29.
[39] 75 of 1997.
[40] Ibid s29(1).
[41] Ibid.
[42] Damane & Marumoagae op cit note 29.
[43] Supra note 39 at s29(1).
[44] Damane & Marumoagae op cit note 29.

an employer can effectively terminate their employment without formally dismissing them, thereby circumventing the legal protections usually afforded to workers.[45]

The nuance of zero-hour contracts was illustrated in *Ferrero SA (Pty) Ltd.*[46] The affected workers were placed under a flexible working hours arrangement.[47] Their contracts did not specify their working hours or the salaries they would receive.[48] This created significant uncertainty for the workers, as they had no control over their work schedules or the ability to plan their finances.[49] In contrast to the permanent employees, the affected employees faced uncertainty regarding when they would be called to work and lacked a basic salary, which affected their ability to obtain credit.[50] Given these circumstances, this type of arrangement could amount to constructive dismissal. According to the LRA, a constructive dismissal occurs when an employee terminates their contract because the employer made the continued employment intolerable.[51] Employees might feel compelled to resign due to intolerable working conditions, such as the lack of financial security and unpredictability. Zero-hour workers' status as 'employees' depends on their contractual relationship with the employer.[52] The LRA defines an employee as someone who works for another and receives remuneration, excluding independent contractors.[53] While zero-hour workers may lack fixed hours and regular pay, they could still qualify as employees if they work for and receive compensation from the employer.[54] If classified as employees, they would be entitled to the protections of the LRA, including the right to claim constructive dismissal.[55]

The affected workers contended that this disparity in treatment was unjustified, arguing that they were performing similar tasks as the permanent employees when called upon and, therefore, should be entitled to the same protections and benefits.[56] The core of the workers' argument was grounded in the principle of equal treatment.[57] The employer argued that section 198C of the LRA

[45] Maralize Conradie A Critical Analysis of the Right to Fair Labour Practices (LLM thesis, University of the Free State, 2016) at 60 – 61.
[46] *Ferrero* supra note 31.
[47] Ibid para 5.
[48] Ibid.
[49] Ibid para 105.
[50] Ibid para 60.
[51] Supra note 37 at s186(1)(e).
[52] Silkin op cit note 10 at 4.
[53] Supra note 37 at s213.
[54] Ibid.
[55] Supra note 53.
[56] Ferrero supra note 31 para 60.
[57] Ibid.

allowed for the employment of part-time workers and that the workers in question were hired according to the employer's operational needs.[58] The employer claimed that the flexibility to adjust working hours according to business demands justified the variation in treatment between permanent and flexible-hour workers.[59] The case emphasises the unequal treatment of workers under different contracts.[60] If there were no permanent workers with fixed schedules, the question of protection would still arise. Even without direct comparison to permanent employees, zero-hour workers could still claim protection under the LRA, particularly where the disparity leads to unequal treatment or undermines the right to fair labour practices.[61] Regardless of whether other workers are on fixed schedules, the workers' classification as 'employees' (should the nature of their relationship allow) and their entitlement to fair treatment would still apply.[62]

However, the commissioner was not persuaded by their argument, noting that, unlike the affected employees, part-time employees are typically aware of their expected working hours.[63] The commissioner concluded that the affected employees did not qualify as part-time employees under the LRA.[64] The commissioner ruled in favour of the workeres, determining that there was no justifiable reason for treating the affected workers differently from the employer's permanent staff.[65] The employer's use of flexible working arrangements was found to be discriminatory, as it denied the affected employees the protections and benefits that should have been afforded to them given the similarity of their work to that of permanent employees.[66] The commissioner underscored that, while operational flexibility might be a legitimate concern for employers, it cannot come at the expense of fundamental employment rights.[67]

Zero-hour employees are subjected to a 'no work, no pay' principle, even though the decision to assign work rests entirely with the employer.[68] Under these contracts, employers determine when employees should work, and when they are not scheduled, there is no obligation to pay

[58] Ibid para 75.
[59] Ibid para 126.
[60] Ibid paras 60 – 61.
[61] The Constitution of the Republic of South Africa, 1996 at s23; supra note 37 at s186(2)(a).
[62] Silkin op cit note 10 at 4.
[63] Ferrero supra note 31 paras 224 – 226.
[64] Ibid.
[65] Ibid para 124 – 127.
[66] Ibid.
[67] Ibid.
[68] Makgetla op cit note 12.

them.[69] Employees on zero-hour contracts may go months without work, forcing them to seek additional income elsewhere to cover daily expenses, support their families, and pay for necessities.[70]

In *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others*[71] the court addressed the misclassification of a worker designated as an independent contractor.[72] The central issue was whether the actual working conditions warranted recognition of the worker as an employee.[73] The court applied a test focusing on key factors such as the level of control exerted by the employer, the worker's integration into the business, and economic dependence on Discovery Health.[74] Despite the contractual label, the court found that the significant control and integration indicated an employment relationship.[75] Consequently, the worker was entitled to the protections afforded to employees under South African law.[76] This highlights the importance of evaluating the substance of the working relationship regardless of how their roles are labelled.

This ruling is particularly relevant to the legal challenges surrounding zero-hour contracts, where employers often classify workers in ways that minimise their obligations while maximising their control.[77] Zero-hour contracts may mask the true nature of the employment relationship, where workers are still dependent on their employers for income and are subject to the employer's discretion in being called in to work.[78] This creates a significant power imbalance, allowing employers to avoid statutory obligations such as fair dismissal procedures, minimum wage guarantees, and other employment protections.[79] Understanding the definition of an 'employee' is crucial, as it determines the rights and protections afforded to workers.[80] By properly classifying

[69] Ibid.
[70] Ibid.
[71] (JR 2877/06) [2008] ZALC 24.
[72] Ibid para 1.
[73] Ibid.
[74] *South African Broadcasting Corporation v McKenzie* (CA8/98) [1998] para 8; ibid para 37.
[75] Ibid para 50.
[76] Ibid.
[77] Damane & Marumoagae op cit note 29.
[78] Ibid.
[79] Ibid.
[80] Silkin op cit note 10 at 4 – 5.

workers as employees, courts can ensure they receive the legal safeguards designed to protect their rights, thereby addressing potential exploitation and promoting fair working conditions.[81]

In relation to the issues of contractual obligations, we could also refer to ILO Recommendation No. 198, which aims to protect employees facing contractual obligations that undermine their legal rights.[82] The recommendation urges member states to align national labour laws with international standards and ensures that vulnerable workers have access to protection.[83] It outlines essential measures for national policy to clarify and enhance the understanding of employment relationships.[84] It emphasises providing guidance to employers and workers on establishing the existence of an employment relationship and distinguishing between employed and self-employed workers.[85] It also addresses the issue of disguised employment relationships, where contractual arrangements may conceal a worker's true legal status, depriving them of their rightful protections.[86] This framework aims to ensure that all workers are appropriately classified and receive the protections to which they are entitled.[87] In the context of zero-hour contracts, where workers often face instability and lack of access to protections, article 4's provisions advocate for measures to combat disguised employment relationships.

