

Relational Dynamics

Organising Rights and Work Relationships

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Declaration

I, Hitesh Harish Dhorajiwala confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Acknowledgements

The very existence of this thesis is in no small part a result of the support of my primary supervisor, Professor Nicola Countouris. It was his encouragement in the winter of 2014, when I was an LLM student at UCL, that convinced me that I could pursue this PhD project. I am deeply grateful to Nicola for the past six years of guidance, patience, and cappuccinos, with the full knowledge that I could not have asked for a better PhD supervisor and mentor.

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¹ Can you imagine a world without lawyers?

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Abstract

This thesis analyses the manner in which labour rights are assigned to work relationships. The first half of the thesis is a doctrinal analysis of the work relationship statuses used in English law. The first chapter assesses the criteria that these statuses use, and the impact of using those criteria when they are applied to non-paradigm work relationship models. Subsequent chapters consider how, when these criteria are applied to atypical work relationships, the law struggles to properly analyse these relationships by virtue of the way they are structured. This analysis is done with a particular focus on tripartite work relationships, zero-hours work relationships, and the synthesis of these structures found in the gig economy.

The second half of the thesis shifts to a normative proposal for a new model of assigning labour rights to work relationships. This begins by setting out the theoretical foundations of the new proposed model, which is based upon a version of the capabilities theory. Once this has been done, the theory of Relational Dynamics is outlined, including how this model relies upon the purposive interpretation of regulations to operate effectively. Following this, the practical aspects of implementing the Relational Dynamics model (including the use of legal presumptions, and the need for a tripartite structure to engage in the purposive interpretation of regulations) is set out, to demonstrate how the model can be practically implemented.

Impact Statement

It is hoped that this thesis will be relevant to both academics and practitioners. From the perspective of academia, this work offers an analytical insight into the operation of work relationship status in English law, and based upon this, builds upon the work of Mark Freedland and Nicola Countouris, as well as Guy Davidov, to offer a new analytical lens through which work relationships are both analysed and regulated. It is also hoped that practitioners and the judiciary will take note of the approach advocated for in this project and consider how to better apply the law on work relationship status by reference to the analysis that is contained herein.

Table of Contents

Declaration	ii
Acknowledgements	iii
Abstract	vi
Impact Statement	vii
Table of Contents	viii
Chapter 1: Introduction & Analysis of the Current Regime	1
I <i>Introduction & Thesis Structure</i>	1
II <i>The Current Regime: Fit for Purpose?</i>	5
II.i <i>A Paradigm Work Relationship?</i>	7
II.ii <i>The Contract of Employment</i>	11
II.iii <i>UK Worker</i>	24
II.iv <i>The ‘Worker’ in EU Law</i>	31
III <i>Conceptual Fragmentation of the UK Worker Status?</i>	37
III.i <i>van Winkelhof and the Internal Tension in UK Worker Status</i>	38
III.ii <i>s 43K ERA 1996 and Day v HEE</i>	41
III.iii <i>A Different Approach in s 296 TULRCA 1992?</i>	45
III.iv <i>The Difficult Case of Windle</i>	53
IV <i>Conclusion</i>	54
Chapter 2: The Growth of Work Relationships Outside the Paradigm	56
I <i>Introduction</i>	56
II <i>The Changing Characteristics of the Workforce</i>	57
III <i>Triangular Work Relationships</i>	62

III.i	<i>Theoretical Foundations of the Agency Relationship</i>	62
III.ii	<i>Applying Bilateral Criteria to Trilateral Relationships</i>	69
III.iii	<i>Statutory Exceptions?</i>	76
IV	<i>Zero Hours Contracts: Excluding Mutuality</i>	81
IV.i	<i>A New Work Relationship Model?</i>	81
IV.ii	<i>Sidestepping Mutuality of Obligation</i>	84
IV.iii	<i>Intervention Preventing ZHCs from Sidestepping Mutuality?</i>	86
IV.iv	<i>Interim Conclusions</i>	89
V	<i>Conclusion</i>	90
Chapter 3: Work Relationship Status in the ‘Gig Economy’ and the Synthesis of Work		
	Relationship Models	92
I	<i>Introduction</i>	92
II	<i>The ‘Gig Economy’: Synthesis of Concepts</i>	93
II.i	<i>Defining the ‘Gig Economy’</i>	93
II.ii	<i>New Taxonomies?</i>	99
II.iii	<i>Synthesis, Digitisation, and Work-On-Demand via Apps</i>	100
II.iv	<i>Crowdwork and Synthesis</i>	110
III	<i>The Problem of Substitution Clauses</i>	124
III.i	<i>Substitution Clauses and Work Relationship Statuses</i>	124
III.ii	<i>Substitution Clauses and Gig Economy Work</i>	127
IV	<i>The Panacea of Autoclenz?</i>	133
IV.i	<i>The Utility of the Autoclenz Doctrine in the Gig Economy</i>	133
V	<i>Conclusion</i>	143
Chapter 4: Theoretical Foundations of a New Analytical Model		
		145

I	<i>Introduction</i>	145
II	<i>The Need for a Philosophical Inquiry</i>	146
III	<i>The Foundational Philosophy of a Regulatory Model</i>	149
III.i	<i>Assumptions for a Regulatory Model's Theoretical Foundation</i>	149
III.ii	<i>Three Criteria</i>	151
IV	<i>A 'Capable' Theory</i>	154
IV.i	<i>The Traditional Foundation?</i>	154
IV.ii	<i>Capabilities Theory</i>	158
IV.iii	<i>Constitutional Entrenchment</i>	161
IV.iv	<i>Assessing Capabilities Theory</i>	167
V	<i>The Theoretical Foundation of a New Analytical Model</i>	169
VI	<i>Conclusion</i>	171
Chapter 5: Relational Dynamics		172
I	<i>Introduction</i>	172
II	<i>Personal Scope and Contractual Foundations</i>	173
II.i	<i>The Role of Contract in Determining Work Relationship Status</i>	173
II.ii	<i>Contractual Influences Beyond Personal Scope</i>	182
II.iii	<i>Limitations of the Contractual Approach</i>	188
III	<i>Relational Dynamics</i>	194
III.i	<i>Defining the Scope of the Analytical Model</i>	195
III.ii	<i>A Relational Model</i>	202
III.iii	<i>The Purposive Interpretation of Regulations</i>	215
IV	<i>Conclusion</i>	223
Chapter 6: Relational Dynamics in Practice		226

I	<i>Introduction</i>	226
II	<i>A Summary of the Relational Dynamics Model</i>	227
III	<i>Corporatism and Purposive Interpretation</i>	230
III.i	<i>Starting from Tripartism</i>	232
III.ii	<i>An Appropriate Model for Relational Dynamics</i>	233
IV	<i>Presumption of Application</i>	246
IV.i	<i>The Value of Presumptions</i>	246
IV.ii	<i>The Presumption in a Relational Dynamics Model</i>	248
V	<i>Conclusion</i>	253
Chapter 7: Conclusion		255
Bibliography		262
I	Books	262
II	Articles	264

Chapter 1

Introduction & Analysis of the Current Regime

I *Introduction & Thesis Structure*

The issue of work relationship status, and how it determines access to labour rights in English law is of central practical importance when considering the protective scope of the discipline of Labour Law. The main aim of this thesis is to critically analyse this approach, and then offer an alternative analytical model for work relationships. It does so in two distinct stages. First, the deficiencies of the current approach in English law will be set out by looking at various work relationship structures which demonstrate how English law struggles to adequately assign rights to non-paradigm work relationships. The second stage is to use the analysis in the first stage of the thesis to construct a new analytical model for assigning rights to work relationships by thinking more directly about the various dynamics that exist within work relationships between a worker and their employing entities, and then seeking to regulate those dynamics. In short, the project can be summarised as follows: if the approach to assigning rights to work relationships through a status-based approach is no longer fit for purpose, would the aim of properly assigning rights to work relationships be better achieved through a model which focuses on assigning rights to specific dynamics within work relationships?

The thesis will therefore have the following structure. This chapter will first consider the three central work relationship statuses used in English law: employee status; UK worker status; and EU worker status. It will demonstrate that, although these statuses each determine whether a disparate collection of rights can be attached to a particular work relationship, the specific criteria used by

all three statuses seek to identify long-term bilateralism with a single employing entity within work relationships. It shall be argued that as work relationships diverge from a homogenous ‘paradigm’ model, they often struggle to exhibit the long-term bilateralism that English employment statuses seek, and as such, a vast number of relationships are excluded from the protective scope of Labour Law. In addition, this chapter will consider the significance of recent divergent interpretations of UK worker status. Although it initially appears that following the *van Winkelhof* decision UK worker status has become more inclusive,¹ it shall be demonstrated that its continued reliance on criteria drawn from employment status neutralise most of the advantage that might theoretically be produced by repositioning UK worker status as a species of self-employment rather than an offshoot of employment status. Moreover, even when we consider other interpretations of UK worker status in the context of whistleblowing, or an analogous construction found in the context of trade union legislation, the underlying issue of relying on the same essential criteria to determine access to those statuses means that their utility in increasing access to workplace rights in any meaningful way is undermined.

Chapter 2 will move on to consider how the regime, as outlined in Chapter 1, operates when faced with two of the most widely-used work relationship structures: tripartite work relationships; and zero-hours contracts. In particular, this chapter will focus on how both of these models, either intentionally or unintentionally, are structured so as to avoid satisfying some of the necessary criteria for employee, UK worker, and potentially even EU worker status. This analysis brings into focus the seeming inadequacy of assessing work relationships through a rigidly bilateral lens, and identifies the unfortunate outcome that it is often work relationship structures with higher degrees of precarity and fragmentation that end up being the ones that face more difficulty in satisfying the criteria for accessing workplace rights in English law.

This then leads to Chapter 3, which discusses how the phenomena of tripartite work relationships and zero hours arrangements have been powerfully synthesised in platform work, with the result of this synthesis being greater than the sum of its parts. This chapter considers how the regulatory

¹ *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730

issues created by work through an intermediary and zero-hours agreements become all the more potent when considered in the context of platform or ‘gig economy’ work. Of course, the work relationship models we see in this sector are multifarious, and as such, much of the analysis in this chapter focuses on those cases and models that have been litigated upon. It is argued that, although so far, the approach of the courts has been somewhat worker-protective, it has done so at the expense of forcing sometimes-genuinely multifarious work relationship models into the bilateral analytical mould. The courts’ reliance upon these orthodox analytical approaches risks producing a jurisprudential approach to the gig economy that becomes dependent upon reasoning by analogy to well-established work relationships, rather than a deeper, transparent analysis of the different work relationship nexuses at play in gig economy work relationship models.

Chapter 4 then marks the beginning of the normative half of the thesis. It begins this task by setting out the theoretical foundations for the analytical model proposed in later chapters. This chapter will have two aims. The chapter will begin by providing a normative argument specifically for the scope of a new analytical model which looks at the internal relations between a worker and their employing entities, and will do so by focusing upon justifications for labour law that operate at a high level of theoretical abstraction. The aim of this chapter is quite narrow, in that it is an attempt to justify the project of this thesis, rather than the discipline of Labour Law. For that reason, the analysis will focus on inequality of bargaining power and capabilities theory in order to determine which high-level theory provides the most appropriate foundational justification for an analytical model which seeks to assign rights to relations within multilateral work relationships. The chapter settles on a conception of capabilities theory with the constitutional entrenchment of core labour rights as the most appropriate foundation upon which the analytical model can then be built.

Chapter 5 then begins to set out the framework for a Relational Dynamics model. Using the theoretical work done in Chapter 4, and reflecting on the failures of the bilateral approach seen in Chapters 1, 2, and 3, a worker-centric model of ‘Relational Dynamics’ will be explored. This model will develop the work done on the ‘Personal Work Nexus’ by Mark Freedland and Nicola Countouris, and propose a model of ‘Relational Dynamics’ to analyse the relationship between a

worker and other entities relevant to the construction and analysis of the work relationship. The chapter will set out the core elements of the theory, by explaining the scope of the analytical model (i.e. that it is concerned with Primary Work Relationships, as will be defined in Chapter 5), and the three-stage analytical approach that the model requires to properly analyse multilateral work relationships. This involves looking at the internal structure of the Primary Work Relationship, then identifying relevant ancillary work relationships, and finally characterising the relations identified within the primary work relationship. Another important aspect of the Relational Dynamics model which will be discussed in depth in this chapter is the importance of the purposive interpretation of regulatory intervention. By reference to the work of Guy Davidov, the importance of the purposive interpretation of specific legal protections will be emphasised, and indeed how the purposive interpretation of particular regulations has a symbiotic relationship with the identification of dynamics within Primary Work Relationships. However, it is important to stress that the focus of this chapter will be to set out the core theoretical elements of the Relational Dynamics theory, and it will not spend much time on more practical questions of its implementation.

Chapter 6 is where the relevant practical considerations relating to the implementation of the Relational Dynamics model are considered, by asking how the proposed model from Chapter 5 can be operationalised. First, this chapter will discuss the value of a tripartite corporatist model for the purpose of determining what dynamics are addressed by what particular rights, and whether such an approach is best characterised as a pluralist or deliberative one. First, this chapter will propose using a somewhat rigid deliberative tripartite decision-making model consisting of representatives for workers, employers, and government, albeit with safeguards that protect the process from non-engagement. In addition, the proposed tripartite model will embrace associate membership from groups who can offer valuable contributions to the process of determining what rights address what dynamics, but without being permanently involved in the process to ensure the efficient operation of that tripartite system. Second, this chapter will discuss the role and importance of using a presumption of universal coverage as the starting point for protection. It will set out economic

theory on presumption bias, as well as a useable framework for presumptions that should be put in place with respect to the Relational Dynamics model.

Returning to the focus to the content of Chapter 1, the purpose of this chapter, and the doctrinal discussion it enters into, is prospective as it lays the necessary foundation for all the chapters that follow. It is vital to understand not only how the work relationship statuses in English law work with respect to the criteria that they use, but also what those criteria tell us about the analytical approach that is taken by English law. As this chapter will demonstrate, these statuses focus on a particularly narrow set of factors for establishing work relationship status, and by extension neglect a much wider set of dynamics that could be considered when determining the proper characterisation of a work relationship, and *de facto*, what rights attach to a work relationship. This analysis will be crucial not only to the later analytical work that is done in Chapters 2 and 3 in assessing the English employment law regime in relation to atypical or complex work relationships, but also to providing the necessary critical foundation upon which Chapters 4 to 6 will develop the new proposed model of Relational Dynamics. This is a model that explicitly *does* seek to address both a much wider selection of dynamics within work relationship, and considers the aims and purposes of different regulatory interventions.

II *The Current Regime: Fit for Purpose?*

The current model for organising work relationships in English law is one whose utility has been in decline for many years. In order to access workplace rights and protections, a worker must usually demonstrate that they have met the criteria for one of three key employment statuses in English law. Traditionally, there existed a distinction between employees,² the self-employed, and

² Employment Rights Act ('ERA') 1996, s 230(1) – (2)

an intermediate status between those two: the UK worker.³ However, within the last decade, there has been the emergence in importance of another key intermediate employment status: the EU worker.⁴ Although the EU worker status is often seen to sit in a similarly intermediate position as UK worker status in the English labour law regime (between genuine self-employment and employee status), as shall be discussed in more detail later in this chapter, it is a conceptually and normatively distinct status that must not be conflated with UK worker status by virtue of its nominally similar intermediate location within the scheme of English employment statuses.

Once a worker can show that they satisfy the criteria for any of these statuses, they are entitled to a bundle of rights related to those statuses. So for example, unfair dismissal protections will only generally be extended to those who can demonstrate that they are ‘employees’ under English law.⁵ As shall be discussed later in this chapter, ‘employee’ status is the most difficult status to access in the current regime, and is a status that can guarantee the broadest collection of rights to a worker who can satisfy its criteria. The next, supposedly-less restrictive status is that of the ‘UK worker’, and given its purported wider scope, it entitles any worker that satisfies its criteria to a more circumscribed bundle of workplace rights. Finally, the most accessible status is ‘EU worker’ status; a category which essentially allows a worker to access rights that (in principle) either originate from or run parallel to rights found in the *acquis* of EU law.⁶ This regime is structured such that an ‘employee’ will always be guaranteed the rights of a ‘UK worker’ and ‘EU worker’, and *mutatis mutandis* for a ‘UK worker’ with respect to the rights an ‘EU worker’ would be entitled to. Formally, this creates a rigidly tiered system of statuses and rights, whereby the personal scope of a number of disparate rights is necessarily determined by one of the three statuses just described.

Unfortunately, as shall be discussed in more detail later in this chapter, a reliance upon these statuses (and crucially, the criteria they use) to determine the personal scope of workplace rights

³ ERA 1996, s 230(3); as will be discussed in specific detail in later chapters, there are a number of other less prominent work relationship statuses that are used in English law, but this chapter’s focus upon the three statuses identified as they are the most ubiquitous

⁴ Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-873; *Jivraj v Hashwani* [2011] UKSC 40, [2011] ICR 1004

⁵ ERA 1996, s 94(1)

⁶ e.g. the Equality Act 2010 contains rights that run parallel to, and generally satisfy, the EU equality directives, and as such must be interpreted compatibly with said directives.

has produced a system where access to rights is determined by criteria that not only have a limited rational link to the rights that they determine access to, but are also applied in a way that reinforces the idea that work relationships are all of a long-term, “personal and bilateral nature” with a unitary employing entity (i.e. the paradigm work relationship).⁷ Yet, although these statuses do usually act to reinforce this paradigm, this chapter will also consider some (exceptional) divergent interpretations that have emerged from the courts that potentially challenge the general trend of the statuses reinforcing that paradigm work model. In particular, some interesting decisions expanding the scope of the UK worker status suggest that, in certain regulatory contexts, UK worker status may be moving away from its conformity to the paradigm work relationship, and be starting to embrace some of the heterogeneity that we see in work relationships. Conversely, a questionable interpretation of the EU worker status in the context of English anti-discrimination law demonstrates that the EU worker status seems to have been interpreted as a species of UK worker status, which may mean that the personal scope for anti-discrimination is now inappropriately narrow.

II.i *A Paradigm Work Relationship?*

The ‘paradigm work relationship’ in English employment law can be described as one which is predicated upon a worker being in a long-term, bilateral wage-work bargain with a “single work-taking counterparty at the non-employee end”.⁸ This assumption about what constitutes the paradigm can be seen as the product of a “smooth evolution” of the law of employment (specifically the contract of employment) from the eighteenth century common law concepts of the master and servant relationship.⁹ This master and servant relationship, and how it invited one to conceive of a work relationship as being one that existed between two unitary parties, began to impact the

⁷ Mark Freedland, *The Personal Employment Contract* (OUP 2003) 36

⁸ Jeremias Prassl, ‘Autonomous Concepts in Labour Law? The Complexities of the Employing Enterprise Revisited’, in Alan Bogg, Cathryn Costello, ACL Davies, and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 153

⁹ Freedland, *The Personal Employment Contract* (n 7) 36-37; Otto Kahn-Freund, ‘Blackstone’s Neglected Child: The Contract of Employment’ (1977) 93 LQR 508

“conceptual question as to which apparatus” should be used to organise work relationships,¹⁰ and heavily influenced the eventual decision to use the law of contract as the analytical framework for organising and analysing work relationships. As shall be discussed in more detail in Chapter 2, through a combination of the primacy of collective *laissez-faire* and the rise of social legislation,¹¹ the contract of employment became the “key organising device for the employment relationship”,¹² and brought with it the notions of privity and formal bilateralism. These concepts reinforced orthodox understanding that the vast majority of work relationships exist in a form where all the relevant rights and obligations are only present between two parties, and at the exclusion of any other actors.

Many contemporary work relationships struggle to conform to this paradigm, or be analysed adequately through a contractual lens due to fact that many of them are not structured like a paradigm work relationship. These work relationships vary from the paradigm model in two distinct ways: a) many do not have a unitary employing entity to satisfy a formal bilateral analysis; and b) they will often not have the long-term qualities such a conceptual approach envisages.

Turning first to the absence of a unitary employing entity, as Hugh Collins has argued, companies “enjoy considerable freedom both in law and in practice to determine the limits of their boundaries”.¹³ Often, they will have significant freedom to either contract certain tasks out to external bodies, or operate through “numerous corporate entities” that act to vertically disintegrate a firm into a collection of related but formally separate corporate entities.¹⁴ This can result in the employer functions (*inter alia*: the providing of work and pay; receiving labour and its fruits; and inception and termination of employment),¹⁵ being split across a number of different personalities and entities, rather than all accruing in a single employer. As such, there is a mismatch between the contractual analysis that sits comfortably alongside the assumption of a paradigm work

¹⁰ Prassl, ‘Autonomous Concepts in Labour Law?’ (n 8) 153

¹¹ Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (OUP 2005) ch 4

¹² Prassl, ‘Autonomous Concepts in Labour Law?’ (n 7) 153

¹³ Hugh Collins, ‘Ascription of Legal Responsibility to Groups in Common Patterns of Economic Integration’ (1990) 53 MLR 731, 736

¹⁴ *ibid*

¹⁵ Jeremias Prassl, *The Concept of the Employer* (OUP 2015) 157

relationship structure, and the reality of how work relationships much more closely resemble a matrix of relations between a worker and a number of actors exercising different employer functions.¹⁶

Take, for example, the “highly artificial” unitary personification of a limited liability company,¹⁷ in its role as the “predominant legal form of the employer”.¹⁸ Even when characterised as a monolithic entity, it is quite clear that employer functions would be split between a number of parties within the organisation. So while the direct offer of work may originate from a worker’s line manager, remuneration for this work may come from head office in a particular company, and the decision to terminate employment could ultimately come from a separate parent company.¹⁹ Alternatively, one can see the difficulty the courts have in attempting to interpret triangular relationships using a bilateral contractual approach. As *James v Greenwich LBC* demonstrated, even in the context of temporary agency work, the court was bound to attempt to use a contractual analytical approach to interpret a situation where the party that offered work and received the fruits of labour, and the party remunerating the worker, were different entities. Rather than being able to accept the “clearly multilateral” nature of agency work,²⁰ the court was required to assess whether it was possible to imply a contract of service between the end-user and the employing entity;²¹ an approach whose high pass-mark and inflexibility even the court conceded could result in a number of workers in triangular relationships being excluded from a variety of legislation that guarantees labour rights and protections.²² As mentioned, the specific problem of triangular relationships will be explored in more detail in Chapter 2. However, to summarise, in the absence of the unitary, personal employer in whom all employer functions are vested, it is unsurprising that the contractual analytical approach born from the paradigm relationship is ill-equipped properly analyse all the relevant aspects of multilateral work relationships.

¹⁶ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 390

¹⁷ Freedland, *The Personal Employment Contract* (n 7) 37

¹⁸ Prassl, ‘Autonomous Concepts in Labour Law?’ (n 8) 153

¹⁹ Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy* [2009] ECR I-8163

²⁰ Prassl, ‘Autonomous Concepts in Labour Law?’ (n 8) 153; cf. *Dacas v Brook Street Bureau UK* [2004] ICR 1437 (CA) and *Cable & Wireless Plc v Muscat* [2006] ICR 975 (CA), which do not necessarily preclude the existence of multi-party contracts or the implication of employer status for the end-user if they exercise certain managerial or disciplinary controls over the worker in question.

²¹ *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] ICR 545

²² *ibid* [57]

The second misrepresentation made by the paradigm work relationship is the idea that most work relationships supposedly tend towards long-term, full-time relationships with the aforementioned single employing entity. Fredman argues that such a characterisation fits comfortably into the narrative of a ‘male breadwinner’,²³ but that such a model is “clearly no longer accurate”,²⁴ given the multiplicity of ‘atypical’ work relationships that do not embody a long-term commitment to a single employer, alongside the fact that a significant number of women engage in the workforce as ‘breadwinners’ (albeit while disproportionately in these non-standard forms of work, such as part-time engagement).²⁵ The growing prevalence of *inter alia* part-time work, fixed-term contracts, agency work, or zero-hours contracts paints a picture of the labour force that is diverging from the idea of the male breadwinner that is committed, long-term, to a single employing entity. Moreover, there is something fundamentally unreal about the persistence of this sort of relationship as the paradigm work relationship given that the organisation of work relationships outside of this model have existed for decades: the facts of cases like *Carmichael* or *Trusthouse Forte* are examples of cases where workers would be required to work without certain hours, and at the request of an employing entity (and without any concrete guarantee for future work).²⁶

These two strands of discussion demonstrate that one of the foundational concepts of the current regime is a paradigm work relationship that is likely no paradigm at all. Yet this model, with its origins in the historical master and servant relationship, has influenced the analytical approach taken by contemporary labour law: i.e. the contractual approach to analysing work relationships. Each of the statuses that will be discussed in the proceeding sections of the chapter *still* contain criteria whose lineage can be traced back (often quite plainly) to a contractual analytical approach. Although this is not the only problematic aspect of the criteria used in work relationship statuses, the issues surrounding the use of the contractual analysis and its reinforcement of the centrality of the paradigm work relationship will prove to be a common theme in the analysis that will follow in the next sections.

²³ Sandra Fredman, ‘Women at work: the broken promise of flexicurity’ (2004) ILJ 299, 300

²⁴ *ibid* 300

²⁵ *ibid* 302

²⁶ *Carmichael v National Power* [1999] ICR 1226 (HL); *O’Kelly v Trusthouse Forte* [1984] QB 90 (CA)

II.ii *The Contract of Employment*

If a worker can establish that their work relationship should be characterised as one of employment, they will be entitled to the broadest collection of workplace rights in English law.²⁷ These rights include not only those that a UK or EU worker would be able to access, but also rights such as statutory notice periods prior to termination,²⁸ or protections against unfair dismissals.²⁹ For the rights that employees alone are entitled to, the personal scope of the right will be defined by reference to employee status. Therefore, in the case of unfair dismissal, the personal scope of the right is defined as: “An employee has the right not to be unfairly dismissed by his employer”.³⁰ The definition of ‘employee’ can be found in s 230 of the ERA 1996, and states that:

“In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.”³¹

Unfortunately, this definition is unhelpful: it circularly defines employment as having a contract of employment, without elaborating upon what *about* a particular work relationship qualifies it to be a contract of employment. Rather, the job of specifying the criteria that are relevant in producing an employment relationship has been done by the common law, which has identified three heads of criteria that must be met before a work relationship can be considered to be one of employment: 1) mutuality of obligation; 2) a relationship of ‘employer and employee’; and 3) the contract must not contain any terms inconsistent with the employer-employee relationship.³² It is these three criteria that shall be assessed, looking at what each criterion demands, and whether the characteristics that a work relationship needs to have in order to satisfy that criterion has any direct

²⁷ A convenient list of employee-specific rights can be found at: ‘Employment Status’ (*gov.uk*) <<https://www.gov.uk/employment-status/employee>> accessed 18 October 2016

²⁸ ERA 1996, ss 86 – 87

²⁹ ERA 1996, s 94(1)

³⁰ ERA 1996, s 94

³¹ ERA 1996, s 230(1)

³² ACL Davies, *Perspectives on Labour Law* (CUP 2009, 2nd edn) ch 5

relationship to the aims or purposes of the rights that would eventually attach to that work relationship.

II.ii.i *Mutuality of Obligation*

Mutuality of obligation is a criterion that was originally developed by Mark Freedland as an analytical tool to better understand the conceptual basis of the law of termination of employment and wrongful dismissal;³³ it was certainly not designed to be a criterion in “the law on the *formation* of the contract of employment”.³⁴ Nevertheless, its application as a criterion has deviated from its original analytical function, where in the 1980s it was adopted as one of the tests for establishing a contract of employment.³⁵ The origin of mutuality of obligation’s use in this form can be attributed to both *O’Kelly* and *Nethermere*: the Court of Appeal in *O’Kelly*, when considering whether a contract of employment existed between casual catering staff and the hotel, determined that mutuality of obligation was in fact the “one important ingredient” when determining whether a contract of employment existed between a worker and an employing entity.³⁶ The status of mutuality as a criterion for a contract of employment was then lionised in *Nethermere*, where the Court of Appeal held that mutuality of obligation was to be considered the “irreducible minimum” of a contract of employment.³⁷

This ‘irreducible minimum’ requires that there is an ongoing obligation upon an employer to offer work to a worker/pay for work, and an obligation placed upon a worker to always accept any work offered by the employer, either to demonstrate that there is an ongoing obligation to offer/pay for and accept work within a single wage-work bargain,³⁸ or to “link a series of wage-work bargains

³³ Nicola Countouris, ‘Mutuality of Obligation’ in Alan Bogg, Cathryn Costello, ACL Davies, and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 174

³⁴ *ibid* 174 (emphasis added)

³⁵ *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA); *O’Kelly and Others v Trusthouse Forte PLC* [1983] ICR 728 (CA)

³⁶ *O’Kelly* (n 35) 754 (Ackner LJ)

³⁷ *Nethermere* (n 35) 623F (Stephenson LJ)

³⁸ *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA), 563H-564B (Waite LJ); see also, *Costwold Developments Construction Ltd v Williams* [2006] IRLR 181 (EAT) [55] (Langstaff J). The authorities do not speak with a single voice on *precisely* the nature of the obligations relevant for mutuality, but generally speaking, and for the purposes of the analysis in this chapter, the broad principle that there are mutual obligations

together into a ‘global’ or ‘umbrella’ contract” that has continuity as a contract of employment between individual wage-work engagements.³⁹ With respect to the latter, in order to demonstrate the existence of a ‘global’ contract of employment, the mutuality of obligation criterion demands that a worker demonstrate that a number of wage-work bargains can be tied together into a continuous work relationship by an enduring obligation between the putative employer and employee to offer/pay and accept work respectively.

Conceptualised as such, the mutuality of obligation test readily offers a “rock” upon which a claim of employee status can “founder”.⁴⁰ The requirement that there must be offers and acceptance of work between two parties very neatly reinforces the idea of the paradigm work relationship discussed in the previous section; and by extension only those work relationships that exhibit the characteristics of the paradigm work relationship have any real chance of satisfying this criterion. This problem is readily demonstrated by the case law. In *O’Kelly*, where the court was required to assess whether casual serving staff who were preferred for offers of work by a hotel (‘regulars’) could be considered employees of the hotel,⁴¹ the Court of Appeal was ready to accept that the nominal ability of these ‘regulars’ to “decide whether nor not to accept the work” was sufficient to conclude that the requirements of the mutuality of obligation criterion had not been met.⁴² Additionally, this is similar to the approach of the House of Lords in *Carmichael*, which concerned power station guides who were engaged by National Power on a ‘casual as required basis’ to give tours around power plants. There too, an ability to refuse work, however unlikely to be exercised,⁴³ would be sufficient grounds for a claim that a contract of employment existed to fail.

What becomes apparent is that mutuality of obligation, as a criterion for the contract of employment, operates in a remarkably restrictive fashion. By its very construction in the case law,

to offer and/or pay for work, and a concurrent obligation to accept (and thus do) the work as articulated in *Cotswold Developments* is an appropriate construction

³⁹ ACL Davies, ‘The contract for intermittent employment’ (2007) ILJ 102, 102

⁴⁰ *Carmichael* (n 26) 1231 (Lord Irvine)

⁴¹ *O’Kelly* (n 35)

⁴² *ibid* 743 (Ackner LJ)

⁴³ *Carmichael* (n 26) 1230 (Lord Irvine); note the quotation from Ward LJ, who interpreted the agreement as constituting: “whenever such a need arises the guide will be required to meet that need and perform the services as a guide”, imposing “an obligation on the company to provide a reasonable share of work for each [guide] whenever the company had ... work available” and “on the [guides] to take a reasonable amount of work once they have agreed to act as [guides] for the company ...”. However, Chadwick LJ read this requirement much more restrictively.

it has become a test that requires very onerous obligations on: the part of the employer to constantly and consistently offer work to the worker; and on the part of the worker to be under an almost-complete obligation to accept such offers of work. Framed like this, the only work relationships that realistically stand any chance of satisfying this criterion are those that are closely aligned with the paradigm work relationship: they must exhibit a high degree of bilateral reciprocity *vis-à-vis* the obligations between the employer and putative employee, of the sort that are usually only found in those relationships that tend towards the paradigm model.

This is particularly relevant to our analysis, as it becomes difficult to see how mutuality of obligation rationally relates to the purpose or aims of the rights that employee status determines access to. It is a criterion that looks for very high levels of reciprocity and continuity in a work relationship. Given the fairly central importance of the mutuality of obligation criterion to the inquiry of whether a worker is an employee (and *ipso facto* its role in shaping the personal scope of rights only employees are entitled to), it is surprising that it does not rationally relate to the aims or purposes of those rights in any meaningful way. For example, if we conceive of the role of unfair dismissal law as an attempt to protect the dignity-based right of a worker to not be dismissed for arbitrary reasons,⁴⁴ or existing to guard a worker's autonomy to aspire to find work that brings meaning to their lives,⁴⁵ then the law of unfair dismissal could be seen to protect these two aspects of a work relationship by preventing dismissals which are arbitrary, irrational,⁴⁶ discriminatory,⁴⁷ or even in the absence of procedural fairness.⁴⁸ Yet it is difficult to understand precisely how the requirement of mutuality of obligation, which seeks out long-term bilateral obligations between a worker and employing entity, acts as an adequate diagnostic test for the work relationship characteristics that require the protections of the kind that unfair dismissal aims to provide.⁴⁹ Mutuality of obligation identifies a dynamic in a work relationship that does not seem to have any particular relevance to the *much more involved* question of the purpose of a workplace right and

⁴⁴ Davies, *Perspectives on Labour Law* (n 31) 162; Hugh Collins, *Justice in Dismissal* (OUP 1992) 16

⁴⁵ Collins, *Justice in Dismissal* (n 44) 16 – 21

⁴⁶ ERA 1996, s 98

⁴⁷ Equality Act 2010, ss 12 – 19

⁴⁸ ERA 1996, s 98A; Employment Act 2002, s 34

⁴⁹ Beyond simply stating that because a worker has a particular form of work relationship, they are therefore entitled to have their dignity and autonomy protected by virtue of their alignment to a relational norm *vis-à-vis* their employing entity.

what characteristics in a work relationship that right is attempting to guard or ameliorate. Rather, the criterion seems premised on the faulty logic that if a work relationship exhibits extended continuity with an employer, this is an adequate proxy for other dynamics that may need protection. Unfortunately, with the bar set so high, it is difficult to see how such a proxy, even if it *were* based on sound reasoning, would be of much help in properly assigning rights to work relationships.

II.ii.ii *A Relationship of Employer and Employee*

The second criterion, which requires an assessment of whether a relationship of employer and employee exists, is one which has a number of different sub-tests to determine whether it, as a criterion, has been satisfied. The key tests are the: a) control test; b) integration test; and c) economic risk test.

Starting with the control test, the “best known”⁵⁰ expression of this can be found in *Yewens v Noakes*, where Bramwell LJ stated that a relationship is one of employer and employee if a person is “subject to the command of his master as to the manner in which he shall do his work”.⁵¹ A contemporary authority for this test is found in *Ready Mixed Concrete*. The case concerned the employment status of a driver for a concrete firm, and whether he would be considered an employee for the purposes of the National Insurance Act 1965.⁵² In order to determine whether there was an employer/employee relationship, McKenna J suggested that a contract of service will exist when, *inter alia*, a worker “agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master”;⁵³ and expanded upon this by stating that:

⁵⁰ Simon Deakin and Gillian S Morris, *Labour Law* (6th edn, Hart 2012) 159

⁵¹ *Yewens v Noakes* (1880) 6 QBD 530, 532-533 (Bramwell LJ)

⁵² *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497, 515 (McKenna J)

⁵³ *ibid* 515 (McKenna J)

“Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. *All these aspects of control must be considered* in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant.”⁵⁴

This approach has appeared in more recent case law, such as *Autoclenz*, where Lord Clarke approved of the ET’s suggestion that one factor in determining employee status (albeit in the context of shams) was the degree of control the employer exercised over the putative employees in the execution of their roles as workers at a car cleaning company.⁵⁵

Even though this modern formulation moves away from the “strong version of personal or formal subordination” in *Yewens* that is plainly premised upon a high degree of control by the employer, alongside dictation of working methods to employees,⁵⁶ the control test as outlined in *Ready Mixed* still retains some of the characteristics of that older test. We can frame the modern control test as being satisfied by an employer’s ability to “give orders and direct the general nature of an employee’s work” within a broader framework of control,⁵⁷ and this formulation *does* have some relevance to modern work relationships where, for example, employees may execute the specific elements of their work almost entirely free of direction (such as a lawyer, doctor, or TV presenter). But even if it is conceived of as such, we have to ask whether this inquiry into the existence of a nonetheless-fairly-formal element of personal subordination helps us to better relate rights to work relationship characteristics.

⁵⁴ *ibid*

⁵⁵ *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] IRLR 820 [37] (Lord Clarke)

⁵⁶ Deakin and Morris (n 50) 160

⁵⁷ *ibid* 161. Note, for example, the recent decision in *Commissioners for Her Majesty’s Revenue and Customs v Professional Game Match Officials Ltd* [2020] UKUT 147 (TCC), [137] – [138]. There, the Upper Tier Tax Tribunal approved the First Tier Tribunal’s conclusions on mutuality of obligation, but held that the FTT had erred in concluding that the putative employer’s inability to step in an exercise direct control, specifically during matches, was not a relevant consideration when assessing the question of control, with the more important factor being that the imposition of an effective sanction a match would be “sufficient to ensure the employer’s directions constitute enforceable contractual obligations”. Note also the FTT’s approach to overall control in *Paya Limited, Tim Willcox Limited, Allday Media Limited v The Commissioners for Her Majesty’s Revenue & Customs* [2019] UKFTT 583 (TC) [535] – [620]

Introduction & Analysis of the Current Regime

Unfortunately, while there may be some utility in identifying personal subordination in a work relationship for the purposes of assigning workplace rights to work relationships, the control test seems to do little more than *simply* identifying personal subordination. This is problematic from an analytical perspective, because when the control test becomes a factor that can determine access to employee status, the fact it simply identifies a narrow, formal kind of personal subordination means that it severely limits the kinds of work relationships that can satisfy its requirements. Indeed, it will usually be those work relationships that exist within the confines of a paradigm relationship that will exhibit these characteristics; and any work relationships that would otherwise be considered ‘atypical’ will often may not. This means that one of the central tests for determining whether a relationship is one of employment will have an unreasonably narrow focus on a particular kind of ‘control’, and a type of ‘control’ which will be much less likely to exist in atypical work relationships that are subject to less obvious, but potent, forms of control on the part of an employing entity. This in turn has an exclusionary effect on atypical work relationships that, while factually subject to control, cannot exhibit the kind of control necessary for the control *test*.

However, this analysis must be nuanced by the *caveat* that it is not improper to identify personal subordination in a work relationship. Indeed, identifying this dynamic between a worker and employing entity can be important when painting a full picture of the various dynamics at play in a work relationship. The problem that the control test creates is that it asks not only for a very specific, formal model of control that could quite easily be circumvented, but also that it looks for it in a strictly bilateral way: control vests in one counter-party. Therefore, while *prima facie* the question of personal subordination is an important one to consider in an analysis of work relationship matrices, the specific way in which it is applied through the control test results in it only identifying a narrow kind personal subordination that one would usually expect find in paradigm work relationships.

Another test used to determine an employer/employee work relationship is the ‘integration’ test. Per Denning LJ (as he then was) in *Stevenson, Jordan and Harrison*, a worker will satisfy the integration test when they are “an integral part of the business; whereas under a contract for

services his work, although done for the business, is not integrated into it but is only accessory to it”.⁵⁸ As such, where one cannot identify personal subordination with (usually) skilled professionals, the integration test can step in to fill the gap of coverage to characterise such relationships as one of employment: “the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service”.⁵⁹ Although the integration test does offer a solution to skilled professionals that exercise a degree of autonomy in their work, such as doctors or journalists,⁶⁰ it is a test that is “not easily applied” to outworkers or agency workers,⁶¹ who will often not be considered to have been integrated into the business in a way that allows them to qualify as employees. Indeed, those workers that do more traditional, professional work with significant degrees of autonomy in the way they provide their labour can establish an employer/employee relationship by looking to the integration test as they will still be integrated into the organisational structure of the workplace. However, it is likely that when non-professional workers with similar degrees of autonomy have their work relationships assessed, they would be unable to demonstrate the requisite ‘integration’ in a workplace. The issue is then further complicated by the fact that as workplaces vertically disintegrate, and rely more on outsourced work,⁶² the material question of what is or is not ‘integral’ to a workplace becomes all the more complex. Is an outsourced engineer who fixes a company’s machinery, or an agency-worker who installs an internet service provider’s cables in a customer’s home integral to that business against a backdrop of a general trend of disintegration of the traditional workplace structure and hierarchy? The answer is unclear at best, and will likely tend towards being satisfied by those work relationships that fit the paradigm, but for the fact that they also exercise an element of autonomy in the supply of their labour to the employing entity. So while doctors and journalists fit into the paradigm conception of what an employee is, even in the absence of the sort of direct control an employer would otherwise be expected to exercise, the same cannot be said for outworkers or agency workers discussed in the previous paragraph. Indeed, if they ‘feel’ like employees, then the integration test can bridge the gap to employee status left by a lack of control.

⁵⁸ *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101, 111 (Denning LJ)

⁵⁹ *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 250 (Ungoed-Thomas J)

⁶⁰ Deakin and Morris (n 50) 162

⁶¹ *ibid* 162

⁶² Collins, ‘Ascription of legal responsibility’ (n 13)

Bringing this back to the purpose of the analysis in this chapter, it is difficult to see what dynamics the integration test identifies in a work relationship. There is some analytical utility in identifying the degree of integration of a worker in a particular workplace, and to be integrated into the structure of a workplace or business might have some proximal relevance to whether or not a relationship is one that can properly be characterised as one of employment where the otherwise-requisite levels of control may not exist due to the nature of the work being done. But notwithstanding the decreased relevance of integration as a test for an employer/employee relationship in the face of increasingly fractious workplace structures and hierarchies, it is a test that tells us a limited amount about the work relationship in which it is identified. Integration can situate a worker *within* a workplace structure, but it still tells us very little about the specific dynamics of the relationship between a worker and various employing entities beyond this: merely acknowledging formal integration does not explain more about the characteristics of the work relationship. Indeed, for this reason, the analytical value of this test is limited, and demonstrates that it, as a test, bears a limited relationship to the collection of rights that flow from *inter alia* identifying a relationship as one of employer and employee. Much as with the mutuality of obligation criterion, the idea of integration is used as a proxy to arrive at the conclusion that the work relationship *ought* to attract the employment rights, without identifying precisely what about the work relationship explains or justifies those rights being attached to it.

Thirdly, the “focus of modern case law has shifted to ... ‘economic reality’” as a determinant of an employer/employee relationship.⁶³ The economic reality test looks at which party takes responsibility for any profits or losses that occur as part of a business undertaking,⁶⁴ such that if that risk is placed upon the employer, then the worker would be considered an employee due to their isolation from those direct economic risks; whereas if the risk of profit or loss is borne by the worker, then this points to the relationship not being one of employer/employee. In *Market Investigations*, the “economic reality” was such that a part-time researcher could be considered

⁶³ Deakin and Morris (n 50) 162

⁶⁴ Davies, *Perspectives on Labour Law* (n 32) 86

an employee, even in the face of having some discretion as to how precisely she did her job.⁶⁵ As Deakin & Morris argue, one can look at factors such as ownership of tools and equipment, method of payment (in the form of a regular salary, even with some performance-based pay for example), and the level of responsibility that a worker takes for the “management and profitability of the business” in order to make an assessment of the economic reality of the work relationship. Appropriately applied, this test can extend protection to a category of workers who are self-employed but not entrepreneurs by virtue of them not adopting specific economic risk within an enterprise structure (such as a freelance journalist).⁶⁶ Additionally, it can prevent workers that are involved in “successive short-term hirings with different employers” as being characterised as independent contractors, provided that the relevant business risk is assumed by the employing entity during the engagement (as occurred in *Lane v Shire Roofing Co (Oxford) Ltd*,⁶⁷ though Deakin & Morris warn that this decision ought not to be extrapolated too far, given that it was decided with respect to health and safety legislation, where the courts take a “strict approach to claims that a worker is self-employed”).⁶⁸

Unfortunately, in situations where there is some complexity to how economic risk has been distributed within the work relationship, the test has proved less useful. When the economic reality test was applied in *Quashie*, where the employment status of a lap dancer in a club was in question, it struggled to adequately analyse a triangular relationship between the club, the dancer, and her clients. Although Ms Quashie did manage personal economic risk to some degree by not asking clients for more pay on days that were less busy,⁶⁹ it was also the case that she was certainly an integral part of the club’s business, and given that management would likely disapprove of her working at other clubs,⁷⁰ her economic reliance upon the club was “quite obvious”.⁷¹ Especially if the role of the clients is conceptualised as buying services from the club, via the dancers (analogous to a sales person working on commission), it becomes slightly less realistic to suggest that in that

⁶⁵ *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184 (Cooke J)

⁶⁶ *Hall v Lorimer* [1994] IRLR 171, 175 (Nolan LJ)

⁶⁷ *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493, 496 (Henry LJ)

⁶⁸ Deakin and Morris (n 50) 164

⁶⁹ *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735 (CA)

⁷⁰ Einat Albin, ‘The Case of Quashie’ (2013) 42 ILJ 180, 188

⁷¹ *ibid* 188

situation a dancer as assuming most, if not all, of the economic risk herself.⁷² Therefore, in the wider context of our discussion, it seems that the economic reality test is a mixed bag. There is something to be said about looking to the levels of economic autonomy that a worker has, and how much enterprise risk they assume within a work relationship; indeed, it is definitely a worthwhile dynamic to consider when looking to produce a full account of the precise nature of the various dynamics at play in a work relationship.

However, two problems must be considered with the test. First, this test has limitations when applied to non-binary work situations. It may be applied straightforwardly when looking at a simple bilateral work relationship, or even an organisation with a rigid hierarchical organisational model, but when the relationship organisation begins to deviate from this model, and into more complex, multilateral situations, the economic risk test's utility is undermined, as was demonstrated by its application in *Quashie*. This is not least because the proper operation of the economic risk test depends on the accurate conceptualisation of the roles that different parties in a multilateral work relationship play: something that is of particular difficulty when the analytical lens through which English employment law operates assumes bilaterality (as will be discussed extensively in Chapter 2). Therefore, *stricto sensu* the dynamic that test is identifying is a useful one if used as a part of a broader picture of a work relationship, but the manner in which it has been applied by courts and tribunals betrays that the test only seems to operate adequately in relation those work relationships that already tend towards the paradigm model.

Secondly, it is perhaps the hallmark of various forms of atypical work that it acts to shift economic risk onto workers through non-paradigm work relationships and outsourcing. A formal assessment of economic risk may well suggest that these workers are somehow adopting enterprise risk per this test, but such an analysis avoids deeper questions about how voluntary that assumption of risk is, and how it may interact with other dynamics within a work relationship that would colour how determinative the fact of a worker adopting economic risk ought to be. Therefore, where there is a *genuine* redistribution of economic risk in a work relationship, but as a result of the intentional

⁷² *ibid* 187

structural decisions made by the employing entity *vis-à-vis* a precarious worker, the perverse outcome of the economic risk test would be that, formally, enterprise risk had somehow been adopted by the worker in that relationship, and as such, there could be no employment relationship between the parties. What this analysis therefore demonstrates is that, where the other aspects of the relationship tend towards the paradigm, then the distribution of economic risk may well offer some indication as to how the relationship between a worker and employing entity ought to be characterised. However, where the relationship does not fit that paradigm, the economic risk test offers little by way of assistance in classifying an atypical relationship where the economic risk has *intentionally* been shifted to the worker, but where other aspects of the relationship would suggest that the relationship still ought to attract protections through employee status.