The impact of zero-hour contracts on the country's poverty rates has yet to be fully quantified.[88] It has been argued that zero-hour contracts appear to be inconsistent with the BCEA, rendering them invalid.[89] They create unnecessary uncertainty regarding employment conditions and may amount to unfair labour practices, as they contravene the provisions of the BCEA.[90] However, it is clear that zero-hour contracts are a significant aspect of the current employment landscape, and there is a pressing need to determine how to manage them effectively.

[81] Ibid.
[82] ILO Employment Relationship Recommendation, 2006 (No. 198).
[83] Ibid art 2.
[84] Ibid art 4.
[85] Ibid.
[86] Ibid art 4(b).
[87] Ibid.
[88] Damane & Marumoagae op cit note 29.
[89] Ibid.
[90] Ibid.

IV A HISTORICAL ANALYSIS OF LABOUR EXPLOITATION AND INEQUALITY IN SOUTH AFRICA

The exploitation of labour in South Africa is entrenched in its colonial and Apartheid history.[91] During the 19th and 20th centuries, particularly in the mining and agricultural sectors, black workers were forced into low-paid, precarious jobs with minimal rights.[92] This system not only exploited workers economically but also disrupted families and communities through the migrant labour structure.[93]

Post-Apartheid, the South African government enacted laws such as the LRA and the BCEA to rectify these injustices, aiming to ensure fair treatment for all workers regardless of race or class.[94] However, the persistence of precarious work demonstrates that many legacies of labour exploitation remain unaddressed. Zero-hour contracts today mirror many of the exploitative aspects of Apartheid-era labour practices. Like the migrant labour system, these contracts offer little security.[95] This dual labour market—where a small group of permanently employed workers enjoy stability while a larger, often disadvantaged group faces job insecurity—continues to foster inequality.[96]

The history of South African labour is one of profound systemic violence and inequality.[97] Under Apartheid—and even before, during British and colonial rule—black workers were deliberately disenfranchised to maintain the socio-economic dominance of the white population.[98] Through structural underemployment, a steady supply of cheap, controllable labour was guaranteed for white capitalists.[99]

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[91] Tshepo Lephakga 'Colonial institutionalisation of poverty among blacks in South Africa' (2017) *Studia Historiae Ecclesiasticae* 43(3) at 1.
[92] Neva Makgetla 'Manufacturing employment and equality in South Africa' (2014) *Development Southern Africa* 31(2) 271 at 2.
[93] Ibid.
[94] Gera Ferreira 'An Overview of South African Labour Relations: The Facilitation of Conflict in Practice' (2012) *SA Journal of Human Resource Management* 10(1) at 1.

[95] Christo Vosloo 'Extreme apartheid: The South African system of migrant labour and its hostels' (1991) *African Studies* 50(1) 69 at 2.
[96] Ibid.
[97] Maxim Bolt & Dinah Rajak 'Introduction: Labour, Insecurity and Violence in South Africa' (2016) *Journal of Southern African Studies* Vol. 42, No. 5, 797–813 at 798.
[98] Gary Kynoch, 'Urban Violence in Colonial Africa: A Case for South African Exceptionalism', *Journal of Southern African Studies*, 34, 3 (2008), pp. 629–45 at 630.
[99] Ibid.

The Apartheid regime institutionalised this racial hierarchy in labour rights.[100] White workers were afforded union rights, social security, medical benefits, and access to labour courts—privileges systematically denied to black workers.[101] This repression of African workers ranged from subverting their organisations to outright violence.[102] The racial hierarchy in the workplace blurred the lines between productive labour and personal servitude.[103] In settings such as the Highveld steel factory, black workers were often relegated to serving white workers, regardless of their skill level.[104] Many black workers held the lowest-paid, least-skilled positions, excluded from benefits like pensions and opportunities for advancement.[105] Even those formally employed had limited bargaining power.[106]

The post-Apartheid labour regime, particularly through the LRA and BCEA, aimed to reshape employer-employee relations and provide protections for all workers.[107] These laws sought to institutionalise the social gains of the anti-apartheid struggle.[108] However, the unmet economic expectations of many South Africans, coupled with ongoing political and violent labour disputes, show that progress has been uneven, particularly in key sectors.[109]

In this context, the rise of zero-hour contracts raises serious concerns. These contracts threaten to perpetuate the inequalities rooted in Apartheid by creating a class of workers who lack the rights and protections of their permanently employed counterparts.[110] The uncertainty and instability that accompany zero-hour contracts echo the precarious labour conditions faced by black workers during Apartheid. The racial disparity in South Africa's labour market is reflected in the overrepresentation of black workers in precarious employment, with 85% of informal sector

[100] Ibid at 631.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Wessel Visser 'Labour and Right-Wing Extremism in the South African Context – A Historical Overview' (2011) *African Studies* 70(3) 384 at 19.
[105] Ibid at 7.
[106] Ibid at 12.
[107] Halton Cheadle & Marlea Clarke 'National Studies on Workers' Protection: Country Study – South Africa' (2012) *International Labour Office* 1 at 6 - 7.
[108] Ibid.
[109] Ibid.
[110] Ibid.

workers being black.[111] The National Development Plan (NDP) projects this sector, along with domestic work, to generate nearly two million new jobs by 2030.[112] This prominence ties into the exploitation of precarious workers, including those on zero-hour contracts, who lack job security and are disproportionately black.[113] The precariousness of zero-hour contracts mirrors the vulnerability found in informal sector employment.[114]

V THE SHIFTING LANDSCAPE OF EMPLOYMENT RELATIONSHIPS AND LABOUR PROTECTION CHALLENGES

The evolving nature of employment relationships presents a challenge to traditional labour protection frameworks.[115] The ILO has conducted extensive studies on the effectiveness and limitations of traditional concepts of the employment relationship as part of national labour market policies.[116] Historically, worker protection has been based on a 'universal notion of the employment relationship', distinguishing between dependent workers and independent workers (e.g., self-employed).[117] However, shifts in the nature of work have resulted in legal definitions of employment relationships that no longer align with modern working arrangements, leading to an increasing number of workers being excluded from labour protection.[118] The transformation and polarisation of employment relationships are further illustrated by the divide between knowledge workers, often employed in managerial or technical roles.[119] and precarious workers, who are more likely to be found in informal, subcontracted, or zero-hour jobs.[120]

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[111] South Africa National Human Development Report 2022: Harnessing the Employability of South Africa's Youth, UNDP. Available at: https://www.undp.org/sites/g/files/zskgke326/files/2023-07/sa-nhdr-2022_web_0.pdf (accessed 28 September 2024) at 25.
[112] Ibid.
[113] Ibid at 25 – 26.
[114] Ibid.
[115] Mokoena op cit note 2 at 1576.
[116] ILO Report V (1): The Employment Relationship, International Labour Conference, 95th Session (2005) International Labour Office, Geneva; ILO Report V: The Scope of Employment Relationship, International Labour Conference, 91st Session (2003) International Labour Office, Geneva; ILO Meeting of Experts on Workers in Situations Needing Protection (The Employment Relationship: Scope) Basic Technical Document (2000) International Labour Office, Geneva.
[117] ILO op cit (2003).
[118] Paul Benjamin 'A Review of Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives' (2010) at 9
[119] Why is the gig economy a future of work? (2023) HRForecast available at https://hrforecast.com/what-is-the-gig-economy-and-why-is-it-the-future-of-work/ accessed on 27 August 2024.
[120] Ibid.

As enterprises adapt to a globalised and technologically advanced environment, they increasingly employ workers in diverse and selective ways, including through various contract types like zero-hour contracts.[121] While this offers businesses flexibility, it also contributes to the 'informalisation of work', where more jobs exhibit informal characteristics such as the absence of regular benefits and employment protection.[122] This trend underscores the need for national governments, in consultation with social partners, to develop frameworks that address the application of labour law to non-standard employment, ensuring that all workers receive adequate protection regardless of their employment relationship.[123]

VI IMPACT OF INADEQUATE LABOUR PROTECTION ON MODERN WORKFORCE MODELS

The absence of robust labour protection has far-reaching negative effects not only on workers but also on enterprises and society at large.[124] For employers, the lack of such protection can lead to diminished productivity and create unfair competition, disadvantaging those who comply with legal standards.[125] It can result in a neglect of employee training, which further reduces productivity both within individual enterprises and across the national economy.[126] An Australian study[127] identified eight key forms of insecurity that impact workers in the modern economy: employment security, functional insecurity, work insecurity, income insecurity, benefit insecurity, working-time insecurity, representation insecurity, and skills reproduction insecurity.[128] There is substantial evidence that job insecurity and contingent work arrangements have adverse effects on occupational health and safety.[129] Research indicates significant increases in injury rates, disease prevalence, exposure to hazards, and work-related stress under these conditions.[130] Temporary workers, subcontractors, and self-employed individuals often lack a clear understanding of their

[121] Karl Klare 'The Horizons of Transformative Labour and Employment Law' in Joanne Conaghan, Richard Michael Fischl & Karl Klare (eds) *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford, Oxford University Press, 2002) 4-5.
[122] Benjamin op cit 118 at 9 – 10.
[123] Ibid.
[124] Rosemary Owens 'Decent Work for the Contingency Workforce in the New Economy' (2002) *University of Adelaide* at 216 – 218.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Ibid.

responsibilities and those of others in the workplace.[131] This confusion is particularly pronounced in industries with long subcontracting chains, such as construction, where small builders and subcontractors frequently engage in blame-shifting and face considerable ignorance about safety obligations.[132] Additionally, some studies suggest that non-compliance with safety regulations may not only result from ignorance but also from deliberate strategies to cope with economic pressures and the perceived low risk of enforcement.[133]

Research reveals that most occupational health and safety legislative frameworks were originally designed and enforced with permanent employees in large workplaces in mind.[134] These frameworks often fail to adequately address the needs of informal and contingent workers.[135] The rise of externalised and informalised work has also weakened traditional participatory mechanisms.[136] Contingent work arrangements require additional administrative efforts to identify employers and classify the status of workers, complicating the enforcement of labour protections.[137] The proliferation of non-standard work has further led to a reduction in the coverage of workers' compensation schemes, further marginalising those in precarious employment.[138]

One significant consequence of inadequate labour protection in modern work arrangements is the erosion of procedural fairness in employment relationships.[139] While not directly related to zero-hour contracts, the case of *Sidumo v Rustenburg Platinum Mines Ltd*[140] established crucial principles regarding procedural fairness in employment disputes.[141] The Constitutional Court (CC) ruled that fairness in employment relationships must be judged based on what is reasonable under the circumstances, rather than strict adherence to formal rules.[142] This principle is highly relevant to zero-hour workers, as it highlights the risk of procedural unfairness when employers have

[131] Iain Nossar, Richard Johnstone & Michael Quinlan 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *Australian Journal of Labour Law* at 137.
[132] Ibid.
[133] Owens op cit note 124.
[134] Ibid.
[135] Nossar op cit note 131.
[136] Ibid.
[137] Ibid.
[138] Benjamin op cit 118 at 12.
[139] Damane & Marumoagae op cit note 29.
[140] (CCT 85/06) [2007] ZACC 22.
[141] Ibid paras 171 – 172.
[142] Ibid paras 173 – 174.

unilateral control over scheduling and wages.[143] While the ruling underscores that fairness should be assessed based on reasonableness rather than rigid formalities, this flexibility can inadvertently perpetuate procedural injustices for zero-hour workers. The unilateral control exercised by employers over scheduling and wages can lead to arbitrary decision-making that disproportionately affects these workers.[144] As they often lack legal recourse, this vulnerability highlights a critical gap in labour protections, where the absence of clear guidelines can result in significant power imbalances and exacerbate feelings of insecurity and exploitation in modern employment arrangements.[145] Therefore, a thorough examination of procedural fairness is vital to understanding how inadequate protections can undermine the rights of zero-hour workers.[146]

Zero-hour contracts often leave employees vulnerable to multiple forms of insecurity, such as income and working-time instability, which could contribute to neglect in training and lower overall productivity.[147] As traditional frameworks fail to address the unique needs of these non-standard workers, it becomes increasingly critical to implement targeted protections that ensure their rights and safety are upheld.[148]

[143] Ibid paras 179 – 183.
[144] Ibid.
[145] International Labour Organization 'Leaving no one behind: Building inclusive labour protection in an evolving world of work' (2023) International Labour Conference, 111th Session, ILC.111/Report V at 57 – 59.
[146] Ibid.
[147] Owens op cit note 124.
[148] Ibid.

PART 2

VII UNDERSTANDING LOADSHEDDING: DEFINITION AND ECONOMIC IMPACTS

Loadshedding refers to the deliberate interruption of electrical power supply to manage the balance between electricity demand and supply.[149] This practice becomes necessary when the demand for electricity outstrips the available generating capacity.[150] As economies expand, energy consumption generally increases, placing added strain on power generation systems.[151] Addressing high electricity demand often requires boosting power generation capacity.[152] However, this expansion can result in temporary power cuts and energy-saving measures to prevent overloading the system.[153]

The strain on South Africa's energy system is largely due to the critical need for energy security among various stakeholders, all of whom rely on a consistent energy supply for their quality of life.[154] Eskom, South Africa's electricity provider, has resorted to load shedding to alleviate pressure from high demand and usage.[155] Eskom has been unable to meet the nation's electricity needs, leading to staged power outages.[156] Contributing factors to this shortfall include poor maintenance of existing power stations, challenges in implementing new facilities, and mismanagement, including allegations of corruption.