An interesting supplemental point in relation to the economic reality test is where the right to substitute sits in relation to the question of the distribution of economic risk. Substitution clauses will be discussed in specific detail in Chapter 3, but it is worth addressing the *prima facie* attractiveness of the argument that a genuine right to substitute in a work relationship speaks to the economic reality of the work relationship between an employer and a worker. As this subsection has demonstrated, the essence of the economic reality test centres around assessing the distribution of economic risk between a worker and an employer. In that context, the ability for the worker to then engage a substitute to do that work is, in relation to the settled risk distribution within the work relationship, a red herring. A worker who otherwise has *not* shouldered the enterprise risk in a work relationship structure cannot then be taken to have assumed more risk *in relation to that work relationship* simply because they may have the right to engage a substitute to do that work: the question of risk distribution between an employing entity and a worker is independent from whether a worker can engage a substitute to do the work they have been engaged to do. Therefore, although more time will be spent considering the significance of substitution powers in Chapter 3, for now it is sufficient to say that it has limited relevance to assessing the economic reality *vis-à-vis* risk distribution in a work relationship.

Therefore, in overview, what these three tests indicate is that in asking whether a relationship of employer and employee exists, no test acts to provide a complete analytical account of a work relationship in answering this question. Rather, we have three tests that ask specific (and sometimes relevant) questions about the dynamics present in a work relationship. However, the problem is that each of these tests, while potentially of utility as part of a wider process of creating a matrix of relations between a worker and various employing entities that could be used to link dynamics to labour rights (as will be discussed in Chapter 5), often act in a determinative way for the employer-employee criterion, rather than as an element in a broader assessment. If control, integration, or economic risk is satisfied, then usually, a relationship of employer/employee will be established. Not only is this approach fairly blunt, and insensitive to the fact that a number of dynamics can colour the precise nature of a work relationship, but as this section has explored, the manner in which these tests have been applied has resulted in them acting to reinforce the idea that the employment relationship is viewed as co-extensive with the paradigm relationship; complex or multilateral work relationship structures often struggle to satisfy the terms of these criteria. Each of these tests could offer something to a more holistic assessment of the complete characterisation of a work relationship, but in their present forms, they offer far too narrow an analytical approach, while also being determinative of one of the criteria for employee status.

Finally, it is briefly worth saying a word about the lack of ‘incompatible terms’. Largely, these relate to a requirement of personal service. As such, an unfettered⁷³ substitution clause in a contract will be fatal to it being found to be a contract of employment.⁷⁴ However, pre-approved reasons for substitution will usually not be fatal to establishing employee status. For the purposes of employee status, there is a limited amount to say about this criterion. Much more attention will be paid to this in Chapter 3, when gig economy work is discussed; and in particular how substitution clauses have been utilised by employers to defeat employment status claims.

⁷³ *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367

⁷⁴ *MacFarlane v Glasgow City Council* [2001] IRLR 7

II.iii *UK Worker*

The UK worker status acts to define the personal scope of a much smaller bundle of rights in English law. If one can demonstrate employee status, then all the rights and protections available to a UK worker will also be available to an employee (in addition to those rights available exclusively to an employee).⁷⁵ However, if a worker is only able to demonstrate UK worker status, then they will be limited to accessing rights such as national minimum wage protections, working time protections, or whistleblower protections.⁷⁶ The UK worker status is conceived of as a sort of intermediate status, that Freedland suggests is aimed at covering “semi-dependent” workers that may not necessarily satisfy the criteria for employee status.⁷⁷ The status is defined in s 230(3)(b) of the ERA 1996 as:

“any other contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual ... ”⁷⁸

Though slightly more descriptive than the definition of employee status, it was still left to the courts to fully elaborate upon the specific criteria for UK worker status. Troublingly, in *Byrne Bros*, the court stated that the criteria used to determine worker status “will essentially involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services”, albeit with “the boundary pushed further in the putative worker’s favour”.⁷⁹ However, the *criteria* used to determine UK worker status are not precisely the same as those used for employee status; rather, they are: a) a contract between the worker and employer (including mutuality of obligation); b) an undertaking to do the work personally; and c) that the putative employer is not a client or customer of a profession or business of the worker.⁸⁰ Again, while we

⁷⁵ ERA 1996, s 230(3)(a)

⁷⁶ ‘Worker Status’ *gov.uk* <<https://www.gov.uk/employment-status/worker>> accessed 22 October 2016

⁷⁷ Freedland, *The Personal Employment Contract* (n 7) 36

⁷⁸ ERA 1996, s 230(3)(b)

⁷⁹ *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (CA) [17(5)] (Mr Recorder Underhill QC)

⁸⁰ *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 (CA) [50] (Mr Justice Langstaff)

do not need to spend too much time looking at the personal service criterion in this chapter, it is certainly worth considering whether a contract (with mutuality of obligation), and an assessment of whether the worker is running their own business are criteria that provide a meaningful diagnostic test for any characteristics of the work relationship that could relate to the aims of particular labour rights and protections that flow from a worker establishing UK Worker status.

II.iii.i *A Contract Between the Employer and Worker (with Mutuality of Obligation)*

As discussed earlier in this chapter, mutuality of obligation requires an ongoing obligation to offer and accept work between an employer and putative employee/UK worker respectively; either in the context of a single wage-work bargain, or to establish continuity for the purpose of a ‘global’ contract of employment by tying a number of discrete wage-work bargains together. While the courts have consistently stated that mutuality of obligation, when used to determine UK worker status, will have its boundary pushed “further in the putative worker’s favour”,⁸¹ the material impact of such an approach is negligible. Indeed, if a work relationship that demonstrates the sort of mutual obligations between (specifically) two parties required by the criterion, and this criterion is deemed to be an “irreducible minimum of obligation”,⁸² it is difficult to see how, as a criterion, there is really any space to make it more lenient for a worker attempting to prove its existence for the purpose of UK worker status; in fact it would be somewhat paradoxical to argue that there can be degrees of a minimum obligation. Davidov makes the further point that, in line with the *Nethermere* interpretation, the mutuality of obligation question exists in such a way that it can be answered with “clear yes or no answers”,⁸³ and therefore the likelihood seems to be that “the answer will not change whether the Tribunal examines the existence of a contract of employment or attempts to identify a ‘worker’”.⁸⁴ Thus, while the courts may suggest that the boundary for the mutuality requirement is pushed towards the worker to offer some leniency in its operation, it seems that the very essence of the criterion means it cannot really be modified in such a way. This

⁸¹ *Byrne Bros* (n 79) [17(5)] (Mr Recorder Underhill QC)

⁸² *Nethermere* (n 35) 623 (Stephenson LJ)

⁸³ Guy Davidov, ‘Who is a Worker?’ (2005) 34 ILJ 57, 60

⁸⁴ *ibid* 60

also means that, in line with analytical purpose of this section, the same issues that we found with the mutuality criterion *vis-à-vis* employee status are also found with UK worker status, given this criterion now governs access to a supposedly-intermediate status between independent contracting and employment. Therefore, not only does the mutuality of obligation requirement act as a blunt proxy for the existence of a long-term bilateral work relationship, but the fact that it almost certainly operates as restrictively when used for UK worker status as when it is applied to employee status means that the same concerns about the criterion only being satisfied by those with work relationships that tend towards the paradigm may largely apply to the same degree with UK worker status as well. Additionally, being the most restrictive criterion for establishing an umbrella UK worker relationship, this may necessarily also mean that the personal scope for UK worker status may collapse into employee status, by virtue of the common mutuality of obligation criterion.

However, there may be some positive news with respect to mutuality of obligation's role in UK worker status, in the form of the Supreme Court's decision in *Bates van Winkelhof*. *van Winkelhof* was a case concerned with an equity partner in a limited liability partnership, and whether she could be considered a UK worker for the purposes of whistleblowing legislation.⁸⁵ First, Lady Hale's leading judgement offered an interpretation of the worker concept that was "brought back into line with Parliament's original intentions" by placing far more reliance on the specific terms of the statutory definition, and rejecting a prescriptive approach that would add a "gloss" to the words of the statute.⁸⁶ Though Lady Hale was specifically rejecting the suggestion that worker status should require a criterion of *subordination* to be satisfied,⁸⁷ this statement may well have significant implications for other non-statutory criteria that have been applied to the worker concept. One could be, as Prassl argues, that the introduction of the requirement of mutuality of obligation in *Byrne Bros* may be vulnerable to challenge in the same way that the proposed criterion of subordination was.⁸⁸ Secondly, the overall interpretation of the UK worker concept

⁸⁵ ERA 1996, ss 43A-L

⁸⁶ *van Winkelhof* (n 1) [38]

⁸⁷ *ibid* [39]

⁸⁸ Jeremias Prassl, 'Members, Partners, Employees, Workers? Partnership Law and Employment Status revisited. *Clyde & Co LLP v Bates van Winkelhof* (2014) 43 ILJ 495, 503

seemed to be recast by Lady Hale. Moving away from the orthodox approach as proposed in *Byrne Bros* which, by placing reliance upon the same criteria for UK worker status as were used for employee status, cast the UK worker as a less-stringent species of employment, Lady Hale was clear that a UK worker was better viewed as “*self-employed people* who provide their services as part of a profession or business undertaking carried on by someone else”.⁸⁹ By repositioning the UK worker status as a form of self-employment, rather than a form of employment-with-relaxed-criteria, Lady Hale seems to be signalling that the status needs to operate in a much more inclusive way (such that ostensibly self-employed people are not automatically excluded from the scope of the status), and that the UK worker status should not be conceptualised as a lower-order of employment (and rather, the analytical starting point for the status should be self-employment). This recasting of UK worker status, which moves away from the old understanding of it being a species of employment, while progressive in the context of doctrinal English labour law, is not novel in the context of academic commentary. Freedland has, for decades, identified the necessity of a status for semi-dependent workers in employment law which captures the “residue of [the] category left behind by the contract of employment”.⁹⁰ Therefore, to see courts ostensibly acknowledge a shift towards inclusivity within UK worker status, while welcome, is far from timely.

Nevertheless, it is worth highlighting that Lady Hale’s *obiter* comments, while encouraging, do not actually do away with the mutuality criterion, or the orthodox position *vis-à-vis* the criteria used to determine worker status as found in *Byrne Bros*. However, her comments do hint at the possibility of the UK worker status being interpreted in a much more holistic fashion, which in turn potentially allows for an approach to assessing UK worker status in a way that could extend the protection of the status to a wider variety of work relationships by focusing upon the words of s 230(3)(b) ERA 1996, shorn of tests such as mutuality of obligation. At present, this is not the approach taken when assessing UK worker status, but it is nevertheless a potentially-fruitful avenue for courts to progress down in future interpretations of UK worker status. However, for

⁸⁹ *van Winkelhof* (n 1) [25] (emphasis added); i.e. the UK worker status is a kind of self-employment, rather than a kind of employment

⁹⁰ Freedland, *The Personal Employment Contract* (n 7) 30

now, the problems inherent in the mutuality of obligation criterion, as used for employee status, are similarly relevant in the context of UK worker status as well.

That being said, the influence of this holistic approach can be identified in employment tribunals' recent approaches to the mutuality of obligation question. Although the tribunals are bound to apply the mutuality test, their recent approach has been demonstrably sensitive to the factual context to which those tests have been applied. Notably, at first instance in the *Uber* decision, the Employment Tribunal took care to address the question with an eye on the way the work relationship was structured. Although this case will be dealt with extensively in Chapter 3 with respect to an analysis of work relationship structures used in the gig economy, the Tribunal's approach to mutuality is particularly relevant to the post-*van Winkelhof* holistic approach to work relationships. Rather than following a rigid analysis around mutuality of obligation, the Tribunal shaped its application of the mutuality test (though not explicitly) by reference to its analysis of the underlying facts in the case. The Tribunal found that there was a "worker' contract and a contract within each of the extended definitions" where a driver had the app switched on, was within the territory in which they were authorised to work, and was able and willing to accept assignments.⁹¹ Even though the Tribunal did not *explicitly* suggest that the relevant engagement, as they defined it, satisfied the mutuality of obligation test, it is patent that by defining the wage-work bargain as they did, that the conclusion that there was sufficient mutuality within it would naturally have to follow. This approach raises two points: first, practically speaking this is an example of the holistic approach to analysing work relationships hinted at in *van Winkelhof*, and in a sense, demonstrates an approach to analysing multilateral work relationships by casting the relevant factual elements of those work relationship *in a way that can satisfy* the necessary criteria to ensure worker protection. However, the second (and troubling) aspect to this approach is while it may achieve worker-protective results on a case-by-case basis, such an approach exposes the obvious shortcomings of criteria such as mutuality of obligation (and the effort a tribunal may have to go to in its construction and representation of a work relationship in order to demonstrate that mutuality exists in non-standard work relationships). This second point will be discussed in depth

⁹¹ *Aslam, Farrar and Others v Uber BV* [2016] Case No: 2202550/2015 & Others (ET) [86]

in Chapter 3, with a particular focus on how this analytical approach to work relationships is severely limited to situations where appropriate analogies or work relationship proxies exist for a tribunal rely upon as part of their analysis.

II.iii.ii *The Employer is Not a Client or Customer of a Profession or Business of the Worker*

The essence of this criterion is to determine whether the worker is working in pursuit of their own business undertaking; and a number of tests have been developed in order to assess this criterion. Though there is “no single key with which to unlock the words of the statute”,⁹² the courts have still developed a variety of approaches to determine whether a work relationship is one of genuine self-employment. However, in line with the position in *Byrne Bros*, a number of these tests have been carried over from assessing whether a relationship of employer and employee exists, albeit with the belief that the boundary is pushed in the putative worker’s favour. In *Byrne Bros* itself, a ‘control’ test was proposed, with a supposedly “lower passmark” than required for employee status.⁹³ Although this should in principle be slightly easier to satisfy than in the context of employee status, similar concerns about how a focus upon formalistic concepts of personal subordination will favour those that can demonstrate a work relationship that tends towards a paradigm relationship remain. Moreover, Mr Justice Underhill QC suggested that other factors, beyond control, such as the exclusivity of the arrangement and the level of economic risk undertaken by the worker would also be relevant in determining whether they could be considered to be in business on their own account.⁹⁴ Both questions of exclusivity and economic dependence continue to speak to a sort of relationship that is both long term, and with a single employing entity. Indeed, the example used by Mr Justice Underhill QC of contractors who “in practice work for long periods for a single employer” as being UK workers points quite directly to the elements of a

⁹² *Hospital Medical Group v Westwood* [2013] ICR 415 (CA) [19] (Maurice Kay LJ)

⁹³ *Byrne Bros* (n 79) [17(5)] (Mr Justice Underhill QC)

⁹⁴ *ibid*

paradigm work relationship we are already familiar with (i.e. bilateralism and *de facto* exclusivity).⁹⁵

Cotswold Developments proposed a test which focused upon whether a putative worker “actively markets his services as an independent person to the world in general”.⁹⁶ Alternatively, where a putative worker did *not* market their services to the public at large, the test proposed in *Redcats*, and approved in *HMG* was that of integration. Specifically, while an employee would be “integrated into the business, ... workers may be described as semi-detached”.⁹⁷ However, this determination was still subject to a formal “analysis of the contract itself”,⁹⁸ rather than a more factual analysis of the nature of the relationship between the parties. We have already discussed the problems with an integration test, and much the same can be said of a requirement of not marketing skills to the public: it assumes a level of loyalty and commitment to a single employer, much like the integration test does. It is a test that looks for a very particular set of characteristics in a work relationship that *could* be relevant to a wider analysis of that work relationship, but when applied as a potentially-determinative test for assessing whether a worker is in business on their own account, reinforces the importance of a work relationship having the characteristics of a paradigm work relationship in determining whether or not that work relationship satisfies this criterion for UK worker status.

What this collection of tests demonstrates is that translating the criteria used to determine whether an employer/employee relationship exists to UK worker status also translates all the analytical issues that these tests created in the context of employee status, and as discussed above. These tests, which largely focus upon formal questions of personal subordination under, or economic dependence upon a single employer, reiterate that they will likely only be satisfied in situations which tend to the paradigm work relationship. Moreover, as with employee status, while these tests *could* offer a valuable resource if one sought to painting a full picture of all the dynamics at play in a work relationship, the manner in which they are deployed here means that they seek to identify

⁹⁵ *ibid* [18]

⁹⁶ *Cotswolds Developments* (n 80) [53] (Langstaff J)

⁹⁷ *James v Redcats (Brands) Ltd* [2007] ICR 1006 (CA) [48]

⁹⁸ *ibid*

and valorise the very specific dynamics that were central to determining a relationship of employer/employee, but in the context of whether a UK worker is in business on their own account.

II.iv *The ‘Worker’ in EU Law*

II.iv.i *An Autonomous EU Law Concept?*

The CJEU has generally taken a minimally interventionist approach to defining the ‘worker’ concept that is found in EU legislation. In the context of social law, the *Danmols* approach has deferred to national definitions of ‘worker’ to determine the personal scope of social legislation, which in turn implies that in the social law context, the CJEU has generally been unwilling to propose an autonomous EU concept of ‘worker’. Nonetheless, this approach has, to some degree, been mitigated by *dicta* in cases such as *O’Brien*, where the CJEU has been willing to suggest that when defining the personal scope of legislation nationally, member states must not do so in a way that would “jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness”⁹⁹ through the “arbitrary exclusion of that category of persons from the protection offered”.¹⁰⁰

However, one area that *has* seen the development of an autonomous concept of ‘worker’ is EU law in relation to free movement. In this area of EU law, the CJEU has historically been more comfortable in developing an autonomous concept of the ‘worker’ for the purpose of determining the personal scope of EU free movement legislation. In *Lawrie-Blum*, the CJEU held that the employment relationship *vis-à-vis* free movement law could be defined by the essential features “that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”.¹⁰¹ As such, for the purposes of free

⁹⁹ Case C-393/10 *O’Brien* [2012] ICR 955 [34]

¹⁰⁰ *ibid* [51]

¹⁰¹ Case C-66/85 *Lawrie-Blum v Land Baden Württemberg* [1987] ICR 483, [17]

movement, if a putative EU worker could exhibit ‘subordination’ and remuneration, then they would fall within the personal scope of EU free movement law.

However, contrary to the *Danmols* approach, this definition has found itself operationalised in relation to certain pieces of social legislation. Most notably, the free movement definition was used in *Allonby* to assess whether a teacher was within the scope of equal pay legislation.¹⁰² Therein, the CJEU restated the *Lawrie-Blum* definition of the worker,¹⁰³ and then further added that the “formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(1) EC if his independence is merely notional”.¹⁰⁴ This free movement definition of worker has also been utilised in other areas of social legislation, such as in *Union Syndicale*, where the CJEU rejected deference to a national worker definition, and relied upon the free movement ‘worker’ definition to determine the personal scope of the Working Time Directive.¹⁰⁵ While there is much to be said about how this definition of worker has been interpreted, such that it extends protection to “under some conditions, job-seekers, on-call-workers, remunerated trainees, and workers on workfare-like schemes”,¹⁰⁶ as well protecting those with zero hours contracts-like contracts when an equally wide interpretation of ‘worker’ was used to interpret Directive 76/207,¹⁰⁷ one of the most notable limitations to the definition is that it remains premised upon “the entrenchment of the binary divide between employment and self-employment”.¹⁰⁸ This is problematic, as not only does the criterion operate in a way that requires a categorisation of either employment or self-employment, but this categorisation occurs on the basis of (often) formalistic conceptions of personal subordination. Therefore, the fact that access to certain aspects of EU law essentially turns on the

¹⁰² *Allonby* (n 4)

¹⁰³ *ibid* [67]

¹⁰⁴ *ibid* [71]

¹⁰⁵ Case C-428/09 *Union Syndicale Solidaires Isère v Premier Ministre and Others* [2011] 1 CMLR 38 [27] – [28]. More recently, see the ECJ’s reasoned order in C-692/19 *B v Yodel Delivery Network Ltd* [2020] 4 WLUK 472, where the court affirmed its previous decisions on the autonomous worker definition, albeit repeating its prior decision in C-413/33 *FNV Kunsten* [2015] 4 CMLR 1, which held that a domestic classification for a work relationship is irrelevant to the assessment of the autonomous concept in EU law. The court then concluded that the did not appear to be a relationship of subordination between the Yodel delivery worker and the employer.

¹⁰⁶ Freedland and Kountouris (n 16) 390

¹⁰⁷ Case C-313/02 *Wippel v Peek & Coppenburg GmbH & Co KG* [2005] IRLR 211

¹⁰⁸ Mark Freedland and Nicola Kountouris, ‘Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*’ (2012) 41 ILJ 56, 60; Nicola Kountouris, ‘The Concept of the ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope (2018) 47 ILJ 192, 197

existence of the bilateral subordination of a putative worker to an employer suggests that the analytical approach taken when determining the EU ‘worker’ question is remarkably limited in relation to the elements of a work relationship that it will consider. It is suggested that there are a vast number of factors *beyond* personal subordination that may well be relevant to determining whether a worker ought to attract the protection of particular elements of EU law, and to reduce that inquiry down simply to whether a relationship exhibits personal subordination is a remarkably two-dimensional approach to assessing whether a worker is an EU worker; and this has an exclusionary effect on atypical work relationships that would benefit from the protection of EU law, but may not exhibit the necessary subordination to fall within the scope of EU worker status.

II.iv.ii *The EU Worker in English Law*

The main incidence of the EU worker concept appearing in English law is in the context of defining the personal scope of English discrimination law, which runs parallel to EU non-discrimination directives. As shall be discussed in this section, the incorrect reliance on the EU free movement ‘worker’ definition in the context of English discrimination law has resulted in the courts applying a ‘subordination’ criterion to workers seeking protection from anti-discrimination law. This section will also discuss the troubling introduction of the mutuality of obligation in the assessment of the personal scope of equality law.

In *Jivraj*, the personal scope of r 2(3) of the Employment Equality (Religion or Belief) Regulations 2003, which implemented Directive 2000/78 was in issue.¹⁰⁹ The personal scope of the Regulations was set out as “employment under a contract of service or of apprenticeship or a contract personally to do any work”¹¹⁰ (an identical definition of personal scope is found in the Equality Act (EqA) 2010).¹¹¹ Though the third limb of this definition seems to suggest that mere personal engagement to do work (i.e. independent contractors) would be covered by the scope of

¹⁰⁹ *Jivraj* (n 4)

¹¹⁰ Employment Equality (Religion or Belief) Regulations 2003, r 2(3)

¹¹¹ Equality Act 2010, s 83(2)(a)

equality legislation, this limb as interpreted quite differently by the Supreme Court. Relying heavily on the *Allonby* decision in the CJEU,¹¹² Lord Clarke attached significance to the words “employment under”, which were held to suggest a distinction between those who were independent providers of services, and “those who worked under the direction of another person”,¹¹³ and as such, were in “a relationship of subordination”.¹¹⁴ There has been very detailed and compelling criticism of this decision,¹¹⁵ but for present purposes, there are specific concerns that the ‘subordination’ requirement introduced in *Jivraj* looks remarkably similar to the ‘control’ test used to determine employee status. If the two are read as equivalent tests, it could come “dangerously close to eliding the concept of ‘employment’ under equality legislation ... with the more limited ‘employee’ category”.¹¹⁶ This likely means that the very analytical problems we have seen with the control test in earlier in this chapter have now also been imported into the EU worker status when applied to English equality law: the focus on formal personal subordination would act to exclude a significant number of work relationships which not only *ought* to benefit from anti-discrimination protections, but per the language of the underlying Directives, fall within the scope of those protections anyway. Therefore, by importing the subordination criterion into the personal scope of domestic equality legislation, the Supreme Court acted to dramatically and inappropriately narrow the kinds of work relationships that will benefit from those protections.

As such, importing a ‘subordination’ requirement not only reinforces a traditional binary distinction between the subordinate employed and the autonomous self-employed *vis-à-vis* the personal scope of domestic discrimination law, but it also sets the threshold for EU worker status in English law much higher than even the EU free movement concept does by introducing a criterion that actually looks similar to the ‘control’ test for employee and UK worker status. From an analytical standpoint, it further limits factors that will be considered when determining access to EU worker status in English law to a particularly narrow set of dynamics in the work relationship: and as already discussed, dynamics which are much more likely to be present in

¹¹² *Jivraj* (n 4) [40] (Lord Clarke)

¹¹³ *ibid* [34]

¹¹⁴ *ibid* [40]

¹¹⁵ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 16) 390

¹¹⁶ Deakin and Morris (n 50) 177

paradigm work relationships than in atypical ones. Moreover, from a practical perspective, such an approach limits the personal scope of equality legislation in a way that excludes independent contractors, which is likely incompatible with the definition of the personal scope in the Directives that run parallel to English equality law: the former of which explicitly extend their personal scopes to independent contractors.¹¹⁷ For that reason, it is also questionable as to whether any reliance can be placed on *Allonby* (whose definition of the ‘worker’ for the purposes of free movement legislation patently maintains an employment/self-employment distinction) as the Supreme Court did when interpreting equality Directives and legislation that *do not* maintain such a textual binary distinction, and clearly extend their personal scopes to independent contractors.

Curiously, commentators such as McCrudden seem supportive of the approach in *Jivraj*, and its introduction of the subordination test. By characterising equality or discrimination law as a subset of ‘employment law’ rather than ‘discrimination law’, it is argued that it is normatively justifiable to restrict access to those work relationships through something like a subordination criterion,¹¹⁸ as ‘employment law’ is premised on subordinate relationships. However, such an approach exhibits not only a troublingly narrow practical approach to discrimination protections in work relationships, for the reasons discussed above, but also fails to provide explanation for its normative claim that discrimination protections in the employment sphere must necessarily be restricted to those work relationships which are subordinate. As has been powerfully argued by Freedland and Kountouris in response to McCrudden, the personal scope of discrimination protections is *not* premised upon a narrow ‘subordination’ approach (especially when one considers the language in the underlying Directives),¹¹⁹ and additionally, there is no convincing normative justification to embrace the strict narrowing of the personal scope of discrimination law proposed by McCrudden.

¹¹⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, Art 3(1); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/1, Art 3(1)(a). Both explicitly do not exclude the self-employed and independent contractors.

¹¹⁸ Christopher McCrudden, ‘Two Views of Subordination: The Personal Scope of Employment Discrimination Law’ (2012) 41 ILJ 30

¹¹⁹ Freedland and Countouris, ‘Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*’ (n 108) 65

However, the problems with the EU worker definition in English law are not only limited to this subordination issue. In *Windle*, the Court of Appeal stated that the existence of mutuality of obligation is a *relevant consideration* when assessing the content of the subordination criterion introduced in *Jivraj*. Interpreting s 83(2) EqA 2010, which defines the personal scope identically to the definition assessed in *Jivraj*, Underhill LJ suggested that when trying to identify ‘subordination’ in the work relationship, the presence (or absence) mutuality of obligation could “influence, or shed light on” that inquiry.¹²⁰ While it is difficult to see how, doctrinally, mutuality of obligation has *any* relevance to determining questions of subordination when the former looks at questions of continuity rather than a subordinate position within a work relationship,¹²¹ its inclusion in the subordination inquiry introduces a problematic analytical limit upon the factors that the court will look at when determining whether a person falls within the personal scope of equality law.

Therefore, other than demonstrating *Jivraj* ‘subordination’, a claimant would now potentially also have to demonstrate that mutuality of obligation was present in a work relationship to establish that it was ‘subordinate’; or rather, the absence of it could be pointed to as evidence that the claimant’s relationship with the employer is not a subordinate one. Not only does this add further hurdles for those attempting to access discrimination protections (and moves the English interpretation of the personal scope of equality law *even further* from the scope as set out in the EU equality Directives that run parallel to it), but it also adds a further analytical constraint to assessing the nature of the work relationship for equality law. Rather than being able to look at the matrix of relations around a worker to assess whether they fall within the scope of equality legislation, a much narrower inquiry based on subordination and mutuality is made instead. The *Windle* decision will encourage courts and tribunals to look for these very particular set of dynamics and contractual obligations between two parties. This will not only further narrow the kinds of (paradigm) work relationships that will fall within the scope of equality legislation, but for reasons already discussed in this chapter, subordination and mutuality tests identify specific

¹²⁰ *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, [2016] ICR 721 [23] (Underhill LJ)

¹²¹ Hitesh Dhorajiwala, ‘*Windle v Secretary of State for Justice: The Expanding Frontiers of Mutuality of Obligation*’ (2017) 46 ILJ 268

characteristics in work relationships, but these characteristics bear limited relevance to the question of whether a relationship *ought* to attract the protection of equality law..

Therefore, it is unfortunately clear that when looking at the use of the EU worker concept in the context of English equality law, the courts have metamorphosed the subordination requirement, derived from an EU free movement definition of ‘worker’, into a criterion that looks similar to the control test used for employee and UK worker status, and additionally, have indicated that the mutuality criterion could be relevant to assessing whether a relationship of subordination exists, which even further narrows English law’s approach to the EU worker concept.

III *Conceptual Fragmentation of the UK Worker Status?*

So far, the UK worker status, as found in s 230(3)(b) ERA 1996 has been presented as a unitary concept; in that it is applied in the same way, regardless of the specific regulatory context in which it is found, be that minimum wage or working time. However, there have been some indications in case law and legislation that the UK worker concept can be applied in a manner which is sensitive to the regulatory context in which the definition has been deployed. This section of the chapter will discuss four particular instances where this fragmentation has occurred. First, the interpretation from *van Winkelhof*, as already discussed briefly earlier in this chapter, will be further explored, and particularly how it hints at an internal tension identifiable in UK worker status. Secondly, the decision in *Day v HEE*, and its purposive application of s 43K ERA 1996 (which constitutes a statutory expansion of UK worker status for work offered through an intermediary in the context of protected disclosures which lead a worker suffering detriment) will be analysed.¹²² Thirdly, the approach taken by the Central Arbitration Committee (CAC) in the IWGB’s trade union recognition claim will be considered, and how the CAC’s approach hints at the possibility of a fragmented

¹²² ERA 1996, s 43K

approach to the interpretation of the UK worker status in the context of collective labour law: especially when the status operates against the backdrop of the ECHR, and requires compatibility with Art 11 and the ECtHR's jurisprudence. Finally, this section will look to the Court of Appeal's decision in *Windle*. Though this decision is principally concerned with the interpretation of s 82(3) EqA 2010, and thus the EU worker status, this questionable decision does, indirectly, offer some further insight into the issue of a fragmenting UK worker status through its elision of EU worker status with UK worker status.

III.i *van Winkelhof and the Internal Tension in UK Worker Status*

As has already been discussed in Section II.iii.i, the decision in *van Winkelhof* rejected the introduction of a 'subordination' criterion when considering UK worker status.¹²³ However, in the process of arriving at this conclusion, Lady Hale set out the framework of work relationship statuses in English law. In particular, when considering the relative conceptual position of the s 230(3)(b) worker in this framework, Lady Hale made a notable observation:

"... employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are *self-employed* but do not fall within the second class."¹²⁴

As briefly mentioned in Section II.iii.i, setting out the s 230(3)(b) worker status as a form of self-employed person marks a notable shift from the orthodox exposition of what the UK worker status was. For example, if we look to (as he then was) Mr Justice Underhill QC's explanation of what the UK worker status was, it seems to cast the status in a noticeably different light:

¹²³ *van Winkelhof* (n 1) [39] (Lady Hale)

¹²⁴ *ibid* [31] (Lady Hale) (emphasis added)

“It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* ... The reason why employees are thought to need such protection is that they are in a subordinate and dependent position *vis-à-vis* their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position.”¹²⁵

Mr Justice Underhill QC was quite plain in his understanding of UK worker status’ position: it was essentially a species of employee status, and certainly not a kind of self-employment. Yet this interpretation is clearly at odds with the approach proposed by Lady Hale in *van Winkelhof*, which sees the UK worker status as a species of self-employment, and not employment.

While it may seem to be a specious interpretive distinction to draw, it is proposed that this difference in framing is important for two reasons: a) the conceptual threshold to access UK worker status could be much lower if we adopt Lady Hale’s interpretation in *van Winkelhof*; and b) it draws out an emerging tension with the UK worker status, between a unitary orthodox interpretive approach, and a more context-sensitive approach that adapts to the regulatory context in which the UK worker status is deployed.

Dealing with the first sub-point, this conscious repositioning by Lady Hale gives the status a notably different normative flavour. By approaching the status from the position that it was a status different only in degree and not in kind from employment, as the court did in *Byrne Bros*,¹²⁶ the court did the necessary groundwork to justify transplanting the criteria for employee status into the s 230(3)(b) status (as discussed in Section II.iii); with the predictable detrimental impact this had upon the operational threshold for accessing the status. Comparatively, if we take the approach

¹²⁵ *Byrne Bros* (n 79) [17(4)] (Mr Justice Underhill QC)

¹²⁶ *ibid*

articulated by Lady Hale in *van Winkelhof*, and approach the UK worker status as an emanation of self-employment, then that very same normative justification used in *Byrne Bros* falls away. Indeed, as Lady Hale suggested, it is imperative that any interpretation of s 230(3)(b) must plainly “[apply] the words of the statute to the facts of the individual case”.¹²⁷ As discussed earlier in this chapter, Prassl has argued that this *dictum* could be relied upon to shear off the mutuality of obligation requirement that has traditionally accompanied s 230(3)(b) worker status,¹²⁸ and it is possible that this interpretation could have wider, indirect implications as well. If *van Winkelhof* encourages us to simply apply the words of the statute, then in principle, the statutory wording of s 230(3)(b), applied as a kind of self-employment, could see a much lower threshold being set for UK worker status if that status is purposively applied in a manner that is sensitive to the UK worker status’ restated position as a species of self-employment.

Moving to the second sub-point, this alternative approach in *van Winkelhof* hints at a potential tension internal to the UK worker status, between a unitary interpretive approach on the one hand, and an approach sensitive to the regulatory context on the other. *van Winkelhof* concerned the work relationship status of an equity partner in a Limited Liability Partnership (LLP) who claimed that she suffered detriment as a product of making protected disclosures about suspected money laundering.¹²⁹ Factually, Ms Bates-van Winkelhof’s work relationship was far removed from those work relationships traditionally litigated upon in the context of UK worker status (be they causal waiters,¹³⁰ or tour guides¹³¹); and certainly did not fit the paradigm conception of ‘employment-in-all-material-senses’.¹³² However, in order for the claimant to successfully fall within the personal scope of s 47B ERA 1996 (*viz.* not being subject to detriment for making protected disclosures),¹³³ Ms Bates-van Winkelhof’s work relationship would have to be one of a UK worker. Therefore, the interpretive shift in *van Winkelhof* not only heralds a potentially more inclusive approach to s 230(3)(b), but could also be explained as a foray into a purposive application of s 230(3)(b),

¹²⁷ *van Winkelhof* (n 1) [39] (Lady Hale)

¹²⁸ Prassl, ‘Members, Partners, Employees, Workers?’ (n 88)

¹²⁹ *van Winkelhof* (n 1) [5] – [9]

¹³⁰ *Byrne Bros* (n 79)

¹³¹ *Carmichael* (n 26)

¹³² *Byrne Bros* (n 79) [17(4)] (Mr Justice Underhill QC)

¹³³ ERA 1996, s 47B

which takes account of the regulatory context in determining whether a work relationship will fall within the scope of UK worker status. Indeed, it seems patently desirable from a policy perspective that whistleblowing protection extends not only to those in plainly-dependent work relationships with employing entities, but also to professional workers and indeed equity partners in law firms. These professional workers may be in a substantively less-dependent work relationship, which deviates from the sort of paradigm work relationship that satisfies the orthodox s 230(3)(b) criteria, but are nevertheless in a *form* of dependent work relationship with an employing entity, and as such ought to be covered by whistleblower protections.

As such, this pivot towards a *prima facie* more inclusive approach to the UK worker status could also indicate a further, more significant shift in the interpretation and application of UK worker status. The courts could potentially be looking to apply the status in a manner which is sensitive to the regulatory aims of the statutory provisions that the status determines the personal scope for. As such, by suggesting that future courts and tribunals aim to apply the words of the statute to “the facts of the individual case”,¹³⁴ this invites not only fact sensitivity, but *ispo facto* contextual sensitivity to the regulatory context as well. While this may seem like a speculative point to make on the basis of the *dicta* in *van Winkelhof*, additional examples of a fragmented approach to UK worker status which will be discussed in this section seem to reinforce the proposition that the status is potentially being applied in a manner which changes depending upon the regulatory environment in which it is found.

III.ii *s 43K ERA 1996 and Day v HEE*

The clearest example of this fragmented approach to UK worker status is the statutory extension of the status, found in s 43K ERA 1996, and its subsequent interpretation in *Day v HEE*. s 43K operates to determine the personal scope of Part IVA of the ERA 1996, which deals with defining

¹³⁴ *van Winkelhof* (n 1) [39] (Lady Hale)

‘protected disclosures’.¹³⁵ In this regulatory context, the UK worker definition is given an extended definition. Specifically:

- “(1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who—
- (a) works or worked for a person in circumstances in which—
 - (i) he is or was introduced or supplied to do that work by a third person, and
 - (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person *or by both of them ...*
- (2) For the purposes of this Part “employer ” includes—
- (a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged”¹³⁶

First the statutory extension found in s 43K makes it clear that it is concerned with tripartite work relationships. This seems to be a notable departure from the orthodox approach taken with UK worker status which, as discussed, assumes a unitary employing entity that would be responsible for any employment rights that vested in a worker. s 43K(1)(a) states that a ‘worker’ is a person who works in a situation where they are supplied to a third person for whom they do work, and the terms of that engagement are substantially determined by either the third party, the person introducing the worker to that third party, *or both*. In essence, a traditional tripartite work relationship where work is supplied via an intermediary. This is also reflected in the content of

¹³⁵ ERA 1996, Part IVA

¹³⁶ ERA 1996, s 43K (emphasis added)

s 43K(2) which explicitly states that the ‘employer’ for the purposes of this extended definition of the worker includes the entity that substantially determines the terms of the worker’s engagement.

This definition was discussed by the Court of Appeal in *Day v Health Education England (HEE)*. In this case, Dr Day, a medical doctor, was engaged in a tripartite relationship whereby HEE would allocate him, “for relatively short fixed periods” to an NHS Trust; in this case, Lewisham and Greenwich NHS Trust.¹³⁷ During each engagement, Dr Day would enter into a contract of employment with the relevant NHS Trust, but the placements would be managed by HEE.¹³⁸ The active question for the Court of Appeal was whether, while being engaged as an employee of the relevant NHS Trust, Dr Day’s relationship with HEE could *simultaneously* be considered to be that of a s 43K worker and employer.¹³⁹ In an encouragingly purposive approach, Elias LJ held that words must be read into s 43K(1) in order to “maximise ... protection whilst remaining true to the language of the statute”,¹⁴⁰ given that a literal application of s 43K(1) would have had the perverse effect of preventing a worker falling into the extended definition of worker provided by s 43K if they had a s 230(3)(b) worker relationship with *any* other entity.¹⁴¹ As such, the Court of Appeal settled on the following interpretation of s 43K(1), with the court adding emphasis to the proposed inserted words:

““worker” includes an individual who *as against a given respondent* is not a worker as defined by section 230(3).”¹⁴²

This insertion of words into the statutory wording is significant as it creates a situation whereby, within a tripartite relationship, a worker could demonstrate a traditional worker or employee relationship with one employing entity, while simultaneously being able to establish a s 43K worker relationship with another respondent (provided an employment or UK worker relationship does not already exist with that other respondent). The court then went on to state that *for the purpose*

¹³⁷ *Day v Health Education England* [2017] EWCA Civ 329 [5] (Elias LJ)

¹³⁸ *ibid* [6] (Elias LJ)

¹³⁹ *ibid* [12] (Elias LJ)

¹⁴⁰ *ibid* [18] (Elias LJ)

¹⁴¹ *ibid* [16] – [17] (Elias LJ)

¹⁴² *ibid* [17] (Elias LJ)

of this regulatory context, a worker could additionally be jointly employed by both the introducer and the end-user, provided that the criteria for determining the terms of engagement set out in ss 43K(1) and 43K(2) were factually satisfied.

Analytically, the *Day v HEE* decision is significant as it directly accepts that there may be context-sensitive interpretations of the UK worker status. When considering the reasons why the proposed interpretation of s 43K(1) above should be accepted, Elias LJ stated that in the context of work through an intermediary, the presence of a worker or employment relationship with the end-user would be of no help when the detriment suffered as a product of making protected disclosures originated from the intermediary or introducing party.¹⁴³ As such, the court accepted that in this *specific* regulatory context, there was a clear justification extend in widening the scope of UK worker status as it did, given the purpose of whistleblowing protections in the context of tripartite work relationships.

While this decision does come with the notable caveat that it is primarily concerned with protecting workers against detriment suffered for making protected disclosures, and cannot be viewed as a general interpretation of s 230(3)(b) worker status, it does demonstrate a piecemeal fragmentation of the UK worker status more generally. Not only did a statutory amendment expand the meaning of ‘worker’ (albeit in a specific context), but the court’s subsequent interpretation then purposively glossed the specific words of the statute to give that statutory amendment a more worker-protective interpretation compared to a literal application of the specific statutory wording. Therefore, not only is the decision of the court to accept joint employer liability in the context of a worker making protected disclosures and suffering detriment a ground-breaking departure from the orthodox approach discussed in Sections I and II (which vested employee or UK worker status in those worker with a paradigm work relationship with a unitary employer), but it also represents a departure from a unitary *conception* of what UK worker status is. Rather than monolithic status with a single meaning applied to all regulatory contexts, s 43K and *Day* explicitly offers clear substantive evidence that UK worker status may have a spectrum of meanings that depend upon

¹⁴³ *ibid* [19] (Elias LJ)

the regulatory context in which the status is deployed when determining the personal scope of workplace rights.

III.iii *A Different Approach in s 296 TULRCA 1992?*

Another possible statutory variation from the s 230(3)(b) definition is the one found in s 296 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992. At first glance, the worker definition at s 296(1)(b) seems similar to that found in s 230(3)(b), but upon closer inspection, there are some subtle differences in wording. s 230(3)(b), a definition we have extensively dealt with in this chapter, requires a worker to be someone who works under:

“any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual ...”¹⁴⁴

Comparatively, the shorter definition found at s 296(1)(b) TULRCA 1992 simply states that a worker is anyone who works:

“under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his ...”¹⁴⁵

Certainly, in a substantive sense, one has to search for the differences between these two definitions. The main difference seems to be that when dealing with the third element of traditional

¹⁴⁴ ERA 1996, s 230(3)(b)

¹⁴⁵ Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992, s 296(1)(b)

worker status (*viz.* whether the putative worker is in business on their own account), the s 296(1)(b) definition simply requires that the putative employer is not a professional client of the worker. However, a question then arises as to whether this difference is a substantial one, or simply a matter of anomalous drafting with a unified meaning between the two definitions.

The s 296(1)(b) definition simply speaks of work being provided to a ‘professional client’, whereas there are more qualifications in s 230(3)(b): a worker is someone who does *not* provide work to a client *or customer*, in the context of *either* a profession or business undertaking. So *prima facie*, s 230(3)(b) extends to situations where a putative worker would work personally for a customer, and additionally, where that putative worker provides that work in the context of a business undertaking rather than a profession.

In the absence of specific guidance on this matter from Parliament on whether s 296 and s 230(3)(b) ought to have the same substantive meaning, the question has been considered by the courts. An assumption of harmonised meaning was adopted most recently by the Central Arbitration Committee (‘CAC’) in the *Deliveroo* decision. The case concerned an application for trade union recognition by the Independent Workers’ Union of Great Britain (IWGB), who wished to be recognised for the purposes of collective bargaining.¹⁴⁶ One crucial question in the proceedings (and the one that the recognition claim failed upon) was whether the workers that the IWGB wished to represent were workers per the s 296 TULRCA 1996 definition: the status they had to demonstrate they had in order to access the relevant collective bargaining rights.¹⁴⁷ The CAC provided no definitive answer to whether there was in fact a substantive difference between this definition of ‘worker’ and s 230(3)(b) worker status, specifically noting that the “... parties were unable to assist with an explanation as to why the definitions were different and why the legislators had chosen not to follow the TULR(C)A definition when drafting the 1996 Employment Rights Act (ERA)”.¹⁴⁸ The CAC proceeded by applying the statutory wording found in s 296 TULRCA 1992, but noted that it “would be odd for there to be a misalignment given the companion nature of the

¹⁴⁶ *Independent Workers’ Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, Case Number TUR1/985(2016), 14 November 2017

¹⁴⁷ *ibid* [88]

¹⁴⁸ *ibid* [90]

two statutes”,¹⁴⁹ and as such, principles of “general application” found in s 230(3)(b) case law *vis-à-vis* the right to substitution was accepted as relevant to s 296 TULRCA 1992 (and indeed, as will be discussed in detail in Chapter 3, this question of substitution was fatal to the Deliveroo rider’s attempt to establish that they were s 296 TULRCA 1996 workers).¹⁵⁰

The CAC’s approach is perhaps not surprising, and it is clear that there is *sufficient* similarity between the wording in s 296 TULRCA 1992 and s 230(3)(b) ERA 1996 so as to justify the application of s 230(3)(b) case law in a generalist manner; and to the CAC’s credit, it was careful not to elide the definitions. However, in finding that the Deliveroo riders were not workers, it essentially implied, by avoiding any discussion of either individual worker definition, that the two were substantively the same: that there was no ‘misalignment’.