South Africa's 2008 energy crisis exemplifies the severe impact of inadequate power supply.[157] The crisis had a cascading effect on the economy, particularly affecting the mineral

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[149] Abraham Jacobus Schutte, Philip Maré & Marius Kleingeld 'Improved Utilisation and Energy Performance of a Mine Cooling System Through Control of Auxiliary Systems' Proceedings of the 10th International Conference on the Industrial and Commercial Use of Energy Cape Peninsula University of Technology, Cape Town, South Africa, 2013.
[150] Ibid.
[151] Ibid.
[152] Hanif Auwal Ibrahim, Michael Kweneojo Ayomoh, Ramesh C. Bansal, Michael Njoroge Gitau, Venkatta S. Yadavalli & Raj Naidoo 'Sustainability of power generation for developing economies: A systematic review of power sources mix' (2023) Energy Strategy Reviews, 47, 101085 at 1.
[153] Ruth Mpho Maphosa & Semanga Mabuza 'The impact of load shedding on the performance of manufacturing SMEs in South Africa' (2023) Presented at the 10th Biennial Academy of World Business, Marketing and Management Development Conference, Perth, Western Australia.
[154] Ibid.
[155] Ibrahim et al op cit note 161.
[156] Maphosa and Mabuza op cit note 162.
[157] Anton Eberhard, Vivien Foster, Cecilia B. Garmendia, Fatimata Ouedraogo, Daniel Camos & Maria Shkaratan 'Underpowered: The State of the Power Sector in Sub-Saharan Africa.' Working Paper 48214, *Africa Infrastructure Country Diagnostic*, 2008 in Mpho Lenoke 'The Impact of Load Shedding on the Economic Growth of South Africa.' Master's dissertation, Northwest University, 23141166, submitted in partial fulfillment of the requirements for the Master of Commerce degree in Economics, 2023 at 9.

industry, which experienced reduced production, exports, and employment.[158] This downturn contributed to stagnation in the country's GDP growth, highlighting the critical link between reliable power supply and economic stability.[159] A study found that 89% of small and medium-sized enterprises (SMEs) depend heavily on a stable electricity supply, with 69% reporting significant impacts from load shedding.[160]

VIII LOADSHEDDING AND ZERO-HOUR CONTRACTS: BALANCING RIGHTS AND RESPONSIBILITIES

Permanent loadshedding in South Africa has become a severe and enduring issue, with no immediate solution in sight.[161] This ongoing problem has significantly impacted productivity and economic growth, creating substantial challenges for both businesses and workers.[162] For zero-hour workers, the consequences of loadshedding are particularly severe.[163] These workers face heightened economic instability and job insecurity as frequent power outages disrupt business operations and limit their work opportunities.[164]

In South Africa's current economic landscape, marked by high unemployment, loadshedding, and widespread financial strain on businesses, it is crucial to balance worker protection with employer flexibility.[165] Employers, especially SMEs, face significant challenges due to fluctuating energy availability, increased operating costs, and the pressures of a competitive global market.[166] Consequently, while protecting zero-hour workers is essential, it must be

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[158] Ibid at 10.
[159] Ibid.
[160] Alison Von Ketelhodt & Albert Wöcke 'The impact of electricity crises on the consumption behaviour of small and medium enterprises' (2008) *Journal of Energy in Southern Africa*, 19(1) at 4-12.
[161] Lee Rondganger 'The Year We Were Plunged into Darkness: A Record 332 Days of Load Shedding in 2023 and Counting.' IOL News, 2023. https://www.iol.co.za/news/south-africa/the-year-we-were-plunged-into-darkness-a-record-332-days-of-load-shedding-in-2023-and-counting-63eafd30-87c8-4f13-acd0-60071e509239 (accessed 4 July 2023).
[162] Joseph Kapika & Anton Eberhard *Power-Sector Reform and Regulation in Africa: Lessons from Kenya, Tanzania, Uganda* 1st ed Cape Town: HSRC Press (2013) at 1 – 2.
[163] Ibid.
[164] Ibid at 3.
[165] PSA the Union of Choice Impact of Loadshedding on Economic Growth and Unemployment available at https://www.psa.co.za/docs/default-source/psa-documents/psa-opinion/impact-of-loadshedding.pdf?sfvrsn=49f278de_0 (accessed 12 September 2024).

[166] Thabisile Mhlongo & Preeya Daya 'Challenges faced by small, medium and micro enterprises in Gauteng: A case for entrepreneurial leadership as an essential tool for success' (2020) *South African Journal of Business Management* 51(1) at 1 – 3.

balanced with the economic realities that businesses confront.[167] The CC in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town*[168] highlighted the need to balance workers' rights with employers' operational requirements.[169] This case underscores the importance of ensuring that labour reforms protect employees without placing unsustainable burdens on businesses, particularly SMEs already struggling with the financial strain caused by loadshedding and other economic pressures.[170]

Employers are grappling with severe financial instability exacerbated by high operational costs and the impacts of loadshedding.[171] The intermittent availability of energy disrupts productivity, increases costs, and reduces profit margins.[172] In this challenging environment, any additional regulatory burdens or costs associated with worker protection measures can push businesses to their limits.[173] This strain can lead to job losses or even business closures, as companies struggle to remain operational amidst mounting financial pressures.[174] In *South African Transport and Allied Workers Union (SATAWU) v Moloto NO*[175], the court addressed the financial strain that businesses may experience due to strikes and other operational disruptions.[176] This principle is relevant when considering the potential consequences of imposing additional regulatory burdens on SMEs, as even well-intentioned worker protection measures can lead to further financial strain.[177]

SMEs often operate with tight profit margins and limited financial buffers, making them highly sensitive to even small increases in operational costs.[178] The global competitive pressures mean that additional expenses related to worker protections, such as higher wages or guaranteed hours, can significantly impact a business' ability to compete effectively.[179] For these businesses,

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[167] Ibid.
[168] (CCT2/02) [2002] ZACC 27.
[169] Ibid para 40.
[170] Ibid para 38: In re *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A) at 589 C–D
[171] Mhlongo & Daya op cit note 166.
[172] RPIR Prasanna, Sisira Kumara, Jayasundara Samarakoon & Sk Naradda Gamage 'Sustainability of SMEs in the Competition: A Systemic Review on Technological Challenges and SME Performance' (2022) at 4.
[173] Ibid at 4 – 6.
[174] Ibid at 5.
[175] (CCT128/11) [2012] ZACC 19.
[176] Ibid para 25.
[177] Ibid.
[178] Mhlongo & Daya op cit note 166.
[179] Ibid at 7.

absorbing such costs may be unsustainable, potentially leading to reduced employment opportunities or business failures.[180]

[180] Ibid.

PART 3

IX COMPARATIVE ANALYSIS: REGULATION OF ZERO-HOUR CONTRACTS IN OTHER JURISDICTIONS

With the growing prevalence of zero-hour contracts globally, various countries have faced the challenge of balancing the flexibility that these contracts offer to employers with the potential for worker exploitation.[181] This section examines the regulatory frameworks of countries that have grappled with the issue of zero-hour contracts and precarious employment. Furthermore, the experiences of countries affected by frequent power cuts are considered.

1. UK

Zero - hour contracts are commonly used in the UK, particularly in sectors like retail, hospitality, and healthcare.[182] The flexibility provided by these contracts has long been an advantage to employers in industries with fluctuating demand, allowing them to increase or decrease staffing levels as needed.[183] However, the rise of zero-hour contracts has come with significant controversy.[184] For many workers, this precarious arrangement has resulted in unpredictable incomes and difficulty in accessing benefits such as holiday pay and sick leave.[185]

The UK took a major step toward regulating zero-hour contracts by banning exclusivity clauses under the Small Business, Enterprise and Employment Act 2015.[186] These clauses previously prevented workers from seeking additional employment, even when their primary employer was offering them few or no hours.[187] By banning these clauses, the government sought to alleviate some of the exploitation and allow workers more autonomy in earning an income.[188] Although the ban was welcomed, many have argued that it does not go far enough.[189] Trade unions and worker advocacy groups have called for further reforms, including requiring employers to provide minimum guaranteed hours or extending the rights afforded to permanent employees to

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[181] Virginia Mantouvalou 'Welfare-to-work, zero-hours contracts and human rights' European Labour Law Journal (2022) 13(3) available at https://doi.org/10.1177/20319525221104168 (accessed 29 September 2024) at 339.
[182] Adams & Prassl op cit note 18.
[183] A. N Pöykkö 'Flexibility or Insecurity? A Comparative Study of the Legal Status of Zero-Hour Workers in Finland, the Netherlands, and the EU' (Master's thesis, Tilburg University 2019) at 24.
[184] Ibid.
[185] Mokoena op cit note 2.
[186] United Kingdom Department for Business, Energy & Industrial Strategy 'Zero Hours Employment Contracts: Government Response to the 'Banning Exclusivity Clauses: Tackling Avoidance' Consultation'(2015) at 4.
[187] Ibid at 5 – 6.
[188] Adams & Prassl op cit note 18.
[189] Ibid.

zero-hour workers.[190] The government has been hesitant to implement more stringent regulations, citing concerns over harming the flexibility that benefits employers.[191]

This approach demonstrates a cautious balance between reforming the worst aspects of zero-hour contracts while maintaining a labour market that allows employers to adapt to changing economic conditions.[192] This balance is achieved through incremental reforms that aim to protect workers without imposing rigid regulations that could disrupt employment patterns.[193] By focusing on banning exclusivity clauses, the government enables workers to seek additional opportunities, thereby reducing their dependency on a single employer.[194] Furthermore, the government's emphasis on consultation with stakeholders reflects a commitment to understanding the implications of potential reforms.[195] However, this cautious approach stops short of addressing the broader issues of job security and income predictability.[196]

2. NEW ZEALAND

New Zealand has taken strong action to regulate and ban zero-hour contracts.[197] Prior to the reforms, zero-hour contracts were widely used in the fast-food, retail, and hospitality sectors, leading to growing concerns over worker exploitation.[198] Workers were often required to be available for work, creating an unsustainable level of insecurity for many.[199] In 2016, New Zealand passed the Employment Standards Legislation Bill[200], a sweeping reform that effectively outlawed zero-hour contracts.[201] Under the new law, all employment agreements must specify guaranteed hours of work, and employers are prohibited from requiring workers to be available for additional hours unless they are compensated for their availability.[202] This legislative change aimed to

[190] Supra note 186.
[191] Ibid.
[192] Adams & Prassl op cit note 18.
[193] Nikhil Datta, Giulia Giupponi & Stephen Machin "Zero Hours Contracts and Labour Market Policy" (2019) http://eprints.lse.ac.uk/100538/1/nd_gg_sm_march_2019.pdf. (accessed 12 August 2024) at 4.
[194] Jenny Holmes & Catherine Rickard 'Zero-hour contracts: the continued debate' (2014) *IES Perspectives on HR* at 1 – 2.
[195]Ibid.
[196] Datta, Giupponi & Machin op cit note 193.
[197] Iain Campbell 'Zero Hours Work Arrangements in New Zealand: Union Action, Public Controversy and Two Regulatory Initiatives' in *Zero Hours and On-call Work in Anglo-Saxon Countries* (2019) 91-110 at 91.
[198] Datta, Giupponi & Machin op cit note 193 at 6.
[199] Ibid.
[200] 2016 No 53-2.
[201] Colins & May 'Major Amendments in the Employment Law Arena for 2016' (2016) Vol 2 at 1.
[202] Supra note 200.

eliminate the most exploitative aspects of zero-hour contracts while still allowing for some flexibility.[203]

The compensation requirement addressed one of the major criticisms of zero-hour contracts:.[204] Under the new law, if an employer wants a worker to be available outside of their guaranteed hours, they must provide compensation, ensuring that workers are not left in a state of unpaid limbo.[205] New Zealand's reforms have been widely praised for restoring balance to the labour market.[206]

3. IRELAND

Ireland has taken an intermediate approach to regulating zero-hour contracts, focusing on mitigating their most harmful aspects rather than banning them outright.[207] In 2018, the government passed the Employment (Miscellaneous Provisions) Act[208], which introduced several significant reforms aimed at improving conditions for workers on precarious contracts.[209] The Act guarantees a minimum payment for workers who are called into work but are given little or no actual work.[210] This prevents employers from requiring workers to be on standby without providing them with compensation if work is not available.[211] The Act also requires that employers provide workers with a written statement of their core terms of employment within five days of starting work, including details about expected hours.[212]

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[203] Colins & May op cit note 201.
[204] Office of the Minister for Workplace Relations and Safety. 'The Chair, Cabinet Economic Growth and Infrastructure Committee: Addressing Zero Hour Contracts and Other Practices in Employment Relationships' available at https://www.mbie.govt.nz/assets/e1f87d6c1e/cabinet-paper-2015-addressing-zero-hours-contracts.pdf (accessed 01 August 2024) at 2.
[205] Ibid.
[206] Philip S. Morrison, "Deregulation of the New Zealand Labour Market," *GeoJournal* 59, no. 2, Re-Inventing Government: Emerging Geographies in New Zealand (2004): 127-136 at 128.
[207] Jay McMahon, 'Plus Ça Change? Regulating Zero Hours Work in Ireland: An Analysis of Provisions of the Employment (Miscellaneous Provisions) Act 2018,' *Industrial Law Journal* (2019). https://doi.org/10.1093/indlaw/dwz014.
[208] Introduces new provisions to protect employees against penalisation for invoking their rights under the Terms of Employment and Information Act 199
[209] McMahon op cit note 207.
[210] Richard Smith 'Ireland: Restrictions on Zero-Hour Contracts Amongst Areas Addressed by New Legislation' (2019) William Fry https://www.williamfry.com/knowledge/ireland-restrictions-on-zero-hour-contracts-amongst-areas-addressed-by-new-legislation/. (accessed 12 September 2024).
[211] Ibid.
[212] Ibid.