However, there was one factor that the CAC briefly touched upon, which may provide some direction in determining whether the s 296 TULRCA 1992 worker definition is in any way different to the s 230(3)(b) ERA 1996. The CAC quickly dismissed the factual relevance of s 3 of the Human Rights Act (HRA) 1998, and compatible interpretation of s 296 worker status with Article 11 of the European Convention on Human Rights (ECHR).¹⁵¹ However, it suggested that such an argument is *entirely* relevant to understanding the proper scope of s 296 worker status. To begin, art 11 sets out that the right to freedom of assembly and association extends to “everyone”, albeit with the usual proportionality limitation that qualifies most ECHR rights.¹⁵² The precise content of art 11 with respect to trade union rights and collective bargaining was set out in the *Demir* decision in the European Court of Human Rights (ECtHR). In this ground-breaking decision, the ECtHR stated that the content of Art 11 ECHR was determined, *inter alia*, by the jurisprudence of the International Labour Organisation (ILO) and the European Social Charter (ESC).¹⁵³ In particular, the ECtHR opened the door to reliance upon reports and decisions from both the ILO Committee

¹⁴⁹ *ibid* [91]

¹⁵⁰ *ibid*

¹⁵¹ *ibid* [104]

¹⁵² European Convention on Human Rights, Art 11

¹⁵³ *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) [147] – [160]

of Experts (CEACR) and the ILO Committee on Freedom of Association (CFA), which help to elaborate upon the specific text of the treaties.¹⁵⁴

For our purposes, one of the more relevant ILO treaty provisions is Convention 87 (C87) which deals with freedom of association and the right to organise. art 2 of C87 states that workers and employers, “*without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”.¹⁵⁵ A textual interpretation of art 2 C87 would suggest that the personal scope envisaged by the provision is a broad one, especially as it seems to state that it covers workers “without distinction whatsoever”. This interpretation is confirmed by the CFA in its *Digest of Decisions*, which discusses the scope of art 2 in the context of self-employed workers. Specifically:

“The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.”¹⁵⁶

The CFA, when interpreting the substantive content of art 2 C87, is quite clear about the expansive application of the scope of the right to freedom of association and to organise, to the extent that it is *not* dependent on the existence of any employment relationship. A similar position is adopted in the ILO CEACR’s 2012 *General Survey*, which questioned the possible exclusion of those workers in “disguised labour relationship[s] (in the form of service contracts ...)” from the scope of the rights granted by C87; and the CEACR warns against C87 rights being circumvented by deploying “employment relationships disguised as civil contracts for the provision of services”.¹⁵⁷ Indeed, it

¹⁵⁴ John Hendy QC and KD Ewing, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 ILJ 1, 8

¹⁵⁵ ILO Convention 87, Art 3 (emphasis added)

¹⁵⁶ ILO CFA, *Digest of Cases* (ILO 2006, 5th edn) [254]

¹⁵⁷ ILO CEACR, *General Survey: Giving globalization a human face* (ILO 2012) [58] and [77]

seems the only requirement to access C87 is that one is a “worker”¹⁵⁸ in the broadest sense; the “sole exception” to the definition being the police and armed forces.¹⁵⁹

This expansive interpretation of the personal scope of the right to organise and collectively bargain is further confirmed by the CEACR’s Observations relating to Convention 98 (C98) on the right to organise and collective bargaining. C98 also defines its scope simply by reference to “workers”,¹⁶⁰ and echoing the approach taken *vis-à-vis* C87, ‘worker’ is applied in an expansive manner. To begin, when interpreting C98 in its 2012 *General Survey*, the CEACR states that the “right to collective bargaining should also cover organizations representing ... [*inter alia*] self-employed and temporary workers”;¹⁶¹ there is a distinctly universal aim to the rights provided in the Convention. Additionally, in its 2015 Observation, which dealt with Ireland’s limitation of collective bargaining for self-employed workers, as a result of a decision of the Competition Authority to declare unlawful a collective bargain between Actors Equity/SITP and the Institute of Advertising Practitioners, the CEACR was quite clear “that the right to collective bargaining should also cover organizations representing the self-employed” (additionally making reference to the aforementioned comments in the 2012 *General Survey*).¹⁶²

Similar guidance can be found in the jurisprudence surrounding art 6 ESC. art 6 relates to the right to bargain collectively, including the right to engage in collective action.¹⁶³ In a manner similar to the ILO, the Digest of the case law of the European Committee of Social Rights (ECSR) has directly addressed the issue of work relationship status and how it constrains access to the rights contained in art 6 ESC. The ECSR noted that given the proliferation of work relationships which are intentionally structured “with the express aim of avoiding contracts of employment”¹⁶⁴ (i.e. domestic definitions of dependent work), it is not sufficient to rely on distinctions between workers and the self-employed when determining the personal scope of collective bargaining rights. Recent

¹⁵⁸ *ibid*

¹⁵⁹ *ibid*

¹⁶⁰ ILO Convention 98, Art 1(1)

¹⁶¹ ILO CEACR (n 156) [209]

¹⁶² ILO CEACR, ‘Observation (CEACR) - adopted 2015, published 105th ILC session’ (2016)

¹⁶³ European Social Charter (1996 Revised), Art 6

¹⁶⁴ European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (ESC 2018), 100, [6.2]

monitoring of the UK's implementation the ESC from March 2019 found that "the scope for workers to defend their interests through lawful collective action is excessively circumscribed";¹⁶⁵ a conclusion no doubt partly influenced by the *Deliveroo* ruling *vis-à-vis* s 296 TULRCA 1992 and the restrictive effect this has upon the personal scope of the right to access collective bargaining rights.

Having set out the contours of the ILO and ESC jurisprudence, which following *Demir*, determines the content of collective bargaining rights in art 11 ECHR, we can assess the s 296 TULRCA 1992 worker definition against this. As discussed in Section III.i, *van Winkelhof* stated that s 230(3)(b) worker status covers a kind of self-employed person; simply those self-employed persons who are not running a business on their own account.¹⁶⁶ As such, s 296 worker status must either have the same personal scope, or be easier to access. Indeed, it would be illogical that s 292 TULRCA 1992, with its sparser wording would act to create *a more restrictive* personal scope than any pre-existing 'worker' definitions. However, even if we were to assume that the most generous application of *van Winkelhof* were to apply, and the words of the statute are simply applied, shorn of glosses derived from case law (such as mutuality of obligation), we are nevertheless faced with the concern that such an interpretation would likely remain incompatible with art 11 ECHR as interpreted in light of ILO jurisprudence, as well as art 6 ESC as interpreted by the ECSR.

Sola scriptura, s 296 TULRCA 1992 still draws a distinction between those who provide work personally but where the putative employer is a professional client, and where the putative employer is not. Additionally, as was fatal to the claim in *Deliveroo*, matters such a theoretically exercisable right to substitution (which affect the question of personal service) would also prevent a worker from establishing that they were a s 296 worker while there were in fact performing work personally.¹⁶⁷ The *fact* of personal work in an engagement was not enough to satisfy s 296 TULRCA from the CAC's perspective. If establishing a bargaining unit for the purposes of collective bargaining in English law therefore turns on this approach, it is difficult to see how the approach

¹⁶⁵ *ibid*

¹⁶⁶ *van Winkelhof* (n 1) [39] (Lady Hale)

¹⁶⁷ *Deliveroo* (n 146) [100] – [101]

taken by the CAC in *Deliveroo* is compatible with C87 or C98 as interpreted by the CEACR and CFA's jurisprudence, or indeed art 6 ESC. Therein, the right to freedom of association and collective bargaining is largely an unfettered one *vis-à-vis* the personal scope of the provisions: and it explicitly extends to those who are self-employed.

To that end, it leaves us with two options. The first is that if we accept the CAC's working assumption that the two worker definitions are equivalent, and as such, principles of "general application" such as questions about the effect of personal service, substitution clauses, and whether a worker is running a business are assessed on the same grounds for s 296 workers as they are for s 230(3)(b),¹⁶⁸ the personal scope of collective bargaining rights becomes constrained in a manner that is quite plainly incompatible with ILO jurisprudence (and *ipso facto* art 11 ECHR) and ESC jurisprudence.

The alternative is that the s 296 worker definition is read compatibly with art 11 ECHR, ILO jurisprudence and ESC jurisprudence, and to that end, the difference in statutory wording between it and s 230(3)(b) is taken as a material one. Of course, there is a clear difficulty with this approach: s 296 TULRCA 1992 endorses, in fewer words, the same border between personal work done as part of a business undertaking, and personal work *not* done as part of an undertaking. As such, whether this is truly a matter for s 3 HRA 1998, or s 4 HRA 1998 (*viz.* declaration of incompatibility) remains to be seen. However, in practical terms, at the very least, a nominal right to substitution, when not exercised, should certainly not be the death-knell for an entire class of workers to establish a bargaining unit for the purposes of collectively bargaining with an employing entity: such a restriction would be demonstrably contrary to C87, C98, and art 6 ESC. In the simplest sense, when workers are *not* exercising a right to substitution, they would be doing personal work, and as such, would for all intents and purposes, be the recipients of the rights that are granted by the relevant ILO Conventions and ESC on collective bargaining and freedom of association.

¹⁶⁸ *ibid* [91]

This leaves the law on s 296 TULRCA 1992 in a fairly unsatisfactory place. Its equivalent interpretation with s 230(3)(b) ERA 1996 leaves much to be desired, even after the favourable interpretation of that status in *van Winkelhof*. Even if some substantial difference was drawn between the two definitions, s 296 TULRCA 1992 nevertheless applies a similar demarcation within self-employed work, which hinges upon whether the work was done as part of a business undertaking. In all senses, this would fall short of the envisaged universality of application found in ILO jurisprudence on C87 and C98 for the rights to freedom of association and collective bargaining, and therefore art 11 ECHR.¹⁶⁹ They are seen to extend to all workers, with exceptional derogations. As such, to limit that right on the basis of the existence of, for example, an almost-believable substitution clause,¹⁷⁰ or the fact that a worker providing work personally was also doing in as part of a business venture, would be incompatible with the consistent *acquis* of interpretation and jurisprudence that both the ILO and ESC has provided on the content of these rights.

But, for the purposes of the argument being pursued in this section of the chapter, this development reinforces the proposal that there is a possibility that the intermediate worker status is far from the unitary entity it is thought to be in doctrinal labour law. Textual differences aside, what is quite clear is that s 296 TULRCA 1992 is compelled by international law obligations to be interpreted in a manner which is far wider than even the most ambitious interpretation of s 230(3)(b). This is demonstrative of the fact that although the drafting of the two provisions may be similar, the regulatory context *in which that definition is found* determines the precise substance of the provision, and as such, a much wider personal scope for the purposes of law relating to freedom of association and collective bargaining. As such, what may look like another iteration of the ubiquitous s 230(3)(b) may in fact be an example of how that intermediate status is fragmenting into a number of different statuses with subtle (and in this case, not so subtle) differences in the personal scope they define.

¹⁶⁹ *Demir* (n 153); *mutatis mutandis* in relation to the jurisprudence relating to art 6 ESC as well

¹⁷⁰ *Deliveroo* (n 146) [76]

III.iv *The Difficult Case of Windle*

The final example of the fragmentary approach to the UK worker status can be found in the troubling decision in *Windle*. I have written more extensively on the precise failings of this decision elsewhere,¹⁷¹ but the reasoning applied by the Court of Appeal in this decision did exemplify the idea that worker status may slowly be being applied in a context-sensitive manner.

Though briefly discussed in Section II, at the Court of Appeal, *Windle* was concerned with determining whether British Sign Language interpreters fell into the personal scope of the EqA 2010, as set out in s 83(2)(a) EqA 2020.¹⁷² Underhill LJ held that when interpreting the *Jivraj* interpretation of EU worker status in English law, that it must be viewed as a status that is of the same kind as s 230(3)(b) worker, albeit with the “boundary ... pushed further in the putative employee’s favour”.¹⁷³ It was upon this foundation that the Court of Appeal then imported the mutuality test into the ‘subordination’ criterion set out in *Jivraj*,¹⁷⁴ as discussed in Section II.

While it seems quite clear that both the *Jivraj* and *Windle* interpretations are incompatible with the EU Directives that govern the boundaries of domestic equality law,¹⁷⁵ this assumption of equivalence tells us a significant amount about how the UK worker status is viewed as part of a fragmented whole. Indeed, working from the position that s 82(3) EqA 2010 is materially the same status as s 230(3)(b), but is applied such that the “passmark is lower”,¹⁷⁶ the Court of Appeal was *necessarily* suggesting that there are degrees of accessibility within this seemingly unitary status. To make the status more accessible compared to a ‘full blooded’ interpretation of s 230(3)(b) seems to make clear that UK worker status is by no means viewed as a status with a consistent threshold across all regulatory fora. Rather, as we see here in the equality law context, the wider statutory wording of s 82(3) EqA 2010 compelled the Court of Appeal to simultaneously accept that it was a

¹⁷¹ Dhorajiwala (n 121)

¹⁷² *Windle* (n 120)

¹⁷³ *ibid* [24] (Underhill LJ); this suggestion of material equivalence was more explicitly made in *Windle* at the EAT, where Judge Peter Clark quite plainly stated that “there is no material difference between the two” (*Windle v Secretary of State for Justice* [2015] ICR 156 (EAT) [27] (Judge Peter Clark))

¹⁷⁴ *Windle* (n 120) [23]

¹⁷⁵ Dhorajiwala (n 121)

¹⁷⁶ *Windle* (n 120) [24]

kind of UK worker status, but also given the external pressures that determined the precise personal scope of equality rights, that the passmark for *this iteration* of 'UK worker' status was necessarily lower. While this by no means ameliorates the plain inadequacy of the reasoning and material personal scope set by *Windle*, it does offer further guidance about how UK worker status may well not be viewed as the unitary status that orthodox labour law would lead us to believe.

IV *Conclusion*

The current state of the law on the personal scope of labour law is troubling. The three tiers of work relationships purport to offer a hierarchy of accessibility, to the effect that the most restrictive status determines access to widest range of workplace rights, whereas the most accessible status allows access to the most limited range of rights. However, a number of issues can be identified with this approach. Far from the rigid hierarchy that this regime presents itself as, case law has shown that the use of shared tests and criteria across the statuses has the adverse effect of causing the statuses to potentially collapse into each other, resulting in a broadly similar material scope for all of the statuses. Moreover, these tests and criteria act to reinforce a norm whereby work relationships that exhibit characteristics of a paradigm work relationship are those which are most likely to qualify into one of these work relationship statuses. Indeed, using criteria which seek to identify dynamics in a work relationship that will be more likely to be found in a long-term bilateral relationship with a unitary employer indirectly favours that kind of relationship.

However, a note must be made of a phenomenon in the case law that points to a potential fragmentation of the UK worker status. A number of developments, from the definition of the UK worker in *van Winkelhof*, to the likely-expanded interpretation of 'worker' in s 296 TULRCA 1992 suggest that the UK worker may not be the monolithic entity that it is presented as in orthodox interpretations of employment status in English law. Rather, there have been a number of (albeit specific and limited) instances in which worker status can be identified as having a moving

threshold depending upon the regulatory context in which the status is deployed. Although it must be stressed that these examples are quite specific, what these development seems to suggest is that by having a sensitivity to the regulatory context in which the status is found in order to interpret the material scope of the status, this approach to the UK worker status may be inadvertently rejecting the doctrinal dominance of the paradigm work relationship in favour of a context-sensitive approach that is more attuned to the relevant dynamics different pieces of regulation are aimed at. While it is far from the case that UK worker status exists as a context-sensitive status in its current form, the fact that it *can* be adapted in specific circumstances may at the very least be a tacit acceptance, on some level, that there is both value and utility in shaping the test or status that determines access to certain rights in a manner that in some way reflects the aim or purpose of that right.

At this stage, it is also worth explaining why this analysis is so important to engage in at the start of this thesis. First, the discussion in this chapter represents the foundation for the analysis and proposals in the rest of this thesis. The arguments that will be advanced with respect to zero-hours work, tripartite relationships, and the gig economy are all premised on an understanding of the structure of the work relationship statuses in English law, and how they reinforce the assumption that work relationships conform to a particular paradigm structure with specific parties. But second, when the thesis moves onto the proposed analytical model in the latter chapters, the analysis in this chapter is once again the foundation for understanding why the proposed structure of the Relational Dynamics model is what it is. Only by fully appreciating the restrictive way that analysis of work relationships is conducted through English work relationship statuses and their tests can the need and utility of a multilateral analytical model be fully appreciated. This theme will of course be revisited in Chapter 5, but it is worth stating the importance of the preceding analysis in this chapter from the outset, and its impact on the later chapters of this thesis.

Chapter 2

The Growth of Work Relationships Outside the Paradigm

I *Introduction*

In recent years, the number of work relationships that have deviated from the paradigm work relationship form has been increasing. Yet the contract of employment (and UK worker contract) has centred around the assumption that the vast majority of work relationships fit this paradigm, even though it has been the case for some time that a significant proportion of work relationships in the labour market no longer fit this paradigm. In particular, there has been a notable increase in the number of work relationships that are less secure, and not structured around a bilateral relationship between a worker and employer. It is important to explore not only why there has been a growth in these non-standard work relationships, but also to look at the problems they create for workers aiming to access employment rights in English law. Therefore, this chapter will first discuss the historical changes to the English workforce, and second analyse two forms of non-paradigm work relationship that have come to prominence in recent years. This latter section will assess the impact of agency work agreements and zero hour contracts (ZHCs) on English law, with a particular focus on how they interact with the work relationship statuses set out in Chapter 1.

The analysis of agency work agreements will look at the problems created by using triangular relationships to avoid establishing a direct link between a worker and either an agency or end-user. The case law in this area demonstrates the trouble the courts have in establishing a responsible entity for employment rights for a worker when the employing entities split the various employment functions between themselves, thus making it very difficult for a worker to

demonstrate an employment relationship with either party. Then, ZHCs will be explored, and the particular strain they place on a worker's ability to demonstrate that they have a continuous work relationship with an employing entity. The formal absence of any promised hours makes it almost impossible for a worker to show that there is an ongoing obligation to offer and accept work between an employing entity and a worker respectively. Furthermore, the premise that such relationships equally as beneficial for workers and employers will also be discussed, with an emphasis on statistical analysis which demonstrates an obvious asymmetry in the benefits employers enjoy by using ZHCs *vis-à-vis* workers: usually, employers deploying these work relationship models are seeking a convenient way to evade more onerous or expensive workplace rights that workers would like to be entitled to.

The analysis in this chapter will serve two functions. First, it is important to see how these different techniques, in isolation, can so easily frustrate necessary elements of work relationship status tests, such that they exclude a worker in such relationships from the scope of those statuses, and by extension the rights they determine access too. The second function of this chapter is to lay the analytical groundwork for Chapter 3. That chapter will rely upon the analysis of the work relationships in this chapter as the foundation for the analysis of more sophisticated multilateral relationships, with a particular focus on the synthesis of tripartite relationships and ZHCs in gig economy work.

II *The Changing Characteristics of the Workforce*

Since the advent of industrial growth in post-Victorian Britain, the “smooth evolution” described by Kahn-Freund,¹ from the law of master/servant to the position of the contract of employment as the regulatory focal point of post-WWII labour law,² can be attributed to the overlap of economic and sociological strands. Three important strands worked together to mainstream the contract of

¹ Mark Freedland, *The Personal Employment Contract* (OUP 2003) 35-36

² Judy Fudge, ‘Labour as a Fictive Commodity: Radically Reconceptualizing Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 122

employment (and *ipso facto* the standard employment relationship): a strong trend towards vertical integration within larger firms; the dominance of collective *laissez-faire* as a labour market regulation technique in the mid-20th century; and the need to define the personal scope for new labour legislation and social security that emerged in the 1960s.

First, as Collins has discussed, business organisations in the UK (and elsewhere) followed a “general pattern” of vertical integration of their operations during the early 20th century.³ In essence, vertical integration constituted a method by which a number of key functions of a business were handled within the structure of the business itself, including production, distribution, and the provision of services, all of which was organised through a hierarchical management structure.⁴ Though this was often a hallmark of a heavily industrialised, Fordist production method,⁵ its relative economic benefits⁶ and sociological influence in industrial organisation resulted in its seeming dominance as a form of business organisation. As Fudge explains, this organisational model offered an “anchor for the standard employment relationship”,⁷ due to the relative security it offered a worker, while delivering significant managerial prerogative to capital in that vertically integrated structure. Indeed, these conditions offered fertile ground for the standard employment contract to flourish. The direct management of the worker in such a structure would likely mean that a clear connection between a worker and their employing entity could be identified, and this relationship could in turn act as the *locus* for not only collective bargaining, but also eventually where statutory employment protections would accrue.

Additionally, the reliance upon a collective *laissez-faire* model as a form of workplace regulation in the post-World War II era helped to secure the standard contract of employment’s dominance in labour law. A “suspicion” of the courts and legislature to produce sufficiently beneficial labour standards caused workers and unions to rely upon collective bargaining as a primary method of

³ Hugh Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 OJLS 353, 353

⁴ Judy Fudge & Kate Zavitz, ‘Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario’ (2006) 13 Canadian Lab & Emp LJ 107, 108

⁵ Deirdre McCann, *Regulating Flexible Work* (OUP 2008) 8

⁶ Collins (n 3) 357

⁷ Fudge & Zavitz (n 4) 107 – 108

regulation,⁸ incorporating the standard employment relationship as the core individual unit of that bargaining process.⁹ Kahn-Freund viewed the contract of employment as a mere instrument for the more important process of collective *laissez-faire* in setting labour standards,¹⁰ and indeed it is important not to diminish the statistical significance of collectively bargained agreements in the first half of the 20th century.¹¹ However, this tactical choice in using the contract of employment as the standard work relationship in the collective bargaining process also contributed to the centralisation of the standard employment relationship as the paradigm organisational unit in the wider context of labour regulation.

However, when a more comprehensive scheme of labour legislation did emerge around the 1960s,¹² the standard employment relationship, being as central to the collective regulatory model as it was, came to be “transplanted to the statutory arena”.¹³ Labour Law could be seen as “codifying” either employment norms arrived at through the collective process or social security standards,¹⁴ including (crucially) the standard work relationship moderated through the contract of employment. This wider regulatory process, which aimed to offer some further protection to workers that were becoming increasingly dependent upon “continuous, waged employment ... and [were] vulnerable to the effects of any prolonged interruptions to earnings”,¹⁵ was significantly reliant, for a long period, on defining the personal scope of protections through the contract of employment.¹⁶ As has already been discussed in Chapter 1, this has of course seen some modification with the introduction of (purportedly) more expansive statuses, and the overlay of EU law. However the confluence of factors in the early-to-mid 1900s manifested in a system of labour regulation whose core organising principle remained the contract of employment, and *de facto* the standard work relationship upon which it modelled itself. Indeed, as Deakin suggests, the

⁸ McCann (n 5) 8

⁹ *ibid.*

¹⁰ Fudge (n 2) 123

¹¹ K D Ewing, John Hendy QC and Carolyn Jones (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (IER 2016) 4

¹² McCann (n 5) 9

¹³ *ibid.*, 9

¹⁴ Simon Deakin, ‘The Many Futures of the Contract of Employment’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in the Era of Globalization* (OUP 2000) 183; Simon Deakin and Frank Wilkinson, ‘Labour law, social security and economic inequality’ (1991) 15 *Cambridge Journal of Economics* 125, 137 – 138

¹⁵ *ibid.*, 183 – 184

¹⁶ McCann (n 5) 9

contract of employment came to prominence at a particular point in the mid-20th century “when changes in economic organisation ... and the regulatory power of the nation-state came together to favour the standardization and stabilization of labour market relations”,¹⁷ which cemented its central regulatory role in labour relations.

However, since around the 1980s, there has been a perceptible shift away from the themes outlined above. For one, the trend of organisational vertical integration began being reversed,¹⁸ with more businesses opting to vertically *disintegrate* their production and provision of services. In particular, we can observe an organisational approach which favours retaining a core contingent of full-time, paradigm employees,¹⁹ and fielding non-core work out to an increasingly large variety of work relationships that fall outside this paradigm. Part-time, fixed-term, self-employed, and agency work (among *many* others) were relied upon by firms who began to see the advantages to having a “network of small firms which offer flexible and specialized skills, creating economies of scale within ... narrow markets”.²⁰ One rationale for this move towards vertical disintegration centres around the need for greater flexibility in business organisation. As McCann has discussed, heavy weather has been made about the need for enterprises to be able to adequately respond to changes in demand that they may experience,²¹ with a plethora of New Labour government policies, and EU-level discourse centring around the need to ensure greater flexibility within the labour market, and in enterprise organisation. By relying on armies of precarious or on-demand workers, firms were able to effectively shift the risk of changing demand onto workers, rather than assuming it themselves, which would have been the case if all their workers were engaged on indefinite contracts of employment.

Statistical evidence also affirms this shift towards employers relying on work relationships that are characterised by their precarity, and deviation from the paradigm work relationship. Roughly, the 1979 Labour Force Survey saw 22.7m workers engaged in the UK economy as employees, with 1.8m

¹⁷ Deakin (n 14) 194 – 195

¹⁸ Collins (n 3) 353

¹⁹ Virginia Dollengast & Ian Greer, ‘Vertical Disintegration and the Disorganisation of German Industrial Relations’ (2007) 45(1) *British Journal of Industrial Relations* 55, 56

²⁰ Collins (n 3) 354

²¹ McCann (n 5) 12

workers classifying themselves as self-employed, and 0.2m not stating their status.²² Comparatively, labour force figures from August 2015 suggest that 26.4m workers considered themselves employees, and 4.5m reported themselves as being self-employed. Of course, while it is worth taking care in comparative statistical analysis, due to the inaccuracies that can result from workers self-reporting, given that workers on flexible contracts with regular hours might misreport themselves as being in full-time employment,²³ there nevertheless seems to be an identifiable trend in the statistics for employees and self-employment. The labour market that has grown numerically, but has exhibited proportionally more significant growth in self-employment. Moreover, these statistics do not do justice to the much more concerning growth of other forms of atypical work nestled somewhere in the statistics for employees and the self-employed. Taking the examples that will be elaborated upon later in the chapter, estimates for temporary agency workers and zero hours workers paint a stark picture. Recent ONS figures estimate that there are approximately 0.2 - 0.3m agency workers in the UK.²⁴ The Recruitment and Employment Confederation (REC) present a much more considerable estimate of 1.15m agency workers.²⁵ Again, given the inaccuracy of the reporting procedures used by the ONS survey, it is difficult to precisely map these agency worker statistics onto the data for employees and self-employed. Similarly, while the most recent ONS labour force survey suggests that there may be approximately 0.9m workers on zero hours contracts, their business survey in April 2018 once again suggests that, in contrast with worker reporting, an estimated 1.8m contracts were used that did not guarantee any hours to a worker.²⁶ While these two figures cannot be directly compared (a single worker may be party to more than one zero hours contract), there is nonetheless a significant disparity between the number of workers that report themselves as working under contracts with no guaranteed hours, and the number of such contracts actually used by businesses.

²² Office of Population Censuses and Surveys, Social Survey Division, *Labour Force Survey 1979* (UK Data Service 1979) SN: 1756 <<http://doi.org/10.5255/UKDA-SN-1756-1>> accessed 13 August 2017

²³ Abi Adams, Mark Freedland, and Jeremias Prassl, 'The 'Zero Hours Contract': Regulating Casual Work, or Legitimizing Precarity?' (2015) Oxford Legal Studies Research Paper No 11/2015, 8

²⁴ Bob Watson, 'EMPO7: Temporary Employees' (ONS 2020) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/temporaryemployeesemp07>> accessed 17 August 2020

²⁵ Department for Business Innovation and Skills (BIS), *Employment Status Review* (London, December 2015) [78]

²⁶ Yanitsa Petkova, 'Contracts that do not guarantee a minimum number of hours' (ONS 2018) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018#how-many-no-guaranteed-hours-contracts-nghcs-are-there>> accessed 17 August 2020

What becomes apparent is that with the organisational shift witnessed in the 1980s towards vertical disintegration, employers have opted to use work relationships that have tended to accommodate “numerical flexibility” within their labour force.²⁷ The next two sections of this chapter will demonstrate that this has resulted in the exclusion of a number of these non-standard work relationships from a large swathe of English labour regulation. This is because labour protections and social security rights are determined by demonstrating an employment relationship, which can only be accessed by what Deakin and Wilkinson describe as “an élite of workers” who “already occupy strong occupational and bargaining positions in the market”.²⁸

Of course, given the sheer variety of work relationships that can exist in English law, it is quite impossible to thoroughly review how all of these work relationships interact with English work relationship statuses, and how their structures exclude workers from labour protections. However, two of the most legally prominent and effective techniques will be discussed: triangular work relationships shall be analysed, alongside the significant amount of case law surrounding this work relationship; and zero hours contract relationships. Both of these techniques will be assessed through the lens of the English work relationship statuses outlined in Chapter 1, with a particular emphasis on how these two models are designed to exploit the contractual foundations of work relationship statuses in English law.

III *Triangular Work Relationships*

III.i *Theoretical Foundations of the Agency Relationship*

One of the most prominent and effective work relationship structures that can prevent workers from falling within the defined personal scopes discussed in Chapter 1 is the triangular agency

²⁷ Sandra Fredman, ‘Labour Law in Flux: The Changing Composition of the Workforce’ (1997) 26 ILJ 337, 339

²⁸ Deakin & Wilkinson (n 14) 138

relationship. Though there are a number of variations of this relationship, with the specific relationships between the parties in the arrangement being defined with different contractual terms, the essence of the relationship is as follows. A worker will often have a direct contractual relationship with an agency, which can be “structured in myriad ways”,²⁹ varying vastly in length and nature of obligation,³⁰ but this will usually take the shape of an agreement for the agency to source work for the worker with an end-user/client, and provide pay. There will then be a contractual relationship between the end-user and the agency for the agency to provide a worker to the end-user, which will involve the legally required minimum terms set out in the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (including *inter alia* terms relating pay, notice periods for termination, and the terms and conditions that may apply if a job with an end-user is accepted).³¹ However, as Prassl suggests, this agreement can often go beyond this to include any training or licencing a putative worker would require, and generally contain very strong termination rights for both of these parties.³² Crucially though, there is often a concerning gap in this work relationship model: the absence of a contractual nexus between the worker and the end-user.³³ While it is perhaps remarkable that there is often absolutely no contractual arrangement between the worker and end-user, as shall be discussed later in this chapter, this is likely done intentionally in order to erect a further obstacle in the path of a worker attempting to claim a direct employee or UK worker relationship with the end-user.

What is most important about such a work relationship arrangement is how it divides work obligations and remuneration obligations between an end-user and agency respectively, and more specifically, apportions employer obligations³⁴ between these two entities. As Chapter 1 explored, the three most significant employment statuses in English law conform, to some degree, to a bilateral, contractual paradigm. With the contract of employment, it is clear that, post-*Nethermere*, a putative employee must demonstrate that they have a work relationship that

²⁹ Jeremias Prassl, *The Concept of the Employer* (OUP 2015) 48

³⁰ Chris Forde and Gary Slater, ‘The Role of Employment Agencies in Pay Setting’ (ACAS Research Paper 05/2011) [2]

³¹ Conduct of Employment Agencies and Employment Businesses Regulations 2003, SI 2009/3319 reg 15

³² Prassl (n 29) 48 – 49; *Bunce v Postworth (as Skyblue)* [2005] EWCA Civ 490, [7] (Keene LJ)

³³ *James v Greenwich LBC* [2007] ICR 577 (EAT) [20] (Elias J)

³⁴ Prassl (n 29) Ch 1

exhibits not only a relation of employer and employee (determined by the plethora of tests such as control, integration, etc),³⁵ but also a global/umbrella contract of employment that extends the contract of employment beyond a single wage-work bargain, mutuality of obligation,³⁶ in the form of an obligation on the part of the employer to offer work, and the putative employee to accept it. What becomes clear is this collection of criteria for employee status sets up a status that can only truly be satisfied by a work relationship that tends towards the paradigm relationship discussed at length in Chapter 1 (*viz.* a long-term, bilateral relationship with an employer) with an employer in whom all the functions of an employer which are crucial to the work relationship status (i.e. the ability to offer work, remunerate for it, and exercise a degree of control or otherwise) accrue. It is a similar story with s 230(3)(b) 'worker' status,³⁷ which following the *Byrne Bros* decision,³⁸ imported all of the criteria for employee status into UK worker status; albeit with a purportedly lower "passmark"³⁹. Therefore, access to either status is premised upon all the relevant criteria being satisfied by a relationship between one worker and one employing entity; and axiomatically, all the characteristics required of the employer must be vested in that single employing entity.

Of course, this creates obvious problems when we break down the relevant employer functions that an employer must exercise for an employee or UK worker relationship to exist, and how those functions are distributed in an agency work relationship. A useful analytical framework here is the set of 'employer functions' outlined by Freedland,⁴⁰ and expanded upon by Prassl.⁴¹ Prassl identifies five functions that are exercised by an employing entity: 1) the inception and termination of the contract of employment; 2) receiving labour and its fruits; 3) the provision of work and pay; 4) managing the enterprise-internal market; and 5) managing the enterprise-external market. These five functions offer a comprehensive way to analyse the criteria for employee status, and how they all point towards the assumption that all the relevant functions of an employer will have to be vested in a single entity before an employment relationship can exist with a worker.

³⁵ *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497 (CA) 515 (MacKenna J)

³⁶ *Nethermere (St. Neots) Ltd. v Gardiner* [1984] ICR 612 (CA) 623F (Stephenson LJ)

³⁷ Employment Rights Act 1996, s 230(3)(b)

³⁸ *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (CA) [17(5)] (Mr Recorder Underhill QC)

³⁹ *ibid.*

⁴⁰ Freedland (n 1) 40

⁴¹ Prassl (n 29) 157

Turning to the criteria for employee status (and *de facto*, UK worker status), first, the criterion of a relationship of ‘employer and employee’ covers four of the five employer functions outlined above. Various tests exist to establish whether this criterion has been satisfied by a work relationship,⁴² and they reveal that this criterion aims to identify a number of Prassl’s employer functions within a work relationship. Perhaps most plainly, the management of the enterprise-external market, which describes activities relating to risks taken to generate profit or loss certainly speak to the existence of an employer/employee relationship when these risks are assumed by an employing entity: as was discussed in Chapter 1, the courts tend to view the assumption of enterprise risk as a hallmark of an employer in an employer-worker relationship.⁴³

Secondly, the receipt of labour and its fruits is directly correlated to the idea that the relationship between a worker and employing entity is indeed one of ‘employer and employee’. Logically, if the worker laboured and received the fruits of labour for themselves, the inference would likely be that they were in business on their own account. This employer function is also closely related to the idea of control,⁴⁴ given its function is to identify “the employer’s right to demand, and if so receive, the worker’s labour”;⁴⁵ though in the case of workers that exercise a higher degree of autonomy in how they do their work it may also relate to the tests of integration⁴⁶ or economic reality.⁴⁷ In either case, the crucial fact is that this employer function would be identified by the ‘employer-employee relationship’ criterion.

Thirdly, powers of inception and termination relate to the employer-employee relationship criterion; the courts often look to issues of where and to what extent a power to create (in the sense

⁴² *Ready Mixed Concrete* (n 35)

⁴³ *Market Investigation Ltd v Minister for Social Security* [1973] 1 All ER 241 (HL) 250; *Stringfellow Restaurants Ltd v Nadie Quashie* [2012] EWCA Civ 1735

⁴⁴ *Yewens v Noakes* (1880) 6 QBD 530, 532, 533

⁴⁵ Prassl (n 29) 34

⁴⁶ *Hospital Medical Group v Westwood* [2013] ICR 415 (CA) [19] (Maurice Kay LJ)

⁴⁷ *Lee Ting Sang v Chung Chi-Keung* [1990] ICR 409 (PC) 414 (Lord Griffiths); *Quashie* (n 43)

of requesting workers and selecting candidates)⁴⁸ and terminate a work relationship resided in order to assess whether the relationship constituted employment.⁴⁹

Finally, the question of managing the enterprise-internal market, which constitutes using directional powers to manage the factors of production,⁵⁰ will again relate to the idea of control (loosely defined) or integration/economic reality when dealing with workers that may exercise a degree of dependence, but who are nevertheless subject to some direction (as the mason in *Lee Ting Sang*, for example).⁵¹ Therefore, the ‘relationship of employer and employee’ criterion is also seeking to identify this employer function through the operation of the various tests that are used in relation to this criterion.

This leaves the final employer function: providing work and pay. As discussed, the “irreducible minimum” of the contract of employment is the requirement that it is demonstrable that there was an obligation to offer and accept work.⁵² While the degree of reciprocity expected by this criterion is concerningly high,⁵³ it nonetheless quite directly maps onto the employer function of providing work and payment. Certainly, it is a very *specific* manifestation of that function, but it nevertheless maps onto it.

What this analysis demonstrates is that when we look at a relationship that has a contract with sufficient mutuality of obligation, and which can be identified as a relationship of ‘employer and employee’ (with no terms inconsistent with an employer/employee relationship),⁵⁴ the single employing entity that can satisfy these criteria will *de facto* exercise all five of Prassl’s employer functions. While we should stop short of suggesting that these criteria directly map onto the five identified employer functions, it is certainly clear that given the significant overlap between the common law criteria for employee status, and the five employer functions, if a worker can

⁴⁸ Prassl (n 29) 34

⁴⁹ *Bunce v Postworth* (n 32) [7] (Keene LJ)

⁵⁰ Prassl (n 29) 35

⁵¹ *Lee Ting Sang* (n 47).

⁵² *Nethermere* (n 36)

⁵³ Guy Davidov, ‘Who is a Worker?’ (2005) 34 ILJ 57, 60; see Chapter 1 for more detail

⁵⁴ *MacFarlane v Glasgow City Council*, EAT/1277/99 (EAT)

demonstrate they are an employee of an employing entity, that entity will likely be exercising all five employer functions.

This becomes particularly problematic when we begin to look at how the agency relationship necessarily splits or shares these employer functions between at least two employing entities. For this stage of the analysis, it is worth considering how the five employer functions discussed above are distributed between the agency and the end-user in an agency work relationship. However, a necessary caveat to this discussion is that the “immense factual variation and complexity” of agency relationships confines this analysis to a broad, conceptual one.⁵⁵ First, the agency: powers of inception and termination will often reside with the agency,⁵⁶ though case law seems to also suggest that fairly robust powers of termination will also accrue in the end-user.⁵⁷ However, with respect to setting the specific terms of engagement, while most of these powers will reside with the agency, end-users will *generally* have more influence in wage or salary rates.⁵⁸ Next, looking to the provision of work and pay, Prassl argues that it is “more difficult to analyse, as it varies drastically between scenarios”.⁵⁹ The kernel of this difficulty is that while a worker may contractually receive work from the agency (albeit through a clause that may make no promise to provide work),⁶⁰ the practical reality is of course that the work that the agency will be able to offer a worker will depend quite significantly on the labour requirements of an end-user. Therefore, while the provision of work will formally rest with the agency, it is worth remembering that this power is in many senses jointly exercised by both parties. As for the provision of pay, perhaps more straightforwardly, due to the usual content of the contractual relationship between the agency and the worker, the obligation to pay the worker for any work done will usually lay with the agency (and courts have generally been sceptical of arguments that suggest that agencies act either as a device for the payment of wages between the end-user and the worker).⁶¹

⁵⁵ Prassl (n 29) 51 – 52

⁵⁶ Prassl (n 29) 49 – 50

⁵⁷ *Hewlett Packard Ltd v O'Murphy* [2002] IRLR 4 (EAT) [22] (Douglas Brown J)

⁵⁸ Forde and Slater (n 30) 5. This is not always the case, though. In “managed service contracts”, agencies would have more of an influence in setting wage terms.

⁵⁹ Prassl (n 29) 51

⁶⁰ Michael Wynn & Patricia Leighton, “Temporary Agency Working: Is the Law on the Turn?” (2008) *Company Law* 7, 9

⁶¹ *Costain v Smith* [2000] ICR 215 (EAT) [16] (Morison J)

Conversely, a number of employer functions can be seen to rest with the end-user in an agency relationship. Most obviously, the receipt of labour and its fruits “rests firmly with the end-user”,⁶² given that an agency relationship is premised on supplying a worker to an end-user so the former can supply their labour to the latter. The management of the enterprise-internal market is slightly more analytically complex. However it can also broadly be seen to rest with the end-user given that most often, a necessary aspect of a worker providing their labour to an end-user in the latter’s business is that they will either be subject to the end-user’s control (a fact often conceded in litigation or a conclusion quickly arrived at by a court),⁶³ or be seen to have been integrated into the end-user’s business.⁶⁴ But some enterprise-internal functions can also be exercised by the agency too: either in the form of agencies having offices at the end-user’s business;⁶⁵ or the more obvious control that they exercise with respect to specifically who will be supplied to the end-user.⁶⁶ Curiously though, the enterprise-external market function, while *prima facie* exercised by the end-user that operates a business that engages a worker, could in fact also be seen as being exercised by both the agency and the worker themselves.⁶⁷ Prassl argues that, on the part of the agency, the cost of training workers could often fall upon an agency that has no guarantee of work from a client. Moreover, workers could also be seen to be exercising the enterprise-external function in a number of ways. First, they could choose to work for different agencies in order to maximise their income.⁶⁸ Second they could refuse an employee relationship with an end-user due to a higher wage available through an agency.⁶⁹ And third, they could be seen as exercising an enterprise-external function by engaging in a work relationship structure where they are the party that runs the risk of there being insufficient work,⁷⁰ given the usual contractual arrangement that neither an agency nor end-user will be obliged to provide remuneration to a worker while there is no work available (indeed,

⁶² Prassl (n 29) 50

⁶³ *ibid* 52; *James v Greenwich LBC* [2008] EWCA Civ 35; [2008] ICR 545; *Pulse Healthcare Ltd v Carewatch Care Services Ltd* [2012] UKEAT/0123/12/BA (EAT) [22]

⁶⁴ *Tilson v Alstom Transport* [2011] IRLR 169 (CA)

⁶⁵ Prassl (n 29) 52; *Astbury v Gist* [2007] UKEAT/0619/06/DA (EAT)

⁶⁶ *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA)

⁶⁷ Prassl (n 29) 53

⁶⁸ *James* (CA) (n 63)

⁶⁹ *Tilson* (n 64)

⁷⁰ Prassl (n 29) 53

as Wynn and Leighton argue, the presence of a concurrent understanding with many workers in agency agreements that they do not rely on agencies to find assignments in a seamless fashion).⁷¹

What this analysis of the intersection of employer functions and the triangular agency agreement demonstrates is that while the paradigm employment relationship, as reinforced by the common law criteria for employee status, requires all the employer functions accrue in a unitary employing entity. A triangular agency relationship sees these functions not only discretely parcelled out between the agency, end-user, and at times worker, but also sees the shared exercise of some of these functions. As such, on a theoretical analysis of this work relationship, it is quite possible to see that when the common law tests for employee status are applied to a situation where the employer functions are as spread out as they are in even the simplest of agency relationships, an agency worker will almost certainly struggle to demonstrate that all the necessary criteria (and therefore, all the employer functions) have been satisfied by one entity in the work relationship.

III.ii *Applying Bilateral Criteria to Trilateral Relationships*

This theoretical issue materialises in the case law that surrounds agency work relationships. The distinctly bilateral nature of the criteria for employee status are particularly difficult for the courts to apply when faced with a triangular or multilateral agency work relationship. Indeed, when attempting either to establish that an employment or UK worker relationship exists between an agency and a worker, or an end-user and a worker, this theoretical mismatch usually means that the courts cannot rely on their usual modes of reasoning to establish that a worker in such a tripartite relationship is in fact an employee or UK worker of either of the other parties.

The splitting of employer functions between multiple parties usually means that while some of the criteria for employee or UK worker will be satisfied by the agency or end-user, neither will meet all of them. Some older cases that attempted to deal with triangular work relationships clearly

⁷¹ Wynn and Leighton (n 60) 9

struggled to reconcile with this splitting of employer functions with an understanding that the employment relationship was strictly bilateral. Particularly illustrative are the *dicta* in *Wickens v Champion Employment*, where a claimant failed to establish an employment relationship with the agency. The particular claim failed due to an absence of mutuality of obligation between the agency and the worker,⁷² but what was notable about this decision was the *obiter* comments from Nolan J. In the process of assessing the claim that the worker had an employment relationship with the agency, the court suggested that it could “think of no contract of service ... remotely resembling the contract [in question]”.⁷³ Indeed, a work relationship that only exhibits a fraction of the totality of employer functions, albeit viewed through the lens of the common law tests, “appears [to the court] to be quite inconsistent with the normal features of an employment under a contract of service”.⁷⁴ The court, perhaps inadvertently, identified the very problem that a traditional contractual analysis for establishing an employment relationship faces: that its tests are necessarily premised upon all the employer functions accruing in a single entity, and any deviation from this is viewed to be ‘abnormal’ in the context of employment relationships. By splitting the aspects of control/integration and the offer/remuneration of work between two (or more) parties, the contractual analysis struggles to fit this multi-entity relationship into the bilateral assessment framework that both employee and UK worker status are premised upon.

This difficulty is also keenly observed when we look at contemporary case law surrounding workers attempting to establish employment or UK worker relationships with either the agency or the end-user in a triangular work relationship. It is worth dealing with each of these two situations individually as they are often concerned with the absence of a particular aspect of the full gamut of employer functions.