Ireland also introduced a 'banded hours' system, which gives workers the right to request more predictable hours if they have been employed for at least 12 months.[213] This reform directly addresses the issue of workers being trapped in precarious employment for long periods without any path to more secure and predictable work.[214] Ireland's approach is useful, particularly in terms of protecting zero-hour workers while retaining flexibility in the labour market.[215]

4. COUNTRIES AFFECTED BY LOADSHEDDING AND LABOUR LAWS

Several countries face frequent power shortages like South Africa's loadshedding.[216] Although none of these countries have zero-hour contract laws identical to those seen in the UK or New Zealand, they have had to adapt their labour laws and policies to address the impact of loadshedding on workers.[217]

India has experienced significant power shortages, affecting industries such as manufacturing, textiles, and agriculture.[218] On average, urban households experience power outages lasting about two hours at least once daily, whereas rural households endure unexpected supply interruptions for six or more hours daily.[219] In response, India's labour laws have been slow to adapt.[220] However, many states introduced policies to provide compensation to workers who lose hours due to power cuts.[221] For instance, Maharashtra, Marathwada and Vidarbha implemented schemes where affected workers can receive partial wages during outages.[222] This alleviates the financial burden on workers who are unable to perform their duties due to insufficient power supply.[223] In addition, some industries have moved toward more flexible work arrangements

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[213] Irish Human Rights and Equality Commission, "Observations on the Employment (Miscellaneous Provisions) Bill (2017) at 20 - 24.
[214] McMahon op cit note 207.
[215] Ibid.
[216] Elum Energy, 'Major Countries with Load Shedding' available at https://elum-energy.com/blog/major-countries-with-load-shedding/ (accessed 13 September 2024).
[217] Ibid.
[218] Hunt Allcott, Allan Collard-Wexler, and Stephen D. O'Connell, 'How Do Electricity Shortages Affect Industry? Evidence from India' Working Paper 19977, National Bureau of Economic Research, 2014, http://www.nber.org/papers/w19977 at 11 - 14.
[219] S Agrawal, S Mani, A Jain & K Ganesan 'State of electricity access in India: Insights from the India residential energy survey' (IRES) 2020. *New Delhi: Council on Energy, Environment and Water*.
[220] Adwitiya Mishra and Aasheerwad Dwivedi 'Labour Laws in India: History, Evolution, and Critical Analysis' at 3.
[221] Ibid.
[222] Nagpur Today 'Big boost: State restores power subsidy scheme for industries in Vidarbha, Marathwada' . (2023) available at www.nagpurtoday.in/big-boost-state-restores-power-subsidy-scheme-for-industries-in-vidarbha-marathwada/03060954 (accessed 21 August 2024).
[223] Ibid.

to accommodate these disruptions.[224] For example, manufacturing firms may shift to staggered work hours or adopt a more rotational approach to staffing, allowing workers to take on additional hours when power is available.[225] This flexibility helps maintain productivity while mitigating the financial impacts of power shortages on workers.[226] However, despite these state-level initiatives, there remains no comprehensive national framework that directly addresses the impact of power outages on precarious employment.[227]

Labour laws in Pakistan, where power cuts are also frequent, have historically focused on permanent employment, and precarious workers have been left without sufficient legal protections during periods of loadshedding.[228] The government recently attempted to address this by introducing minimum wage laws for workers affected by power cuts and mandating compensation for lost hours in certain industries.[229] However, the enforcement of these regulations remains inconsistent.[230]

X IMPACT OF LOADSHEDDING ON ZERO-HOUR CONTRACTS: A SOUTH AFRICAN PERSPECTIVE

While zero-hour workers have often been the primary focus, it's crucial to acknowledge that loadshedding has significantly impacted permanent employees and the broader economy.[231] Industries dependent on consistent power have experienced frequent disruptions, decreased productivity, and revenue loss.[232] This situation forces businesses to struggle with operations, resulting in reduced working hours, delayed projects, and retrenchments for permanent staff.[233] South Africa's mining industry, a major economic driver, has faced severe disruptions due to power

[224] IBEF 'Flexi Staffing Industry Grows 3.6% in December Quarter of FY24.' India Brand Equity Foundation, 2024 available at https://www.ibef.org/news/flexi-staffing-industry-grows-3-6-in-december-quarter-of-fy24-report (accessed 21 August 2024).
[225] Ibid.
[226] Mishra and Dwivedi op cit note 220.
[227] Allcott, Collard-Wexler & O'Connel op cit note 218.
[228] Profit by Pakistan Today 'In Pakistan, the platform economy's labour problem is as strong as ever.' July 8, 2024 available at: https://profit.pakistantoday.com.pk/2024/07/08/in-pakistan-the-platform-economys-labour-problem-is-as-strong-as-ever/ (accessed 13 August 2024).
[229] Ibid.
[230] Hafsa Ahmad & Faisal Jamil 'Investigating power outages in Pakistan' (2024) Energy Policy 189, 114117.
[231] Mkateko Vivian Mabunda, Ricky Munyaradzi Mukonza & Lufuno Robert Mudzanani 'The Effects of Loadshedding on Small and Medium Enterprises in the Collins Chabane Local Municipality' (2023) *Journal of Innovation and Entrepreneurship* vol 12 (57) at 4-5.
[232] Timothy King Avordeh 'Impact of Power Outages: Unveiling Their Influence on Micro, Small, and Medium-Sized Enterprises and Poverty in Sub-Saharan Africa – An In-Depth Literature Review' (2022) at 8.
[233] Public Servants Association 'South Africa's Electricity Crisis' (2021) at 3 – 6.

shortages, leading companies to cut shifts or halt operations.[234] This situation not only affects zero-hour workers but also risks permanent employees losing bonuses, benefits, or even their jobs due to prolonged downtime.[235]

Loadshedding's impact extends beyond individual industries, contributing to GDP stagnation, reduced foreign investment, and hindering growth in sectors that could otherwise offer more stable employment opportunities.[236] Both permanent and precarious workers face economic instability, with businesses struggling to plan due to unpredictable power availability.[237] In *NUMSA v Assign Services*[238]*,* the court recognised that temporary workers should, after a certain period, be treated the same as permanent employees.[239] This case underscores the importance of ensuring that precarious workers, including zero-hour contract workers, are afforded the same rights and protections, especially during periods of economic instability like loadshedding.[240]

The broader economic context must be considered when discussing zero-hour contract reforms.[241] Without addressing underlying issues of energy instability and slow economic growth, efforts to protect vulnerable workers may be undermined by these structural challenges.[242] Findings from this paper reveal that while zero-hour contracts offer flexibility for employers, they often increase worker vulnerability, especially in uncertain economic climates. In *Minister of Home Affairs v Watchenuka*,[243] the Supreme Court of Appeal highlighted the importance of the right to work as a component of human dignity.[244] Even though this case was based on asylum seekers,[245] the principle is particularly relevant for zero-hour workers in South Africa, who face erratic employment opportunities due to loadshedding. The lack of legal safeguards not only affects their income security but also undermines their right to work with dignity.