One situation is where a worker will aim to establish an employment relationship with the agency itself. As discussed above, while there are myriad formulations for the precise nature of the relationship between agency and worker, it is often the case that the offers to do work for an end-

⁷² *Wickens v Champion Employment* [1984] ICR 365 (EAT) 371 (Nolan J)

⁷³ *ibid*

⁷⁴ *ibid*

user will come via the agency, as well as any remuneration due for that work. However, a distinct feature of the worker-agency relationship is that there will be an absence of any exclusive exercise of the indicia of an employer-employee relationship (per the common law criteria) during the relationship, as the worker will be placed at the workplace of the end-user. Indeed, absent the unlikely situation where an agency will directly state that it is in an employment relationship with the worker,⁷⁵ usually a worker will struggle to establish such a relationship with the agency where it has not already been explicitly conceded. This is generally because during an ongoing wage-work bargain, as discussed above, the agency will have a limited (if any) role in controlling or directing the work that the worker will do at the end-user's business. So when a worker attempts to establish an employment relationship with the agency, the claim will normally fail on this ground. This was evident in *Skyblue*, when a railway engineer wished to establish that there was a direct employment relationship with his agency, but failed due to the fact that most of the control over the claimant was vested in the client company,⁷⁶ with the court rejecting a fairly ingenious argument from the claimant's counsel that the employment agency held ultimate control which it delegated to the end-user.⁷⁷ Similarly, in *Dacas*, when assessing the nature of the agreement between a worker and the agency, the absence *inter alia* of any "day to day control" over the worker while she was engaged at the end-user's business was a determinative factor in finding that there was no employment relationship between her and the agency: merely a contract for services.⁷⁸

It is worth acknowledging that there have been situations where there have been exceptions to this general trend, such as in *McMeechan*, where the agency was deemed to be a worker's employer due to the presence of strong powers of dismissal, its power to end assignments, and the power of wage-setting.⁷⁹ However, this was with the significant caveat that the agency was only an employer for the duration of an individual wage-work bargain, due to the worker's inability to demonstrate mutuality of obligation beyond a consideration-like requirement for each individual wage-work bargain.⁸⁰ Additionally, in *Kalwak*, due to the "exceptional" factual situation whereby the agency

⁷⁵ *Cairns v Visteon* [2007] ICR 616 (CA) [17]

⁷⁶ *Bunce* (n 32) [27] (Keene LJ)

⁷⁷ *ibid* [29]

⁷⁸ *Dacas v Brook Street Bureau UK* [2004] ICR 1437 (CA) [64] (Mummery LJ)

⁷⁹ *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA) 565E (Waite LJ)

⁸⁰ *ibid*, 565D (Waite LJ)

was responsible for accommodation and transport for the workers, sufficient mutuality of obligation and control was established for an umbrella contract of employment with the agency.⁸¹ However, these examples act as exceptions that prove the rule. The very specific factual scenarios in both situations tend to suggest that there were likely policy considerations at play in the courts' decisions. In *McMeechan*, the employee status of the worker would determine whether they could claim unpaid wages when the agency went insolvent;⁸² and in *Kalwak*, the court even conceded that while the orthodox doctrinal position is an expectation of a significant degree of control,⁸³ the court perhaps felt more comfortable in side-stepping this requirement's strict application due to the particularly vulnerable position of the Polish migrant workers in that case.⁸⁴ Indeed, the general rule is certainly that it would be "exceptional" for a court to find that there was a contract of employment between an agency and a worker given the agency's usual inability to exercise the "day to day control which would establish such a contract".⁸⁵

It is likely for this reason that a significant proportion of litigation surrounding agency work relates to the relationship between the worker and end-user.⁸⁶ However, here the usual stumbling block for the worker is the absence of any contractual nexus between themselves and the end-user. This means that although the relationship with the end-user will exhibit the necessary control, integration or otherwise required to satisfy the employer-employee limb of employee (or the equivalent UK worker status limb), it will be incredibly difficult for a worker to demonstrate that the relationship with the end-user had the necessary mutuality of obligation. This will present a difficulty either in the sense of there being subsisting obligations to offer and accept work between wage-work bargains; or even as the analogue to consideration for a single bargain as identified in *McMeechan*.⁸⁷ In fact, it is even doubtful as to whether we should describe the relationship as a wage-work bargain when speaking of the specific relationship between the worker and end-user,

⁸¹ *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT) [75] – [76] (Elias J); though note this decision was appealed to the Court of Appeal, which remitted it to a fresh tribunal for rehearing due to deficiencies in the original Employment Tribunal decision

⁸² *McMeechan* (n 79)

⁸³ *Kalwak* (n 81) [69] and [75]

⁸⁴ *ibid*

⁸⁵ *James* (EAT) (n 33) [22] (Elias J)

⁸⁶ *McCann* (n 5) 148

⁸⁷ *McMeechan* (n 79)

given the remuneration obligations will usually rest with the agency. The work relationship with the worker imposes no obligation on the end-user to remunerate the worker for their labour. Indeed, McCann describes how earlier decisions that attempted to establish an employment relationship between the end-user and the worker failed due to the courts doubting whether “there was any contract between the end-user and worker and concluded that even if one did exist it was not a contract of employment”.⁸⁸

In the absence of an express contract, the courts have sometimes been receptive to the idea that there could be an implied contract of employment between the worker and end-user. In *Motorola v Davidson*, a claim for unfair dismissal arising between a worker and their end-user was allowed, with the EAT holding that the degree of control that Motorola exercised over Mr Davidson was equivalent to that which they exercised over an “orthodox” employee, meaning that the worker was to be considered to be an employee of the end-user.⁸⁹ Though it is notable that the case did not engage in any discussion of the question of mutuality of obligation, what it did reveal was a possible willingness for the courts to imply a contractual relationship between an end-user and the worker they engaged, and characterise it as a contract of employment. Following this decision, the court in *Franks v Reuters* laid the groundwork to suggest that a tribunal must be live to the possibility that there could be the necessary mutuality of obligation between worker and end-user “in the form of an ... implied contract of service”, with obligations for both parties beyond the contracts that governed the agency relationship.⁹⁰ The high-point of this line of reasoning came with the *Dacas* and *Muscat* decisions. In *Dacas*, although the *ratio* was that a worker was not in an employment relationship with the relevant agency, *obiter* comments from Mummery LJ and Sedley LJ noted that tribunals should be attentive to the fact that it might well be possible to imply a contract of service between the worker and end-user (and *ipso facto* the presence of the necessary mutuality of obligation between the worker and end-user that is integral to an employment relationship).⁹¹ Sedley LJ stressed that the conclusion that Mrs Dacas was employed by nobody was “simply not

⁸⁸ McCann (n 5) 148

⁸⁹ *Motorola Ltd v Davidson* [2001] IRLR 4 (EAT) [10], [14] (Lindsay J)

⁹⁰ *Franks v Reuters* [2003] ICR 1166 (CA) 1171E (Mummery LJ)

⁹¹ *Dacas* (n 78) [66] – [68] (Mummery LJ)

credible”,⁹² and that “there are more means of expressing mutual intentions than putting them in writing”.⁹³ McCann suggests that the court was sanctioning treating a number of transactions in a “holistic way” in order to imply the necessary mutuality to operate alongside the control the end-user would normally exercise,⁹⁴ and even indicated its openness to the idea that there could be a jointly-exercised contract of service between the worker, and the end user and agency.⁹⁵ This general line of reasoning came to its apex in *Muscat v Cable and Wireless*, where the Court of Appeal approved the court’s reasoning in *Dacas* to hold that, as it was *necessary* to give business reality to a work relationship,⁹⁶ a contract of service was implied between a worker and the end-user in an agency agreement. Though some weight should be placed upon the fact that this implied contract was found where there had once been an express contractual relationship between the worker and end-user,⁹⁷ to the extent that the introduction of an agency had “no effect on the substance of his existing relationship with Cable & Wireless”,⁹⁸ it is nonetheless significant to observe a situation where the court *would* be willing to imply a contract of service between the end-user and the worker.

Unfortunately, this implied contract approach is far from a panacea for the theoretical problems that the triangular relationship creates for a bilateral analytical approach. For one, the very specific outcome in *Muscat* should be read in light of later *obiter* comments from the Court of Appeal in *James*, who were quite clear that the business necessity test to imply a contract of service operated restrictively.⁹⁹ To that end, the court in that case was willing to accept that the work arrangement could be fully explained through the express contractual arrangements between the parties. As Frederic Reynolds QC suggests, where a worker’s relationship with an end user is “[purportedly

⁹² *ibid* [72] (Sedley LJ)

⁹³ *ibid* [75] (Sedley LJ)

⁹⁴ McCann (n 5) 151

⁹⁵ *Dacas* (n 78) [19] (Mummery LJ), [78] (Sedley LJ); this latter point has been accepted by the Court of Appeal in *Day v Health Education England* [2017] EWCA Civ 329 (CA) in the context of whistleblowing legislation, where it was held that even if a worker was in an employment relationship, they may also, per the extended definition of ‘worker’ under s 43K(2)(a) ERA 1996, have a ‘worker’ relationship with another party in what is most often an agency work relationship. This is certainly an encouraging step, although this is a statutory provision which may not translate into a general approach of dual liability for rights beyond those whose personal scope is defined by s 43K(2)(a) ERA 1996.

⁹⁶ *Cable & Wireless Plc v Muscat* [2006] ICR 975 (CA) [51] (Smith LJ)

⁹⁷ *ibid*

⁹⁸ *ibid* [50] (Smith LJ)

⁹⁹ *James* (n 63) [23] and [42] (Mummery LJ)

governed] exhaustively by the parties' obligations",¹⁰⁰ the likelihood of a court finding that there was sufficient business necessity to imply a contract of service with an end-user will pose a "seemingly insuperable conceptual difficulty".¹⁰¹ Indeed, given the absence of the sort of "unambiguous employer/employee relationship of the type needed for an implied contract to crystallise",¹⁰² recent cases have shied away from implying contracts of employment between end-users and workers. Rather, they exhibit a tendency to embrace the express contractual arrangements of an agency relationship as being sufficient to explain the relationship. In *Hewlett Packard Ltd v O'Murphy*, the EAT proved unwilling to disturb the contractual allocation of obligations in the agency work agreement,¹⁰³ even though there was a long-term relationship with significant control between the end-user and the worker.¹⁰⁴ Similarly, in *Costain v Smith*, the EAT was resistant to the suggestion that an agency existed as a "device" for payment between the end-user and the worker,¹⁰⁵ viewing the contractual distribution of powers and obligations as a sufficient explanation of the relationship between the parties.¹⁰⁶

What the case law demonstrates is that while there is some possibility that the courts might discover an implied contract of employment between a worker and end-user, the general tenor seems to be that there is usually an unwillingness to imply a contract that would otherwise disturb "the contractual allocation of risks which the parties have made".¹⁰⁷ Indeed, given that an orthodox application of the tests to determine employee status in English law rely upon a bilateral analysis which requires all employer functions to accrue in one entity before it can be considered an 'employer', this means that short of any judicial intervention, the *prima facie* position for most agency workers will be that they do not have an employment or UK worker relationship with either the agency or the end-user (unless expressly conceded). The express contractual allocation of obligations, duties, and risks between the agency and end-user will almost certainly result in

¹⁰⁰ Frederic Reynolds QC, 'The Status of Agency Workers: A Question of Legal Principle' (2006) 35 ILJ 320, 323

¹⁰¹ *ibid*, 321

¹⁰² Michael Wynn & Patricia Leighton, 'Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of the Temporary Agency Worker' (2006) 35 ILJ 301

¹⁰³ *O'Murphy* (n 57) [52] (Douglas Brown J)

¹⁰⁴ *ibid* [12] – [15] (Douglas Brown J)

¹⁰⁵ *Costain* (n 61) [16] (Morison J)

¹⁰⁶ *ibid* [17] (Morison J)

¹⁰⁷ Simon Deakin, 'The Changing Concept of the 'Employer' (2001) 30 ILJ 72, 75

neither party being able to satisfy all the criteria for an employment relationship with the worker, and as such, the bilateral criteria for establishing work relationship status exhibit a particular weakness in their inability to adequately extend rights to workers who are engaged in these triangular work relationships.

III.iii *Statutory Exceptions?*

Although the picture presented by the common law is fairly bleak, the explicit statutory extension of rights to agency workers for certain employment rights is cause for some optimism. Most notable is the extension of both whistleblower and EqA 2010 protections for workers in triangular work relationships.

First, Part V of the ERA 1996 provides a right not to suffer a detriment for the making of a protected disclosure.¹⁰⁸ Crucially, this right not only applies to employees and workers as defined in s 230(3) ERA 1996, but also to an extended category of worker. s 43K of the ERA 1996 defines this extended status with respect to agency workers as follows:

- “(1) For the purposes of this Part “worker ” includes an individual who is not a worker as defined by section 230(3) but who—
- (a) works or worked for a person in circumstances in which—
 - (i) he is or was introduced or supplied to do that work by a third person, and
 - (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them ... ”¹⁰⁹

¹⁰⁸ Employment Rights Act 1996, Part V

¹⁰⁹ *ibid* s 43K(1)(a)

s 43K(1)(b) also extends rights to those who may be homeworkers, freelance employees, or similar.¹¹⁰ However, for our purposes, the most interesting provision is s 43K(1)(a), which clearly aims to extend the protections against detriment for whistleblowing to workers engaged in agency work agreements. In practice, the provision does seem to operate inclusively, in that “most individuals operating within a workplace will fall within the scope of the protected disclosure provisions”.¹¹¹ This assertion is also evidenced in the sparse case law surrounding s 43K ERA 1996. For example, in *Croke v Hydro Aluminium Worcester*, the ‘introduction’ provision in s 43K(1)(a)(i) was given a wide reading, such that even though an engineer provided services through his own limited company, because he was introduced to the end-user by an employment agency, he would fall into the extended definition of a worker under s 43K(1) ERA 1996.¹¹² The agency “introduced the claimant the individual to [the end-user] ... as a potential individual to do the work, albeit subsequently supplied through the [claimant’s] corporate vehicle”.¹¹³ Moreover, the EAT stressed the importance of adopting a purposive approach when dealing with the personal scope defined in s 43K(1)(a),¹¹⁴ to apply the provisions as inclusively as possible. It stated that this is because “where statutory provisions are explicitly for the purpose of providing protection from discrimination or victimisation it is appropriate to construe those provisions so far as one properly can to provide protection rather than deny it.”¹¹⁵ More recently, and in a similarly purposive vein (as discussed at length in Chapter 1), the Court of Appeal in *Day v HEE* reaffirmed this purposive approach by holding that a worker can fall under the extended definition of worker even if, in the triangular relationship, they have a s 230(3) relationship with another one of the parties (which in this case, was an NHS Trust).¹¹⁶

Indeed, what is encouraging is that the broad language of the statutory provision has been applied in a similarly broad fashion by the courts when dealing with triangular work relationships: it is a

¹¹⁰ *ibid* s 43K(1)(b)

¹¹¹ IDS, *IDS Employment Law Handbooks* (Sweet & Maxwell) vol 14, ch 2, [2.6]

¹¹² *Croke v Hydro Aluminium Worcester Ltd* [2007] ICR 1303 (EAT) [23] (Wilkie J)

¹¹³ *ibid*

¹¹⁴ *ibid* [41] (Wilkie J)

¹¹⁵ *ibid* [33] (Wilkie J)

¹¹⁶ *Day v Health Education England* [2017] EWCA Civ 329 (CA)

definition shorn of the sorts of tests or criteria that work relationship status claims so often founder upon, applied in a purpose way to whistleblowing claims.¹¹⁷ However, while this provision and the courts' subsequent treatment of it is some cause for celebration, it must nevertheless be contextualised in the broader scheme of Labour Law. For one, this provision only applies to the very specific instance of detriment suffered as a product of protected disclosures; a fairly specific cause of action, which also likely explains the comparative lack of substantial case law in the area. Secondly, the courts are explicit that they derive their authority to apply this expansive purposive interpretation on the basis of Parliamentary intention; an intention that may not necessarily exist for other areas of English Labour Law. Indeed, there will be resistance to "transplanting" the purposive approach applied to s 43K ERA 1996 to other areas of Labour Law;¹¹⁸ a resistance which will have the ultimate effect of not challenging the traditional approach for defining the personal scope for the majority of rights that may still be relevant to triangular work relationships. Therefore this provision, and the courts' subsequent treatment of it, is very unlikely to be a vision of the future for the treatment of work relationship status more generally in the context of triangular work relationships.

The second statutory extension for workers in triangular work relationships is found in the EqA 2010, which contains specific provisions for dealing with agency work agreements. Most of the time, the absence of any contractual nexus between the worker and the relevant putative employing entity will first require contractual relationship to be implied between those two parties, and then that implied contractual relationship would have to satisfy s 83(2) EqA 2010. As discussed, even this seemingly broad definition will be subject to the same bilateral forces of the tests introduced in *Jivraj*, as interpreted in *Windle*.¹¹⁹ However, the EqA 2010 contains specific provisions to offer protections to workers in triangular relationships. s 41 of the EqA 2010 prevents a principal (i.e. an end-user) from discriminating against or victimising a person to whom they make work available for,¹²⁰ when that person is:

¹¹⁷ Chapter 1

¹¹⁸ *Croke* (n 112) [33] (Wilkie J)

¹¹⁹ Chapter 1

¹²⁰ Equality Act 2010, s 41(1)

“(5) ...

- (a) employed by another person, and
- (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).”

This essentially captures the agency work relationship, and provided the worker can satisfy the definition set out above, s 41 EqA 2010 sets out the various forms of discrimination, victimisation or detriment that a worker in such a relationship is protected from.¹²¹ However, an agency worker’s ability to vindicate these rights is nonetheless contingent upon there being a s 83(2) employment relationship between the worker and the agency that supplies the worker to the end-user. Yet as has already been discussed, given recent developments in the jurisprudence surrounding s 83(2) EqA 2010, it may be more difficult to establish that such a relationship does exist between a worker and the agency that supplies them to the end-user. Some earlier agency work discrimination decisions that assessed the nature of the contractual nexus between the worker and an agency seemed to embrace the idea that even in the absence of any obligation to offer or accept work, a worker could be a s 83(2) worker,¹²² provided that some contractual obligations subsisted between the agency and worker while the worker was assigned to an end-user.¹²³ However, following the decision in *Windle*, it is now the case that mutuality of obligation could be a relevant consideration when assessing the ‘subordination’ requirement for a s 83(2) work relationship.¹²⁴ Though this does not set mutuality of obligation as a *criterion*, its potential influence should not be understated,¹²⁵ as its absence between engagements could result in relationships between a worker and agency being classified as independent contracting, rather than s 83(2) employment.

Nevertheless, the case law surrounding this area of law does seem to exhibit a purposive application of this statutory provision for the benefit of agency workers. Indeed, although s 41 was “clearly designed to cover situations where an employment agency supplies workers, such as

¹²¹ *ibid* s 41

¹²² *London Borough of Camden v Pegg and ors*, EAT 0590/11 (EAT)

¹²³ *ibid*; IDS (n 111) vol 4, ch 28, 28.47

¹²⁴ *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, [2016] ICR 721 [23] (Underhill LJ)

¹²⁵ Hitesh Dhorajiwala, ‘*Secretary of State v Windle*: The Expanding Frontiers of Mutuality of Obligation’ (2017) 46 ILJ 268

clerical staff or nurses, to an end-user (principal) under a contract of supply, it is by no means confined to this situation”.¹²⁶ This is such that in *Harrods v Remick*, women working on a licensee’s concession stand in Harrods were considered to be working for Harrods as a principal,¹²⁷ even in the absence of the exercise of managerial control by Harrods.¹²⁸ Or in *Leeds City Council v Woodhouse*, where even when the council dealt with an ‘arm’s length management organisation’ which supplied housing management services to the council through their employees, those employees would nevertheless be considered to be working for the benefit of Leeds City Council, and would therefore fall into the scope of (the former equivalent of) s 41 EqA 2010.¹²⁹ Indeed, given this body of case law, it is hoped that the less encouraging decisions in *Jivraj* and *Windle* may be tempered when considered in this specific statutory context alongside the line of jurisprudence that applies the provisions in a reasonably purposive manner.

Nonetheless, to summarise, when considered in their totality, the statutory carve-outs are by no means a comprehensive solution to the triangular work relationship problem. These specific provisions *do* offer some limited recourse for workers in agency relationships (especially in the context of the EqA 2010), but they are certainly not complete solutions. Notwithstanding the fact these statutory extensions only apply to very specific areas of law, and may use criteria that *could* limit the kinds of work relationships to which these carve-outs even apply, they also stand to emphasise the protective lacuna that exists for agency workers. Seeing the potential that these two carve-outs have simply draws attention to how lacking the general bilateral approach to regulating trilateral relationships is. Moreover, by having specific purposively-applied carve-outs in specific regulatory contexts may lead to the retrenchment of the rigid bilateral analytical approach in all other areas of Labour Law where similar statutory extensions do not exist: the assumption being that if Parliament specifically extends the personal scope definition in specified regulatory contexts, it increases the legitimacy of applying the orthodox bilateral criteria in all other regulatory contexts that may still be applicable to triangular work relationships (such as, for example, all the rights that would be accessed by s 230(3)(b) worker status).

¹²⁶ IDS (n 111) vol 4, ch 28, [28.48]

¹²⁷ *Harrods v Remick* [1998] ICR 156 (CA)

¹²⁸ *ibid*, 162 (Sir Richard Scott VC)

¹²⁹ *Leeds City Council v Woodhouse* [2010] IRLR 625 (CA); IDS (n 111) vol 4, ch 28, [28.50]

IV *Zero Hours Contracts: Excluding Mutuality*

IV.i *A New Work Relationship Model?*

A work relationship model that has been referred to as the ‘zero hours contract’ (ZHC) is not really a new phenomenon, but there is a diversity of opinion as to how the ZHC is actually defined. The ONS suggests that they are defined by a “common element” of the lack of a guarantee of a minimum number of hours.¹³⁰ Deakin & Morris suggest that a ZHC constitutes a work relationship where an employer will refuse to commit to offering the worker “any quantum of work”.¹³¹ Freedland & Kountouris “bring out this diversity more clearly”¹³² by highlighting that work relationships characterised by their lack of obligation on the part of the employing entity to offer any hours could be classified as “‘on-call’, ‘intermittent’, or ‘on-demand’ work”.¹³³ The common thread with all of these definitions is, of course, that no employing entity contractually obliges itself to offer work at any regular interval. From the worker’s perspective, whichever definition we use, the worker in a ZHC agreement would also be under no *contractual* obligation to accept any work that was offered by an employer.¹³⁴

This diversity of definitions demonstrates that the skeleton of no obligation to offer or accept work can be fleshed out in any number of ways while still falling into the broad classifications that have been provided by a number of academic commentators. Indeed, Adams, Freedland and Prassl explicitly warn against accepting the assumption prevalent in political discourse that there may be some unitary model of the ZHC;¹³⁵ perhaps the only defining characteristic of the ZHC relationship

¹³⁰ ONS (n 26) 2

¹³¹ Simon Deakin and Gillian Morris, *Labour Law* (6th edn, Hart 2012) 167

¹³² Adams, Freedland and Prassl (n 23) 6

¹³³ Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 318 – 319

¹³⁴ Hugh Collins, KD Ewing and Aileen McColgan, *Labour Law* (CUP 2012) 243

¹³⁵ Adams, Freedland and Prassl (n 23) 3

model is the heterogeneity it invites. Moreover, the idea of a contract where there is no obligation to offer or accept work is far from a novel development. While the discussion of this concept in the language of a ZHC may be fairly new, a good deal of case law from decades prior deals with work relationships which relate to the same core idea of a lack of obligation for either party. The *Airfix Footwear* decision related to a work agreement to produce shoe parts to seasonal demand, with an absence of any obligation on the part of the employer or the putative employee to offer or accept work respectively.¹³⁶ Similarly, the central issue in *Nethermere*, the case that introduced the ‘irreducible minimum’ of mutuality of obligation as a criterion for the contract of employment,¹³⁷ concerned the absence of any contractual obligation to offer or accept work and the question of whether an implied obligation could crystallise from consistent practice between an employer and putative employee.¹³⁸ The sheer diversity of cases that have turned to the question of whether an absence of obligation to offer or accept work on the part of an employer and worker respectively is notable: from casual waiters,¹³⁹ tour guides who would be engaged on a “casual ... as required” basis,¹⁴⁰ to building subcontractors who could reject any work that a contractor was under no obligation to offer them.¹⁴¹

Rather than the particular novelty of ZHCs, what may have drawn considerable recent attention to the ZHC relationship could be the significant growth in the use of work relationships that do not offer any guarantee of hours. As discussed earlier in this chapter, since the 1980s there has been a noticeable shift away from vertically integrated firms which offered paradigm work relationships, and towards fragmented corporate organisational models which place much more emphasis on the characteristics of flexibility in the workplace.¹⁴² Further, it is likely that in pursuit of this flexibility that more firms are engaging workers with ZHC-style relationships. ONS figures show that over a remarkably short period of time, the number of workers on some kind of ZHC has grown from

¹³⁶ *Airfix Footwear v Cope* [1978] ICR 1210 (EAT) 1211 (Slynn J)

¹³⁷ *Nethermere* (n 36) 623F (Stephenson LJ)

¹³⁸ *ibid* 626F – 627A (Stephenson LJ)

¹³⁹ *O’Kelly v Trusthouse Forte* [1983] ICR 728 (CA)

¹⁴⁰ *Carmichael v National Power* [1999] ICR 1226 (HL)

¹⁴¹ *Byrne Bros* (n 38)

¹⁴² *Collins* (n 3) 353

583,000 in December 2013,¹⁴³ to almost 903,000 in June 2016.¹⁴⁴ Though some of this increase could be attributed to the increase in recognition and correct reporting of work relationships that could be considered to be ZHCs,¹⁴⁵ it is still likely that there is chronic underreporting by those who do not recognise that their work relationships are in fact ZHCs.¹⁴⁶ Indeed, the comparative ONS business survey estimates that the number of contracts that do not guarantee any hours to workers were at approximately 1.8 million in April 2018, with around 6% of businesses making some use of this form of work relationship during the same reference period (and 28% of businesses with employment of 250 or more).¹⁴⁷ Therefore, while there is perhaps nothing strictly novel about this kind of work relationship, it is the striking growth of its use by employing entities which warrants paying particular attention to ZHCs.

In any event, the reasons why employers choose to use these work relationships are unsurprising. The Resolution Foundation succinctly explains that employers rely on ZHC relationships because they allow management to “maximise the flexibility of their workforce to more easily adjust to variations in demand”.¹⁴⁸ By adjusting workforce levels by reference to demand, employers are able to shift the risk of low demand and income onto the workforce, who can be engaged or let go “at a stroke”.¹⁴⁹ This attitude is borne out in some of the case studies found in the CIPD report on ZHCs. For example, Hertz UK cites seasonal fluctuations and the pursuit of a competitive pricing model to justify the use of ZHCs;¹⁵⁰ and rationalises its decision by suggesting it may also be a stepping stone to a more permanent relationship with the company.¹⁵¹ Similarly, Moorfields Eye Hospital NHS Trust engages 275 nurses on ZHCs, and again, its rationale for using a relationship which hands apparent freedom to a worker to offer or accept work is to account for fluctuations in demand at the place of work.¹⁵² The benefits of engagement flexibility are certainly apparent for an

¹⁴³ ONS, ‘Zero Hours Contract Levels and Percent 2000 to 2012’ <<http://www.ons.gov.uk/ons/about-ons/business-transparency/freedom-of-information/what-can-i-request/published-ad-hoc-data/labour/july-2013/index.html>> accessed 06 March 2017

¹⁴⁴ ONS (n 26) 2

¹⁴⁵ *ibid*

¹⁴⁶ Adams, Freedland and Prassl (n 23)

¹⁴⁷ ONS (n 26) 5

¹⁴⁸ Matthew Pennycook, Giselle Cory and Vidhya Alakeson, *A Matter of Time: The rise of zero-hours contracts* (Resolution Foundation 2013) 13

¹⁴⁹ *ibid*

¹⁵⁰ CIPD, *Zero Hours Contracts: Myth and reality* (CIPD 2013) 10

¹⁵¹ *ibid*

¹⁵² *ibid*, 26

employing entity, but it creates a bleak situation for the worker engaged on it, whose income will be subject to the whims of business demand, bearing the full brunt of the related risks while reaping few of the related profits.

IV.ii *Sidestepping Mutuality of Obligation*

One of the primary concerns created by the ZHC, and its reliance on a contractual absence of obligation to offer or accept work, is that it almost certainly means that such work relationships will struggle to meet the mutuality of obligation criterion needed for employee and UK worker status (and most recently, possibly even EU worker status).

As Chapter 1 already explored, employee status grants access to the widest range of labour rights in English law,¹⁵³ and is contingent on the satisfaction of three criteria: a relationship of employer and employee, mutuality of obligation, and that no terms of the agreement are inconsistent with an employer and employee relationship.¹⁵⁴ For a ‘global’ contract of employment which continues between wage-work bargains, the “irreducible minimum” of mutuality of obligation (*viz.* the obligation on the employer to offer work, and the worker’s obligation to accept that offer) must be established in some form.¹⁵⁵ As explored in Chapter 1, this criterion requires a work relationship to exhibit a long-term bilateral work relationship with reciprocal obligations between a worker and their employing entity. However, when a worker is providing labour under a ZHC, which will expressly state that no such obligation to offer or accept work exists in the work relationship, the worker is placed in a difficult position where the *prima facie* position will be that there is no ‘global’ contract of employment. The relationship, by its very structure, is not a long-term relationship, given it is formally characterised as a succession of separate, individual engagements. This problem can be observed in a number of cases where significant weight has been placed on such express terms when the court was determining whether a worker could be considered an employee. In

¹⁵³ Chapter 1, Section II.ii

¹⁵⁴ ACL Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) 84

¹⁵⁵ *Nethermere* (n 36) 623F (Stephenson LJ)

Carmichael, the majority of the House of Lords found that although the claimant tour guides consistently worked 25 hours per week,¹⁵⁶ the express agreement that the guides were to be offered work on a casual basis, and were under no obligation to accept any offers, proved fatal to the finding that they were working under a global contract of employment. Similarly, the Court of Appeal in *Clark v Oxfordshire Health Authority* found that although a worker was regularly engaged for 37.5 hours per week, and never refused an engagement, she was not employed under a global contract of employment due to the absence of any formal obligation to offer work between individual wage-work bargains.¹⁵⁷ Of course, in both *Carmichael* and *McMeechan*, the worker *was* classified as an employee for the duration of the individual wage-work bargain as the mutuality requirement in those situations is much closer to a contractual notion of consideration.¹⁵⁸ However this would be of limited assistance to a worker hoping to access rights granted to an employee which also have a continuity requirement.¹⁵⁹

Doctrinally, much the same is true when looking at the mutuality requirement for a worker to be classified as a UK worker. Following the introduction of the mutuality criterion into UK worker status in *Byrne Bros*,¹⁶⁰ the criterion is likely to operate as restrictively as it would for employee status.¹⁶¹ However, a concerning recent development may even see the mutuality requirement seep into EU worker status as found in *inter alia* anti-discrimination legislation, and potentially cause workers providing labour via a ZHC to be excluded from the personal scope of the Equality Act (EqA) 2010. In *Secretary of State for Justice v Windle*, the Court of Appeal was looking at whether court interpreters could be considered to be in “employment under ... a contract personally to do work” under the EqA 2010.¹⁶² Following *Jivraj*, this required the court to consider whether the work relationship was a “subordinate” one,¹⁶³ but the Court of Appeal suggested that when assessing subordination, a tribunal may look to see if there was any mutuality of obligation between individual bargains in order to “shed light on” whether there was subordination during the

¹⁵⁶ *Carmichael* (n 140)

¹⁵⁷ *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (CA)

¹⁵⁸ *McMeechan* (n 79)

¹⁵⁹ For example, unfair dismissal protections (Employment Rights Act 1996, s 108)

¹⁶⁰ *Byrne Bros* (n 38) [17(5)] (Mr Recorder Underhill QC)

¹⁶¹ *Davidov* (n 53) 60

¹⁶² *Windle* (n 124)

¹⁶³ *Jivraj v Hashwani* [2011] UKSC 40, [2011] ICR 1004, [36] (Lord Clarke)

individual bargain.¹⁶⁴ I have argued elsewhere that the presence of mutuality of obligation is of limited assistance when assessing the question of subordination. It can only usually be satisfied by the kinds of paradigm work relationships that are well-clear of the line between subordinate work and independent work,¹⁶⁵ and this kind of continuity between wage-work bargains sheds little, if any, light on whether a particular relationship is a ‘subordinate’ one. This becomes acutely relevant for a worker engaged under a ZHC, as the absence of umbrella mutuality of obligation could influence the assessment of whether they were in a subordinate relationship with an employing entity for each individual engagement; in turn excluding them from the protective scope of the EqA 2010. Therefore, the *prima facie* position for the ZHC worker will likely be that, due to the express contractual exclusion of mutuality of obligation from their work relationships, they will most likely not be considered engaged under a contract of employment or UK worker contract (and potentially not even covered by the EqA 2010).

IV.iii *Intervention Preventing ZHCs from Sidestepping Mutuality?*

However, there are some factors militating against this assumption of exclusion. While one should remain sceptical about the argument advanced by other authors that the mutuality criterion can be applied in a particularly sensitive way,¹⁶⁶ the courts have approached the ZHC question in a holistic manner in recent years, exhibiting a willingness to look beyond the express terms that govern a work relationship, and attempting to discover the reality of the agreement between the parties. The first technique is where the courts look beyond the express terms of a work relationship to determine whether a course of dealing between the worker and the employer could crystallise into some form of mutual, legal obligation. For example, in *Airfix*, the worker producing shoe parts received a consistent amount of work “for seven years, generally five days a week”,¹⁶⁷ and the EAT determined that the ET was correct to consider that this consistent practice matured

¹⁶⁴ *Windle* (n 124) [23] (Underhill LJ)

¹⁶⁵ *Dhorajiwala* (n 125)

¹⁶⁶ *Adams, Freedland and Prassl* (n 23) 12

¹⁶⁷ *Airfix Footwear* (n 136) 1215E – 1215F

into a continuing relationship that typified a contract of employment. Similarly, in *Nethermere*, although the express terms of the agreement between the worker and employer did not oblige the worker to accept any quantity of work, the court found that over a sufficient period of time, a consistent course of dealing with “well founded” expectations of continuing offers of work could “harden” into enforceable contracts over periods of years. Alternatively, s 212(1) of the ERA 1996 could tie a number of individual wage-work bargains together,¹⁶⁸ provided that the whole or part of that week was governed by a contract of employment. As such, although the worker may not be able to demonstrate mutuality of obligation for the purposes of an umbrella contract, this will not affect the operation of the statutory provision, which would tie the individual bargains together into a single continuous period of employment.¹⁶⁹ Therefore, provided that a worker can demonstrate a relationship of employer and employee, no terms inconsistent with that relationship, and mutuality for the *individual* wage-work bargain,¹⁷⁰ then s 212(1) could operate to tie a number of engagements under a ZHC into a continuous employment relationship with the employer.¹⁷¹

However, the *Autoclenz* decision has allowed the courts to move away from relying on consistent practice over a period of time in order to establish the real nature of the agreement between the parties.¹⁷² There will be extensive analysis of the *Autoclenz* decision in Chapter 3.IV which I do not propose to repeat at this stage, but for present purposes, the following is relevant. Per Lord Clarke, taking into account the relative bargaining power of the parties, it may be necessary to ask whether the written terms of the agreement represent the “true nature” of the agreement between the parties.¹⁷³ This means that where there is an employment relationship with an asymmetry of bargaining power, as exhibited in many ZHC relationships, the court will be able to look beyond the written terms to other contextual factors such as the manner in which the parties dealt with each other.¹⁷⁴ As such, if a ZHC agreement suggests that there is no formal obligation to offer or

¹⁶⁸ *Cornwall CC v Prater* [2006] IRLR 362 (CA)

¹⁶⁹ *ibid* [11] (Mummery LJ)

¹⁷⁰ *McMeechan* (n 79)

¹⁷¹ ACL Davies, ‘Casual Workers and Continuity of Employment’ (2006) 35 ILJ 196, 198

¹⁷² *Autoclenz v Belcher* [2011] UKSC 41, [2011] ICR 1157 [35] (Lord Clarke)

¹⁷³ *ibid*

¹⁷⁴ Alan Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 ILJ 328, 339

accept work, but in practice there is a regularity to the work relationship, then the court can look beyond contractual “fictions and mystifications” to ascertain the true nature of the work arrangement,¹⁷⁵ and whether or not it could be classified as either an employee or UK worker relationship.

This approach was used in *Pulse Healthcare*, where at first instance, the ET judge applied the *Autoclenz* approach to determine that the contractual terms provided to nurses providing critical care did not reflect the true reality of the relationship; a conclusion that the EAT agreed with, suggesting that it was “fanciful” that the claimants were engaged on terms as precarious as those set out in the express contractual agreement between the employer and workers.¹⁷⁶ The *Autoclenz* doctrine seems to have given courts a powerful tool when assessing the reality of a work relationship behind the edifice of the contractual relationship, and it is perhaps even more striking when compared to the more formalistic approach to interpreting a work relationship in agency work agreements, as explored earlier in this chapter. Indeed, especially if, as the Resolution Foundation has argued, the power to reject work is often more “apparent than real”,¹⁷⁷ due to the need to secure a minimum weekly income, or due to the risk of less favourable treatment when an employer is considering who to offer work to,¹⁷⁸ it would seem that giving a tribunal the power to look beyond contractual terms and embrace these realities of ZHCs could prove to be a very powerful tool to assist ZHC workers in vindicating their employment rights.

Given these interventions from both the court and statute, it may give the impression that the situation for ZHC workers is not perhaps as problematic as their express contractual terms may lead one to believe. Unfortunately, there are two particular problems with this reasoning. First, the vindication of a worker’s *actual* employment status and the rights attached to it will usually depend upon a claim either through ACAS or the tribunal system. The Department for Business Innovation & Skills’ Employment Status Review was even willing to concede that in ZHC relationships, there is often inherent uncertainty about whether a worker will have the necessary continuity in their

¹⁷⁵ *ibid* 331 – 332

¹⁷⁶ *Pulse Healthcare Ltd v Carewatch Care Services Ltd* [2012] UKEAT 0123/12/BA [35] (EAT)

¹⁷⁷ Pennycook, Cory and Alakeson (n 148) 21

¹⁷⁸ CIPD (n 150) 26

work relationship to be considered umbrella employees.¹⁷⁹ The practical effect of this is that the *prima facie* position for most workers on ZHCs is that they have no access to any of the employment rights an employee or UK worker would be entitled to, as the express terms of their contract (and the assertion of their employer) will generally state that they are not employees or UK workers due to the formal contractual exclusion of mutuality of obligation. Thus, the only way to access these rights would be via litigation (no easy feat for low-paid workers, even in the absence of tribunal fees).¹⁸⁰

Secondly, there is the other significant issue faced by ZHC workers which is that of ‘zeroing-down’:¹⁸¹ the practice of an employer starving a worker of hours. Given that the practice of reducing a worker’s weekly hours to zero would constitute neither a formal dismissal nor a constructive breach of contract *vis-à-vis* the formal contractual terms of a ZHC,¹⁸² workers have reported concerns about raising issues in the workplace while working under ZHCs out of fear of punitive ‘zeroing down’;¹⁸³ a concern corroborated by the Resolution Foundation’s ACAS focus group studies.¹⁸⁴ Therefore, while there is some cause to be hopeful with respect to the more proactive interpretive approach taken by the courts when assessing the reality of the formal contractual terms in ZHC agreements, this still depends on a worker feeling comfortable bringing a claim, and a tribunal being sympathetic to the claim that the reality of the relationship did not accord accurately with the express contractual terms, and could therefore be explained by it.

IV.iv *Interim Conclusions*

¹⁷⁹ BIS (n 24) [104]

¹⁸⁰ Ministry of Justice, *Review of the introduction of fees in the Employment Tribunals: Consultation on proposals for reform* (MoJ 2017) 5; *R (UNISON) v Lord Chancellor* [2017] UKSC 51

¹⁸¹ Such an approach is likely only made possible due to the “implicit threat” present when work is structured in a manner which breaks down tasks into non-high-skilled or specialised tasks, which carry the underlying risk that the worker performing that task can easily be replaced: Valerio de Stefano, ‘Smuggling-in flexibility: temporary work contracts and the “implicit threat” mechanism’ (2009) ILO Working Document No 4, 28

¹⁸² Mark Freedland and Jeremias Prassl, ‘Zero-Hours - Zero Solutions’ (OxHRH Blog, 22 February 2016) <<http://ohrh.law.ox.ac.uk/zerohours-zero-solutions/>> accessed 08 March 2017

¹⁸³ Pennycook, Cory and Alakeson (n 148) 18

¹⁸⁴ *ibid* 13 and (n 11)

The express exclusion of mutuality of obligation in a ZHC poses serious problems for workers attempting to argue that they fall within the scope of employee, UK worker, and possibly even EU worker status. While individual wage-work bargains could be classified as employment or otherwise, it will often be incredibly difficult for a worker engaged under a ZHC to establish the necessary continuity in their engagement to establish access to employment rights such as unfair dismissal protections. While there have been some promising developments in the courts surrounding establishing *inter alia* the necessary mutual obligations or continuity for ZHC workers, this must still be viewed against the wider practical issues that surround establishing this status and vindicating the attached rights. Indeed, what is clear is that it is quite simple to exploit the mutuality criterion to exclude ZHC work relationships from the protective scope of pieces of legislation that use these statuses to determine access to the rights they guarantee. Moreover, it is notable that so long as the mutuality criterion (which demands that work relationships conform to a continuous bilateral model with long-term reciprocal obligations) remains a determinative criterion for employment or UK worker status, ZHCs and similarly precarious work relationships, which often do not exhibit such characteristics, will struggle to benefit from the protection offered by a wide range of statutory rights.

V *Conclusion*

The growth of work relationships that fall outside the paradigm model for work relationships has been a steady trend since the 1980s, alongside the vertical disintegration of businesses in the labour market. What has resulted is the proliferation of myriad atypical work relationships, just two of which (albeit prominent ones) this chapter has focused upon. Agency relationships expose the serious problems that basing employment statuses and their criteria on a bilateral contractual model of work relationships creates. The analysis is necessarily conducted through this bilateral lens, and it is one which is ill-suited to appreciating the fact that in many triangular relationships,

the employer functions are split between two parties, and do not accrue in a unitary employing entity, as required by the criteria for employee and UK worker status.

Moreover, with ZHC work relationships, a distinct problem lies in the fact that by framing a relationship in direct opposition to the expectations of mutuality and reciprocity engrained in employee and UK worker status,¹⁸⁵ employers can cast these relationships as ones where there may be a presumption of independence and self-employment; a presumption which might be susceptible to being overturned, but in any practical sense, probably will not be. What is apparent is that when employment statuses contain this built-in presumption of a paradigm relationship, any deviation from that norm will immediately cast doubt over the employment status of a worker in that relationship. It is hoped that this chapter, alongside the analysis in Chapter 1, has demonstrated the analytical problems created by using non-paradigm work relationship structures, when the analytical tools we are compelled to use in English Labour Law are wholly bilateral, and reinforce the idea of a long-term reciprocal relationship with a unitary employing entity. Moreover, this analysis forms the essential foundation for the next chapter, which explores the potency of the synthesis of multilateral work relationships and ZHCs into a single work relationship, as found in the gig economy.

¹⁸⁵ And possibly even EU worker status, following *Windle*

Chapter 3

Work Relationship Status in the ‘Gig Economy’ and the Synthesis of Work Relationship Models

I *Introduction*

The on-demand or ‘gig’ economy brings into focus a number of problems with the bilateral analytical model that the English employment law regime relies upon. This chapter will consider how two of work relationship models, so far discussed as discrete entities, can be synthesised to produce much more complex work relationship form that presents acute problems for a contractual analytical approach.

First, this chapter will consider definitions of the gig economy, and whether the phenomenon can be accurately defined given its sheer heterogeneity. This will consider how, in gig economy work, multi-party work relationship models and a zero hours agreement between the worker and the relevant work-offering platform are combined into a single work relationship form. It shall be shown this combination creates a work relationship model that is more potent than the sum of its parts in relation to how that model undermines the analytical strictures of the current approach taken by English law, as discussed in the preceding chapters of this thesis. Following this, specific attention will be paid to the issue of substitution clauses: to date, this has been the principal technique that has successfully undermined UK worker status in gig economy cases, but it shall be argued that not only is the approach taken towards substitution clauses doctrinally incorrect, but that they also should play a limited role in the determination of UK worker or employee status, given the very specific dynamic that such a criterion aims to identify within a work relationship.

After this, the chapter will move on to the broader issue within the line of gig economy cases, which relates to the application of the *Autoclenz* principle. Although there is much to be said for the manner in which gig economy cases have been resolved by using *Autoclenz*, it shall be argued that the principle invites courts to find UK worker status by analogy, which in turn allows them to avoid confronting the more complex questions surrounding the specific actors and relationships in these more complex work relationships. The end-result of finding employee or UK worker status (even if confined to a single wage-work bargain) is certainly desirable, but it is achieved at the expense of obscuring the particular contours of a work relationship. It shall be suggested that this in turn produces a worrying situation whereby the *Autoclenz* approach to gig economy cases creates the assumption that the law may be only adequately suited to confer rights upon workers in complex work relationships that are easily analogised to existing traditional work relationships. Moreover, it shall be suggested that such an approach also avoids asking more difficult questions about the adequacy of the law as it exists, and whether it requires fundamental change to properly address the issue of assigning rights to those workers who provide their labour in these complex work relationship models.

II *The ‘Gig Economy’: Synthesis of Concepts*

II.i *Defining the ‘Gig Economy’*

There is no agreed definition of the gig economy.¹ The Office of Tax Simplification suggests that it is “an environment in which temporary positions are common and organisations contract with independent workers for short-term or on-demand engagements”,² whereas McKinsey opt for a

¹ Ian Brinkley, *In search of the Gig Economy* (The Work Foundation 2016) 5

² Office of Tax Simplification, *Gig Economy Focus Paper* (OTS 2016) 1

less committal formulation in “contingent work that is transacted on a digital marketplace”.³ Comparatively, Nesta-Collaborative Lab choose to define it as a subset of a wider phenomenon known as the ‘collaborative economy’,⁴ with the gig economy describing the proliferation of “platforms that provide flexible work”.⁵ The diversity of the types of labour the gig economy can provide, from food delivery to coding tasks,⁶ means that a more specific definition is quite difficult: all we can say is that it represents a system whereby diverse forms of work are delivered through “decentralised [online] networks”,⁷ facilitated by an “online intermediary”.⁸ What this usually means is that far from the neatly compartmentalised questions about a work relationship that appellate case law may have to consider, the reality is that in this emergent area of the labour market, there is exceptional variety and complexity to the network of actors that play a part in the organisation of the wage-work bargain therein, and the relationships that these actors will have with each other.

Within this broader technological definition, de Stefano has proposed a distinction that has been widely replicated within the academic literature between two types of work within the gig economy: ‘crowdwork’ and ‘work-on-demand via apps’.⁹ The distinction between these two broad forms of organising work in the gig economy can be summarised in the following way. ‘Crowdwork’ is work which is executed through “online platforms that put in contact an indefinite number of organisations, businesses and individuals through the Internet, potentially ... connecting clients and workers on a global basis”.¹⁰ In essence, this part of gig economy work concerns labour that is provided *on a digital platform*, with a helpful example being that of Amazon Mechanical Turk (‘Mechanical Turk’), where work will be offered, accepted, and completed through online media. By comparison, ‘work-on-demand via apps’ refers to work which is organised through online

³ McKinsey & Company, ‘Connecting talent with opportunity in the digital age’ (McKinsey & Company 2015) <<http://www.mckinsey.com/global-themes/employment-and-growth/connecting-talent-with-opportunity-in-the-digital-age>> accessed 14 August 2017

⁴ Kathleen Stokes, Emma Clarence, Lauren Anderson and April Rinne, *Making sense of the UK collaborative economy* (Nesta-Collaborative Lab 2014) 10

⁵ *ibid*

⁶ *ibid*

⁷ Diana Beech, *Gig economy: The Uberisation of work* (Recruitment & Employment Confederation 2016) 13

⁸ *ibid*

⁹ Valerio de Stefano, ‘The rise of the ‘just-in-time workforce’: On-demand work, crowdwork and labour protection in the ‘gig-economy’ (2016) ILO Conditions of Work and Employment Series Working Paper, No 71

¹⁰ Valerio de Stefano & Antonio Aloisi, ‘Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers’ (2018) Boccini Legal Studies Research Paper, No 1, 6

platforms, but is actually done in the physical world;¹¹ with examples such as Deliveroo or Uber, where inherent to the work is the physical and geographical location of the workers providing labour.

The reason the bifurcation offered by de Stefano is so useful is because it offers a helpful way of rationally categorising a vast, heterogeneous collection of work relationships that exist on a “spectrum of services and arrangements”¹² in a manner that makes them both amenable to analysis, while providing sufficient distinction between their particular characteristics. Specific numbers of those engaged in the gig economy (in the broader sense) are difficult to calculate, not only due to the definitional difficulties presented by asking what precisely we class as gig economy work, and the possible fluidity of those who log on to the relevant platforms,¹³ but also by an unwillingness on the part of those platforms engaged in this area of work to disclose statistics about their workforces.¹⁴ But recent estimates companies like Uber engage approximately 160,000 drivers, Mechanical Turk may have as many as 500,000 workers, and smaller platforms like Taskrabbit engage 30,000 workers internationally.¹⁵

These vast *numbers* aside, there is the additional likelihood that there is a huge range in the *types* of work that gig economy workers do. As will be discussed later in this chapter, platforms can exert a variety of forms and degrees of control over workers working in a huge range of sectors, and the work that is done can be structured and distributed in innumerable ways through the platforms that are central to gig economy work. This heterogeneity means that it is of course possible to consider further subdivisions for the work relationships found in this sector. For example, Antonio Aloisi, in his doctoral thesis, proceeds by analysing the “kaleidoscopic array of app-distributed employment arrangements” in three clusters: passenger transport services; professional

¹¹ *ibid*

¹² Jeremias Prassl and Martin Risak, ‘Uber, TaskRabbit, & Co: Platforms as Employers?’ (2016) *Comparative Labor Law & Policy* (forthcoming) 5

¹³ Natasha Singer, ‘In the Sharing Economy, Workers Find Both Freedom and Uncertainty’, in *The New York Times*, 16 August 2014 <http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0> accessed 24 July 2018

¹⁴ Valerio de Stefano, ‘The rise of the ‘just-in-time workforce’: On-demand work, crowdwork and labour protection in the ‘gig-economy’ (2016) ILO Conditions of Work and Employment Series Working Paper, No 71, 2

¹⁵ Rebecca Smith & Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy* (National Employment Law Project 2015) 3

crowdsourcing; and on-demand work at the client's premises.¹⁶ This is of utility when assessing the particular operational practices of platforms that offer particular kinds of work, but it is equally imaginable that the categorisations used could become more (or less) specific, depending upon the analytical purpose. For the purposes of this chapter, a wider analysis is of more utility than an approach which focuses on specific sectors; and to this end, the analysis will proceed on the basis of the two-fold distinction between crowdwork and work-on-demand via apps discussed in de Stefano's work.

Finally, before proceeding with the doctrinal assessment of gig economy work relationships, it is worth taking a moment to reflect on the wider ramifications of what the gig economy represents. As mentioned, by way of sheer numbers, work offered via a platform may not represent a majority, or even significant proportion of the total workforce. However, what this new category of labour may offer is an insight into trends affecting the nature of work more broadly. As already discussed in Chapter 2, we have in the past few decades seen a shift away from the traditional Fordist, highly-vertically-integrated workplace, and towards vertical disintegration and the atomisation of tasks.¹⁷ To that end, platform work offers a unique insight into the more extreme end of this process. As Miriam Cherry discusses, the gig economy in many ways represents the sharpest end of a shift towards what she describes as a "flattening of organisations and subtracting middle management" in favour of an organisational model which relies heavily upon technology to hire workers for specific projects based upon their particular knowledge and skills.¹⁸

Commentators such as Stone see the potential value of such a model, as part of the reconceptualization of the labour market as a digital one, which places a significant emphasis on workers' particular intellectual capital, and an expectation that workers would move horizontally between firms throughout their working lives: workers would remain competitive to secure work in an ever-fluctuating marketplace.¹⁹ While this approach certainly does have value in the context

¹⁶ Antonio Aloisi, 'Facing the challenges of platform---mediated labour. The employment relationship in times of Non-standard work and digital transformation' (PhD thesis, Università Commerciale Luigi Bocconi 2018) 5

¹⁷ Chapter 2

¹⁸ Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 *Comparative Labor Law & Policy Journal* 577, 596

¹⁹ Katherine V W Stone, *From Widgets to Digits* (CUP 2010) 92 – 96

of skilled knowledge-based work, it is unclear how beneficial such an approach is when applied to the kinds of work often done in platform work. Indeed, far from a competitive marketplace where there is an underlying assumption that bargaining power (however defined) shifts, to some degree, towards the highly-skilled workers, the picture is quite the opposite when we think about platform work as it exists in its current form. Cherry in fact notes that gig economy work looks like a “throwback to the earlier industrial models” which acts to break tasks down into their lowest common denominator.²⁰ Indeed, this is certainly the case when we think about traditional crowdwork platforms like Mechanical Turk which will ask for very specific (likely repetitive) tasks such as spellchecking or survey responding to be done by the workers that accept jobs via the platform.²¹ However, with work-on-demand via an app, the issue is less that there is a regression towards a Taylorian/Fordist production model as we see with crowdwork. Rather, the particular regression we see there is the one Stone sets out as a consequence of a digital economy: precarity.²² Instead of the idea of institutional security in a vertically integrated workplace, vertical disintegration and digital work distribution work together to obscure the particular nature of a work relationship, with the result that work that is physically and geographically contingent (in the same way as it would be in an traditional institutional work relationship structure) is stripped of any security by virtue of its distribution through a digital platform. This issue of precarity pervades both forms of gig economy work, either because work is recast as independent contracting through the use of digital work distribution platforms, or in the case of crowdwork, where the subdivision of work into “micro labour”²³ produces a system whereby work has almost no long-term continuity, and as a result, has “rapid job fluctuation, decreasing authority of worker, a decrease in skill required and along with it decreasing remuneration”.²⁴

At this early stage, it is worth highlighting that gig economy work, so defined, does still represent a small proportion of the labour market as a whole. In the UK, it is estimated that 84.3% of workers

²⁰ Cherry (n 18) 596

²¹ Antonio Aloisi, ‘Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of on-Demand/Gig Economy Platforms’ (2016) 37 *Comparative Labor Law & Policy Journal* 653, 666

²² Stone (n 18)

²³ Cherry (n 18) 598

²⁴ *ibid*, 600

are classified as employees,²⁵ but by the same token, self-employment is at the highest it has been in 40 years,²⁶ with increasing engagement in gig economy work being “one salient aspect of this shift”.²⁷ This should of course be contextualised against the sorts of work relationships that have been produced as a result of vertical disintegration,²⁸ which were discussed in Chapter 2. However, the reason this chapter is focusing on what, in absolute terms, may not be the most ubiquitous labour law issue is due to the potential that these work relationships models have to be applied to other, traditional work relationship structures. Far from being “distracted by the bright, shiny objects that appear on our smartphones”,²⁹ what we might be observing is the vanguard for an method of organising work relationships in a way which could be applied in whole or in part to the majority of work relationships that, for now, are recognised as employment relationships. Indeed, as the technological costs of mediating work digitally continue to fall, the economies of scale once present in organising work through vertically integrated employment reduce; and in turn the viability and desirability of digital organisation may increase for employing entities.³⁰

The digital organisation of work might not necessarily mean that all work relationships will be organised like the sorts of gig economy models that this chapter will focus on, but what the gig economy analysis will highlight are the worst abuses and excesses of this shift. The underlying features of instability and poor remuneration in the forms of work that are prevalent in the gig economy, as it currently exists, are amplified by the fact that these relationships are situated in a regulatory field that is often considered by commentators to be a “normative vacuum”.³¹ The next section will consider the legal techniques used to create this normative vacuum, and will analyse both the manner in which ‘crowdwork’ and ‘work-on-demand via apps’ relationships are structured, and how these relationships interact with doctrinal labour law.

²⁵ Abi Adams, Judith Freedman, and Jeremias Prassl, ‘Rethinking legal taxonomies for the gig economy’ (2018) 34 *Oxford Review of Economic Policy* 475, 476; Office for National Statistics, Table EMP01 SA, June 2017

²⁶ *ibid* 477

²⁷ *ibid* 477

²⁸ Hugh Collins, ‘Vertical Disintegration Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *OJLS* 353; David Weil and Tanya Goldman, ‘Labor Standards, the Fissured Workplace and the On-Demand Economy’ (2016) *Perspectives on Work* 26

²⁹ Weil and Goldman (n 28) 28

³⁰ Adams, Freedman and Prassl (n 25) 479

³¹ Valerio de Stefano, ‘Labour is not a technology – Reasserting the Declaration of Philadelphia in times of platform-work and gig-economy’ (2017) *UISLabor* 2/2017, 13

II.ii *New Taxonomies?*

As we unpack precisely how platform work is organised, we will be using the two-strand approach suggested in the previous section: crowdwork; and work-on-demand via apps. This will provide sufficiently general analysis, while ensuring that the key distinctions between the two forms of work organisation can be drawn out in the discussion.

However, before we look at these two strands, it is worth considering the particular structure of platform work generally, and why the idea of 'technique synthesis' could be potentially applied to obscure the particular nature of gig economy work relationships. When we consider the language that is used in discussions of gig economy work, it tends to distance itself from traditional taxonomies surrounding labour. Take, for example, the EU Commission's Communication on platform work: in characterising platform work in the most general sense, it categorises participants as service providers ('peers' who are private individuals offering services on an occasional basis, or professional service providers); users of these services; and intermediaries that connect these entities.³² As later parts of this chapter will discuss, whether this new taxonomy is even required may be queried, but the effect of using a unique system of classification for participants in gig economy work, as opposed to other forms of work, is that it may inadvertently suggest that there may be something particularly unique about how work is organised via these platforms. While it is certainly true that it may be easy to slip into thinking about gig economy platform workers as 'users' of a particular app, such that they can be framed as a kind of hybridised "ProdUser" (a portmanteau of 'producers' and 'users')³³ given their receipt, interaction, and sometimes *provision* of work through an online platform, care should be taken when using novel descriptors in situations that may not truly demand them. As the remainder of this section will explore, although platform work is heavily reliant on technological intervention for the (as we shall

³² EU Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European agenda for the collaborative economy COM(2016) 356 final, 3

³³ Sophie-Charlotte Moatti, 'The Sharing Economy's New Middlemen' (2015) Harvard Business Review

see *inter alia*)³⁴ the distribution of work, which *prima facie* places gig economy workers in a “grey area” with respect to the true nature of their work relationships *vis-à-vis* traditional work relationship statuses and binaries,³⁵ it is likely that the new taxonomies and classifications being deployed in gig economy narratives may simply act to obscure what are likely traditional relationship dynamics, albeit on a digital landscape.

It is this particular assumption that the next subsection will assess. By looking at the relationships between workers who provide work-on-demand via apps, and crowdworkers, the analysis will consider whether there is in fact anything novel about how work is organised on digital platforms, and whether these new structures could provide *unique* challenges to the English law on work relationship status. The analysis will focus on how techniques discussed in earlier chapters (such as ZHCs and tripartite work relationships) have been combined and operationalised in platform work relationships to further obscure the true nature of the work relationships between different parties in these relationships.

II.iii *Synthesis, Digitisation, and Work-On-Demand via Apps*

Before we enter into an assessment of how work relationships are organised in work-on-demand via apps, it is important to grasp the meaning of ‘synthesis’ as applied in this analytical context. So far, we have discussed how particular structural techniques can be used to undermine specific criteria used to establish a particular work relationship status (e.g. employee or UK worker), but up to this point, the focus has been on how each technique is used in isolation to attack a specific part of a work relationship status. As the gig economy has evolved from what might have been characterised as an informal method of exchanging services via digital platforms, to a *bona fide* aspect of the labour market, it is all the more important to be able to properly analyse how those workers that are engaged within it are classified and characterised. Indeed, as the gig economy

³⁴ Cherry (n 18) 596

³⁵ Directorate-General for Internal Policies, ‘Critical Assessment of European Agenda for the Collaborative Economy: In-Depth Analysis for IMCO Committee’ (2017) IP/A/IMCO/2016-10, 4

becomes “professionalized”,³⁶ we can see that platforms strive to combine the structural techniques utilised in isolation (such as zero hours contracts, or work through an intermediary) via digital platforms in order to create the impression that there is something novel about the nature of the work relationship offered through an app, as opposed to one that would be mediated through more traditional channels.

This is particularly notable in work-on-demand via apps, which constitutes labour that is geographically and physically restricted, and is often highly analogous to traditional labour models such as taxis, cleaning, or food delivery. As shall be discussed, given the fairly straightforward way that such analogies can be made, platforms will synthesise a number of techniques across a digital medium in order to represent the work being done within the relationships they mediate as being outside the scope of established work relationship statuses and models. It shall be shown that “there is little, if anything, that is novel about the work arrangements underlying different on demand platforms’ business models”,³⁷ as they draw on the same organisational tropes that are already exploited in non-platform work; however, there is something notably potent about applying these techniques together, through an online platform. Specifically, it shall be shown that the importance of obscuring a number of managerial powers and prerogatives, usually plainly vested in an employing entity, in the ether of digital work organisation amplifies the effect of the synthesis of organisational techniques used to characterise platform work relationships as something other than a kind of employment or worker status. As de Stefano notes in his ILO research paper on automation in *inter alia* platform work relationships, managerial prerogatives are often viewed as one of the “distinctive elements of employment status [broadly defined]”,³⁸ and when those prerogatives are exercised through algorithms and automation, it further obscures the precise nature of the work relationship on the platform: framing an otherwise-familiar relationship as one that is potentially novel.

³⁶ Moatti (n 33)

³⁷ Mark Freedland and Jeremias Prassl, ‘Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom’ (2017) Legal Research Paper No 19/2017 <<https://ssrn.com/abstract=2932757>> accessed 20 February 2018, 7

³⁸ Valerio de Stefano, “Negotiating the algorithm”: Automation, artificial intelligence and labour protection”, Working Paper No. 246 (ILO 2018) 13

This is what this section means when discussing the concept of 'synthesis'. It is the powerful combination of a number of traditional work relationship structures *within* a digital organisational system. So while Freedland and Prassl *are* correct to note that there may not be anything particularly novel about the specific *forms* of organisation that can be identified in gig economy relationships,³⁹ there certainly is something to be said about how they have a more potent character when implemented through myriad professional digital platforms.

II.iii.i *The Uber decision*

A good example of how this synthesis on a digital platform works with respect to work-on-demand via apps, which centre around work done physically in a particular location is the recent litigation in *Aslam and Farrar v Uber*.⁴⁰ This case has been somewhat totemic in the raft of litigation that has recently emerged in relation to the gig economy, and is an excellent example of how the synthesis of work relationship models can act with such potent effectiveness to undermine work relationship status classifications. What was interesting about the relationship between a driver, the passenger, and Uber was that it represented a triangular work relationship, but one that was imbued with aspects of a ZHC, and where employer functions were distributed between Uber and (to some very limited extent) the passenger. The arrangement can be summarised as such: the passenger would request a journey via the Uber app, which is relayed to Uber London Ltd (ULL). ULL passes this request on to a nearby driver, who has 10 seconds to accept the request by the passenger. If accepted, the driver will be made aware of the passenger's destination when they collect the passenger from their starting point. The route for the journey is provided to the driver by Uber's mapping software, and the driver is expected to follow this route unless expressly otherwise requested by the passenger.⁴¹ The passenger pays the cost of the journey to Uber, who render weekly payment to the drivers, less a 'Service Fee' at either 20% or 25% of the total earnings.⁴²

³⁹ Freedland and Prassl (n 37)

⁴⁰ *Aslam, Farrar and Others v Uber BV* [2016] Case No: 2202550/2015 & Others (ET)

⁴¹ *ibid* [15] – [16]

⁴² *ibid* [21]

Uber, however, claimed that this triangular relationship merely provided a platform to connect drivers and passengers.⁴³ Formally, they excluded any control over the drivers, and claimed that drivers were completely free to accept or reject any offers for rides that were offered to them via Uber.⁴⁴ However this formal contractual characterisation was not accepted on face value by the ET. For one, it was found that Uber's contractual attempts to abdicate control in the work relationship was, per the approach in *Autoclenz*,⁴⁵ not reflective of the reality of the relationship. Aside from the obvious control Uber exercised when determining the routes that the drivers would be expected to take, there was a plethora of conduct rules and disciplinary procedures that Uber also implemented: from having wide powers to terminate a relationship with a driver;⁴⁶ a form of performance review in the shape of the constant surveillance of not only the percentage of rides that a driver would accept (a driver would have to accept 80% of requests to retain their accounts with Uber);⁴⁷ a risk of account deactivation if their rating fell below 4.4/5 as rated by passengers;⁴⁸ and a fairly sophisticated disciplinary procedure for complaints made about drivers' conduct.⁴⁹

While this demonstrated that the majority of control practically lay with Uber, it is also worth taking a moment to note that another aspect of this relationship is the role *passengers* play in the performance review of drivers. A driver's eligibility to drive is premised upon their ability to maintain a particular rating, determined by the ratings provided by passengers. As such, while the passengers may not be in a direct contractual relationship with the driver,⁵⁰ they may exercise an employer function by having a hand in the Uber's performance review procedure. Per Miriam Cherry, "Uber has essentially outsourced its quality control to its passengers".⁵¹ In summary, what is striking is how this panoply of control and direction over the drivers, and the manner in which they drove, was almost exclusively mediated through digital media and code. By abstracting these

⁴³ *ibid* [33]

⁴⁴ *ibid* [38]

⁴⁵ *ibid* [93]

⁴⁶ *ibid* [35]

⁴⁷ *ibid* [51]

⁴⁸ *ibid* [55]

⁴⁹ *ibid* [56]

⁵⁰ *ibid* [93]; the drivers could in no real sense have a contractual relationship with the passengers when they did not know their identities.

⁵¹ Cherry (n 18) 597

employer functions, which were plainly vested in Uber, to a digital platform, further complication was added to discerning precisely how these powers were in fact exercised, and indeed by whom.

Encouragingly, the ET found that ULL was the relevant employing entity for drivers, and that while the app was switched on, the driver was in the relevant territory, and available to accept fares, that there was the necessary mutuality of obligation and control between Uber and the drivers for the latter to be considered 'workers' per the s 230(3)(b) ERA 1996 definition (i.e. UK worker).⁵² For the Tribunal, the "essential bargain" was that drivers would make themselves available to accept work for reward, and would carry Uber's passengers to their destinations. To the ET, it was "simple common sense" that, though characterised otherwise by the contractual relations between the parties, in any real sense, Uber was providing transportation services.⁵³ The Tribunal was able to look beyond the triangular relationship that the contractual documentation presented, as well as the express term that each ride a driver offered was part of a discrete wage-work bargain, to find sufficient control of the driver by Uber, and sufficient mutuality of obligation between Uber and the driver to satisfy the requirements for UK worker status; an outcome that is certainly to be welcomed.

However, even though the ET reasoned by analogy to the conclusion that Uber drivers were UK workers for the periods they were logged on, the manner in which both the triangular relationship and the ZHC element were operationalised in this case demonstrate the potency of the synthesis of these techniques.⁵⁴ Focusing first upon the tripartite element of the work relationship in *Uber*, it is crucial that Uber characterised their role in the relationship not as an agency as discussed in Chapter 2, insofar as they were an intermediate that supplied work to another party; rather they presented the relationship as *facilitating a contractual agreement between the driver and the passenger*.⁵⁵ This is in notable contrast to the cases discussed in Chapter 2, where the intermediary would usually accept that they possessed at least *some* employer functions (per Prassl's taxonomy). Uber was adamant to present itself as an entity that exercised absolutely no employer functions in

⁵² *Uber* (ET) (n 40) [93]

⁵³ *ibid* [89]

⁵⁴ For more discussion of this issue, see Chapter 1 of this thesis.

⁵⁵ *Uber* (ET) (n 40) [91]

the tripartite relationship, purporting rather to connect drivers to passengers in order to facilitate a contractual agreement between the latter two (when neither would even know the full name or nature of the bargain until the trip had been accepted).⁵⁶ This complete abdication from any employer functions is then further compounded by an assertion on the part of Uber that they were also under no obligation to offer work (nor the drivers under any obligation to accept it).

The second significant element that was then layered on top of this was the claim that at all material times, Uber claimed that drivers were under no obligation to switch on their apps, or accept any jobs that “may be offered to them”.⁵⁷ This approach is quite closely aligned with the manner in which a traditional ZHC would operate insofar as there is an insistence in the formal written terms of the work agreement that there is no obligation to offer or accept any work placed upon the employer or employee respectively. Indeed, there have been a number of gig economy cases, such as *Dewhurst v CitySprint* for example, where a two-party work relationship model has relied upon *inter alia* a ZHC-like agreement between the worker and employer to try and undermine the mutuality of obligation element.⁵⁸ As discussed in Chapter 2, by formally framing the relationship between the worker and employer as one where there are no underlying obligations to offer or accept work, these relationships create, at the very least, a pre-litigation assumption that these obligations do not in fact exist between the parties.

II.iii.ii *Analytical Problems Created by Technique Synthesis*

It is the combination of both these techniques in a single work relationship model in *Uber* that makes it powerful, and more so than the cumulative sum of the effect of each individual structural method that is adopted. Beginning with the tripartite relationship, it attempts to split the control and remuneration aspects of a work relationship such that the existence of a fully formed contract of employment/UK worker between the worker and the end-user who receives the worker's labour

⁵⁶ *ibid* [91]

⁵⁷ *ibid* [85]

⁵⁸ *Dewhurst v Citysprint UK Ltd* [2016] Case No 2202512/2016 (ET)

cannot exist due to the lack of mutuality of obligation between those two parties.⁵⁹ The end-user may have some partial element of control in the relationship, but because they are not the party responsible for remuneration or the organisation of the *offers* of work (which are mediated behind the veil of a digital platform), the mutuality element cannot be found between these two parties. Indeed, there is no contractual nexus between these parties. Yet when the worker then aims to establish an employment/UK worker relationship with the intermediary, the fact that the intermediary will rarely *formally* exercise “day to day” control over the worker will usually be fatal to the ‘employer-employee’ or ‘not running a business’ limb of the employee or UK worker tests respectively.⁶⁰ Of course, when we interrogate the facts of any given case (as was done in *Uber*), we may see that this may not have been the case, and a number of managerial prerogatives could be identified in those work relationships, but this project is notably difficult when those prerogatives may not be formally recognised in any documentation, but are rather buried within the depths of the algorithms used to mediate work relationships on these digital platforms.⁶¹ *Then*, interspersed within this relationship with the intermediary would be a term in the contractual agreement between the worker and intermediary which would state that any work offered would not be done under any obligation; and that there would be no obligation to accept said work.

By characterising the only likely contractual nexus in the tripartite relationship as such, we begin to see how the synthesis of techniques acts to undermine an attempt to establish work relationship status in any way. Alone, the tripartite approach already does a significant amount of the heavy lifting in order to exclude the notion that a worker would be under the control or instruction of the intermediary when performing work for the end-user. However, *even in the event* that a ‘control’ element were to be identified between the parties, the additional assertion that the relationship was one where neither party owed any ongoing obligations to the other *vis-à-vis* the mutuality of obligation question would act to even further undermine the argument that any contractual nexus between worker and intermediary satisfied the requirement that there would be some obligation to offer and accept work. To that extent, each element of the work relationship structure attacks a

⁵⁹ *Hewlett Packard Ltd v O'Murphy* [2002] IRLR 4 (EAT)

⁶⁰ *Dacas v Brook Street Bureau UK* [2004] ICR 1437 (CA) [64] (Mummery LJ)

⁶¹ *Cherry* (n 18) 596

specific criterion that is used to determine employee or UK worker status; but this approach is more than a matter of simple arithmetic. In essence, the formal relationship between the worker and gig economy platform is characterised as one that is entirely divested of any of the traditional managerial prerogatives that one would expect to see in an entity that exercises an 'employer' role, obscuring them behind complex digital arrangements that may often prove remarkably difficult to decipher. This is then compounded by the fact that whatever nexus that *can* be established between the worker and the gig economy platform (*even where it cannot entirely constitute a full employee/UK worker relationship*), the platform asserts that there is a ZHC relationship between these two parties, thereby attacking a different aspect of the necessary work relationship criteria needed to qualify a work relationship as one worthy of a status in English law.

The reason that such an approach is so potent relates to the manner in which a tribunal is expected to reason when assessing questions of employment status. The starting point is that the first instance tribunal will act as a fact-finding entity which generally establishes the "overall factual matrix" of the case before it.⁶² Crucially, when a tribunal is presented with an agreement that synthesises both an agency work agreement with a ZHC approach, its analysis is not simply limited to the fact that each device attacks a particular criterion for work relationship status (such as mutuality, or whether the worker is not running a business on their own account), but rather forms part of a broader picture that the tribunal will paint of the work relationship. The argument proposed here is that in the event that a number of these techniques are applied, which ostensibly only undermine a specific aspect of the criteria for establishing a work relationship status, they act in concert to produce a factual matrix that reinforces the idea that the work relationship is one of, usually, a contract for services. This is also not helped by the fact that managerial powers which certainly do exist in the work relationship are obscured behind and within complex algorithmic control within the app itself.

When these techniques come together and undermine the idea that, for example, mutuality of obligation (in either guise) exists in a work relationship, it could have two worrying effects. First,

⁶² *Uber v Aslam, Farrar, Dawson and Others* [2017] Appeal No UKEAT/0056/17/DA (EAT)

it could provide a tribunal with a route to producing a factual matrix that characterises a work relationship as one which fails to meet certain *individual* criteria for a work relationship status in relation to either the platform or end-user. However, the second issue that flows from such a finding is that it could give the impression that the relationship *as a whole* is therefore best characterised as independent contracting *because* of that finding that each nexus between the worker and employer and/or end-user is *prima facie* deficient *vis-à-vis* the criteria for work relationship status. It is in this approach that there is a potency to the synthesis of techniques. When these deficiencies are interwoven, they produce a work relationship form that is not only remarkably complex and difficult to analyse, but because it also explicitly attacks the existence of specific necessary work relationship status criteria that need to exist in the nexus a worker has between any employing entity within the work relationship, combine to create the overall impression that the relationship *as a whole* is best characterised as independent contracting.

Of course, in the case of *Uber*, the tribunal found this synthesis and compounding of techniques to be “faintly ridiculous”,⁶³ given that Uber aimed to argue that they existed merely as a platform to allow individual drivers to act as their own businesses, which contracted directly with passengers.⁶⁴ Indeed, the absurdity of what the synthesis of techniques led to in *Uber* was enough for the tribunal to analogise with any other taxi company and find that the drivers were, at least during the periods in which they were logged on to the *Uber* app and available to work, UK workers.⁶⁵ However, this decision must be treated with care. Given the “absurdity of the propositions” that the synthesis in *Uber* created,⁶⁶ it is perhaps not surprising that the court was able to apply the *Autoclenz* test (which will be discussed in specific detail later in this chapter) to find that *Uber* was a supplier of transportation services, and its drivers were UK workers.⁶⁷ But it is this inherent absurdity that undermines what could otherwise be described as the potency of the synthesis approach. Combining these techniques with a greater degree of finesse, such that the final work relationship bears some partial link to reality while attacking each of the criteria for work relationship status

⁶³ *Uber* (ET) (n 40) [90]

⁶⁴ *ibid*

⁶⁵ *ibid* [93]

⁶⁶ *ibid* [91]

⁶⁷ *ibid* [89]

could act to produce an incredibly effective way of obscuring the precise nature of the relationships that a worker will have with their employing entities, such that a tribunal *may* find that the factual matrix produced would fail to satisfy criteria such as mutuality of obligation in any of the nexuses that exist in a triangular work relationship.

So when we think about how work-on-demand via apps is organised by looking at the “paradigm” approach taken by Uber,⁶⁸ what become strikingly clear is not only that a number of different techniques are blended together to produce a work relationship that is structurally geared to attack every criterion of work relationship status in English law, but also that the concentration of employer powers and prerogatives in a digital platform offers a layer of abstraction that adds further confusion and obscurity to who is exercising these powers, and precisely how that is being done. This approach introduces informational asymmetries *vis-à-vis* “labor logistics ... , driver behaviour, and policies for performance targets”,⁶⁹ vesting significant “decentralised” power in Uber’s hands in relation to the employer functions they factually exercise,⁷⁰ while simultaneously allowing them to claim that none are actually being exercised. This in turn creates enormous difficulty when attempting to discern what the true factual matrix for the work relationship will actually be. Moreover, bringing this discussion back to the question of English employment law, the likely result of this synthesis could well be that the precise nature of a gig economy platform’s role in a work relationship could be obscured behind the blend of structural synthesis and digital abstraction of prerogatives; thus making the job of trying to wrangle all these disparate functions into the fairly rigid criteria used to determine English work relationship statuses rather difficult, and at worst, almost impossible. Quite the same problem has also been articulated outside the jurisdiction too, with the EU Commission also straining to essentialise the elements of these complex work relationship models so that European courts can attempt to apply the binary EU employment status question to work relationships that likely need much more sensitive analysis.⁷¹

⁶⁸ Antonio Aloisi (n 21) 672

⁶⁹ Alex Rosenblatt and Luke Stark, ‘Algorithmic Labor and Information Asymmetries: A Case Study of Uber Drivers’ (2016) 10 *International Journal of communication* 3758, 3777

⁷⁰ *ibid*

⁷¹ EU Commission (n 32) 12

What the structure of work-on-demand via apps relationships, through the lens of *Uber*, demonstrates is a criticism and a failing. The criticism is that of the gig economy platforms that deliberately adopt new taxonomies, complex work relationship models, and digital abstraction to not only undermine the work relationship statuses of their workers, but also to mask the power that they as platforms wield in those work relationships. Yet by the very same token, what becomes striking is that the act of producing these complex structures may produce analytically insurmountable hurdles for English employment law; forcing tribunals to rely on reasoning by analogy and ‘common sense’ to arrive at a conclusion that the criteria and settled case law seem to be unable to allow them to reach. Indeed, it draws out the notable failings of the current analytical approach to work relationship status, and one which is certainly not limited to the English jurisdiction alone.

II.iv *Crowdwork and Synthesis*

Waters become even more muddled when we shift our focus from work-on-demand via apps to crowdwork. To recap, this is crowdsourced work where a crowdsourcer (i.e. a person requesting work) will interact with a digital platform in some way to put them in contact with a crowdworker (i.e. the person who will end up providing their labour in relation to the digital platform).⁷² These platforms often work to reduce tasks down to very basic or specific jobs that require some human participation to complete, such that they look like a modern iteration of Taylorism or Fordist production; albeit with tasks that are completed in the “knowledge-based, information-rich economy” in which these crowdworking platforms are necessarily located in.⁷³

Prassl and Risak note that the viability of such a model is premised on two factors. First, there must be a sufficiently large pool of crowdworkers who are willing to accept work, and compete for it in order for the price of the work they offer to remain sufficiently low.⁷⁴ Take, for example, Amazon

⁷² Prassl and Risak (n 12) 5 provides a helpful diagrammatical explanation of how precisely this works.

⁷³ Cherry (n 18) 595

⁷⁴ Prassl and Risak (n 12) 7

Mechanical Turk ('AMT'). Specific numbers of how many crowdworkers are engaged with AMT are difficult to obtain, given the disparity that exists between workers that may be registered on the platform, and those who actively engage with it and provide work through it. The Pew Research Centre estimates that there are potentially 500,000 registered workers on the platform,⁷⁵ whereas others have undertaken detailed statistical data capture research to estimate that the number of *unique* users may be closer to the 100,000 – 200,000 mark.⁷⁶ Whatever the specific numbers may be, even the vast range of estimates provided give an insight into the sheer scale of the potential pool of workers that may be available to complete tasks for crowdsourcing.

The second necessary requirement for such a model is that the platforms move away from a more traditional exercise of managerial prerogative powers,⁷⁷ and rather rely upon digital reputation management systems that provide a worker with a sort of 'rating' of their performance, produced either by the platform, the end-user, or some combination of the two. Again, this particular approach is not particularly novel to crowdwork *vis-à-vis* work-on-demand via an app (note how this aptly describes Uber's own internal rating system),⁷⁸ but is central to the manner in which crowdworking platforms operate in order to deliver the sort of flexible, on-demand workforce that is shorn of the "overheads"⁷⁹ that are attached to the exercise of traditional "command-and-control systems inherent in 'traditional' employment relationships".⁸⁰

Beyond these broad strokes, the heterogeneity that we see in crowdwork prevents a general analysis to be conducted. Indeed, the manner in which the relationships are mediated between:⁸¹ the crowdworker and the platform; the crowdsourcer and the crowdworker; and the crowdsourcer and the platform are myriad, and would demand unique analysis to draw out the nature of the relationships between the various parties involved. The work done, and how it is mediated and

⁷⁵ Paul Hitchin, 'Research in the Crowdsourcing Age, A Case Study' (*Pew Research Centre*, 11 July 2016) <<http://www.pewinternet.org/2016/07/11/the-size-of-the-mechanical-turk-marketplace/>> accessed 03 August 2018

⁷⁶ Panos Ipeirotis, 'How many Mechanical Turk workers are there?' (*A Computer Scientist in a Business School*, 29 January 2018) <<http://www.behind-the-enemy-lines.com/2018/01/how-many-mechanical-turk-workers-are.html>> accessed 03 August 2018

⁷⁷ Prassl and Risak (n 12) 7

⁷⁸ *Uber* (ET) (n 40) [93]

⁷⁹ Amazon Mechanical Turk, *Homepage* <<https://www.mturk.com/>> accessed 03 August 2018

⁸⁰ Prassl and Risak (n 12) 7

⁸¹ *ibid*

requested can vary so much that, what may be an accurate analysis for one platform may well be an entirely fanciful explanation for how another one would work. For that reason, the analysis here is limited to an exemplar platform that offers sufficient insight into its operations, and one which raises some particularly interesting points about what the specific relationships between the three actors in this crowdsourcing relationships say about the dynamics in those relationships: Amazon Mechanical Turk.

II.iv.i *How Stuff Turks: Structure and Operation of Amazon Mechanical Turk*

The first step in understanding the dynamics of the work relationships we see in AMT is to understand specifically how the platform works. Famously, Amazon CEO Jeff Bezos referred to the platform as offering “humans as a service”,⁸² and those humans that AMT provides as a service offer a fantastical range of benefits to a potential crowdsourcer who wishes to use the platform for labour. Per the AMT homepage, potential crowdsourcers are offered an array of potential perks for using the service: a 24-hour, on-demand workforce “whenever your business needs them”;⁸³ almost complete elasticity in the size of the workforce you can engage through AMT;⁸⁴ lower cost structures produced by turning “fixed costs into variable costs”;⁸⁵ as well as “several mechanisms” to conduct quality control for the work done by a crowdworker.⁸⁶ The actual service that AMT purports to provide, beyond this marketing material, is a platform upon which crowdsourcers can tender offers for ‘human-intelligence-tasks’ (HITs) to be undertaken by workers on AMT’s digital platform. HITs are essentially forms of work that require some human input to be completed (i.e. they cannot be completed by a computer or algorithm), and perhaps tautologically, can only be completed by humans. HITs can range from categorising photographs to “participating in an online behavioural study and sorting data spread-sheets”.⁸⁷ Therefore, AMT purportedly exists

⁸² Jeremias Prassl, *Humans as a Service* (OUP 2018) 3

⁸³ Amazon Mechanical Turk, ‘Homepage’ (n 79)

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ Aloisi (n 21) 666

simply to create a “marketplace for work that requires human intelligence”;⁸⁸ a platform in the truest sense.

However, the picture is far less straightforward than the public-facing marketing would lead a potential crowdsourcer (and perhaps more importantly, crowdworker) to believe. If we break down each of the three relevant relationships within the structure of the overall AMT relationship, we see that there is a fair amount of hidden complexity in the terms of use for the platform.

The first relationship is that between the crowdsourcer and the platform. If a crowdsourcer wishes to post an HIT on AMT, they must *inter alia* agree to the AMT Participation Agreement. Beyond more straightforward obligations such as an obligation to provide AMT with accurate information,⁸⁹ there are some notable powers that the platform reserves with respect to the crowdsourcer. AMT’s position in the Participation Agreement is that they are “not involved in the transactions” that occur via the platform,⁹⁰ and yet there are numerous examples of how there are indirect or subtle prerogatives and powers exercised by AMT against a crowdsourcer. First, not only does AMT set behavioural standards for crowdsourcers *vis-à-vis* crowdworkers (“you will interact with Workers in a professional and courteous manner”),⁹¹ but additionally, the platform prohibits a crowdsourcer from asking a worker to perform any tasks outside the platform itself: a *de facto* exclusivity requirement if the formation of the relationship was through the platform. This latter restriction is a notable limitation on the supposed relational freedom the parties would supposedly have if the platform simply acted as an uninvolved marketplace,⁹² and is illustrative of a more subtle form of control exerted by the platform, which may not affect precisely how obligations are organised between a crowdsourcer and crowdworker, but will affect the nature of the relationship at a higher level of abstraction.

⁸⁸ Amazon Mechanical Turk, ‘Homepage’ (n 79)

⁸⁹ Amazon Mechanical Turk, ‘Participation Agreement’ <<https://www.mturk.com/worker/participation-agreement>> accessed 03 August 2018, cl 1

⁹⁰ *ibid* cl 2

⁹¹ *ibid* cl 3(a)(i)

⁹² Aloisi (n 21) 670; Guy Davidov, ‘Who is a Worker?’ (2005) 34 ILJ 57

The next notable inroad into the claim that the platform is not involved in the relationships fostered on it can be found at cl 3(d) of the Participation Agreement. This clause, which claims that crowdworkers on the platform are independent contractors places a further obligation upon the crowdsourcer to “not engage a Worker in any way that may jeopardize that Worker’s status as an independent contractor performing Tasks for you”.⁹³ There are two particularly striking things about this requirement: first, that AMT is placing a (somewhat ill-defined) prohibition upon a crowdsourcer to engage crowdworkers in a specific form, depending on jurisdiction; and second, it seems remarkably interventionist. This sort of provision in the Participation Agreement is particularly difficult to reconcile the overarching claim that AMT is simply a platform, in no way involved with the transactions between the parties.⁹⁴ Indeed, to compel not simply the form but also the eventual characterisation of the relationship between the two parties using the platform *as between them* clearly places the platform in a position that goes beyond that of a mere disinterested platform.

The remaining provisions of particular interest between AMT and the crowdsourcers are those that relate to pay, termination, and intellectual property. The basic fee structure imposed upon the crowdsourcer is a “20% fee on the reward and bonus amount (if any) you pay Workers”,⁹⁵ with certain additional costs imposed for specific additional ‘Qualifications’.⁹⁶ The curious thing about such an approach is that a percentage fee of any total pay is taken by AMT, which is certainly a more significant incursion into the remuneration structure of the crowdwork than a flat fee would be (indeed, on a *bona fide* platform that is not involved in the transaction between two parties, one may assume that the money that flows between two contracting parties and the nature of the work they do would be irrelevant to the fee the platform would charge), is the specificity of the fee structure, and the fact that AMT has a fee structure for characteristics vested in the crowdworker. The crowdsourcer is required to work within AMT’s pricing structure, and this is particularly prescriptive with respect to ‘premium qualifications’. If a crowdsourcer wishes to have the work

⁹³ Amazon Mechanical Turk, ‘Participation Agreement’ (n 89) cl 3(d)

⁹⁴ *ibid* cl 1

⁹⁵ Amazon Mechanical Turk, ‘Amazon Mechanical Turk Pricing’ <<https://requester.mturk.com/pricing>> accessed 03 August 2018

⁹⁶ *ibid*

done by a person with particular characteristics (such as being of a particular age, gender, or job function),⁹⁷ then a fixed pricing structure dictates how much the crowdsourcer *pays AMT* for the characteristics of the crowdworker. This kind of fee structure casts doubt over the exactly how much scope a crowdsourcer would have in interacting with a crowdworker. While the fee the crowdsourcer pays the crowdworker is largely at the discretion of the former, introducing this tiered pricing structure on top of this suggests that the role of AMT is not simply that of facilitation: the more specific or detailed the HIT and its qualifications become, the more influence and power the platform has to fix prices and costs, albeit between itself and the crowdsourcer.

The remaining two powers that are vested in AMT by virtue of the Participation Agreement run remarkably close to the kinds of managerial prerogatives that one would expect in a paradigm work relationship. The first is the absolute power of termination found at cl 11, which states that AMT can terminate or suspend a crowdsourcer's account "immediately without notice for any reason".⁹⁸ Bearing in mind that the relationship between the crowdsourcer and AMT is not ostensibly a work relationship, it may not seem particularly remarkable that the platform retains the power to unilaterally terminate an agreement with a crowdsourcer; but of course, given the platform is about creating work relationships, the likely effect is that power is in reality an incidental right to terminate any work relationship between a crowdsourcer and crowdworker: termination of a work relationship by proxy once the crowdsourcer is barred from the site. The second power the Participation Agreement purports to create a number of rights over intellectual property provided to the site. cl 3(f) of the Participation Agreement allows AMT to track a number of metrics related to tracking requests or a crowdsourcer's "performance as a Requester";⁹⁹ all data that is potentially valuable to AMT's platform simply *qua* data or to improve the performance of the platform itself.¹⁰⁰ In this vein, content uploaded to the site in pursuit of a HIT is retained by AMT to improve "the Site and other machine learning related products and services" offered by them;¹⁰¹ and any ancillary information and materials uploaded to AMT can be used by Amazon with a "non-

⁹⁷ *ibid*

⁹⁸ Amazon Mechanical Turk, 'Participation Agreement' (n 89) cl 11

⁹⁹ *ibid*

¹⁰⁰ John Akred and Anjali Samani, 'Your Data is Worth More Than You Think' (*MIT Sloan Management Review*, 18 January 2018) <<https://sloanreview.mit.edu/article/your-data-is-worth-more-than-you-think/>>

¹⁰¹ Amazon Mechanical Turk, 'Participation Agreement' (n 89) cl 11

exclusive, royalty-free, perpetual, worldwide, irrevocable license”, for no cost.¹⁰² While this does not claim exclusive ownership of any intellectual property, AMT has claimed a significant stake in using data and information that may be valuable to it as a platform;¹⁰³ and while the specific question of where IP rights reside in a work relationship is a question generally found in the contract between an employing entity and its workers, at least in English law, when “there is doubt as to whether an employee or their employer owns IP rights in the fruits of their work, UK legislation generally favours employers”.¹⁰⁴ This approach by AMT typifies its approach to many other employer functions (even when defining its relationship with the crowdsourcer); rarely does it claim the function or prerogative power outright, but the powers and rights that it derives piecemeal from the Participation Agreement clearly vest some (often significant) powers in the platform.

The next important relationship to consider is that between AMT and the crowdworker. Broadly speaking, a number of the powers already discussed apply equally to crowdworkers as they do the crowdsourcers; represented as homogenised ‘users’ of the platform. For those powers, the fundamental points about how the platform operates to exercise veiled employer functions remain as true for crowdworkers as for those who engage them. However, some of the unique provisions for crowdworkers raise further questions about AMT’s claim that it acts simply as a platform. For example, AMT (and notably not the crowdsourcer) requires a crowdworker to use their “human intelligence” to complete tasks,¹⁰⁵ as well as prohibiting them from using “robots, scripts or other automated methods” to complete tasks.¹⁰⁶ The rationale for this, per AMT, is that the platform is a “marketplace for completing tasks by exercising human judgment”;¹⁰⁷ a condition they take “seriously”.¹⁰⁸ What is notable is the intersection between platform and product that this one term

¹⁰² *ibid*

¹⁰³ Olivia Solon and Julia Carrie Wong, ‘Jeff Bezos v the world: why all companies fear death by Amazon’ *The Guardian* (London, 24 April 2018) <<https://www.theguardian.com/technology/2018/apr/24/amazon-jeff-bezos-customer-data-industries>> accessed 03 August 2018: “What makes Amazon so frightening for rival businesses is that it can use its expertise in data analytics to move into almost any sector.”

¹⁰⁴ Practical Law IP & IT and Rosalind Mallinson, ‘Intellectual property issues relating to employees and consultants’ (*Practical Law*, 2018) <<https://uk.practicallaw.thomsonreuters.com/5-200-2151>> accessed 04 August 2018

¹⁰⁵ Amazon Mechanical Turk, ‘Participation Agreement’ (n 89) cl 3(b)(i)

¹⁰⁶ *ibid* cl 3(b)(ii)

¹⁰⁷ Amazon Mechanical Turk, ‘Acceptable Use Policy’ <<https://www.mturk.com/acceptable-use-policy>> accessed 03 August 2018, ‘Why are bots, scripts, or other automated HIT-answering tools a problem?’

¹⁰⁸ *ibid*

neatly embodies. While AMT are at pains to state that they are merely a marketplace, their intervention in ensuring a particular kind of service (and method of providing that service) is a notable foray into the role of an entity that is offering a service to customer. By insisting that they only deal with HITs, AMT exert influence over the *content* of the marketplace, and in turn exercise overlapping functions as not only a marketplace, but as a provider (and possibly guarantor) of a certain kind of service to crowdsourcers that use the platform. This is the same phenomenon argued by Uber in the Employment Tribunal: they are preserving the “integrity of the platform”,¹⁰⁹ but in doing so, necessarily concede that they have a role to play in ensuring (to some extent) the kind of work the platform offers.

Moreover, AMT insists that crowdworkers are independent contractors, and that they must offer their work in a personal capacity.¹¹⁰ Yet this is a particularly curious combination of requests for AMT to make of crowdworkers using the platform. Jurisdictional questions aside, perhaps tautologically, the idea of being an independent contractor “means owning your own business, thus, in a sense, being independent”;¹¹¹ i.e. having the freedom to determine the manner in which you work, or having the ability to substitute or subcontract the work to another party. While one may question the viability of either of these options given the poor remuneration that crowdworkers on these platforms receive,¹¹² it is nevertheless paradoxical that within the same clause of a contract, AMT claim crowdworkers on the platform are independent contractors, while prohibiting one of the archetypal freedoms often associated with that form of work relationship. Finally, it is also worth noting that the unilateral power of account termination that AMT had *vis-à-vis* crowdsourcers is equally applicable to crowdworkers, with the same incidental effect:¹¹³ they may not have the power to terminate work relationships directly (if characterised as existing *only* between the crowdsourcer and crowdworker), but by preventing the crowdworker from using

¹⁰⁹ *Uber (ET)* (n 40) [47]

¹¹⁰ Amazon Mechanical Turk, ‘Participation Agreement’ (n 89) cl 3(d)

¹¹¹ Guy Davidov, ‘Who is a Worker?’ (2005) 34 *ILJ* 57, 60

¹¹² Prassl & Risak (n 12) 8; Amazon Mechanical Turk, ‘Amazon Mechanical Turk Pricing’ (n 95) which sets the minimum price-per-task at \$0.01; Eurofound, *New forms of employment* (2015) 115, 90% of AMT work pays \$0.10 or less.

¹¹³ Amazon Mechanical Turk, ‘Participation Agreement’ (n 89) cl 11

the platform by terminating their account, the power is (as already discussed) one of *de facto* termination.

The final relationship to consider is that between the crowdworker and the crowdsourcer. The form of the relationship between the parties is mediated through AMT's platform, once again placing significant indirect power in AMT's discretion. But breaking down the content of the relationship, we see that a number of significant prerogative powers are concentrated in the hands of the crowdsourcer. Most significantly, the crowdsourcer will decide how much to pay the crowdworker (the fee euphemistically referred to as a 'reward').¹¹⁴ The platform offers no real method by which the crowdworker can attempt to negotiate the price being offered, which is provided quite distinctly on a 'take it or leave it' basis. This creates an "enormous difference in bargaining power between Requesters and Providers",¹¹⁵ who have the power to outline the task, and the remuneration a crowdworker can expect from it. This huge bargaining power, combined with the already-discussed low wages create work relationships that some commentators liken to "virtual sweatshops".¹¹⁶ However, while the (low) pay does technically flow from crowdsourcer to crowdworker for work done, pay is exclusively managed through a system of 'task credits' that must be purchased from AMT, and are the exclusive unit of remuneration.¹¹⁷ Additionally, crowdsourcers are required to pre-pay for the work requested.¹¹⁸ Yet again, the strict terms of remuneration, imposed by AMT do not necessarily undermine the primary relationship of remuneration between the crowdsourcer and crowdworker, but do demonstrate a further significant erosion of the claim that AMT simply acts as a platform, when it has such a central role in mediating the form of relationships.