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[234] Ibid.
[235] J. Lindahl Towards Better Environmental Management and Sustainable Exploitation of Mineral Resources (2014) *Environmental Science and Geology* at 12.
[236] Ibid.
[237] Ibid.
[238] (JA96/15) [2017] ZALAC 44.
[239] Ibid para 48.
[240] Ibid.
[241] Benjamin op cit note 118.
[242] Mhlongo & Daya op cit note 166.
[243] [2004] 1 All SA 21 (SCA).
[244] Ibid para 27.
[245] Ibid para 1.

PART 4

XI BUILDING A RESILIENT FUTURE: RECOMMENDATIONS FOR SOUTH AFRICA

1. LEGAL AMENDMENTS

Stricter regulations should be implemented to protect workers under zero-hour contracts. The nature of these contracts leaves employees vulnerable to exploitation, income insecurity, and a lack of basic employment rights. ILO Convention No. 181[246] on private employment agencies establishes principles for regulating these agencies, ensuring that all workers have access to protections regardless of their employment status, including fair treatment, non-discrimination, and access to essential benefits.[247] The convention mandates that agencies provide clear and comprehensive information to workers about their rights, job opportunities, and terms of employment, promoting informed decision-making for those entering precarious roles.[248] It also encourages countries to implement measures for monitoring private employment agencies and ensuring compliance with labour standards.[249] The first recommendation is that South Africa ratify this convention.

Similarly, the Guidelines on the Promotion of Decent Work for Young People[250] recognise the need to consider the rights and protections of young individuals engaged in non-standard work arrangements.[251] By acknowledging these employment types, the guidelines advocate for appropriate legislative and policy responses.[252] They encourage governments to ensure that young workers have access to essential rights, such as fair wages, social protection, and the right to join trade unions, which are crucial for those in precarious employment.[253] Additionally, the guidelines promote initiatives aimed at educating young workers about their rights and enhancing their employability, empowering them to negotiate better terms and conditions in their employment.[254] By aligning with these guidelines, South Africa can strengthen its regulatory framework. These

[246] ILO Convention on Private Employment Agencies, 1997 (No. 181).
[247] Ibid art 1.
[248] Ibid art 2.
[249] Ibid art 5.
[250] ILO The Guidelines on the Promotion of Decent Work for Young People, 2005 (No. 1).
[251] Ibid art 2.
[252] Ibid art 1.
[253] Ibid art 4.
[254] Ibid art 5.

measures would help address the vulnerabilities associated with such contracts while promoting decent work conditions for all workers.

The LRA should be amended to explicitly define and recognise zero-hour contracts as a distinct form of employment.[255] This amendment could be included in section 213, which provides definitions of various employment terms.[256] Recognising zero-hour contracts within the LRA would ensure that workers under such agreements are clearly identified and protected under the broader scope of labour law. Additionally, section 185 of the LRA, which deals with unfair dismissal, should be amended to protect zero-hour workers from being unfairly dismissed through the mere non-scheduling of work.[257] The section should be explicitly amended to include non-scheduling of work as a form of unfair dismissal, ensuring that zero-hour workers are protected from arbitrary or unjustified decisions not to schedule them.[258] Additionally, provisions could be introduced to guarantee a minimum number of hours per month for zero-hour workers, except where valid reasons are provided by the employer.[259] Employers should also be required to give advance notice of their scheduling decisions, with a standard notice period of one or two weeks, to help workers plan accordingly.[260] Furthermore, a reasonable notice period before termination or significant reduction in hours should be mandated to provide additional security for zero-hour workers.[261] This would close a significant loophole where employers can effectively terminate employment without following formal dismissal procedures.

A new provision should be added to section 9 of the BCEA, to introduce a minimum guaranteed number of working hours for zero-hour contracts.[262] This would provide workers with a basic level of income security, even during periods when no work is available. Furthermore, section 29, which outlines the particulars of employment that must be provided to employees, should be amended to include a requirement for employers to provide a minimum notice period for scheduling work.[263] This amendment would help reduce the uncertainty faced by zero-hour

[255] Op cit note at 37 at s185 – the LRA makes no mention of zero-hour contractors.
[256] Ibid.
[257] Benjamin op cit note 118 at 26 – 27.
[258] Ibid at 27 – 29.
[259] Supra note 197.
[260] Benjamin op cit note 118.
[261] Ibid.
[262] Ibid at 30.
[263] Supra note 39.

workers and enable them to plan their lives more effectively around their employment. Additionally, an equal treatment clause should be introduced in section 10 of the BCEA, ensuring that zero-hour workers receive the same benefits and protections, such as sick leave and holiday pay, as other employees, proportionate to the hours they work.[264] This would reduce the disparity between zero-hour workers and their permanently employed counterparts.[265]

The Employment Equity Act[266] (EEA) should be amended to increase transparency and monitoring of zero-hour contracts. A new provision should be added to section 27, requiring employers to report on the use of zero-hour contracts.[267] This report should include details on the number of workers under such contracts, the hours they work, and any disparities in pay and benefits.[268] This would enable better monitoring of the impact of zero-hour contracts on vulnerable groups and help identify patterns of exploitation.[269]

Enforcement mechanisms need to be strengthened. The role of the Department of Employment and Labour should be enhanced to conduct regular inspections and audits of employers who use zero-hour contracts, ensuring compliance with the newly established regulations.[270] Stricter penalties should also be introduced under section 93 of the BCEA, which addresses offences and penalties, for employers who fail to comply with these regulations.[271] These penalties could include substantial fines and, for repeat offenders, the potential suspension of business operations.[272] These measures would serve as a deterrent against the exploitation of zero-hour workers and contribute to a fairer and more equitable labour market.

While these amendments aim to enhance worker protections, they must balance the need for employers to maintain flexibility in managing their workforce.[273] Zero-hour contracts allow businesses to adjust staffing levels according to fluctuating demand, especially in sectors sensitive

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[264] *Discovery* supra note 71.
[265] Ibid.
[266] 55 of 1998.
[267] Benjamin op cit note 118 at 33.
[268] Ibid.
[269] Ibid.
[270] Department of Employment and Labour. "Employment and Labour Inspectors Committed to Educate Employers to Ensure Workplace Compliance." 17 July 2024. https://www.labour.gov.za/employment-and-labour-inspectors-committed-to-educate-employers-to-ensure-workplace-compliance (accessed 13 September 2024).
[271] Ibid.
[272] Ibid.
[273] Owens op cit note 124 at 217.

to economic changes.[274] Overly restrictive regulations could lead to increased operational costs or reduced hiring, stunting economic growth.[275] However, flexibility should not come at the expense of worker rights.[276]

2. BALANCING EMPLOYER FLEXIBILITY WITH WORKER PROTECTION

While the implementation of these regulations is crucial, it can present challenges, particularly for smaller businesses.[277] Foreign models provide valuable insights into how to balance worker protection with employer flexibility.[278] One notable example is Germany's Kurzarbeit system.[279] During economic downturns, this system allows businesses to reduce working hours while the government compensates workers for their lost income.[280] This approach helps businesses avoid layoffs and ensures that workers maintain income security, demonstrating how governments can share the burden of economic instability.[281] To address these challenges, government support programs and phased implementation strategies may be needed to assist smaller enterprises in adjusting to new regulations without suffering significant financial strain.