As for the nature of the tasks themselves, one may not see the more traditional kinds of control that one would expect in a paradigm work relationship, but this is more likely down to the nature of the tasks themselves. When the activities that the crowdsourcers are boiled down to "simple, repetitive activities" in a "highly standardized" format,¹¹⁹ we can see that these neo-Taylorian tasks

¹¹⁴ Amazon Mechanical Turk, 'Amazon Mechanical Turk Pricing' (n 95)

¹¹⁵ Aloisi (n 21) 667

¹¹⁶ Prassl & Risak (n 12) 8

¹¹⁷ Amazon Mechanical Turk, 'Participation Agreement' (n 89) cl 4(a)

¹¹⁸ *ibid*

¹¹⁹ Prassl & Risak (n 12) 6

will rarely leave much space for any independent activity within the scope of the task beyond the 'human intelligence' input required by the crowdworker.¹²⁰ As such, while there may be no control in the sense that the crowdsourcer directs the manner in which the work is done *per se*, the fact that the tasks are so specifically defined, and completed on the platform's interface certainly divests the crowdworker of any real freedom in determining how to complete the task in any material sense. An issue further related to that of pay is the ability that a crowdsourcer has to 'approve' work that they do not believe was completed to a satisfactory quality.¹²¹ This seemingly untrammelled power to accept or reject work seems to have no real accountability check,¹²² beyond the anodyne suggestion in the Acceptable Use Policy that "rejection affects your Requester statistics".¹²³ Indeed, this power certainly correlates with the kinds of prerogatives more common in employment relationships than between two arms-length contractors. Additionally, crowdsourcers have the ability to set hiring conditions (known on the platform as 'Qualifications') which are characteristics that their putative crowdworkers must have before they can complete a particular HIT offered by the former. As mentioned, while the crowdsourcer sets the terms of these Qualifications, they are required to do so through AMT's platform, and pay AMT for the provision.¹²⁴ This in itself represents an interesting overlap in employer functions between the crowdsourcer and AMT, but this is even more prominent when we consider the issue of AMT 'Masters Qualifications'. 'Masters Qualifications' is a status given to "high performing Workers, and monitors their performance over time", and is awarded on the basis of "technology" build by AMT to award the status.¹²⁵ While there is speculation over precisely how this qualification is awarded,¹²⁶ the essence is that there is a plain intersection of employer roles when a crowdsourcer requests this characteristic from a crowdworker. Its terms are evaluated by AMT, it is awarded by AMT, and a crowdsourcer *pays* AMT a 5% premium on top of any money paid to a crowdworker to request this status. Yet again, this seems to demonstrate not only AMT's control over the internal market that it has produced,

¹²⁰ Cherry (n 18) 595; see also the discussion around the value that this sort of Human Intelligence Task can generate for an entity like Amazon in Bonnie Nardi and Hamid R Ekbia, *Heteromation, and Other Stories of Computing and Capitalism* (MIT Press 2017) 113 – 114

¹²¹ Amazon Mechanical Turk, 'FAQs' <<https://www.mturk.com/help>> accessed 05 August 2018

¹²² Aloisi (n 21) 667

¹²³ Amazon Mechanical Turk, 'FAQs' (n 121) 'What happens when I reject work'

¹²⁴ Amazon Mechanical Turk, 'Amazon Mechanical Turk Pricing' (n 95)

¹²⁵ Amazon Mechanical Turk, 'FAQs' (n 121)

¹²⁶ clickhappier, 'Masters Qualification Info – Everything You Need to Know' *MTurk Crowd* (2016) <<https://www.mturkcrowd.com/threads/masters-qualification-info-everything-you-need-to-know.1453/>> accessed 05 August 2018

but moreover, that it very much appears to be selling crowdworkers as a quasi-service to crowdsourcers.

The final element of the relationship between all three parties is the murky world of ratings. In many ways, these form the lifeblood of the platform; a proxy for quality control.¹²⁷ So central are ratings to how crowdworkers and crowdsourcers determine whether they will accept particular tasks, that a panoply of different online resources and browser add-ons have grown to provide greater information about the ratings that the parties in AMT's work have.¹²⁸ However, AMT provides little-to-no information about precisely how these ratings systems are managed, calculated, or averaged. Given that significant employer functions are invested in a crowdsourcer by having the ability to rate a crowdworker (and maybe less significantly, the crowdworker can rate the crowdsourcer), based on *inter alia* the amount of approved work the crowdworker has,¹²⁹ once again AMT demonstrates that it plays a crucial role in managing the relationships between the parties involved in the wage-work bargain it necessarily facilitates, having a central role in enforcing and administrating the *de facto* disciplinary system the platform uses to rank crowdworkers.

What this survey of AMT demonstrates is that its initial claim that it is simply a platform for work to be completed for crowdsourcers by crowdworkers, is highly contestable. At a number of points, there have been incursions by AMT into the sorts of managerial prerogative powers or employer functions that one would not usually expect to reside in a platform that claims it has no influence over the work it facilitates. As with Uber, simply because these functions are exercised on digital platforms, with prerogatives hidden away in inaccessible code, does not mean they cease to exist. As much as these platforms strive to remove personhood from the crowdworker,¹³⁰ they nevertheless exercise powers that affect the very core of what affects a work relationship *qua*

¹²⁷ James Surowiecki, *The wisdom of the crowds* (Doubleday 2004)

¹²⁸ For example, a browser add-on called 'Turkopticon' offers a detailed breakdown of a Requester's characteristics on the basis of communicativity, generosity, etc <<https://turkopticon.ucsd.edu/>> accessed 05 August 2018

¹²⁹ Aloisi (n 21) 667

¹³⁰ Note how crowdworkers can literally be integrated into an API, characterising them as a "computational service" alongside Amazon's other "computational services": Lilly C Irani and M Six Silberman, 'Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk' (CHI '13: Proceedings of SIGCHI Conference on Human Factors in Computing Systems, 2013) 611, 620.

employer. This is not to say that such powers are vested *exclusively* in AMT, but they certainly own a fair share of those powers, potentially even at the exclusion of the crowdsourcer themselves.

II.iv.ii *Mechanical Turk in English Law*

Bringing the analysis back to the domestic sphere, an important question for those looking at AMT is what the status of crowdworkers would be, if analysed through the lens of contemporary English employment law. As discussed at length in earlier chapters of this thesis,¹³¹ the basic analytical tool used in the majority of English employment law is the idea of contractual relationships, and contractual nexuses. This has been borne out time and time again in case law discussing multilateral work relationships (usually tripartite), where not only does a putative worker face the tactical question of whether to attempt to establish a work relationship with the end-user or the intermediary,¹³² but then have to establish that this contractual relationship is one which constitutes a work relationship that qualifies for employee or UK Worker status. In the case of AMT, we can at least establish that by virtue of using the platform, a crowdworker and crowdsourcer have some kind of contractual nexus with AMT (as a product of *inter alia* the Participation Agreement they must accept).¹³³ Moreover, the process of a crowdworker accepting an HIT on the terms offered by the crowdsourcer for a set amount of remuneration additionally produces an unavoidable contractual nexus between the crowdworker and the crowdsourcer.¹³⁴ Therefore, rather than the notably difficult task of trying to establish a contractual nexus between parties *at all*,¹³⁵ the real problem that a crowdworker would face is attempting to establish whether there is a recognised form of work relationship between either them and the crowdsourcer, or them and AMT.

¹³¹ Chapters 1 and 2

¹³² Deirdre McCann, *Regulating Flexible Work* (OUP 2008) 148

¹³³ Amazon Mechanical Turk, 'Participation Agreement' (n 89)

¹³⁴ *ibid*

¹³⁵ See: *Dacas v Brook Street Bureau UK* [2004] ICR 1437 (CA); *Cable & Wireless Plc v Muscat* [2006] ICR 975 (CA)

Per the foregoing discussion, this is where the difficulties begin to arise. As AMT mediate all their work through digital media (sometimes to the extent that work done by crowdworkers can be integrated *into the code of the apps* of the crowdsourcer),¹³⁶ the abstraction of these work relationships to an entirely digital arena acts to obscure precisely how a tribunal would assess the factual matrix that is presented by this kind of work relationship.¹³⁷ In order to establish an employment/worker relationship in English law, the panoply of tests and criteria effectively require all the functions of an employer to vest in a single, bilateral work relationship with a unitary employing entity (the 'paradigm' work relationship). The manner in which AMT structures the relationships between itself and the crowdworker, as well as between the crowdworker and the crowdsourcer demonstrates that in particular circumstances, powers such as inception, termination, or remuneration (for example) are either apportioned between the crowdsourcer and AMT, or potentially exercised jointly between the two with respect to the worker. A good example is perhaps the termination power: though formally rests with the crowdsourcer in a straightforward wage-work bargain with the crowdworker, it can also indirectly be exercised by AMT's unilateral power to terminate any user's account while on the platform. To that extent, it is likely inaccurate to suggest that the true picture of the relationship is simply that the only work relationship that exists is one between the crowdworker and the crowdsourcer. Moreover, running parallel to this is the fact that AMT sells the HITs that crowdworkers do as a "computational service",¹³⁸ such that serious questions arise about whether there is in fact a work relationship between AMT and the crowdworker, and AMT is simply selling a (well-tailored) service to a crowdsourcer, and in fact has a work relationship with the crowdworker.

The reality is likely that, far from a binary answer, which would be demanded from the current analytical approach,¹³⁹ the answer lies somewhere in the middle. The entirety of the relevant employer functions and prerogative powers do not vest in a single party, and relationships such as those found in AMT, mediated on a digital platform, demonstrate a *bona fide* complexity that cannot be accurately reduced down to straightforward contractual nexuses. Assuming for a

¹³⁶ Irani and Silberman (n 130) 620

¹³⁷ *Uber v Aslam, Farrar, Dawson and Others* [2017] Appeal No UKEAT/0056/17/DA (EAT)

¹³⁸ Irani and Silberman (n 130) 620

¹³⁹ Prassl and Risak (n 12)

moment that we find mutuality of obligation for an individual wage-work bargain in the form of one HIT,¹⁴⁰ between either AMT or the crowdsourcer as the putative employee/worker, the deeper question of whether the relationship is one of employment/not one of client or customer becomes incredibly difficult to answer honestly, simply because the truth of the relationship, obscured by the manner in which the digital platform operates, is that there is a distinct intermingling of prerogative powers and employer functions between two entities.

Indeed, this is precisely why the approach taken to gig economy cases thus far will prove to be of limited value when applied to this kind of genuinely novel relationship. So far, the case law has almost exclusively focused upon work-on-demand via apps, and the form of reasoning that the tribunals enter into is based primarily on analogising with pre-existing work relationships. In *Uber*, the ET concluded its analysis by suggesting that “simple common sense” allowed them to properly characterise the relationship as one of UK worker between drivers and Uber.¹⁴¹ Similarly, in cases such as *Gascoigne v Addison Lee*, the contention that the contractual provisions were not representative of the way “the business ran” is much easier to make when the business that is mediated through a digital platform is plainly analogous to a well-established form of work in the real world (in this case, courier services).¹⁴² Indeed, in almost all of the gig economy decisions that have been tested in English courts, the foundational work relationship is usually always bilateral, making the step to finding the necessary work relationship status much easier. However, with crowdwork relationships, where there exists a genuine distribution of employer powers between two entities, and for different functions and purposes, the analysis becomes much more difficult. There are no straightforward analogies that provide comfortable routes to finding employment status in bilateral form; and an accurate analysis of the work relationship would result in a tribunal having to identify and characterise the confusing, muddled distribution of rights that were demonstrated in the previous sub-section. To that end, crowdwork potentially represents an incredibly useful focus for any potential proposed analytical model, insofar as any proposed model must be able to not only accommodate the full range of rights and obligations between parties that

¹⁴⁰ *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA)

¹⁴¹ *Uber* (ET) (n 40) [88]

¹⁴² *Gascoigne v Addison Lee Ltd* (2017) Case No 2200436/2016 (ET) [44]

these relationships encompass, but also that it must offer a rational explanation for why rights would be distributed within these relationships as they would be.

III *The Problem of Substitution Clauses*

In the strictest sense, the use of substitution clauses in work relationships could legitimately fall under the previous sub-section of this chapter. Indeed, as with tripartite work relationships and ZHC arrangements, the inclusion of a substitution clause are all part of a broader synthesis of different techniques that act to undermine the conclusion that a work relationship is one which would be considered a work relationship status in English law. However, there are two reasons why this particular technique requires specific attention. The first is that as case law has developed which explicitly recognises that individual work engagements can constitute a worker or employment relationship, a number of cases (particularly in the gig economy) have turned on whether or not there was not a right to substitute (to whatever degree) vested in the worker.¹⁴³ The second is that the manner in which this technique has been approached in the case law to date betrays the courts' remarkably prescriptive understanding of the significance and impact of substitution powers on the question of work relationship status.

III.i *Substitution Clauses and Work Relationship Statuses*

Substitution clauses are relevant in the context of almost every work relationship status in English law, given that they all require some degree of personal service. Starting with employee status, if we recall the three common law limbs of s 230(3) ERA 1996, one of those limbs is that there must

¹⁴³ Michael Ford, 'Pimlico Plumbers: Cutting the Gordian Knot of Substitution Clauses?' *UK Labour Law Blog* (20 July 2018) <<https://uklabourlawblog.com/2018/07/20/pimlico-plumbers-cutting-the-gordian-knot-of-substitution-clauses-michael-ford-qc/>> accessed 26 February 2019.

be 'no terms inconsistent with the relationship of employer and employee'.¹⁴⁴ In essence, the issue that is most pertinent when considering whether the work relationship will contain terms that are *inconsistent* with an employment relationship is whether the worker will be expected to render personal service to the employer.¹⁴⁵ This issue is more plainly expressed when we consider the other two main work relationship statuses. Per s 230(3)(b), the statutory definition clearly states that a UK worker is someone who is under a contract "whereby the individual undertakes to do or *perform personally* any work or services for another party to the contract".¹⁴⁶ Here, the criterion that the work must be done personally in order for the successful establishment of UK worker status is plainer, and in *Byrne Bros*, it was confirmed that the question of whether a substitute could be engaged to do the work was relevant to this personal service criterion.¹⁴⁷ Similarly, when one looks to EU worker status (as usually found in discrimination law), the definition as found in s 83(2) of the Equality Act (EqA) 2010 states that for a work relationship to be classified as one of EU worker, the work must *inter alia* be done under a contract to do work personally.¹⁴⁸ This position was confirmed in *Halawi*, where the discussion of the EU worker status of a worker in part considered whether there was a right to substitution contained within the agreement that the worker had with the putative employer.¹⁴⁹

The leading authorities for determining whether a power to substitute is inconsistent with either the employer/employee relationship or the personal work criterion are still *Express & Echo Publications Ltd v Tanton* and *MacFarlane v Glasgow City Council*. In *Express & Echo*, a driver's substitution clause, which purported to afford him an unfettered right to appoint a substitute, was found to be a term inconsistent with the relationship of employer and employee, as it suggested that the worker was under no obligation to provide his work personally (which was referred to by the court as an "irreducible minimum" of a contract of service).¹⁵⁰ This position was moderated in *MacFarlane*. The case concerned gymnastics instructors whose contracts of employment

¹⁴⁴ ACL Davies, *Perspectives on Labour Law* (2nd edn, CUP 2010) 84

¹⁴⁵ *ibid*

¹⁴⁶ Employment Rights Act 1996, s 230(3)(b) (emphasis added)

¹⁴⁷ *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) [12] (Mr Recorder Underhill QC)

¹⁴⁸ Equality Act 2010, s 83(2)(a)

¹⁴⁹ *Halawi v WDFG UK (t/a Word Duty Free)* [2015] 1 CMLR 31 (CA) [31] (Arden LJ)

¹⁵⁰ *Echo & Express Publications Ltd v Tanton* [1999] ICR 693 (CA) 699 (Peter Gibson LJ)

contained terms which allowed them to arrange for replacement instructors to take over classes that they were unable to lead (by way of sickness, for example).¹⁵¹ The EAT held that the substitution clause that was used in *Echo & Express* was “extreme”,¹⁵² and that when the right to substitution is qualified or fettered, such a clause would not be incompatible with an employment relationship.¹⁵³ In arriving at this conclusion, the EAT surveyed a wide variety of factual elements unique to the circumstances in *MacFarlane* (such as how a substitute was paid, and who could be a substitute) in order to arrive at this conclusion *vis-à-vis Tanton*.¹⁵⁴

Substitution clauses and their impact upon establishing work relationship statuses draw out a tension between on the one hand, concepts such as loyalty and bilateralism that are inherent in the concept of the paradigm work relationship as discussed in Chapter 1, and on the other hand the fact that personal service in an *individual* wage-work bargain (i.e. where one *is doing* the work personally) is likely a reasonable minimum floor for accessing individual labour rights in the context of a single wage-work bargain. Unfortunately, the manner in which substitution clauses have been approached by the court (*viz.* that an *entire relationship's classification* can be jeopardised by interpreting a work agreement as one which contains a right to substitution that affords the worker too much discretion in its exercise) places an unreasonable emphasis on the formal terms of a work relationship.

Such an approach by the courts is a product of the fact that, as discussed in Chapter 1, the criteria for work relationship statuses in English law act to reinforce the underlying norms of the paradigm work relationship: i.e. that the worker has a long-term, bilateral work relationship with a single employer. Therefore, what initially seems like a curious criterion to rely upon in the context of work relationships that exist outside this paradigm, often with either multilateral employing entities and without any longevity, starts to make sense when we recall that these criteria reinforce the norm of the paradigm work relationship. In essence: while the power to engage a substitute may well have strongly pointed to independent contracting in a situation where the overwhelming majority of

¹⁵¹ *MacFarlane v Glasgow City Council* [2001] IRLR 7 (EAT) [12] (Lindsay J)

¹⁵² *ibid* [13] (Lindsay J)

¹⁵³ *ibid*

¹⁵⁴ *ibid* [11] (Lindsay J)

work relationships conformed to the paradigm, much the same cannot be said with respect to non-standard or atypical work relationships, where the existence of a formal power to substitute offers no meaningful indications when attempting to characterise the work relationship as a whole.

Additionally, in the context of individual work engagements, much like the approach to mutuality of obligation taken in *Windle*,¹⁵⁵ it is difficult to understand what dynamic a non-exercised power of substitution has when assessing an *individual* work engagement (as is increasingly common in modern work relationships, and as shall be explored later in this chapter). Although a personal service obligation may well be partly relevant when characterising an ongoing relationship which will encompass a number of separate engagements, its utility in characterising an individual wage-work bargain is limited. Indeed, quite simply, if the work is being performed personally, that should surely be all that is needed to answer the personal service element for an individual wage-work bargain; in the same way that simple mutuality of obligation (akin to contractual consideration) is all that needs to be shown to satisfy the mutuality criterion in the context of an individual wage-work bargain for the purposes of employee or UK worker status.¹⁵⁶ Looking to the issue of whether there is an overarching duty of personal service (and *ipso facto* whether there is an unfettered right to substitute) is analytically *irrelevant* when focusing upon an individual work bargain where there is personal service.

III.ii *Substitution Clauses and Gig Economy Work*

Having set out the legal background to substitution clauses, the anxiety that they produce when applied to work done in the context of the gig economy is perhaps apparent. A significant amount of recent litigation in gig economy cases has focused upon the presence of a substitution clause in the formal terms of the work relationship, and has required courts and tribunals to assess the effect of such a clause on work relationship status classification. In particular, the focus of this subsection

¹⁵⁵ *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, [2016] ICR 721 [24] (Underhill LJ)

¹⁵⁶ *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735 [10] (Elias LJ); *Stephenson v Delphi Diesel Systems* [2003] ICR 471 (CA) [12]

will be upon two significant recent cases: *Pimlico Plumbers* at the Court of Appeal and *Deliveroo* in the CAC.¹⁵⁷

Although it is not a gig economy case *stricto sensu*, *Pimlico Plumbers* concerned the employment status of a plumber (Mr Smith) who worked for the London-based plumbing company, and whether this was a UK worker relationship. There were a number of iterations of the agreement between the parties, and the issues at trial were whether that agreement contained sufficient mutuality of obligation, and an obligation to provide work personally.¹⁵⁸ On the personal service question, the ET and the EAT found that the relationship between Mr Smith and Pimlico Plumbers was one that required the former to provide his services personally,¹⁵⁹ and the first question on appeal to the Court of Appeal was whether this finding was correct.¹⁶⁰ The Court found that on a “proper interpretation of the [relevant] agreement”,¹⁶¹ Mr Smith was expected to provide his work personally (and curiously, the *Autoclenz* reasoning discussed earlier in this thesis was not relied upon). Although the conclusion is most likely the correct one to arrive at, what was illustrative were the authorities that the Court of Appeal relied upon when evaluating whether there was indeed an obligation to render personal service. Central to the court’s reasoning were the two cases discussed in detail in the previous sub-section: *Echo & Express* and *MacFarlane*. Although the Court did look to some EAT and Court of Appeal decisions that related to UK worker status and the question of substitution clauses, they were cases that also aimed to apply the *ratio* from these two cases that were distinctly concerned with *employee* status. Moreover, what the survey of the authorities in *Pimlico* demonstrated was the sheer capriciousness of both how substitution clauses were interpreted in English law, and whether they was inconsistent with establishing a work relationship status. For example, in *Premier Groundworks Ltd v Jozsa*, the question of personal service turned on whether the specific contractual obligations stated that the worker was able to substitute for any

¹⁵⁷ Although *Pimlico Plumbers Ltd* has subsequently been considered by the Supreme Court, the substantive discussion of substitution clauses was in the Court of Appeal. The Supreme Court further glossed the personal service requirement by asking whether the “dominant feature” of the contract was for Mr Smith to provide personal service (*Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1511 [32]), but this reasoning takes the underlying case law no further, hence the focus upon the Court of Appeal’s more substantial reasoning

¹⁵⁸ *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51, [2017] ICR 657

¹⁵⁹ *ibid* [54]; [59]

¹⁶⁰ *ibid* [63]

¹⁶¹ *ibid* [85]

reason, rather than the worker being “unable” to perform their obligations.¹⁶² Similarly, in *UK Mail Ltd v Creasey*, the ability to substitute with the approval of the employer was held to be inconsistent with a personal service obligation, and as such, the worker was not a s 230(3)(b) worker.¹⁶³ What becomes apparent when surveying the decisions in substitution clauses cases is that when courts engage with the question of personal service in the context of UK worker status (as is often the disputed status in gig economy disputes), the answer will often turn on the factual myopia of how the clause is phrased in the contractual documentation, rather than a focus on the reality of how the work relationship is actually performed.

While the balance fell in the favour of Mr Smith in *Pimlico*, it is plain that there seems to be an inherent unpredictability in how the personal work obligation will be decided on any specific set of facts. Indeed, whether a right to substitute is unfettered or conditional will depend upon the “precise contractual arrangements” between the relevant parties;¹⁶⁴ but based upon this, the personal service requirement can founder on any number of things. In attempting to set out a list of general principles surrounding the operation of the personal service requirement, the Court of Appeal in *Pimlico* inadvertently demonstrated how difficult to navigate this criterion is. Matters such as authorisation, qualifications, frequency, and reasons for substitution were all set out as demonstrating consistency or inconsistency with an obligation to provide work personally.¹⁶⁵ These principles set out a confusing map of the contours of this criterion: for example, the court did not elaborate upon *why*, for example, a substitution right that is limited only by the need to show that the substitute is sufficiently qualified is inconsistent with the personal service requirement, whereas a substitution power that is exercisable simply when the worker is unable to do the work *is* consistent with a personal work obligation. There seems to be an absence of any clear underlying principle in the application of this criterion, which turns on a patchwork of factual scenarios that do or do not sit comfortably with the idea of personal service. Moreover, given the sheer factual sensitivity of how the personal service question is determined, coupled with the fact that in the context of UK worker status, the court will often be attempting to draw a line between

¹⁶² *Premier Groundworks Ltd v Jozsa* [2009] 3 WLUK 425 (EAT) [22]

¹⁶³ *UK Mail Ltd v Creasey* [2012] 9 WLUK 438 (EAT)

¹⁶⁴ *Pimlico Plumbers Ltd* (n 158) [84]

¹⁶⁵ *ibid*

two different kinds of self-employed workers,¹⁶⁶ an unprincipled approach to this criterion may inevitably produce perverse results.

In *Deliveroo*, this problem manifested itself. The case related to the employment status of riders who delivered food from restaurants to customers via the Deliveroo platform (the full facts have already been discussed in Chapter 1). The issue upon which the workers' claim failed was the question of personal service. As will be recalled, the case was strictly concerned with the s 296 TULRCA 1992 'worker' definition, and the tribunal applied the same case law used to interpret s 230(3)(b) worker status to this decision (albeit on the basis that the CAC would only apply their "principles" which were deemed to be of "general application").¹⁶⁷ The reality was, however, that the manner in which the CAC approached the question of s 296 worker status was essentially as an analogue to s 230(3)(b) worker status. Therefore, when it turned to the question of the power of substitution that a rider had, the approach taken was plainly related to the approach taken to substitution in cases such as *Pimlico*.

Concerningly, the CAC found that there was indeed a genuine right to substitute, which evidence demonstrated had been exercised by some riders.¹⁶⁸ It was stated that the right was one to "substitute at will",¹⁶⁹ and although the CAC did not directly refer to the *Tanton* and *MacFarlane* authorities, it was clear that the language that the Committee chose when substantiating its conclusion was drawn from the ideas stated in those authorities which asked whether powers of substitution were either conditional or unfettered. The result of this finding was therefore that the Deliveroo riders were not s 296 workers, and their union recognition claim could not proceed.

However, there are a number of failings in the reasoning that was applied by the CAC in this case. First, if we accept the CAC's reasoning that although the two work relationship statuses are not identical, we can nonetheless use the same "principles ... of general application" for their

¹⁶⁶ *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730 [25] (Lady Hale)

¹⁶⁷ *Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, Case Number TUR1/985(2016), 14 November 2017 (CAC)

¹⁶⁸ *ibid* [100]

¹⁶⁹ *ibid* [102]

interpretation,¹⁷⁰ then one would imagine that the approach taken in either *Byrne Bros* or *van Winkelhof* would apply. Taking *Byrne Bros* first, it will be recalled that this case stated that UK worker and employee status were statuses of the same kind, with the “same considerations”, albeit that when those considerations were applied to the latter status, a tribunal would “lower the passmark” for that criterion.¹⁷¹ In the present context, this would suggest that, at the very least, although the broad principles that are derived from *Tanton* and *MacFarlane* can be applied to find an answer to the personal service question, they cannot be applied as they were in that case: indeed, their passmark must be lower, which would imply that there would be some added lenience in their application. Alternatively, if we follow Baroness Hale’s reasoning in *van Winkelhof*, which characterised UK worker status not as a kind of employment, but rather as an emanation of self-employment,¹⁷² to which the words of the s 230(3)(b) are then applied,¹⁷³ then the nature of the test changes entirely. Not only would we expect a direct assessment of whether there is a contract to “perform personally any work”,¹⁷⁴ but that assessment would be undertaken in the context of the work relationship fundamentally being one of self-employment. This would imply that there is a significant amount of lenience that could be applied to the manner in which substitution could be exercised without such a power being incompatible with the idea that the labour is provided in the context of a self-employed worker relationship.¹⁷⁵

Yet when we consider how the substitution issue was approached in *Deliveroo*, it becomes apparent that neither the approach from *van Winkelhof* or even *Byrne Bros* was taken. Rather, the same principles and questions that have been applied to determining the compatibility of substitution clauses for the purposes of *employee* status, as derived from the foundational authorities of *Tanton* and *MacFarlane* have been transplanted directly into the considerations that would apply when assessing UK worker and s 296 TULRCA 1992 worker status. The result was that because some unregulated substitution did take place,¹⁷⁶ the CAC found that there was no

¹⁷⁰ *ibid* [91]

¹⁷¹ *Byrne Bros* (n 49) [17(5)] (Mr Justice Underhill QC)

¹⁷² (n 166) [31] (Lady Hale)

¹⁷³ *ibid* [39] (Lady Hale)

¹⁷⁴ Trade Union and Labour Relations (Consolidation) Act 1992

¹⁷⁵ Joe Atkinson and Hitesh Dhorajiwala, ‘*TWGB v RooFoods: Status, Rights and Substitution*’ (2019) 48 ILJ 278

¹⁷⁶ *Deliveroo* (n 167) [100]

obligation of personal service on the part of the Deliveroo riders. This was so even where such a power was: only exercised by a minority of riders because it was not particularly profitable to do so;¹⁷⁷ would potentially violate non-delegable health and safety obligations placed on Deliveroo;¹⁷⁸ and would require a rider to share their private login details with a chosen substitute. This made the entire exercise of substitution, per submissions from John Hendy QC, “both unnecessary and undesirable”; but this did not affect the CAC’s conclusion on the personal service question.¹⁷⁹ Moreover, what this decision made clear was that *if* the personal service requirement had been read compatibly with the interpretive expectations set out in either *van Winkelhof* or *Byrne Bros*, the substitution that was done in *Deliveroo* should not have been fatal to the finding that the riders were workers, given the rarity, unlikelihood, and undesirability exercising of such a power.

Additionally, one must also consider why the finding that the theoretical power to substitute as part of the work relationship *as a whole* is enough to jeopardise the classification of a work relationship as one of a ‘worker’ during an *individual* wage-work bargain. Remaining with the factual pattern in *Deliveroo*, if the question was simply whether UK worker status was to be established, then the question of whether the riders were running their own businesses could be answered by looking to a variety of tests established in common law. Axiomatically, the riders were an integral and integrated part of Deliveroo’s business model (a food delivery service cannot operate without delivery riders); it would be fanciful to suggest that the riders were simply an ‘accessory’ to Deliveroo’s business model.¹⁸⁰ Moreover, it is apparent that usually, Deliveroo riders would not market their services to the world as independent contractors either (the fact that they may have used or simultaneously have been logged into a number of food delivery apps likely speaks more to the economic precarity of exclusive reliance upon Deliveroo alone,¹⁸¹ rather than the fact that they were somehow marketing their services to the world at large). Additionally, for an individual wage-work bargain, the mutuality of obligation question can be dealt with relatively straightforwardly, given that it will usually be a matter of simple contractual consideration to

¹⁷⁷ *ibid*

¹⁷⁸ *ibid* [103]

¹⁷⁹ *ibid* [98]

¹⁸⁰ *Hospital Medical Group v Westwood* [2013] ICR 415 (CA) [19] (Maurice Kay LJ)

¹⁸¹ *Deliveroo* (n 167) [84]

determine its presence in a single bargain.¹⁸² All the worker would then have to establish is the existence of an obligation to provide work personally. However, it is curious that this requirement is not approached in the same way as mutuality of obligation. When dealing with a single wage-work bargain, the question of personal work can surely be answered by the patent fact that the work *was* performed personally. If one were to consider an umbrella agreement, then the current approach of construing the nature of the agreement to determine the subsisting obligations to do personal work between individual engagements may make some logical sense when asking whether a relationship with multiple engagements was a worker relationship for the entirety of its duration (notwithstanding the questionably high passmark that this test currently applies). But when looking at the characterisation of a *single* wage-work bargain, then the personal work requirement should be as patent as the mutuality requirement; and should certainly not cause an entire work relationship status claim to fail on the basis of an almost-fanciful but theoretically possible power to substitute.

IV *The Panacea of Autoclenz?*

IV.i *The Utility of the Autoclenz Doctrine in the Gig Economy*

As was briefly discussed in Chapter 2, one of the most significant developments in recent Labour Law is the Supreme Court decision in *Autoclenz*. The case concerned workers who were engaged by Autoclenz Ltd to valet cars on formal contractual terms that made provisions for the workers to provide their own materials, excluded mutuality, and included a supposed power of substitution for a qualified substitute.¹⁸³ In deciding whether the workers were UK workers for the purposes of working time regulations, the Supreme Court took an encouraging approach to assessing the nature of the work relationship as defined between two parties:

¹⁸² (n 140) 563H-564B (Waite LJ)

¹⁸³ *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157

“So the relative bargaining power of the parties must be taken into account in deciding *whether the terms of any written agreement* in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.”¹⁸⁴

Alan Bogg comments that the decision represents the extent to which the courts are finally willing to “dispense with [the] fictions and mystifications” that are often deployed in order to formally mischaracterise contracts for personal employment.¹⁸⁵ Indeed, “[g]iven the unilateral control exercised by the employer over the drafting of the contract, it would not be justified for a presumption to be raised concerning *both parties’* intentions by the simple fact of writing”.¹⁸⁶ This approach is of particular potency when we specifically consider the dynamics of work relationships that exist in the gig economy. Often, they will be characterised by formal contractual precarity, and notably low remuneration for the work that is done;¹⁸⁷ and as such, will usually exhibit a notable asymmetry in bargaining power between the influence that the employing entity has over the formal terms under which the work is offered *vis-à-vis* the worker that may accept those terms. As such, having an interpretive approach to the formal written terms that can take into account circumstances that are extrinsic to those formal terms to arrive at an assessment of the “true agreement” should certainly be welcomed; especially if there is a strong ‘purposive’ force behind such an analysis.¹⁸⁸ This reasoning has been applied with great effect in a number of gig economy cases, perhaps most notably the aforementioned *Uber* decision. Although the formal terms of the agreement between Uber and their drivers purported to *inter alia* exclude control and mutuality of obligation, the ET applied the *Autoclenz* approach to determine that terms in the “carefully

¹⁸⁴ *ibid* [34] (Lord Clarke) (emphasis added)

¹⁸⁵ Alan Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *ILJ* 328, 332

¹⁸⁶ *ibid* 335

¹⁸⁷ Hannah Jane Parkinson, ‘Sometimes you don’t feel human’ – how the gig economy chews up and spits out millennials’ *The Guardian* (17 October 2017) <<https://www.theguardian.com/business/2017/oct/17/sometimes-you-dont-feel-human-how-the-gig-economy-chews-up-and-spits-out-millennials>> accessed 26 February 2018

¹⁸⁸ *Autoclenz* (n 183) [34] (Lord Clarke)

crafted documentation” provided by Uber bore “no relation to reality”.¹⁸⁹ As such, the ET was able to find that, for the periods during which riders were logged on and ready to accept rides, they were s 230(3)(b) workers.

The *Autoclenz* principle was most recently considered by the Court of Appeal in *Uber BV v Aslam*,¹⁹⁰ where the proper approach to the principle was in issue before the court. The majority of the Court approached the *Autoclenz* principle as one which prioritised the factual arrangements in the work relationship,¹⁹¹ and allowed a court to disregard those contractual terms which did not “reflect the reality of what [was] occurring on the ground”.¹⁹² In contrast to this approach, Underhill LJ in the minority was of the view that the *Autoclenz* principle engages only where the written terms of the contract are inconsistent with the performance of the relationship,¹⁹³ placing emphasis on the written terms of the contract. Although Bogg & Ford identify concerns with the *Autoclenz* approach when applied to analysing the statutory category of UK worker as opposed to the common law contract of employment,¹⁹⁴ it is nonetheless a positive development that (for now) the correct approach to *Autoclenz* places the true performance of the work relationship in the foreground of the analysis, rather than the contractual terms that technically govern the relationship. At the time of writing, the Supreme Court was hearing the appeal from the Court of Appeal’s decision in *Uber*.

So the analysis that follows proceeds on the basis of the majority of the Court of Appeal’s interpretation of *Autoclenz* in *Uber*. It is certainly true that a court or tribunal’s ability to look beyond formal contractual terms, to how the work relationship is actually performed is an incredibly useful check on the use of contractual terms that bear no resemblance to the true nature of the work relationship. However, the optimism that one may rightly have about the *Autoclenz* approach must be considered in light of some particular drawbacks with this approach.

¹⁸⁹ *Uber* (ET) (n 40) [93]

¹⁹⁰ *Uber BV v Aslam* [2018] EWCA Civ 2748

¹⁹¹ Alan Bogg and Michael Ford QC, ‘Between statute and contract: who is a worker?’ (2019) LQR 347, 349

¹⁹² *Uber* (CA) (n 190), [66]

¹⁹³ *ibid* [119] – [120]

¹⁹⁴ Bogg & Ford (n 191)

The first, and perhaps most notable in the context of work provided through an intermediate platform is that the *Autoclenz* doctrine is one which is relevant exclusively in the context of a contractual relationship. Per the emphasised terms in the quotation from *Autoclenz* above, the 'purposive' interpretive approach is relevant when deciding whether the terms of a "written agreement" are an accurate reflection of the reality of the relationship between the employing entity and worker.¹⁹⁵ This, of course, presupposes that there is some sort of contractual arrangement between the parties. The reason that this becomes troubling is that, as explored in both this chapter and in Chapter 2, there will often be relationships between a number of entities that exercise some form of employer function that may not actually be governed by any contractual arrangement at all (notoriously, the worker-end-user relationship in a tripartite relationship is rarely formalised by contractual terms). This seriously limits the utility of the *Autoclenz* doctrine. For sure, when locus of (most) of the elements of a work relationship is the contractual agreement between the platform and the worker, then *Autoclenz* is of course an incredibly useful interpretive tool. However, where platform-based work relationships become more complex, such as where there is a legitimate sharing of employer functions between a number of parties, and the worker has no direct contractual relationship with one of those employing entities, the *Autoclenz* doctrine becomes irrelevant for the purposes of that particular relation. Thought of in this way, the *Autoclenz* doctrine is one that resides quite squarely in the world of orthodox relational bilateralism as derived from contractual principles. Of course there are legitimate debates *within the realm of contract law* as to the effect of the principle created in *Autoclenz*,¹⁹⁶ but the doctrine at no point challenges the very bilateral basis of contractual relationships themselves. For example, if we consider the case of *Quashie*, which was discussed in Chapter 1, where there was a seemingly genuine distribution of employer functions between the employer and customer, but only a contractual relationship with the employing entity (i.e. the nightclub),¹⁹⁷ then the *Autoclenz* doctrine would be of no utility in interpreting the relationship between the worker and the customer, unless a contract was first implied between the parties (which in itself would negate any need for an *Autoclenz* doctrine).

¹⁹⁵ *Autoclenz* (n 183) [34] (Lord Clarke)

¹⁹⁶ *Bogg* (n 185)

¹⁹⁷ *Quashie* (n 156) [22] – [24] (Elias LJ)

Another concern with the *Autoclenz* approach is how it is heavily reliant on analogous reasoning. Looking to the ET's reasoning in *Uber*, what is illustrative is how one of the central pillars of the tribunal's reasoning was that it was a matter of "simple common sense" that Uber was a supplier of transportation services.¹⁹⁸ It is important to be explicit that the tribunal did consider all the elements of the statutory definition for UK worker, and applied the *Autoclenz* principles to assessing whether particular contractual terms that undermined a particular criterion bore any resemblance to the reality of the agreement,¹⁹⁹ but a prominent feature throughout the reasoning was the fact that the tribunal had, in many ways, already arrived at the conclusion that Uber was providing transportation services, and that its drivers must therefore likely be workers. *Dicta* throughout the decision, such as how Uber's formal characterisation of the work relationship was "faintly ridiculous",²⁰⁰ or the "remarkable lengths"²⁰¹ that Uber would go to in order to undermine their drivers' UK worker status hint at the tribunal reasoning by analogy to some central case model of transportation services. Again, this is not to say that there was any particular deficiency in the tribunal's reasoning; to the contrary, it was heroically forensic. Moreover, in the context of the sheer absurdity of how Uber had characterised its work relationships, such language on the part of the tribunal is perhaps unsurprising. However, some care must nonetheless be taken when dealing with analogy. All too easily, the question of the 'true agreement' could readily morph into a question of 'what traditional work relationship is this gig economy work most like'. With Uber, the service almost certainly *is* simply a transportation service, but where the work relationship begins to tend towards something novel, the *Autoclenz* approach could run into problems. Indeed, rather than directly assess the complexity that a multi-party work relationship may present, a court or tribunal may aim to analogise the relationship *as a whole* to a more traditional one (likely between the worker and the platform), and then use *Autoclenz* to bridge what may be genuine gaps in the exercise of employer functions by the platform *vis-à-vis* the worker.

¹⁹⁸ *Uber* (n 40) [89]

¹⁹⁹ *ibid* [92]

²⁰⁰ *ibid* [90]

²⁰¹ *ibid* [87]

To illustrate this concern, let us consider the example of the TaskRabbit platform. TaskRabbit operates as a platform that purports to connect end-users, who wish for any variety of task to be done, with the a worker who can complete that task.²⁰² However, as Prassl and Risak identify, a relationship formed through TaskRabbit tends to legitimately share employer functions (such as control, discipline, or remuneration) between the platform and the end-user.²⁰³ A concern is that full adherence to an *Autoclenz* approach, when applied to a multilateral situation like in TaskRabbit, is that it would invite a court or tribunal to first analogise that complex relationship to a more traditional bilateral one (a handyman service, perhaps) where the worker is directly engaged by an employer. Once the analogy is established, it would also be assumed that all employer functions would vest in the putative unitary employer. Then, the *Autoclenz* approach would fill any gaps in the worker-platform relationship by analogy to the traditional work relationship (where all employer functions *would* vest in the unitary employer). In purely functional terms, one may not entirely object to such an approach, given the end-result is that a worker is classified as having a work relationship status in English law. But to approach work relationship analysis in this way (*viz.* one which depends upon forcing all the dynamics of a work relationship into a single bilateral relationship) runs the real risk of obscuring the true complexity that exist in some relationships.

As gig economy platforms diversify how they organise work, and how employer functions could be shared between more than one party, considering *Autoclenz* to be the panacea for workers' rights may be an opinion with an expiration date. *Autoclenz*, while an adequate solution for now, may not be of equivalent utility when multi-party relationships for the provision of work are organised through digital platforms. Even now, when a worker provides work through TaskRabbit, as discussed, there could legitimately be a genuine divestment of employer functions on the part of the platform, onto the end-user (perhaps more so than one would see in a traditional agency work situation). To that end, an *Autoclenz* analysis would likely be limited to interpreting the contract between the worker and platform; and in the event that a worker would seek to establish a work

²⁰² Prassl and Risak (n 12) 22

²⁰³ *ibid* 22 – 25

relationship with their end-user, *Autoclenz* would be of little help in relation to that non-contractual relationship.

A further limitation of the *Autoclenz* approach is that the precise concept of what the 'true agreement' actually is remains broadly undefined; and it is in the difficult cases that this problem presents itself. Take, for example, the approach to the idea of what the true agreement was in *Dewhurst v CitySprint*. When looking to the issue of personal performance, the Tribunal was able to determine that although the written terms of the agreement did purport to allow for some substitution (where they had sufficient qualifications for the role, such that they would otherwise be offered a similar role by CitySprint),²⁰⁴ the Tribunal, in following the principles of *Autoclenz* and making an assessment of the 'true agreement', found that given the "opportunity [to substitute] available to Ms Dewhurst is so small that it cannot be said to show that she did not render personal service to the respondent".²⁰⁵ In essence, the fact that particular limitations were placed upon the right to substitute such that it was nominally viable but in reality very unlikely to be exercised was sufficient for the Tribunal to find that the power to substitute was incompatible with the idea that personal service should be rendered personally: *even though the power did exist*.

Contrast this with the earlier discussion of substitution clauses in *Deliveroo*. There, a similar situation arose: the likelihood and viability of a substitution power was vanishingly small (even if a distinct minority of riders did exercise it). It was subject to fewer conditions than the substitution power in *CitySprint*, but the underlying viability of actually substituting was remarkably similar to that which was found in *CitySprint*.²⁰⁶ Nevertheless, the CAC found that even though it accepted that there was an inherent undesirability and absence of incentive for exercising the purportedly unfettered substitution power that the delivery rider had,²⁰⁷ the factual possibility of it being exercised was sufficient for the CAC to find that the substitution right was a "genuine" one.²⁰⁸ The *Deliveroo* finding is currently being appealed, but what is apparent is that there is a notable lack

²⁰⁴ *CitySprint* (n 58) [8(3.5)]

²⁰⁵ *ibid* [71]

²⁰⁶ *Deliveroo* (n 167) [98]

²⁰⁷ *ibid* [102]

²⁰⁸ *ibid* [100]

of understanding as to precisely how the *Autoclenz* doctrine actually works. Perhaps when a contract states that there are no set hours, but a worker regularly works 8 hours, 5 days a week, the true agreement is clear. But as here, where *in both cases* there is a genuine (but fundamentally undesirable, and highly contrived) right to substitution, it is curious that the same test can arrive at polar opposite results. In *CitySprint*, the clear lack of viability of a theoretically usable substitution clause was sufficient to determine that this did not represent the true agreement; and yet in *Deliveroo*, that same foundational fact pattern was taken precisely the other way, in that the theoretical viability of the substitution right,²⁰⁹ was sufficient to undermine the personal service requirement, even though it was an almost-fanciful right to substitution. As such, when courts and tribunals approach the concept of a 'true agreement' per *Autoclenz*, they lack direction as to whether they are simply looking for a genuine right to substitution (as the CAC did in *Deliveroo*), or whether the 'true agreement' is a genuine contractual right which must also be viably exercised (as in *CitySprint*). It is suggested that the latter interpretation is almost certainly the most desirable, given that a genuine right that has no basis in reality *vis-à-vis* its actual exercise cannot possibly represent the 'true agreement' that the parties may have, given that a power nominally vested in a worker, which they would almost certainly never exercise, cannot honestly be described as representing the 'true agreement' in any real sense.

Another issue that we face when considering the *Autoclenz* doctrine is the problem of the true agreement actually being one which embraces flexibility. *Gascoigne v Addison Lee* concerned a cycle courier who worked for Addison Lee,²¹⁰ and wished to be classified as a UK worker for the purposes of holiday pay. While the claim in the Tribunal was successful, with the Tribunal relying on *Autoclenz* to look beyond the specific contractual terms of the agreement,²¹¹ there were some notable comments from the tribunal as to the nature of the work relationship Mr Gascoigne had with Addison Lee. In particular, it recognised that the claimant "took full advantage of the flexibility available" in the work relationship with Addison Lee.²¹² Therein lies the problem with the *Autoclenz* approach: a tension that the Tribunal in *Gascoigne* inadvertently identified. Indeed,

²⁰⁹ Which was performatively exercised by some riders (*Deliveroo* (n 167) [100])

²¹⁰ *Gascoigne* (n 142)

²¹¹ *ibid* [47]

²¹² *ibid* [26]

when the true nature of the agreement is that of genuine flexibility, then the interpretive approach proposed by *Autoclenz* cannot do very much: if there is genuine, unfettered substitution, or genuine freedom to accept work, then *Autoclenz* cannot act to change that underlying reality. As purposively as the test may be applied,²¹³ if the work relationship genuinely cannot satisfy one of the criteria for an English employment status, *Autoclenz* offers no recourse. Indeed, the problem that we face when relying so heavily on the *Autoclenz* interpretive principle is that it involves a tacit endorsement of the underlying analytical assumptions and central tests that are used in to determine employment status. By reverting to the this interpretive approach, the aim is to demonstrate that the work relationship being analysed *fits into the mould of English employment law as it exists*. Fundamentally, by acting to bridge the gap between the formally drafted contractual terms and the 'true agreement' that the parties have, the *Autoclenz* approach in no way challenges the underlying principles of the analytical model to which it is applied. So, although it may provide some corrective relief to workers who genuinely are misclassified, by doing so, it reinforces and affirms the existence of the current bilateral analytical model that is so heavily relied upon for analysing work relationship statuses in English law.

The final, and most general concern that is raised by *Autoclenz* (at least until the Supreme Court provides a decision on the appeal from the Court of Appeal's decision), is whether the doctrine that was articulated by Lord Clarke is *more* than a mere interpretive doctrine for the written terms of the agreement, and whether a deeper principle is at work in this doctrine. This was first flagged by Alan Bogg in his analysis of the *Autoclenz* decision in the Supreme Court, where he suggested that one of the interpretations of Lord Clarke's classification of his approach as a 'purposive' one may be aligned with the purposive approach articulated by Guy Davidov whereby the disputed relationship should be interpreted through the prism of the *purpose of the worker-protective status* that the worker is seeking to access.²¹⁴ More recently, following the Court of Appeal decision in *Uber* discussed above, where the *Autoclenz* principle was considered, Bogg and Ford identified a distinct 'stream' of case law prior to *Autoclenz* in the realm of tax law, which sought to identify

²¹³ *ibid*

²¹⁴ Bogg, 'Sham Self-Employment in the Supreme Court' (n 185) 343

the purpose of a statutory test and to essentially ask whether in light of that purpose, that statutory provision *was intended* to apply to a particular work relationship.²¹⁵ Such an approach, in principle, would produce a more expansive approach than either approach taken by the Court of Appeal in *Uber*, by retraining the focus of the status question upon an overall examination of the relationship between the parties in the work relationship, rather than “forensically scrutinising discrete elements within it to see if they are ‘real’”.²¹⁶

Unfortunately, the reason this is presented as a problem is twofold. First, while the approach proposed by Bogg and Ford is certainly preferable to the contractual approach as formally articulated by Lord Clarke and adopted by the Court of Appeal, it remains the case that at least doctrinally, that contractual approach remains the accepted understanding of the *Autoclenz* principle.²¹⁷ The second issue is that, adopting the approach proposed by Bogg and Ford may not be the complete solution to the problems already identified with the *Autoclenz* approach. Even by taking a purposive approach to, say, worker status, the question of whether the status *ought* to protect a certain relationship will be plagued by the same issues already discussed: qualitative assessments based upon reasoning by analogy, which may well result in tribunals concluding that truly novel relationships, which genuinely do incorporate flexibility, ought not to be covered by the status. Indeed, courts and tribunals have purported to engage in this holistic approach of “standing back from the detailed picture” to appraise the whole of the work relationship for decades,²¹⁸ and continue to fail to adequately classify work relationships as employment or worker relationships. As such it is seriously doubtful how adequate a solution even the most optimistic interpretation of the *Autoclenz* doctrine, as articulated by Bogg and Ford, is when applied to novel or truly flexible work relationships; the sort that are often the central case in the gig economy.

In summary, there is no doubt that the approach articulated in *Autoclenz* represented a notable interpretive shift in English employment law. However, while it does offer an adequate solution in

²¹⁵ Bogg and Ford QC (n 191) 350 – 351

²¹⁶ *ibid* 351

²¹⁷ This may well be subject to the Supreme Court’s decision in *Uber*

²¹⁸ *Hall v Lorimer* [1994] ICR 218 (CA) 226; though of course, the approach as articulated in *Hall* was not strictly taking a ‘purposive’ approach as articulated by Davidov or Bogg and Ford

situations where there is a notable divergence between the manner in which the relationship operates, and the contractual representation of that relationship, it is by no means a panacea, especially in the context of the work relationship structures deployed in the gig economy.

V *Conclusion*

The gig economy is an illuminating case study for work relationship status, and bringing out the concerns that the current analytical approach in English law produces. For one, the manner in which the discrete work relationship models discussed in Chapter 2 are synthesised into a much more potent work relationship model in the context of work offered through a digital platform draws out not only the effectiveness of a multi-faceted attack on work relationship status' criteria, but also the manner in which these models produce work relationships with genuine relational complexity. Moreover, the issue of personal work, which has been so central to a number of gig economy cases, demonstrates the lack of clarity that the courts and tribunals have when dealing with these clauses. Not only is the test applied in a fundamentally unprincipled way (such that factual myopia can be the difference between personal service and a fatal right to substitute), but it relies upon case law that was assessing personal service *for employee status*; and at no stage is the 'passmark' for this test lowered in any material way (as both *van Winkelhof* and *Byrne Bros* would require).

Finally, when dealing with gig economy cases, the specific shortcomings of the *Autoclenz* interpretive analysis become apparent. While *Autoclenz* certainly has proven to be a useful worker-protective decision, it is a doctrine limited to relationships defined by contractual nexuses. It invites a tribunal to reason by analogy to identify the 'true agreement' between two parties, yet there is a distinct lack of guidance as to what the 'true agreement' between two parties actually is. Moreover, by acting as a corrective for the failings of a bilateral model of work relationship statuses, it indirectly endorses and affirms that analytical approach, obscuring the need for a more forensic

assessment of all the dynamics that exist in the sort of complex work relationships that are typically found in gig economy work. Therefore, when considering the gig economy, one can see that the orthodox analytical approaches and interpretive doctrines that were described in Chapters 1 and 2 fall remarkably short of providing a comprehensive, honest picture of the structure of complex work relationships.

Chapter 4

Theoretical Foundations of a New Analytical Model

I *Introduction*

Any analytical model that aims to direct rights to work relationships requires some theoretical foundation to guide its operation. While this chapter will not aim to provide an answer to the much more difficult question of the philosophical foundations of Labour Law as a discipline, it will aim to set out the theoretical foundations for a Relational Dynamics model. Section II will discuss why thinking about labour theory is necessary at all, and explain why we cannot simply take an intuitive approach to how an analytical model should work. From there, Section III will survey potential theories that could provide the foundation for a Relational Dynamics analytical model. The set of assumptions that this theory will be based upon will be set out, and then three criteria for assessing proposed theoretical foundations *vis-à-vis* an analytical model will be set out (*viz*: generality, purpose, and guidance). Using these analytical tools, Section IV will first look at the traditional foundations of labour law, often characterised as inequality of bargaining power. The narrow and broad conceptions of this theory will be discussed, and analysed by reference to the three criteria set out earlier in the chapter. After this, capabilities theory will be assessed in specific detail. The generic conception, as well as Sen and Nussbaum's particular interpretation of the theory will be discussed. Moreover, specific focus will be paid to the question of constitutional entrenchment: one of the most frequently-referenced critiques of Sen's work. Having done this, the capabilities theory will be assessed by reference to the three criteria already mentioned in order to assess its suitability as the theoretical foundation for a Relational Dynamics model. Once that has been done,

Section IV.v will set out what the settled foundational theory for an analytical model for relating rights to work relationships for this project will be.

II *The Need for a Philosophical Inquiry*

This chapter represents a crucial juncture in this thesis: the transition from the doctrinal critique of the law, to the development of a new analytical model. It is precisely because we have arrived at this point that it becomes clear that some theoretical reflection is needed before the thesis fully sets out the Relational Dynamics model in the following chapters. The reason for this is that it is important to understand the aims and purposes of any proposed analytical model, which is best understood by looking at the underlying theoretical rationale.

However, this chapter will not be a complete attempt to provide the theoretical groundings for the *discipline of labour law*; indeed there is a depth and breadth to that discussion that simply cannot be done justice in the space of this one chapter.¹ But what it does aim to do is try to provide an explanation of some of the guiding theoretical principles for the Relational Dynamics model proposed in the next chapters. The reason this is a worthwhile task to undertake is that simply taking an empiricist approach to the question of what the aims and purpose of an analytical model are offers unsatisfactory guidance. A good contemporary exposition of the empirical justification for labour law comes from Bob Hepple, who recently stated that:

“The temptation for labour law scholars is to focus their energies on developing an ideal theory of labour rights or social justice. But any theory is sterile unless we first try to understand why real employers, workers, politicians and judges act as they do

¹ See, for example: Brian Langille, ‘Labour Law’s Theory of Justice’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 101 – 102

in practice. Labour law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies, of power relationships.”²

There is of course some merit to Hepple’s suggestions: at the very least it is true to say that a thorough and well-informed understanding of the role that actors play, and the particular ways in which they act within whatever we define to be the boundaries of labour law form a crucial part of our analysis when thinking about labour law. Moreover, Hepple does not propose an *exclusively* empirical approach to the discipline of labour law, acknowledging the role of the outcome of different social actors *and* ideologies. However, the focus of Hepple’s approach remains a sort of pragmatic realism within which ideology can exist, but which decidedly does not form the foundation or starting-point for understanding the scope of labour law.³

It certainly is important to know how an employer will behave *vis-à-vis* an employee in a particular kind of work relationship; and then how judges, unions and the government also behave with respect to that particular relationship. But the inquiry cannot focus either exclusively or primarily upon these dynamics when thinking about the role that labour law plays. First, it is difficult to see how the scope of an empirical inquiry can be defined without some reference to some kind of normative theory of labour law. Absent some underlying principle or collection of principles that offers guidance as to the boundaries and purpose of labour law, it becomes difficult to determine why any particular set of empirical data is relevant to the project of labour law, and why others are not.⁴ So while it may be patent that, for example, a paradigm employer-employee relationship, governed by the contract of employment ought to be part of labour law’s focus, this becomes less straightforward when we look at relationships and dynamics that may exist beyond this central case, if indeed the exercise is one centred around pure empiricism.

Second, if we were to define the empirical scope of labour law without an underlying moral theory, that exercise would assume that the answer to the question of *why* certain relationships (or

² Bob Hepple ‘Factors Influencing the Making and Transformation of Labour Law in Europe’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 30

³ *ibid* 30

⁴ Alan Bogg, ‘Love, Labour and Futility: Philosophical Perspectives on Labour Law’ (2017) *IJCLLR* 7, 11

behaviour in those relationships) are considered to be within the scope of the discipline (or deserving or undeserving of regulation) would somehow be patent. Empiricism alone tends towards the assumption that the reason why a certain empirical state of affairs is undesirable is apparent to regulators; but the mistake that this approach makes is that it seems to presuppose the existence of some normative reason as to why that is the case. In fact, the likelihood is that an empirical theory which does not concern itself with the philosophical justification for why a certain state of affairs demands a particular response will likely end up “not allow[ing] much space for normative theorizing about how things should be”.⁵ Indeed, going from one empirically identified problem to another, without directly interrogating the normative justification for why intervention may be required, could cause the discipline to lose sight of a wider “concrete and pressing agenda” that it is proposed that a normative foundational theory of labour law can provide.⁶ While this approach may to some degree reflect the often-iterative process of *making* labour regulations, it is separate from the question of what a *model* for assigning rights to work relations (i.e. the structure which determines how regulations which have been made are then then assigned) should look like. That latter exercise is one which demands some normative foundation which can explain why a model operates in the way it does; and indeed why it is appropriate for rights to apply to certain work relationships and not others.

As a brief word in Hepple’s defence, he in fact does acknowledge that there is a theoretical basis in his claim of empiricism, found in the work of Sinzheimer;⁷ and therein lies the point. However bold the claim for empiricism may seem, Hepple acknowledges that it is only a coherent approach to labour law if we accept that there is some underlying normative explanation for why those particular relationships that he identified are the subject of the urgent attention of the discipline of labour law. Therefore, it is hoped that this discussion lays out the initial justification for why, at all, it is worth spending a moment to consider what the underlying theoretical basis of any proposed analytical model is, and how identifying this can assist in the proper operation of such a model.

⁵ Langille, ‘Labour Law’s Theory of Justice’ (n 1) 103

⁶ *ibid*, 104

⁷ Bob Hepple ‘Factors Influencing the Making and Transformation of Labour Law in Europe’ (n 2) 2

III *The Foundational Philosophy of a Regulatory Model*

III.i *Assumptions for a Regulatory Model's Theoretical Foundation*

It is important to identify the assumptions that any foundational philosophical theory will rely upon, and to understand what influence such assumptions would have on the scope and content of such a theory. One important qualification about the aim of this chapter is that it is seeking to establish a useful theoretical foundation for a model that organises rights to work relationships. In essence, the question that this chapter seeks to answer is: if we want to use a model that is more sensitive about how it assigns rights to work relationships, what theoretical grounding will best facilitate that. This is a much narrower question than what the purpose of the entire discipline of labour law is. However, the scholarship on the discipline of Labour Law more generally is still of relevance and utility when trying to find a suitable foundation for this more specific project. Indeed, the principles that are articulated in a theory that may prove too specific or narrow in trying to understand the discipline as a whole may be entirely suitable as a justification for the kind of model for organising rights to aspects of work relationships, between a worker and numerous actors within a work relationship, that will be proposed in the following chapters.

The next assumption being made is that any foundational theory we settle on would also be situated in, and concerned with, a particular socio-political environment. Indeed, the purpose of any proposed analytical model would not be to 'start from zero', but articulate an analytical approach that works *within* a system that has certain norms and characteristics. In this case, we are aiming to think about how rights are assigned to work relationships *within* a society that functions with liberal representative democracy, holds (relatively) progressive values, has some kind of system of

state-organised welfare, and are broadly recognised as ‘developed’ nations.⁸ The particular metrics that can be used to determine the degree of ‘development’ are notably diverse. For example, the UN Human Development Index considers data sources that range across Gross National Income, life expectancy, and the standards and lengths of education.⁹ However, while these approaches can provide useful mathematical metrics for assessing broader questions of ‘development’,¹⁰ the purpose of raising this issue is somewhat more straightforward. It is simply to state that the philosophical model and its appropriateness to serve as the foundation for a theory for assigning labour rights *within* a legal order would assume certain axioms about what a developed liberal democracy is. As the project is not aiming to identify the theoretical foundations of a *comparative* model,¹¹ but rather identifying a theoretical foundation for an analytical model that would be implemented in a specific socio-economic environment, we are in essence “only interested in [a theory which addresses] the institutional arrangements to govern an industrial and post-industrial society”.¹²

An important reason for embracing this non-comparative approach, which acknowledges certain axioms about the society for which the philosophical theory is relevant, is that it enables us to look to theories that may be particular to certain jurisdictions, or at the very least, are not entirely neutral in the values that they place at their centre. Some works, which have a comparative purpose at their heart,¹³ will often avoid making any claims about “constitutional entrenchment in democratic societies”¹⁴ at the risk of essentialising the requirements for a good life or a flourishing existence. This results in a kind of theory that is of significant utility when engaging in a comparative exercise between different societies, with differing aims and resources,¹⁵ but does also run the risk of being of limited conceptual use when applied to more specific tasks within the

⁸ UN, World Economic Situation and Prospects (UN, 2020) <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf> accessed 30 June 2020

⁹ UN, Human Development Index: 2018 Statistical Update (UN 2018) <http://dev-hdr.pantheonsite.io/sites/default/files/hdr2018_technical_notes.pdf?> accessed 30 June 2020, Technical Notes, ‘Data Sources’

¹⁰ *ibid*

¹¹ Martha C Nussbaum, *Creating Capabilities* (HUP 2011) 29

¹² Hugh Collins, ‘What Can Sen’s Capability Approach Offer to Labour Law?’ in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 32

¹³ Amartya Sen, *Development as Freedom* (OUP 1999); Nussbaum, *Creating Capabilities* (n 11) 70

¹⁴ Alan Bogg, ‘Constitution of Capabilities’ in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019), 248

¹⁵ Nussbaum, *Creating Capabilities* (n 11) 36 – 37

context of certain settled socio-economic context or constitutional arrangement. Bogg refers to this as a kind of ‘agnosticism’,¹⁶ which refuses to make any prescriptive claims about the path to the end result of the philosophical theory.

For our purposes, given we are concerned with English Labour Law specifically (and other jurisdictions where analogous), we should be comfortable with moving away from a broad, comparative approach to identifying the appropriate theoretical foundations of the proposed analytical model, and looking rather to those which can offer more specific guidance within the scope of the particular axioms that we can identify with respect to the English legal system. As the next section will discuss, this does of course involve attempting to balance generality with specificity, but the crucial point is that we should not feel compelled to embrace an entirely neutral theory as the foundational philosophy for an analytical model for assigning rights to work relationships; in fact, we are likely to have a richer theory with more potential for guiding the content of the analytical model if we do embrace certain axioms and assumptions about the particular context in which that analytical model operates.

III.ii *Three Criteria*

Given that we need some kind of foundational theory for an analytical model for work relationships and rights, the inevitable question is what role such an underlying theoretical foundation would fulfil. To that end, Davidov’s proposed typology of ‘universalism’ and ‘selectivism’ could be of some use in articulating what that theoretical foundation could do. Davidov analyses a number of theories of labour law by reference to a spectrum between either ‘universalism’ (the idea that a theory aims to benefit an entire group of people) or ‘selectivity’ (the theory aims to target benefits to a specified group).¹⁷ This taxonomy has been borrowed from welfare scholarship,¹⁸ and is

¹⁶ Bogg, ‘Constitution of Capabilities’ (n 14) 248

¹⁷ Guy Davidov, ‘The Goals of Regulating Work: Between Universalism and Selectivity’ (2014) 64 *University of Toronto Law Journal* 1, 3

¹⁸ *ibid* 4

primarily concerned with how welfare rights are distributed to individuals. But the spirit of the spectrum Davidov proposes is useful for the present inquiry: a foundational theory should err towards universality, but given the previous discussion about the accepted axioms of the society in which the theory would be situated,¹⁹ a theory should also be able to accommodate some specificity as well.

However, while Davidov's spectrum does offer some guidance, we need to ask more specific questions about a philosophical model in order to determine whether it strikes the appropriate balance between generality and specificity, such that it would be helpful when relied on as the foundation for an analytical model for workplace rights. To that end, it is suggested that we should assess any proposed analytical approach with three criteria: a) whether the theory is sufficiently broad to encompass the full heterogeneity of contemporary and future work relationships; b) whether it offers a concrete purpose for the analytical model; and c) that the purpose it offers should give some guidance for the operation of the analytical model.

Considering the question of breadth first, there are a vast number of potential relationships related to work that will likely fall within the scope of any analytical model that is proposed. Therefore, any proposed theoretical foundation must be able to have sufficient generality so as to be relevant to that wide range of work relationships; a theoretical approach that restricts itself, or mainly concerns itself with a particular *kind* or *paradigm* of work would likely not have sufficient relevance as an underlying theory. Given how embedded the idea of the paradigm work relationship currently is in English Labour Law, we should consciously seek a theory that does not valorise the centrality or importance of work relationships that have the characteristics of bilateralism or long-term commitment to a unitary employing entity, and rather, is much more open to capturing non-paradigm work relationships within its scope.

Second, the theory must offer some real purpose. This is where there will be a difficult balancing-act when selecting an appropriate theoretical foundation: a theory that is broad but frustratingly

¹⁹ Chapter 4, Section III.i

vague will provide little to no real purpose or aim for an analytical model for work relationships. Alternatively, if the theory has a purpose that is too specific, it will fail to provide the necessary breadth that one would require for such a foundation. At this stage, we should consider any of the axioms that may underpin a proposed theory that we are assessing. The more assumptions we find incorporated into the theory, the higher the likelihood that the normative focus of that theory narrows.²⁰ Therefore, we can address the more abstract question of ‘purpose’ by using these axioms and assumptions as proxies to determine how wide or narrow the scope of a proposed theory is, and in turn, whether its focus is appropriate for the purpose of acting as an underlying normative theory for the project of assigning rights to work relationships.

Finally, after the breadth and purpose issues have been addressed, then the third criterion is that the purpose should provide some guidance for the operation of the analytical model. This is crucial, as a model which looks at assigning rights to work relationships will necessarily deal with the question of the weight and relevance of certain relationships; and if they are suitable for regulation, how that regulations should take place. Take, for example, anti-discrimination legislation. While it would (hopefully) be fairly uncontroversial that it should extend to all market work, there are further questions about what *specific relationships* in that market work anti-discrimination rights and obligations should attach to. While in a paradigm work relationship,²¹ the rights and obligations will neatly vest in the worker and employer respectively, when we look beyond this to non-standard and atypical work relationships, an analytical model would likely have to grapple with whether certain relationships attract anti-discrimination protections, and the content of those protections in that relationship (*viz.* where rights and duties would lie).

Finally, an important caveat to this point about guidance is that any proposed foundation theory or model is simply the starting point for the Relational Dynamics model.²² The Relational Dynamics model, as will be set out in Chapters 5 and 6, will provide much more detail as to its operation than any philosophical model that will be settled on in this chapter, and to that end it is

²⁰ Nussbaum, *Creating Capabilities* (n 11) 29

²¹ See, Chapter 1

²² Collins, ‘What Can Sen’s Capability Approach Offer to Labour Law?’ (n 12) 34

important to understand the foundational, but non-detailed role that any philosophical model will have in the grander scheme of this thesis. Crucially, this is why this third criterion is considered to be guidance. The Relational Dynamics model will offer a more detailed framework for how certain rights relate to a work relationship, but where broader guidance or overriding principles are needed, they can be found by reference to the broader philosophical foundations that will be outlined in this chapter.

IV *A 'Capable' Theory*

IV.i *The Traditional Foundation?*

Having set out the reasons and criteria for choosing an underlying theory for a new analytical model, the question remains as to which theory would be most appropriate to act as this foundation. Before we begin, it is worth reiterating that this project does not aim to establish the moral or philosophical foundation of the discipline of Labour Law. However, some theories that have been used to explain the foundations of the subject of Labour Law are still of interest, even though they are concerned with the wider task of justifying the purpose of the discipline.

To that end, it is first worth interrogating whether the traditional justification for Labour Law could be fit for purpose. There is a significant volume of contemporary literature on the question of what the purpose of the discipline of Labour Law is,²³ but traditionally it was framed as a discipline concerned with the struggle between workers and capital, the subordination of the former to the latter,²⁴ and the resulting inequality of bargaining power that resulted.²⁵ For example, per Kahn-Freund:

²³ For a thorough contemporary discussion, see Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011); Davidov, 'The Goals of Regulating Work: Between Universalism and Selectivity' (n 17); Bogg, 'Love, Labour and Futility: Philosophical Perspectives on Labour Law' (n 4)

²⁴ Karl Marx, *Capital: Volume 1* (Penguin 1990)

²⁵ Hugh Collins, 'Labour Law as a Vocation' (1989) 105 LQR 468, 477

“The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship”²⁶

As discussed in previous chapters, this approach tended to centre around the importance of the mechanisms of collective bargaining,²⁷ which were viewed as the most effective way of addressing the problem of this inequality of bargaining power between workers and capital.²⁸ Considering this through the lens of the three criteria set out in the previous sub-section, such a conception runs into trouble at the first limb of ‘generality’. While a focus on inequality of bargaining power certainly has relevance in a world dominated by paradigm work relationships governed (generally) by contracts of employment, the growing heterogeneity of market work raises concerns about the value of using inequality of bargaining power as the basis of a new analytical model. This issue is explored in depth by Brian Langille, who notes his scepticism of inequality of bargaining power being the normative basis of the entire project of Labour Law (rather than the more limited project here). Langille suggests that thinking about the discipline in terms of inequality of bargaining power has “incarcerated our thinking about labour law and has held us hostage to a thin normative ideal” for two reasons.²⁹

The first is that to conceive of the theoretical basis of Labour Law as this sort of struggle between specific actors who are bargaining (often conceived of as employers and trade unions engaged in a collective bargaining process) runs the risk of being too prescriptive: Labour Law certainly has concerns beyond the scope of collective bargaining between these actors,³⁰ but looking at the discipline through the lens of inequality of bargaining power runs the risk of restricting the attention of the subject entirely or primarily to that particular dynamic in work relationships.

²⁶ Paul Davies and Mark Freedland (eds), *Kahn-Freund's Labour and the Law* (Stevens 1983, 3rd edn) 18

²⁷ Chapter 2; Hugh Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 OJLS 353; Judy Fudge & Kate Zavitz, ‘Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario’ (2006) 13 Canadian Lab & Emp LJ 107

²⁸ K W Wedderburn, *The Worker and the Law* (Harmondsworth 1965) 835

²⁹ Langille, ‘Labour Law’s Theory of Justice’ (n 1) 107

³⁰ *ibid*

Focus is directed at the balance of bargaining power in “the negotiation of terms and conditions of employment”.³¹ Second, there is the concern that inequality of bargaining power provides no normative explanation for why it is undesirable.³² Once we interrogate the moral reasoning behind why inequality of bargaining power is actually not something that should be present in a work relationship, “we have nothing left to say and thus have established real limits not only to our moral reasoning underpinning the content of labour law but to labour law itself”.³³

Translating this wider critique of inequality of bargaining power *vis-à-vis* the discipline of Labour Law to the criterion of generality, we see that the theory runs into problems. Conceived of as a concept that has a (relatively) narrow focus insofar as it is primarily concerned with inequality of bargaining power in market labour, and the actors involved in that balancing act, it fails to provide a justification for the wider breadth of relationships that would be covered by the scope of a proposed analytical approach. A new analytical approach would necessarily have to extend beyond merely those actors that are concerned with balancing bargaining power in work relationships to other parties that, while not directly involved in that process, would nevertheless be the subjects of labour regulation within this new model. Flowing from this, the specificity of this approach does have the benefit of offering both a clear purpose and sufficient normative guidance if it were to be deployed as the foundation of an analytical model. However, given the issue that is created in the first limb of the three criteria for choosing an analytical model, the inequality of bargaining power approach (though of merit), is not suitable as the basis of a new approach to assigning rights to work relationships.

Collins, however, takes issue with this particular conception of inequality of bargaining power. Indeed, he suggests that Langille’s interpretation and attack of inequality of bargaining power is an attack either on a “strawman or at least one that is a corpse”.³⁴ He suggests that far from the more specific conception of inequality of bargaining power presented by Langille as one which is

³¹ *ibid* 110

³² *ibid*

³³ *ibid*

³⁴ Collins, ‘What Can Sen’s Capability Approach Offer to Labour Law?’ (n 12) 26

primarily concerned with the terms and conditions of employment,³⁵ the concept of inequality of bargaining power is a more nebulous concept, which can encompass *inter alia* “the material and psychological risks to individual workers involved in obtaining and holding on to a job”, which are “far more significant” than the “risks of gaining or losing a particular employee” to an employing entity.³⁶ If we consider the manner in which the concept has been treated by the courts, it is fair to suggest that the concept of unequal bargaining power is used to cover a wide variety of unarticulated assumptions. *Autoclenz* provides a useful insight into this phenomenon. When considering the weight to be placed on written contractual terms in determining the actual nature of the agreement in a work relationship, Lord Clarke suggested that the “relative bargaining power” of the parties should be considered when thinking about whether the written agreement represents the “true agreement” for the provision of work.³⁷ But what is telling about this use of inequality of bargaining power in *Autoclenz* is that while it does represent a version of the concept which looks beyond the more prescriptive approach set out by Langille,³⁸ it nevertheless shares some similar characteristics. Per Langille’s critique, the fact it is a concept that still remains limited to the interpretation of bilateral contractual relationships at the very least suggests that there is something inherent in the concept of inequality of bargaining power that makes it best-suited to application in a bilateral context.

But even if we think about the theory as a more holistic concept that could be applied in a multilateral relational context, we have seen through its numerous invocations that its content remains unexplored. When relying the concept, courts will refer to terms of contracts being written by “armies of lawyers”,³⁹ or offered on a ‘take it or leave it’ basis (in line with Collins’s broader exposition of the concept),⁴⁰ but rarely do they explore what the precise content of inequality of bargaining power actually constitutes. Rather, it is presumed that the meaning of inequality of bargaining power is patent in the context; heavy reliance is placed on the intuitive conclusions we arrive at when these points are raised. Even if, upon reading the full facts of a case where it is

³⁵ Langille, ‘Labour Law’s Theory of Justice’ (n 1) 110

³⁶ Collins, ‘What Can Sen’s Capability Approach Offer to Labour Law?’ (n 12) 23

³⁷ *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157 [35] (Lord Clarke)

³⁸ Langille, ‘Labour Law’s Theory of Justice’ (n 1)

³⁹ *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT) [57] (Elias J)

⁴⁰ *Dewhurst v Citysprint UK Ltd* [2016] Case No 2202512/2016 (ET)

invoked, one may see why there might be some kind of inequality of bargaining power *in that particular context*, this empirical approach offers little in the way of pre-emptive normative guidance. The result is that the concept itself is frustratingly vague;⁴¹ and one that seems to operate *ex post facto*, rather than providing direction before the fact.

Therefore, even if we accept Collins's critique of Langille's characterisation of inequality of bargaining power and assess the less prescriptive approach that is concerned with a wider set of relationships and actors beyond those engaged in the process of collective bargaining,⁴² we encounter very similar problems. A wider conception of inequality of bargaining power still has an "inherent bias towards looking at issues of material welfare", and is at its core still an *a posteriori* bilateral assessment of an unarticulated concept of 'inequality'.⁴³ Especially as we are attempting to think about theories as normative foundations for an analytical model for assigning rights to work relationships, this broader theory of unequal bargaining power would still, at the best of times, be battling with its own internal biases in order to encompass non-standard, multilateral work relationships. For that reason, if we return to the three criteria of assessment for an analytical model from Section III.ii, inequality of bargaining power would falter at the 'generality' criterion. Collins may well be correct that Langille has set up a strawman in inequality of bargaining power as the *foundation of Labour Law*,⁴⁴ but the latter's critiques of the internal structure and content of the *idea* of unequal bargaining power remain forceful, even when we expand its meaning beyond the traditional conception of inequality of bargaining power *vis-à-vis* collective bargaining.

IV.ii *Capabilities Theory*

As has already been discussed, there are a variety of potential theories that aim to justify the project of labour law.⁴⁵ Although the purpose of this project is narrower than providing a justification for

⁴¹ Collins, 'What Can Sen's Capability Approach Offer to Labour Law?' (n 12) 25

⁴² *ibid* 24

⁴³ *Autoclenz* (n 37) [33] – [35] (Lord Clark)

⁴⁴ Collins, 'What Can Sen's Capability Approach Offer to Labour Law?' (n 12) 26

⁴⁵ *ibid*; Davidov, 'The Goals of Regulating Work: Between Universalism and Selectivity' (n 17)

the entire discipline, we would still rather seek to rely upon a broad theory for the foundation of any new analytical model. To that end, we can look to Davidov's assessment of the scope of philosophical theories of Labour Law to narrow down our analysis. At the 'universal' end of Davidov's spectrum, there are two theories: capabilities and efficiency. 'Efficiency' broadly focuses on correcting market failures, so as to ensure the eponymous market efficiency that is the aim of the theory;⁴⁶ and in doing so, it has been argued that Labour Law plays a constitutive role in creating the labour market "alongside other economic and political institutions".⁴⁷ In the same vein, this theory argues that by virtue of increasing market efficiency and addressing market failures, labour law can in fact aid business competitiveness and economic efficiency at a national level.⁴⁸ Though one can conceive of situations where the regulatory goals of Labour Law elide with economic notions of efficiency,⁴⁹ as the foundation of an analytical model for labour rights (even in its looser 'market ordering' guise), the theory would fail on the first limb of our analysis. Its intrinsic focus on questions of economic efficiency prevents the theory from offering a sufficiently holistic approach to labour regulation, which embraces ideas beyond those purely related to questions of economic performance. Indeed, trying to link more specific regulations which relate principally to achieving workplace social democracy back to the foundation of 'efficiency' would likely result in specious reasoning that would offer a limited rational link between the two. Therefore, not only does the efficiency argument fail to satisfy the generality requirement, but the difficulty it would cause in relating to some specific regulatory interventions that would be the subject of the proposed analytical model would also cause it to fall foul of the third 'guidance' criterion articulated above.

However, a theory that could offer a fruitful foundation for a new analytical model could be the capabilities theory, as expressed by both Amartya Sen and Martha Nussbaum. Capabilities theory as a whole spans well beyond work relationships, or even the most ambitious boundaries placed

⁴⁶ Davidov, 'The Goals of Regulating Work: Between Universalism and Selectivity' (n 17) 28

⁴⁷ *ibid*

⁴⁸ Hugh Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 31 *ILJ* 17

⁴⁹ Stephen F Befort and John W Budd, *Invisible Hands, Invisible Objectives: Bringing Workplace Law & Public Policy into Focus* (Stanford University Press 2009), for example, identify the goal of labour law as striking a balance between worker voice, equity, and efficiency.

around the discipline of Labour Law; but again, our discussion of it relates primarily to its utility as a foundation for an analytical model for relating rights to work relationships.

Capabilities theory is an ambitiously wide theory of human development based around the fundamental premise that “each person is an end”,⁵⁰ and that the goal of development should be to maximise substantive freedom for those individuals.⁵¹ There are some distinct differences between the theory as articulated by Sen and Nussbaum, but for this subsection, we shall contain the discussion to those aspects where the two articulations converge. One can immediately appreciate the instinct of a labour lawyer to balk at the idea of ‘freedom’ as a regulatory goal, but in the context of Sen’s work, freedom specifically entails ensuring people can “live the kinds of lives that they value – and have reason to value”.⁵² Freedom, conceptualised in this way, and opposed to a neoliberal fig-leaf for deregulation, potentially offers a rich normative foundation for assessing not only the success of contemporary Labour Law, but could also provide guidance for the direction of Labour Law’s development.

Capabilities theory is a “comparative quality-of-life assessment” theory that provides a set of analytical tools to assess the degree of human freedom in the form of capabilities and functionings.⁵³ Capabilities are most straightforwardly described as ‘opportunities’ to realise a real freedom: e.g. if a person deemed a life worth living as one which involved the ability to consume a large number of books, then the capability would be the substantive and real ability to be able to read.⁵⁴ The end that a person seeks is called a ‘functioning’, and essentially constitutes those “beings and doings”⁵⁵ that a person would consider a valuable way of living their lives (e.g. reading books in our example). When thinking about which capabilities may be relevant to a particular scenario, both Nussbaum and Sen acknowledge that the capabilities that we rely upon for a particular socio-political environment or (more importantly) regulatory function will heavily depend on the particular context we are focusing on, and what substantive freedom may mean in

⁵⁰ Nussbaum, *Creating Capabilities* (n 11) 35

⁵¹ *ibid*; as opposed to using “some people as a means to the capabilities of others or of the whole”

⁵² Sen, *Development as Freedom* (n 13) 18

⁵³ Nussbaum, *Creating Capabilities* (n 11) 18, 176; Sen, *Development as Freedom* (n 13)

⁵⁴ Sen, *Development as Freedom* (n 13) 18

⁵⁵ Nussbaum (n 11) 28

that context.⁵⁶ (Though there is a crucial divergence on the question of the constitutional entrenchment of particular capabilities in both theories, which will be discussed later in this chapter.)

A further crucial aspect of this theory of looking at capabilities, and how they are realised as functionings is the concept of ‘conversion factors’. Conversion factors acknowledge the heterogeneity of people and their particular circumstances by acknowledging that often, an opportunity alone cannot be directly converted into a being or doing because of a variety of factors that may apply to that person. These factors can fall into three broad categories:⁵⁷ personal factors which relate to a person’s individual physical and mental state; social factors are those which relate to the characteristics of the society a person lives in, such as whether women would be expected not to work and occupy home-work roles; and environmental factors which speak to the physical environment a person lives in. Conversion factors play an important role in capabilities theory, as they are an explicit acknowledgement of the fact that a number of different factors may be influential in going from a capability to a functioning: simply having the opportunity to do something may not always necessarily translate into actually doing that thing. What these three categories helpfully demonstrate about capabilities theory is the sheer breadth of considerations when thinking about conversion factors. Although it is not the purpose of this project, it is worth commenting that this degree of sensitivity is likely necessary for a complete philosophy for the subject of Labour Law (indeed, similar strands have been identified in other works, such as Freedland and Kountouris’s *Personal Work Profile*),⁵⁸ as it offers a richer, more holistic explanation of how to effectively realise the end-goals of rights, protections, and substantive opportunities while considering matters that are ostensibly extraneous to market labour.

IV.iii *Constitutional Entrenchment*

⁵⁶ *ibid* 29, 176

⁵⁷ Ingrid Robeyns, ‘The Capability Approach: A theoretical survey’ (2005) 6(1) *Journal of Human Development* 93, 99

⁵⁸ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) ch 8

So far, we have discussed capabilities theory as a unified theory. However, one of the key weaknesses of Sen's conception of the theory must be discussed: his aversion to constitutional entrenchment of any particular capabilities or even the constitutional mechanisms by which a capabilities approach to regulation would be realised.⁵⁹ Bogg describes Sen's insistence upon an articulation of capabilities theory that does not commit itself to any particular goals or constitutional capabilities as a form of agnosticism about the importance of particular aims such as the entrenchment of human rights into capabilities theory.⁶⁰ While one can see that if Sen's purpose is to set out a theory of capabilities that is of use when comparing substantive freedom across different constitutional and socioeconomic environments,⁶¹ then to essentialise certain institutions or models of rights may act to undermine a truly effective comparison. Rather for Sen and those who ascribe to his particular version of capabilities theory, by entrenching certain freedoms and capabilities, rather than adopting equal respect for them in pursuit of the underlying question of substantive freedom, we may be seen to be engaging in an act of 'condescension' by making assumptions about what facets of a society necessarily result in the end goal of the capabilities assessment.⁶²

While one can see the value of this approach in a purely comparative context, Nussbaum has argued powerfully against this unwillingness to articulate some core tenets of a capabilities approach, which does not incorporate elements such as entrenched human rights in its understanding of what the bare essentials for substantive freedom look like. For Nussbaum, while it is not the purpose or function of a capabilities model to "impose anything on democratic nations from without",⁶³ as soon as we aim to rely upon the capabilities approach for the purpose of "normative law and public policy",⁶⁴ we are required to take a stand on those elements of the theory

⁵⁹ Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (OUP 2005) 351 – 2

⁶⁰ Bogg, 'Constitution of Capabilities' (n 14) 248; though it is also worth noting that while Sen does acknowledge the importance of human rights in achieving substantive freedom, he chooses not to entrench that belief within his conception of capabilities theory

⁶¹ Nussbaum, *Creating Capabilities* (n 11) 37

⁶² Brian Langille, "The Condescending Constitution (or, The Purpose of Freedom of Association is Freedom of Association) (2016) 19 Canadian Labour and Employment Law Journal 335; Bogg, 'Constitution of Capabilities' (n 14) 247 – 254

⁶³ Nussbaum, *Creating Capabilities* (n 11) 71

⁶⁴ *ibid* 28

that we consider to be essential to achieving substantive freedom. As such, Nussbaum's version of capabilities theory proposes a list of 10 'central capabilities' in "areas of freedom so central that their removal makes life not worthy of human dignity".⁶⁵ These central capabilities range from the more tangible questions of bodily health and integrity,⁶⁶ to abstract questions such as practical reason and affiliation.⁶⁷ The list itself remains fairly general, with an absence of any real prescriptive guidance for each of the central capabilities; but what they clearly represent is Nussbaum's willingness to make a moral claim about the centrality of human dignity as part of her conception of the capabilities theory, and then structure a list of the most important freedoms around this. Perhaps most notably for our purposes, Nussbaum states that 'affiliation' should have a central entrenched status in her capabilities analysis,⁶⁸ to the extent that capabilities analysis should be used to produce "fully human and sociable forms of labor for all citizens".⁶⁹ By considering labour relations *before* they reach the "legislative stage of implementation",⁷⁰ Nussbaum's conception of the capabilities theory makes the moral claim for the necessity of *inter alia* a well-functioning system of labour relations as a primary consideration when seeking the end goal of substantive freedom.

This central difference between Nussbaum and Sen's conceptions of the capabilities addresses the criticism levelled against Sen's 'agnosticism'.⁷¹ By moving away from a comparative theory,⁷² Nussbaum offers a richer model for assessing the question of substantive freedom and human dignity by making certain foundational claims about the importance of particular freedoms and axioms relevant to a particular society. We can tentatively suggest that if we were to look to capabilities theory as the foundation for an analytical model for labour rights, it would certainly benefit from following Nussbaum's approach to the capabilities theory by embracing particular axioms and basic principles as the 'central' as some of its central, articulated elements.

⁶⁵ *ibid* 31 – 32

⁶⁶ *ibid* 33

⁶⁷ Nussbaum, *Creating Capabilities* (n 11) 33 - 34

⁶⁸ *ibid* 34

⁶⁹ Martha Nussbaum, 'Aristotelian Social Democracy', in R Bruce Douglass, Gerald M Mara, and Henry S Richardson (eds), *Liberalism and the Good* (Routledge 1990) 231

⁷⁰ Bogg, 'Constitution of Capabilities' (n 14) 249

⁷¹ *ibid* 248

⁷² Nussbaum, *Creating Capabilities* (n 11) 70

Unfortunately, setting out precisely what those principles are *vis-à-vis* labour relations is an exercise beyond the scope of this particular project; indeed if the volume of literature on the philosophical foundations of labour law is any indication, even attempting to determine what principles should be constitutionalised for the purposes of a new analytical model would be an entirely different task to the one at hand. However, it would still assist this project to have a general idea of the sorts of principles (and rights) that we consider central to the capabilities model that we seek to use as the foundation of a model for organising rights to work relationships in English law. A helpful starting point is provided by Davidov, who considers the regulatory significance of open-ended standards. Open-ended standards differ from more specific ‘rules’ in that they have a much more broadly-drawn scope, and in principle are much less difficult to enforce.⁷³ While that would be an important consideration if there was a direct nexus between the open-ended standard and regulation (as Davidov proposes),⁷⁴ the role that these standards play is at a much more foundational level, and abstracted from the immediate regulatory process which will be set out in Chapters 5 and 6. Indeed constitutionalised open-ended standards at the core of a capabilities model, for the purpose of this thesis, only go so far as to provide direction and grounding to the operation of the regulatory model that will be built upon it: a function that open-ended standards are well suited to. While lacking specificity, their generality would allow for them to offer both guidance and place important controls on the operation of a regulatory model where novel situations may arise and the function of the model needs to adapt to technological or societal changes that may not have been obvious when the theoretical foundation was proposed.⁷⁵

In practice, this means that we need to consider what standards we should constitutionalise in the foundational theory for a Relational Dynamics model. For the reasons discussed in the previous paragraph, at this stage there is much more value in relying on open-ended standards rather than more specific rules. To that end, a good starting point for the sorts of open-ended standards that could be constitutionalised within the capabilities model would be fundamental ILO Conventions.

⁷³ Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 160

⁷⁴ *ibid* ch 7

⁷⁵ *ibid* 161

The list of eight Conventions covers collective bargaining, the prohibition of child labour, the elimination of discrimination, and the abolition of forced labour.⁷⁶ These instruments have a broad ambit, and cover a wide spectrum of matters deemed fundamental to regulating work relationship standards, both minimum and aspirational. However, the value of these Conventions is that, given they aim to apply to myriad states and regulatory regimes, their drafting is such that it offers the sort of generality within a specified purpose that would be valuable as a constitutionalised right. Take, for example, ILO Convention 87 on collective bargaining: its aim is to provide minimum standards around the guarantee and operation of rights to collective bargaining. However, the language of the Convention itself is drafted in general terms. For example, art 2 relates to workers “without distinction” being able to join “organisations of their own choosing without prior authorisation”;⁷⁷ and art 4 prevents workers’ organisations from being “dissolved or suspended by administrative authorities”.⁷⁸ These standards are of course broadly defined, and are not drafted as technical rules. They aim to provide broad guidance for how to achieve certain standards, and do not prescribe how exactly that is achieved. This is the kind of standard that is of utility when thinking about the sorts of rights that should be constitutionalised as part of the capabilities theory *qua* the foundational theory for a relational analytical model for workplace rights, as it sets broad constitutional limits upon the theory without prescribing specific sets of rules.

But while these fundamental ILO standards are a helpful textual source for this current project for these reasons, it is also worth noting that their subject matter is limited to those four areas set out at the start of the previous paragraph. Moreover, beyond the fundamental Conventions, other Conventions err towards a degree of technicality that is likely too specific for the purposes of a very general theoretical foundation of the kind we require.⁷⁹ This means that we do need to broaden the scope of the sources we are relying on for the constitutionalised principles of the capabilities model; and a helpful area to consider is human rights and labour law scholarship. Though of course a link

⁷⁶ K D Ewing, ‘International Regulation: the ILO (and other Agencies)’ in Carola Frege and John Kelly (eds), *Comparative Employment Relations in the Global Economy* (Routledge 2013)

⁷⁷ ILO Co87 – Freedom of Association and Protection of the Right to Organise, 1948 (No 87), art 2

⁷⁸ *ibid*, art 4

⁷⁹ These other Conventions are categorised as ‘technical’ conventions, and include, for example, C-013 on White Lead (Painting) Convention: ILO, ‘Conventions and protocols’ (*ILO*) <<https://www.ilo.org/dyn/normlex/en/f?p=1000:12000::NO::>> accessed 07 July 2020

between human rights and ILO instruments has been acknowledged,⁸⁰ with the latter having been used to interpret the scope of the former,⁸¹ human rights as fundamental labour rights have been acknowledged to extend beyond the four areas covered by fundamental ILO Conventions. Precisely what the contours of human rights as fundamental labour rights are is a matter that is beyond the scope of this particular project, but the general proposition that some human rights are relevant to the regulation of work relationships is uncontroversial. On the narrowest interpretation of the relationship of human rights as labour rights on Mantouvalou's analysis, a "positivistic" approach would still render some rights derived from human rights instruments as fundamental rights in the field of labour law.⁸² However, if the interpretation is expanded beyond a purely positivist analysis, to one which Mantouvalou describes as "instrumentalist" (which is one adopted by most labour law scholarship in the human rights field),⁸³ then one can consider not only textual sources of human rights, but also how institutions have interpreted and developed those sources for the purposes of labour law. What this allows is an expansion of the constitutionally entrenched rights within the capabilities theory beyond just ILO instruments, and also to other human rights where that courts and institutions have held to apply to labour relationships. For example, human rights such as freedom of association,⁸⁴ freedom of expression,⁸⁵ or the right to a private life have all been interpreted to have application within the realm of work relationships,⁸⁶ even where the textual source that such an interpretation is based upon may not explicitly refer to the application of the right within labour relationships.

Therefore, recognising that certain constitutional rights should be entrenched within a capabilities model makes it altogether more attractive when considering whether it should form the foundation of an analytical model for assigning rights to work relationships. A concern some may have with the capabilities model is that is directed towards a more individualised assessment of the rights

⁸⁰ *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) [147] – [160]

⁸¹ John Hendy QC and KD Ewing, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 ILJ 1

⁸² Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) ELLJ 151, 152 – 155

⁸³ *ibid*

⁸⁴ European Convention on Human Rights, art 11; *Demir* (n 81)

⁸⁵ *Barbulescu v Romania* App no 61496/08 (ECtHR, 05 September 2017)

⁸⁶ Virginia Mantouvalou, 'I Lost My Job over a Facebook Post: Was that Fair?' Discipline and Dismissal for Social Media Activity' (2019) IJCLLR 101; *Pay v United Kingdom (Admissibility)* App no 32792/05 (ECtHR 16 September 2008); *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470

that would attach to a work relationship. As will be explored in Chapter 5, this is what the Relational Dynamics model will broadly look like. However, by recognising that this individual assessment is nonetheless subject to entrenched principles based upon labour rights that are recognised as human rights, it would ensure that even though the proposed model will enter into a granular assessment of individual work relationships and assign rights within them, this process will nonetheless be subject to the long stop of entrenched human rights that would define the outer limits of how the model should operate. In short: the capabilities model justifies the individual assessment of work relationships, and the human rights entrenchment prevents it from straying into morally undesirable territory in pursuit of maximising individual freedom *qua* the capabilities model.

IV.iv *Assessing Capabilities Theory*

Narrowing the focus of the discussion back to the question of a new analytical model for allocating labour rights to work relationships, and thinking of the three criteria for determining a useful theoretical model for such a system, it seems that the capabilities approach could provide a helpful underlying theory upon which to build an more sophisticated relational approach for connecting rights to work relationships. Dealing with the first criterion (generality) there is much to be said for the capabilities approach. As set out above, the ideas of capabilities, functionings, and the interstitial conversion factors present an ambitiously broad theory; and all in service of realising human freedom in the context of living a life a person values living. Davidov is certainly right to suggest that one potential weakness of the capabilities approach is that given this breadth, it sets its goals at “such a high level of abstraction ... they do not lead to any concrete programmes”.⁸⁷ This is a fair critique, and is one which is shared by Nussbaum in her analysis of Sen’s work: the idea of ‘freedom’ does not offer an easy path to regulatory solutions by itself.⁸⁸ To achieve a “coherent political project”,⁸⁹ more is needed. To that end, if we adopt the idea of constitutionalised

⁸⁷ Davidov, ‘The Goals of Regulating Work: Between Universalism and Selectivity’ (n 17) 30

⁸⁸ Nussbaum, *Creating Capabilities* (n 11) 71

⁸⁹ *ibid*

principles within the capabilities theory (as proposed by Nussbaum), we can add a degree of further specificity to our foundational theory, beyond Sen's entirely agnostic conception of substantive freedom. By accepting a Nussbaumian position, which embraces the constitutional entrenchment of *inter alia* core labour rights as a crucial part of capabilities theory, we add some necessary specificity and moral guarantees to an otherwise overly-broad theory. The result is a theory which is still capable of encompassing a broad range of work relationships, but within the bounds of certain inalienable rights and principles.