Introducing minimum income guarantees for zero-hour workers could provide essential financial support during loadshedding.[282] Such guarantees would ensure that workers receive a baseline income, even when work is unavailable.[283] A government subsidy programme could be established to compensate these workers for earnings lost directly due to power outages.[284]. The implementation of such regulations in South Africa will require initial investment, particularly in establishing compensation frameworks.[285] However, by alleviating the financial burden on

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[274] Ann Bevitt 'Zero hours contracts offer flexibility and give employers a competitive edge' *Labour Law* (2013) available at https://www.hrmagazine.co.uk/content/features/zero-hours-contracts-offer-flexibility-and-give-employers-a-competitive-edge (accessed 20 August 2024).
[275] Matthew Pennycook, Vidhya Alakeson & Giselle Cory 'A Matter of Time: The Rise of Zero-Hours Contracts' *Resolution Foundation* (2013) at 18.
[276] Ibid.
[277] Scottish Government Economic Impact of a Minimum Income Guarantee: Analysis of Economic Theory and Policy Evidence (2021) available at https://www.gov.scot/publications/economic-impact-minimum-income-guarantee-analysis-economic-theory-policy-evidence/pages/6/ (accessed 12 September 2024) at 6.
[278] Kapika and Eberhard op cit note 173.
[279] Shekhar Aiyar & Mai Chi Dao 'The Effectiveness of Job-Retention Schemes: COVID-19' (2021) Evidence from the German States at 2.
[280] Ibid.
[281] Ibid.
[282] James Bishop & Iris Day 'How Many Jobs Did JobKeeper Keep?' (2021) at 4.
[283] Ibid.
[284] Aiyar and Dao op cit note 279.
[285] Regulatory Imperatives for Renewable Energy: South African Perspectives (2021) Cambridge University Press.

employers during crises, the government can prevent widespread job losses and promote stability in the workforce.[286] The Kurzarbeit system shows that government intervention can effectively balance worker protection and economic flexibility, sharing the burden of economic instability while fostering a resilient labour market. This model could serve as a blueprint for developing similar systems in South Africa, particularly in industries heavily affected by loadshedding.

3. SUPPORT FOR EMPLOYERS

Introducing a minimum number of guaranteed hours for zero-hour workers, as seen in New Zealand and Ireland, would provide crucial income security, particularly in industries affected by loadshedding.[287] This could be achieved by enacting legislation that mandates employers to guarantee a minimum number of paid hours per week, regardless of actual hours worked, ensuring financial stability for workers. Additionally, workers should be compensated for their availability, even if they are not called to work.[288] This could be implemented through an 'on-call allowance,' where workers are paid a set amount for being available to work, even if no shifts are assigned, thus acknowledging their time commitment and ensuring they are fairly remunerated.

4. POLICY RECOMMENDATIONS

To alleviate the financial impact on employers, the government could introduce tax incentives or subsidies for businesses that compensate zero-hour workers during loadshedding.[289] This approach, similar to Australia's JobKeeper, would help employers retain staff while ensuring fair compensation.[290] A phased approach to reform would allow businesses to adjust gradually to new regulations.[291] South Africa could begin by introducing minimum protections in sectors most affected by loadshedding, such as manufacturing and retail, before expanding these protections to other industries.[292] This would prevent a sudden financial strain on businesses while ensuring that vulnerable workers are protected.

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[286] Ibid.
[287] Colins & May op cit note 201.
[288] Ibid.
[289] Mhlongo & Daya op cit note 166.
[290] Australian Treasury Insights from the First Six Months of JobKeeper (2020) at 1.
[291] Nedbank 'Impact of Loadshedding on SMMEs' (2023) available at https://business.nedbank.co.za/content/dam/nedbank/pdfs/Nedbank-Impact-of-Loadshedding-on-SMMEs.pdf (accessed 14 August 2024).
[292] Ibid.

XII CONCLUSION

South Africa's increasing reliance on zero-hour contracts, during an era of unpredictable energy supply, highlights significant gaps in labour protection.[293] While these contracts provide businesses with the flexibility to adapt to fluctuating demand, they leave workers vulnerable to exploitation and a lack of essential employment rights.[294] This issue is exacerbated by the ongoing loadshedding crisis, which intensifies the uncertainty faced by zero-hour workers, who are often the first to bear the consequences of reduced work opportunities and irregular income.[295]

To address these challenges, legislative reforms must be implemented to offer clearer protections to workers under zero-hour contracts. Defining and recognising these contracts within the LRA would ensure that zero-hour workers are granted the same basic protections as other employees.[296] Key amendments, such as ensuring minimum guaranteed hours and compensation for standby time during periods of loadshedding, would provide workers with a critical safety net.[297] Moreover, introducing fair notice periods for scheduling changes or termination would prevent employers from arbitrarily withholding work and wages, offering greater job security to those in precarious positions.[298]

It is crucial to balance these worker protections with the economic realities faced by employers that are already under significant strain due to high operational costs and energy instability.[299] Policies that support businesses, such as tax incentives and phased reforms, can help alleviate the financial burdens associated with implementing fair labour practices.[300] By offering financial support, South Africa can ensure that businesses remain viable while safeguarding workers' rights.

Foreign models and international conventions illustrate how governments can play an active role in balancing worker protection with economic resilience. These programs demonstrate that it is possible to mitigate the risks posed by precarious work arrangements while maintaining the

[293] Damane & Marumoagae op cit note 29.
[294] Ibid.
[295] Mhlongo & Daya op cit note 166.
[296] Ibid.
[297] Part 1 of this report.
[298] Ibid.
[299] Mhlongo & Daya op cit note 166.
[300] Avordeh op cit note 232.

flexibility that employers need in a volatile economic landscape.[301] South Africa can adapt these models to suit its unique context, introducing reforms that protect workers from exploitation while providing the necessary support for businesses to thrive.[302]

Ultimately, these reforms are not just about protecting zero-hour workers from exploitation; they are about creating a more resilient and inclusive labour market. A forward-thinking approach to labour law, combined with robust enforcement, will mitigate the risks posed by zero-hour contracts and ensure that both employers and employees benefit from a fairer, more equitable economy. By learning from global best practices and tailoring them to South Africa's needs, the country can navigate its current challenges while building a sustainable and balanced future for all its workers.

[301] Ibid.
[302] Ibid.

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