This runs into the second criterion, which requires that a foundational theory provides some concrete purpose for the analytical model. Here, it is important to distinguish Davidov's critique of concrete *programmes* from the desire to have a concrete *purpose* for an analytical model. The function of an underlying theoretical model is to provide guidance, rather than some concrete programme or explanation of what dynamics should be identified within work relationships, and which rights would attach to those dynamics. In short, the theoretical foundation is not the tool we seek to use to actually regulate work relationships. Once again, if we adopt Nussbaum's version of the capabilities theory, it is much easier to identify a purpose:⁹⁰ her approach provides an outline sketch of what capabilities represent an essential threshold for any political order, by reference to particularly important aspects of human life.⁹¹ Of course, the inclusion of labour relations (as elaborated upon above with respect to entrenched labour rights) is of particular significance when thinking about the suitability of the capabilities model *vis-à-vis* an analytical model for assigning rights to work relationships. The result is that this 'general outline' approach,⁹² which embraces some core constitutional entrenchment, tempers the inherent generality of the capabilities approach that is crucial for a foundational theory, with a degree of specificity that such a theory must also provide to an analytical model that would be based upon it. This in turn means that this conception of capabilities theory would provide concrete purpose to a new analytical model for work relationships: the theory seeks to maximise human freedom for individuals, but with a view to achieving that in accordance with entrenched fundamental rights.

⁹⁰ Nussbaum, 'Aristotelian Social Democracy' (n 69) 217

⁹¹ Nussbaum (n 11) 32 – 33

⁹² *ibid*

Finally when we consider whether the capabilities theory in this form offers sufficient guidance for the new analytical model, as per the third assessment criterion, we can see that it would achieve that goal. Of course, the foundational theory for a proposed model is not the model itself, and to that end there is no direct nexus between the capabilities theory and regulation of work relationships. But if we are seeking to establish a new analytical model for work relationships that assesses the dynamics within work relationships in order to understand how to best regulate them, then the capabilities model with labour rights entrenched within it does provide particularly helpful guidance. The capabilities model itself looks at maximising human freedom for individuals, and it is plain that such an approach can be of particular utility when looking at whether it can provide guidance for an analytical model that aims to regulate individual work relationships in the most appropriate way.

For these reasons, a conception of the capabilities theory which embraces some specific constitutional entrenchment of freedoms and principles satisfies the three criteria for assessment set out above. Its holistic approach to the circumstances surrounding the various socioeconomic factors that affect how one may realise certain capabilities offers a form of reasoning and a broad end-goal that is particularly useful when pursuing the more limited project of assigning rights to work relationships; all the more so when we accept that it is simply a theoretical foundation for the analytical model, and not the sole theory. In fact, as later chapters of the thesis will discuss, the breadth of the model leaves space for asking more specific questions about how particular rights in different regulatory fields should be conceptualised, and linked to particular relational characteristics in work relationships, which remains compatible with the broad purpose and aims that a capabilities theory sets out.

V *The Theoretical Foundation of a New Analytical Model*

Having set out the strengths of Nussbaum's conception of capabilities theory as a foundational theory for a new relational analytical model for labour rights, the guiding principles of that underlying theory can now be set out.

First, a Relational Dynamics model must centre the idea of human freedom (defined as the ability to live a life a person values living) as its general purpose. At this base level, the high degree of abstraction that is presented by this model is not problematic, but a distinctly desirable characteristic. Second, the analytical model must pay particular attention to how capabilities and functionings, as relevant to labour rights, can effectively be realised; which requires a particular focus upon the idea of conversion factors. More plainly, this demands that any relational model must build in a sensitivity to externalities that affect how a right may be exercised, or why it may not be exercised as effectively as possible. Although there are limits to the scope of the subject matters that this model will consider (as will be discussed the next chapter), it still does not exclude a sensitivity to factors that may be external to the formal scope of the analytical model. Third, we should adopt an approach to the capabilities theory that embraces some constitutional entrenchment. Not only does this include certain axioms about the society in which the analytical model will operate (*viz.* that it is a liberal representative democracy, with commitments to civil, political, social, and economic rights), but in addition we shall also embrace Nussbaum's suggestion that labour relations are of foundational importance in her conception of capabilities theory. Finally, it should be noted that this theory is the foundation for a more detailed analytical model for assigning rights to work relationships. It is not the case that there is a direct nexus between the capabilities theory being relied upon, and regulatory outcomes within work relationships; work relationships would not be regulated by reference to maximising human freedom alone. To that end, the generality of the theoretical model is a particular strength for this project, given it provides adequate space for any proposed analytical model that relies upon it to embrace the full heterogeneity of the work relationships that it would seek to regulate.

VI *Conclusion*

What has hopefully been demonstrated is that not only is there a pressing need to look beyond intuition and vocation when thinking about the foundations of any proposed analytical model, but that the traditional foundation of inequality of bargaining power that we use to justify Labour Law is both frustratingly vague and risks being too wedded to a particular set of work relationships. As such, when we apply the three assessment criteria to it, it lacks not only the generality to be appropriate for a more ambitious model for relating rights to work relationships, but additionally, it is frustratingly vague in what its purpose or aims are. By contrast, one can be much more optimistic about capabilities theory. When we look to the interpretation proposed by Nussbaum, which embraces the entrenchment of certain principles and freedoms (including labour relations) as core to the project of human freedom, we find a much more promising theoretical foundation for a Relational Dynamics model. Though it remains sufficiently broad in aim and purpose, Nussbaum's capabilities approach, which is not a comparative theory, with its incorporation of certain socioeconomic axioms about the society in which the theory is situated, offers the ideal foundational theory for a proposed analytical model. To that end, it is the favoured theory for the Relational Dynamics model. Its sensitivity to a variety of factors that affect the realisation of capabilities is precisely the kind of holistic reasoning that would represent a useful foundational theory, to help guide intermediate stages of reasoning that result in regulation. For these reasons, we should settle upon it as the philosophical foundation of the analytical model that will be discussed in the following chapters.

Chapter 5

Relational Dynamics

I *Introduction*

This chapter marks the point at which the discussion shifts to the new proposed analytical model for work relationships. This will be done in two parts: the first part of this chapter will aim to draw together a number of threads from previous chapters' doctrinal analysis to discuss the specific shortcomings of English law's heavily contractual approach to the question of work relationship status. In particular, this will involve determining how traditional contractual principles find themselves well-integrated into the tests and criteria for status, and the resulting problems this creates with respect to the breadth and inclusivity of the statuses used to determine access to workplace rights. The second part of this chapter will then proceed to propose a new analytical model for work relationships, titled 'Relational Dynamics'. This approach will aim to assess the full complexity of the relationships that a worker would have with other entities in the context of personal work. The theory underlying the proposed scope of the model will be set out, with discussion about the appropriate boundaries of an analytical model and the balance to be struck between inclusivity and normative purpose.

Then, within this, the framework of the Relational Dynamics model will be set out. It is proposed that the model should be relational, centring upon the worker that offers their labour personally. Drawing upon some of the discussion in Chapter 4 around the theoretical foundations of this model (that is, a modified version of Nussbaum's capabilities theory), the new analytical model will be set out. This model will aim to determine *what* relationships a worker has with a number of entities in the context of providing personal labour, and the *nature* of those particular relationships. The

‘Relational Dynamics’ taxonomy will be explored, which broadly aims to identify the type and quality of a particular work relationship, in order to determine the ‘dynamics’ that may be present within that personal work relationship. Then, the importance of a symbiotic relationship with the purposive assessment of the regulations that would apply to work relationships will be set out, and in particular, why that process will offer a convenient way to relate a regulatory intervention to any particular aspect of the internal structure of a personal work relationship. The work done in this chapter will hopefully outline the ideas and the theories that are important in understanding the shape of the Relational Dynamics model. However, further work will be done in Chapter 6 to set out some of the practical concerns that relate to how the model would operate when assigning rights to the work relationships being analysed, including questions of how to appropriately assign liability to the relevant employing entities in work relationships, as well as the necessary mechanisms needed to realise the Relational Dynamics model.

II *Personal Scope and Contractual Foundations*

II.i *The Role of Contract in Determining Work Relationship Status*

When we consider the principal statuses that are relied upon in English employment law, such as employee, UK worker,¹ or ‘worker’ for the purposes of the Equality Act,² what is notable is the common thread that runs through these statuses: the presumption of a contractual foundation for a work relationship. The focal point for the analysis of work relationships in the context of labour regulation and status is around the concept of ‘wage work bargain’: the idea that labour is sold or exchanged for remuneration or other equivalent benefits. While it is an accepted fundamental principle of labour law that labour is not a commodity in the strictest sense,³ we nonetheless accept

¹ Employment Rights Act 1996, s 230(3)(b)

² Equality Act 2010, s 83(2)

³ ILO Declaration of Philadelphia: Declaration concerning the aims and purposes of the International Labour Organisation, art 1(a)

that “humans sell their capacity to work, not themselves”.⁴ As such, though labour cannot and should not be treated as a commodity *stricto sensu* given the inalienable humanity that is connected to how it is offered and performed, we nonetheless accept that it is traded as part of a labour market in which that work is exchanged for some form of payment.

The central vehicle for organising this exchange in English law has been the contract of employment,⁵ which developed as the legal device that was “devoted to capturing [the] particular social phenomenon ... [of] subordinate employment”.⁶ But there are structural aspects to the contract of employment that have reinforced the idea that labour is exchanged as a commodity, in a manner that tends towards a commercial transaction. While it is certainly not the case that the contract of employment exists wholly as a commercial device, two aspects of how the contract of employment has been interpreted and applied in English law suggests that the principles of traditional contractual reasoning have a significant influence over its operation. First, the criteria used to determine employee status (and by extension, UK worker status and EU worker status) rely heavily on the concepts of bilateral exchange between two parties in a work relationship agreement; and second, the foundational body of law for managing the operation of work relationships, beyond questions of scope, is the law of contract.⁷

II.i.i *Equivalent Statuses*

Looking first to the question of the criteria, it is worth noting that a significant amount of the discussion around the specific criteria that are relied upon to determine status for either employee status or UK worker status have been discussed extensively in Chapter 1.⁸ However, it is worth returning to that discussion (albeit in less specific detail) in order to explore the specific influence

⁴ Judy Fudge, ‘Labour as a Fictive Commodity: Radically Reconceptualizing Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 130

⁵ Mark Freedland and Simon Deakin, ‘The Exchange Principle and the Wage Work Bargain’ in Mark Freedland (ed), *The Contract of Employment* (OUP 2017) 52

⁶ Nicola Countouris, ‘Defining and regulating work relations for the future of work’, ILO Future of Work Research Paper Series, Research Paper 6, 3

⁷ Patrick Elias, ‘Changes and Challenges to the Contract of Employment’ (2018) OJLS 1, 1

⁸ Chapter 1.II

of contractual reasoning in the determination of status. As a starting point, it is worth recalling the proximity between the common statuses that are the vehicles for rights in English law. The contract of employment may be the primary “exoskeleton” for the standard employment relationship, but a series of interpretive decisions by the courts have resulted in the effective elision of UK worker status and even EU worker status (as applied in English law) with it. UK worker status was held to be the same status in kind as employment status by Mr Justice Underhill (as he then was) in *Byrne Bros*,⁹ to the effect that the questions that would be asked to determine the answer to the question of status for UK worker status would “essentially involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services”, albeit with “the boundary pushed further in the putative worker’s favour”.¹⁰ Although more recent developments in *van Winkelhof* have given cause for some limited optimism, with Lady Hale commenting *obiter* that UK worker status is a kind of self-employment rather than a kind of employment status,¹¹ which would in principle suggest that the difference between UK worker status and employee status is one of *kind* rather than *degree*,¹² the practical outcome of these statements has not been particularly revolutionary. While tribunals assessing the factual matrix of a case do use the language proposed in *van Winkelhof*, insofar as they suggest that they are attempting to determine whether a worker is a self-employed person not running a business,¹³ they are nonetheless approaching the question with underlying logic from *Byrne Bros*: that the same criteria and questions that are relevant to assessing employee status are still relevant for UK worker status. As discussed earlier in the thesis,¹⁴ this reveals an internal tension with UK worker status, which on the one hand aims to be a wider, inclusive work relationship status, and on the other, commits itself to using the same criteria as employee status behind the fig leaf of a ‘lower boundary’.¹⁵

⁹ *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) [17(5)] (Mr Recorder Underhill QC)

¹⁰ *ibid*

¹¹ *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730 [31] (Lady Hale)

¹² Jeremias Prassl, ‘Members, Partners, Employees, Workers? Partnership Law and Employment Status revisited. *Clyde & Co LLP v Bates van Winkelhof* (2014) 43 ILJ 495, 502

¹³ *Aslam, Farrar and Others v Uber BV* [2016] Case No: 2202550/2015 & Others (ET) [76]

¹⁴ Chapter 1.III.i

¹⁵ *Byrne Bros* (n 9)

To a lesser extent, the same issue can be observed with respect to EU worker status as interpreted in s 83(2) of the Equality Act 2010. Textually, this provision simply requires the provision of personal work for a worker to fall within its scope;¹⁶ however a series of interpretive decisions about the scope of this provision have set it upon a similar trajectory to s 230(3)(b) UK worker status. First, *Jivraj* introduced a subordination criterion to the domestic EU worker status,¹⁷ derived from EU free movement jurisprudence,¹⁸ which hinted at the elision of s 83(2) worker status with UK worker status due to the potential similarity between ‘subordination’ and the ‘control’ test often used to determine employee or UK worker status. This overlap was confirmed in the series of decisions in *Windle*. First, in the EAT, Judge Peter Clarke accepted counsel’s assertion that there was “no material difference” between UK worker status and EU worker status.¹⁹ This surprising assumption was later affirmed by the Court of Appeal, with Underhill LJ repeating the same construction from *Byrne Bros* to suggest that the “factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense”,²⁰ albeit with an *even* lower passmark than when those considerations are applied for UK worker status.²¹ I have argued in more detail elsewhere that this assumption of equivalence is both doctrinally and normatively faulty,²² but for present purposes this is not particularly important. The important point is that the Supreme Court has endorsed the position adopted in *Windle*, stating that “[n]otwithstanding the murmurs of discontent” about the issue, the court was not invited, nor did it proceed with an assessment of the proposed equivalence of s 230(3)(b) worker status and s 83(2) EU worker status.²³ Therefore, we must accept for now that the two statuses are treated as doctrinally similar, but with differing ‘passmarks’.

¹⁶ Equality Act 2010, s 83(2)(a)

¹⁷ *Jivraj v Hashwani* [2011] UKSC 40, [2011] ICR 1004

¹⁸ Mark Freedland & Nicola Kountouris, ‘Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*’ (2012) 41 ILJ 56

¹⁹ *Windle v Secretary of State for Justice* [2015] ICR 156 (EAT) [27] (Judge Peter Clark)

²⁰ *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, [2016] ICR 721 [24] (Underhill LJ)

²¹ *ibid.*

²² Hitesh Dhorajiwala, ‘*Secretary of State for Justice v Windle*: The Expanding Frontiers of Mutuality of Obligation?’ (2017) 46 ILJ 268

²³ *Pimlico Plumbers and another v Smith* [2018] UKSC 29, [2018] ICR 1551 [15] (Lord Wilson)

II.i.ii *Shared Criteria*

While these two instances of equivalence are certainly independently troubling, the reason it is notable for the purposes of this chapter is due to the result of this elision: equivalence of tests. If the logic of both *Byrne Bros* and *Windle* is accepted, the result is a situation where the same or similar questions and tests can be used to determine the answer to whether a worker falls within the scope of those different statuses. This overlap is observable in the context of a number of recent decisions on gig economy work. While the claimants have generally been successful in gaining recognition as UK workers against their employing entities, these cases have highlighted a reliance on criteria also seen in employee status assessments, that reinforce the need for bilaterality in a work relationship. Perhaps most notably, the concept of mutuality of obligation continues to be an expressly necessary criterion for both employee and UK worker status,²⁴ and in the context of a global/umbrella contract requires a worker to demonstrate that a unitary employing entity is under an obligation to offer work, and the worker is under an obligation to accept that offer of work.²⁵ This is perhaps the most oppressive side of mutuality of obligation: it establishes a norm of continuity and loyalty to a single employing entity, placing a long-term bilateral agreement at the centre of the criterion, and by extension, at the heart of any status that uses it as criterion. Specifically in the context of UK worker status, although in principle the passmark for satisfying it has been lowered,²⁶ commentators such as Guy Davidov argue that given its characterisation as a criterion that is an “irreducible minimum”,²⁷ it is difficult to conceive of a situation where in the context of the criterion being applied in the ‘umbrella contract’ sense, there can be degrees of an irreducible minimum obligation: the ‘passmark’ in all contexts will likely be the same.²⁸ Additionally, following the developments in *Windle*, there is a concern that this passmark issue may spread to s 83(2) EqA 2010 worker status as well.²⁹ As such, to establish continuity and status *between* wage-work bargains, this fairly high degree of obligation on both parties in the work

²⁴ *ibid*; following *Windle* (n 20), mutuality of obligation, while not a determinative factor for s 83(2) worker status, is nonetheless an important factor that a tribunal can consider when assessing worker status during a single bargain.

²⁵ *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA); *O’Kelly and Others v Trusthouse Forte PLC* [1983] ICR 728 (CA)

²⁶ *Byrne Bros* (n 9) [17(5)] (Mr Justice Underhill)

²⁷ *Nethermere* (n 25) 623F (Stephenson LJ)

²⁸ Guy Davidov, ‘Who is a Worker?’ (2005) 34 ILJ 57, 60

²⁹ Dhorajiwala (n 22)

arrangement must be established. However, by contrast, mutuality has also been interpreted as existing only within a single wage-work bargain,³⁰ and this situation has been characterised as being akin to contractual consideration: “the only mutual obligations needed for a contract are consideration: work for a wage”.³¹

The particular failings of each of these interpretations has already been explored,³² but for present purposes, a few points are pertinent. For one, the umbrella interpretation of mutuality envisages a pre-existing long term relationship between an employer and a worker akin to the emerging scholarship on ‘relational contracts’;³³ but additionally, it demands that this pre-existing relationship exhibits strong, long-term bilaterality as well. Mutuality can only exist with a single employing counterparty, and focuses upon very specific obligations being reciprocally exchanged between those two parties. While the nature of those obligations may be specific to the idea of work relationships and wage-work bargains, the fact that one of the *essential* criteria for establishing that a relationship is one of employment or UK worker is based upon identifying the *exchange* of these very specifically defined obligations draws very heavily upon the idea of contractual exchange.³⁴ This point is perhaps more obviously made when we look to mutuality *within* the wage-work bargain. Indeed, to characterise it as contractual consideration plainly reduces the purpose of this particular criterion as identifying the exchange of wages and work in the context of a work relationship.

A notable discussion around the mutuality issue can be found in former Lord Justice of Appeal Patrick Elias’s review of *The Contract of Employment*, specifically where he engages with Albin and Prassl’s critique of the exclusionary effect that doctrines such as mutuality of obligation have. Challenging Albin and Prassl’s convincing argument that there is no conceptual reason why there

³⁰ *McMeechan v Secretary of State for Employment* [1997] ICR 549, 563H-564B (Waite LJ)

³¹ Ewan McGaughey, ‘Uber, The Taylor Review, Mutuality, and the Duty not to Misrepresent Employment Status’ (2018) 48 ILJ 180, 187

³² Chapter 1

³³ Douglas Brodie, ‘Relational Contracts’ in Mark Freedland (ed), *The Contract of Employment* (OUP 2016) 146 - 147

³⁴ Freedland and Deakin (n 5)

must be “continuity of employment and of contract” for an employment relationship to exist,³⁵ as required for a ‘global’ contract of employment in cases such as *Carmichael* or *O’Kelly*, Elias argued that one cannot “properly describe the relationship as contractual when no mutual obligations exist between the parties so that neither can make a claim on the other”.³⁶ Not only does Elias’s argument seem to misconceive the more nuanced point that Albin and Prassl are making about the necessity or utility in identifying subsisting obligations *between* assignments as a necessary requirement for certain employment relationships,³⁷ but also offers an insight into why courts seem attached to the idea of mutuality of obligation. Elias’s argument reveals the centrality that the concept of exchanged obligations have in the employment relationship as analysed by courts and tribunals, as opposed to a focus on the fact that a worker is providing their personal labour.

Moving on to the other criteria for establishing the existence of a work relationship, there are myriad tests that a tribunal may look at in order to determine whether, in addition to the existence of some form of mutuality of obligation, there is (for the purposes of employee status) a relationship of employer and employee between the parties. Again, while it may not be worth going over the same the ground covered in Chapter 1, there are some elements of that doctrinal discussion that are salient to this chapter. A common thread that was identified, which ran through the tests, from control to integration was the fact that they were premised on some form of principle of reciprocity within a bilateral relationship framework. Control, perhaps straightforwardly, has been characterised as the managerial prerogative to dictate the manner or circumstances in which work is done;³⁸ and where tribunals seek to heavily rely on control as the determinative factor in characterising a work relationship as one of employment, elements of contractual reasoning are inherent in that assessment. As part of the wage-work bargain, for remuneration, a worker will acquiesce to managerial prerogatives,³⁹ and the presence of those prerogatives alone may sometimes be enough for a tribunal to decide that there is an employment relationship between

³⁵ Einat Albin and Jeremias Prassl, ‘Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion’ (2015) Hebrew University of Jerusalem Legal Research Paper No. 17-39, 20 <<https://ssrn.com/abstract=2709569>> accessed 17 November 2018

³⁶ Elias, ‘Changes and Challenges to the Contract of Employment’ (n 7) 133

³⁷ Albin and Prassl (n 35) 19

³⁸ *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497 (HC) 515 (McKenna J)

³⁹ *Countouris* (n 6) 4

the parties. Upon examination, this fits quite neatly into the precepts of contractual exchange. Although we are once again concerned with obligations that are of specific relevance to employment relationships (*viz.* a wage for work under managerial control), the framework within which those obligations exist do exhibit elements of contractual reasoning. The control obligation must vest in the employing entity; indeed to apportion it between a number of parties would usually conflict with the conclusion that there was a relationship of employer and employee.⁴⁰ To that end, we have a test within this criterion that quite closely aligns to the concept of an exchange specifically between two parties in a work relationship, akin to the principles of contract. This principle also applies *mutatis mutandis* to the identification of control in UK worker status cases;⁴¹ and even in s 83(2) EqA 2010 status cases,⁴² if we accept the convincing argument from Freedland and Countouris that in its operation, the subordination test derived from *Allonby* is essentially an analogue of the control test used for employee status.⁴³

The other tests that are also used by the courts and tribunals are perhaps less obviously bilateral in their operation, but we can still identify elements of contractualism within their structure. Take for example, the integration test, where a tribunal will seek to ask whether a relationship of employer and employee can be established on the basis that the putative employee is integrated into the business of the putative employer.⁴⁴ Superficially this does not seem to have the same direct exchange that is more visible in the control test, but a deeper assessment of this test reveals that contractual principles remain obliquely relevant to it. Indeed, integration is often relied on as an identifier of an employment relationship in the context of skilled independent workers that would not usually be subject to the direct formal control of an employing entity. Nonetheless, it acts as a proxy for the exchange of remuneration for managerial prerogative: while there may not be any formal day-to-day control, the fact that a worker would be integrated into the firm (however

⁴⁰ *Wickens v Champion Employment* [1984] ICR 365 (EAT)

⁴¹ *Byrne Bros* (n 9); note for example the detailed assessment of the control criterion by the ET in *Uber* (n 13) [54] – [57] where the ET identified the various forms of managerial prerogative that were exercised by Uber, albeit obscured behind a digital platform, in the context of UK worker status

⁴² *Jivraj* (n 17); *Halawi v WDFG UK (t/a Word Duty Free)* [2015] 1 CMLR 31 (CA)

⁴³ Freedland and Kountouris, 'Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwaní*' (n 18)

⁴⁴ *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101, 111 (Denning LJ)

nebulously that principle of integration may be defined)⁴⁵ carries with it the implied suggestion that said integration correlates with some form of acquiescence to managerial prerogative. The exchange between the worker and the employer exists where the integration test is applied; but it is acknowledged via a proxy. Even the economic reality test,⁴⁶ which relies on an assessment of a number of factors to determine where economic risk falls in a work relationship,⁴⁷ is still often considered alongside more traditional questions of control,⁴⁸ while asking further questions related to *inter alia* the management of the business or investment.⁴⁹ This test seeks to identify exchange in a more sophisticated manner that looks to consequential issues such as profit, and the substantive wielding of prerogative, rather than simpler questions of acquiescence to any prerogative power. In the absence of an exchange that does not result in prerogative power vesting wholly or substantially in the employing entity (identified by the various factors set out in the business reality assessment),⁵⁰ it would be a strong indication that the relationship is not one of employment (or UK worker given the overlapping tests).⁵¹

However, before we proceed to the next subsection, it is worth being clear about the claim being advanced about the contractual influence seen in these tests. Without doubt, these tests reinforce the idea of the paradigm work relationship discussed in Chapter 1, and primarily, they do so by looking for characteristics in a work relationship that link back to the idea of a long-term, bilateral work relationship with a unitary employing entity. But closely aligned to that, and albeit more subtly, there is the additional contractual influence which also relates to what that paradigm work relationship is: i.e. the exchange of remuneration for work and subordination to managerial prerogatives. This exchange can be identified as an underlying factor in all the tests whose primary aim is to identify a particular kind of dynamic in the broader exercise of classifying that work relationship (however problematic using that dynamic as a diagnostic test for *inter alia*

⁴⁵ *Hospital Medical Group v Westwood* [2013] ICR 415 (CA) [19] (Maurice Kay LJ)

⁴⁶ *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184 (Cooke J); *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735 (CA)

⁴⁷ *Quashie* (n 46) [51] (Elias LJ)

⁴⁸ *Market Investigations* (n 46) 184 (Cooke J)

⁴⁹ *ibid* 185

⁵⁰ *ibid* 184 – 185

⁵¹ *Hospital Medical Group* (n 45)

employment status is). Therefore, it is hopefully clear that these tests, while not *about* exchange, do exhibit symptoms of that contractual method of reasoning in their operation.

II.ii *Contractual Influences Beyond Personal Scope*

So far the discussion has centred around the question of personal scope, and how elements of contractual reasoning have had a subtle influence over the tests and criteria that we use to decide whether a worker will have status for the purposes of employment protection. However, there is a wider point to make about the influence of contractual principles beyond questions of scope. To that end, this subsection is concerned with identifying other areas of overlap between the disciplines of Labour Law and the law of contract. While it may not be directly related to the broader aim of producing an new analytical model for work relationships, it will provide some important background to how intertwined our thinking in Labour Law has become with contract law.⁵²

II.ii.i *Normative Implications of the ‘Wage-Work Bargain’*

Perhaps the first and most common influence of contractual language is the potential normative baggage that is carried in the concept of the ‘wage-work bargain’. In a system of Labour Law that attaches normative (and doctrinal) value to terms such as employee, worker, and even employer,⁵³ the requirement to have a wholly neutral term that can describe the bare skeleton of the work relationship is an analytical necessity. The idea of the ‘wage-work bargain’ has become the main device we rely on as a seemingly-neutral expression that relates to the core elements of the a work relationship; but even that expression may itself have certain normative meaning. As Davies has suggested (in the context of discussing working time), the wage-work bargain is “summed up in

⁵² Hugh Collins, ‘Contractual Autonomy’ in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Bloomsbury 2015) 64

⁵³ Jeremias Prassl, *The Concept of the Employer* (OUP 2015)

the well-known and oft-repeated statement, “The consideration for work is wages, the consideration for wages is work”.⁵⁴ Given that the wage-work bargain “can be identified as a central feature of the contract of employment”,⁵⁵ there is significant normative value in the fact that this central component is so frequently characterised as direct, almost-commercial exchange of wages for work. This approach has the ability to shape our thinking about employment relationships: that if the core of the relationship is this idea of bilateral, bargained-for exchange, in absence of any legislative intervention,⁵⁶ it readily follows that the default rules to analyse those employment relationships ought to derive from the law of contract. An example of this point comes from Patrick Elias who has stated that:

“The employment relationship lies at the heart of labour law: the worker agrees to sell his labour power to his employer. *Like any other agreement in private law*, the legal mechanism for understanding the rights and obligations of the parties is the contract.”⁵⁷

This is an excellent example of the concerns that are raised when we explore the implications of the language of the wage-work bargain. Former senior members of the judiciary expressly characterise work as a quasi-commodity traded for remuneration, and are seemingly untroubled by analogising that relationship with any other private law agreement. While it would certainly go too far to suggest that this is a result of the language of the ‘wage work bargain’, the language and its normative baggage may nonetheless be symptomatic of an assumption of a contractual *status quo* for analysing work relationships, where other regulatory interventions may not exist or take primacy.

⁵⁴ ACL Davies, ‘Getting More Than You Bargained for? Rethinking the Meaning of ‘Work’ in Employment Law (2017) 46 ILJ forthcoming, 8

⁵⁵ Freedland and Deakin (n 5) 53

⁵⁶ *ibid* 54

⁵⁷ Patrick Elias, ‘Challenges and Changes to the Contract of Employment’ (2018) OJLS 1, 1 (emphasis added)

II.ii.ii *The Contractual Interpretation of Work Relationships*

What the previous discussion has hopefully demonstrated is that contractual precepts are deeply ingrained into the analytical concepts central to assessing essentially all employment statuses in English law. However, what is perhaps even more concerning is the effect that this has had upon the understanding of employment status. Employment (broadly defined) seems to not be conceived of as a relationship which happens to be regulated by contract, but has been reduced down to a relationship that is those very contractual obligations; a particular phenomenon which has been identified by Gardner:

“Whenever the norms of certain roles and relationships can be understood as having their source in a contract, they are so understood. They are reinterpreted as contractual norms, existing for content-independent reasons.”⁵⁸

Beyond matters of language, we can see a number of situations where this assumption of the contractual foundation of employment law has manifested in employment law, such that “judges have indubitably drawn extensively upon the rules and principles of the general law of contract”.⁵⁹ At the outset, it is important to be clear that the claim is not that employment law looks simply to the exchange of wages and work, and regulates the entire affair with common law rules of contract. Indeed, this area of law is one where there is significant overlap and interaction with legislation, contract law, and judicial interpretation; all of which are factors which operate as “interdependent layers of regulation”.⁶⁰ This regulatory overlay exists alongside (and sometimes symbiotically) with the contractual foundation of employment law; and to that end, statements such as the one above from Patrick Elias seem to go too far in their characterisation of the precise relationship between employment law and the law of contract. Indeed, while it will be argued that contract does play a significant role in the operation of employment law, it is far from the case that it plays any kind of exclusive role either. However, even if its role remains non-exclusive, its influence is significant.

⁵⁸ John Gardner, ‘The Contractualisation of Labour Law’ in Hugh Collins, Gillian Lester, and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 36

⁵⁹ Collins (n 52) 64

⁶⁰ Freedland and Deakin (n 5) 68

Collins is most likely correct when he describes contract as the “scaffolding” of the discipline rather than the “bricks and mortar” of the discipline (the ‘bricks and mortar’ being “mandatory rules in legislation” which supplement the basic institutions of private law with special, workplace-specific rules).⁶¹ The influence of the law of contract has also similarly been referred to by Langille as the discipline’s basic “legal grammar” (i.e. contract is “how we must articulate any narrative in such a way” for it to be understood within the context of the discipline);⁶² and what is notable is that the law of contract has a presence in employment law not *simply* when considering the criteria relating to work relationships status as explored in the previous sub-section. Being the default method of reasoning for the discipline, contract exists not only as a kind of ‘scaffolding’ supporting alternative intervention, but also a concept whose roots penetrate and intertwine with the ‘bricks and mortar’ of regulatory intervention, while also occupying the voids left in the discipline where there has been *no* regulatory intervention.

There are a number of further examples of situations where contract has played a foundational role in the interpretation of Labour Law. While it is well beyond the scope of this piece to consider each particular regulatory domain within labour law where the law of contract has been relied upon for interpretive direction, some examples will be used to illustrate how the discipline remains “irrevocably committed to contractual reasoning”.⁶³ One example which is pertinent to this project is the approach taken by the English courts with respect to implied contracts in the context of triangular work relationships. It is sometimes the case that in a triangular work relationship, the worker will not have any contractual nexus with the end-user of their work; and that the contract between the worker and the agency that supplies them may not be sufficient to grant the worker status with that entity (for lack of control, for example).⁶⁴ In such a situation, where a worker in a triangular work relationship would aim to establish an employment/UK worker relationship with the end-user of their work, traditional (largely commercial) principles of contract law have been

⁶¹ Hugh Collins, ‘What Can Sen’s Capability Approach Offer to a Labour Law?’ in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 23

⁶² Brian Langille, ‘What is Labour Law? Implications of the Capability Approach’ in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 127

⁶³ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 42

⁶⁴ *Dacas v Brook Street Bureau UK* [2004] ICR 1437 (CA) [64] (Mummery LJ)

relied upon to determine whether such a work relationship can be implied in contract. One case which dealt with this (as discussed in Chapter 2) was *Dacas*. *Obiter*, Sedley and Mummery LJJ suggested that in a triangular work relationship where *prima facie* the worker had no employment relationship with any party, it would be possible to imply a contract of service between a worker and an end-user.⁶⁵ There, the Court of Appeal's approach seemed to be sensitive to the fact that in absence of such an implication, a worker may have no work relationship status with either party,⁶⁶ and therefore tribunals should be open to the possibility of implying a contract of service if the evidence in the case points in that direction.⁶⁷ However, later cases (even those where the court actually *did* imply a contract of service between a worker and an end-user in a triangular relationship)⁶⁸ qualified this approach by attaching contractual principles of business necessity to the process of implication. For example, in *James v Greenwich LBC*, the Court of Appeal stated that "in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service";⁶⁹ a test with a wholly commercial tilt drawn from *The Aramis*,⁷⁰ which concerned implying contracts between the presenter of a bill of lading and a shipowner. Notwithstanding the incredibly high bar that reliance on this principle creates *vis-à-vis* implied contracts,⁷¹ this approach also demonstrates what seemed to be a wholly uncontroversial proposition that the approach to implying contracts in the context of *work relationships* can draw entirely from the principles used to imply contracts in entirely commercial situations. This is quite likely due to the courts accepting the *status quo* that the analytical foundation of labour law is indeed the law of contract.⁷²

More recently, a useful insight into the influence that contract law has in the employment law was seen in the dissenting judgment of Underhill LJ in the *Uber* decision in the Court of Appeal. The line of case law emerging from the Uber business model has been discussed in more detail in Chapters 1 and 3, and for present purposes our focus is the reasoning in the dissenting judgment

⁶⁵ *ibid* [16] – [18] (Mummery LJ)

⁶⁶ *ibid* [72] (Sedley LJ)

⁶⁷ *ibid* [16] (Mummery LJ)

⁶⁸ *Cable & Wireless Plc v Muscat* [2006] ICR 975 (CA)

⁶⁹ *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] ICR 545, [23] (Mummery LJ)

⁷⁰ *The Aramis* [1989] 1 Lloyd's Rep 213 (CA) 224

⁷¹ This is discussed in more detail in Chapter 2

⁷² Elias (n 57) 1

and its discussion of the *Autoclenz* principle. For Underhill LJ, the *Autoclenz* principle applied only when factual performance of the work relationship was “inconsistent with the true agreement”,⁷³ which can be “gleaned from all the circumstances of the case, of which the written agreement is part but only a part”.⁷⁴ This approach was notably more restrictive than the approach taken by the majority of the Court of Appeal,⁷⁵ which determined that the written terms could be disregarded where they did not “reflect the reality” of what was “occurring on the ground”.⁷⁶ This contrast is explained by Bogg and Ford, who suggest that the difference in application of the *Autoclenz* principle between the majority and Underhill LJ can be accounted for by the “legal prism through which they view the arrangements”.⁷⁷ For Underhill LJ, the written agreement was in the “foreground” of the assessment,⁷⁸ and it in turn precipitated a more restrictive approach to the *Autoclenz* doctrine, and a reduced willingness to disregard those contractual terms. What this demonstrates is that at times, where judicial attitudes are closely aligned to the idea of employment law having a contractual foundation, this in turn results in greater significance being placed upon contractual elements that exist within an employment relationship, notwithstanding the potential harm that such an approach can do with respect to access to employment rights. While it is important to remember that this was a minority opinion, and the majority took a more purposive approach based on the statutory basis of s 230(3)(b) worker status,⁷⁹ the centrality of contract in Underhill LJ’s reasoning reveals the extent to which some judges do see contract as the core ‘legal grammar’ of employment law. Even when interpreting a work relationship status ostensibly defined in statute,⁸⁰ the method by which that status is interpreted is through the lens of contract, and with contractual notions at the centre of the reasoning. So while it is true that employment law is a *mélange* of contract and statute,⁸¹ quite often the analytical tool used to interpret and assess difficult questions within the discipline will be that of contract.

⁷³ *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] ICR 845 [119] (Underhill LJ)

⁷⁴ *ibid* [119]

⁷⁵ Alan Bogg and Michael Ford QC, ‘Between statute and contract: who is a worker?’ (2019) 135 LQR 347, 349

⁷⁶ *Uber (CA)* (n 73) [66]

⁷⁷ Bogg and Ford (n 75) 349

⁷⁸ *ibid*

⁷⁹ Bogg and Ford (n 75) 350 – 351; *Uber (CA)* (n 76) [72] – [73]

⁸⁰ Though, of course this is subject to earlier discussion discussing the creep of contractual reasoning and criteria into s 230(3)(b) status

⁸¹ Collins, ‘What Can Sen’s Capability Approach Offer to a Labour Law?’ (n 61) 23

While we should be careful not to overstate the significance of these decisions with respect to the wider argument about contractual influence being advanced in this subsection, they do add further weight to the idea that once the work relationship is characterised, at its core, as one which is concerned with the exchange of wages for work, defined in the first instance by a contractual agreement, then the less controversial and more invasive traditional contractual norms become in how we think about regulating or assessing those relationships.

II.iii *Limitations of the Contractual Approach*

Up to this point, it has hopefully been demonstrated that contractual reasoning (and as a result, common law principles of contract law) have featured heavily in English employment law; both generally and with respect to the questions of personal scope that are of specific concern to this project. However it is worth setting out why exactly this contractual foundation presents a problem when we are thinking about how we choose to analyse work relationships. The reason is that it forces our analytical approach into a distinctly binary, personal model which may not be entirely suitable for the heterogeneity of work relationships that employment law seeks to regulate. The paradigm work relationship (i.e. the bilateral contract of employment, which lasted indefinitely) which was explored in depth in Chapters 1 and 2 may well represent a majority of work relationships that English employment law is concerned with, but there has also been dramatic growth in the size of work relationships that are atypical (insofar as they deviate from this norm) since around 2008.⁸² These include zero-hours contract relationships (which have grown most dramatically, by almost 400%),⁸³ agency work, part-time work, and (self-classified) self-employment.⁸⁴ Additionally, gig economy work has also grown rapidly (to almost 2.8 million people in the UK, though still a relatively small proportion of the total workforce),⁸⁵ and this form

⁸² Stephen Clarke, ‘Atypical’ day at the office’ in Stephen Clarke (ed) *Work in Brexit Britain: Reshaping the Nation’s Labour Market* (Resolution Foundation 2017) ch 5

⁸³ *ibid* 4

⁸⁴ *ibid* 4

⁸⁵ BEIS, ‘The Characteristics of those in the Gig Economy’ (Department for Business, Energy & Industrial Strategy 2018)

⁵ <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687553/The_characteristics_of_those_in_the_gig_economy.pdf> accessed 17 November 2018; though *cf* ONS, ‘The

of work relationship synthesises discrete organisational techniques to create a work relationship model that effectively obscures the precise nature of the relationship between the various parties which participate in it.⁸⁶

This becomes all the more troubling when we consider how ill-equipped the contractual approach seems to be when attempting to analyse work relationships. Chapter 1 discussed in great detail the manner in which the criteria for the main work relationships have reinforced the centrality of the paradigm work relationship in English employment law,⁸⁷ and this is further supported by the contractual character that some of these criteria have. Unfortunately, the result is that while the statuses invite courts to think in a bilateral, personal way, non-paradigm work relationships are organised in a manner that sits outside that very specific framework. Agency work relationships may split employer functions and worker obligations between a number of employing entities; zero-hours contracts directly challenge the requirement of mutuality of obligation and the paradigm of open-endedness in employment relationships; and gig economy work can obscure the precise nature of a work relationship by splitting employer obligations between a number of parties, and using opaque relationship structures that are hidden within digital platforms designed by the employing entities.⁸⁸ The result is an analytical norm that is an “artificial’ model imposed on a more complex ‘reality’ of labour relations”.⁸⁹

This is a problem because there is of course a pressing need to ensure that we are using appropriate tools to analyse work relationships, as the way we decide how to characterise a particular work relationship will usually determine the rights that flow to the worker. The ILO, in its Recommendation on the employment relationship, suggests that any legal framework that seeks to identify employment relationships (broadly defined) should be sensitive to the issue of

feasibility of measuring the sharing economy: November 2017 progress update’ (Office for National Statistics 2017) <<https://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/thefeasibilityofmeasuringthesharingeconomy/november2017progressupdate>> accessed 14 July 2020, which sets out some of the challenges of accurately estimating the statistical significance of the gig economy

⁸⁶ Chapter 3

⁸⁷ Chapter 1

⁸⁸ See Chapter 3 for more discussion of this point

⁸⁹ Simon Deakin, ‘The comparative evolution of the employment relationship’ in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006) 104

“disguised employment”,⁹⁰ as well as ensure that work relationships with multiple actors have the appropriate labour standards apply to them. Sadly, it is unlikely that in its current form, the English law surrounding questions of personal scope provides “functionally adequate structural analysis of arrangements for employment and a functionally adequate regulation of those arrangements”,⁹¹ given the significant influence of the prescriptive analytical approach it uses.

This strain of contractual reasoning also severely limits the scope of reform when thinking about questions of personal scope and status in English law. Even the most encouraging or ambitious reform proposals are still forced to embrace some degree of contractualism in order to be considered viable reforms. Take, for example, the reform proposals in *Rolling out the Manifesto for Labour Law*. The treatise itself is an ambitious and incredibly encouraging reconceptualization of how English Labour Law ought to function, but even in that proposal, when the authors turn to the question of redefining personal scope, they are understandably constrained by the underlying contractual reasoning that has become so central to questions of personal scope. The authors propose that ‘employee’ and ‘worker’ should have a unified meaning, defined as following:

“In this Act “worker” or “employee” means an individual who-

- (a) seeks to be engaged by another to provide labour;
- (b) is engaged by another to provide labour; or
- (c) where the employment has ceased was engaged by another to provide labour; and
- (d) is not genuinely operating a business on his or her own account.”⁹²

Alongside this new definition of unified employee/worker, there is an equivalent proposal to approach the question identifying the employing entity by reference to s 43K(1)(a) ERA 1996, which ascribes employer status to an entity that has a role in substantially determining the terms

⁹⁰ ILO R198 – Employment Relationship Recommendation, 2006 (No 198), art 4(b)

⁹¹ Freedland and Deakin (n 5) 54

⁹² K D Ewing, John Hendy QC and Carolyn Jones (eds), *Rolling out the Manifesto for Labour Law* (IER 2018) [6.11]

of the engagement,⁹³ albeit with the expansion of that provision by making it possible for two entities to jointly be responsible for substantially determining the nature of the engagement, and therefore, jointly be responsible for employer status.⁹⁴ This approach is certainly encouraging, as it offers hope for reasonably significant reform within the existing confines of the English regime of Labour Law: by expanding worker protections to those providing labour *not* as independent contractors, shorn of questions of control or mutuality,⁹⁵ the scope of the status widens dramatically. In particular, this provision centres around the concept of labour, as opposed to ‘work’, which is of particular significance. This language distances the proposed definition from the heavily contractual precepts of the ‘wage-work bargain’ as already discussed earlier in this chapter: placing the focus of this definition not on the idea of an exchange of work for wages, but rather, just the provision of labour alone.

However, as much as this definition does represent an incredibly useful reform to the existing labour law system, there are two potential issues that would remain even if it were adopted. These problems, related more broadly to the fact that definition would *substitute* the existing worker and employee definitions in s 230(3) ERA 1996,⁹⁶ are: first, that this single definition would govern all regulatory contexts in which it is applied, running the risk of the provision being interpreted restrictively given the pre-existing hierarchy of employee rights, and worker rights; and second, that the definition still excludes those who operate a genuine business.

These two issues are intimately related, and can be dealt with together. The reason that such an approach is troubling is that the proposed definition has, for obvious reasons, not been written to be used as part of a completely novel analytical model for analysing work relationships. Rather, it is to be implanted in the place of pre-existing worker and employee statuses. The definition is certainly textually wide, but given it is being used to govern access to rights that were previously the reserve of employees or workers, there is a serious concern that such an approach would result in the wider proposed definition from being narrowed by tribunals and courts. If the legal

⁹³ *ibid* [6.19]

⁹⁴ *ibid* [6.20]

⁹⁵ *ibid*

⁹⁶ *ibid* [6.11]

framework remains the same, but for a differently defined personal scope, it may be the case that the precepts that surround certain rights will result in a narrowing of that newly defined personal scope. If the experience of how multiple work relationship statuses, of varying textual restrictiveness, were all gradually aligned to a similar level of restrictiveness as employee status can teach us anything,⁹⁷ it is that in the context of a unified work relationship status, there is a significant risk that the single status will end up being interpreted as restrictively as employment status or worker status if it is simply transplanted in place of those statuses; with the ‘genuine independent contractor’ criterion doing the heavy lifting to ensure that restrictiveness.

This is especially pertinent with employment status and worker status in the condition that they are in. One of the current hard-fought battlegrounds for establishing status is the question of whether the work relationship is one which contains a substitution clause which would be fatal to employee or worker status. As the analysis in Chapter 3 identified,⁹⁸ the presence of a sufficiently well-drafted substitution clause will be fatal to a work relationship being classified as an employee or worker relationship,⁹⁹ even where all the other aspects of that relationship would fit the paradigm for either status. This is because an effective substitution clause would either be a term inconsistent with an employer/employee relationship;¹⁰⁰ or indicative of a situation where the worker did not perform the work personally. The concern is that, as the definition which is proposed in *Rolling out the Manifesto* is drafted in a manner that requires the personal provision of labour, and it also excludes those who are genuinely independent contractors from being within its scope, it does not take a leap of the imagination to see how tribunals may rely on the same “principles” of “general application”¹⁰¹ relating to substitution clauses to conclude that similar clauses would exclude work relationships from falling into the scope of the definition proposed in *Rolling out the Manifesto*, by suggesting that such clauses are indicative of genuine independent contracting.

⁹⁷ See generally the discussion surrounding UK worker status and EU worker status in equality law in Chapter 1; *Byrne Bros* (n 9); *Jivraj* (n 17) and *Windle* (n 20).

⁹⁸ Chapter 1; *Pimlico* (n 23); *Independent Workers’ Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, Case Number TUR1/985(2016), 14 November 2017

⁹⁹ *Deliveroo* (n 98)

¹⁰⁰ *Ready Mixed Concrete* (n 38) 515; *Echo & Express Publications Ltd v Tanton* [1999] ICR 693 (CA); *MacFarlane v Glasgow City Council* [2001] IRLR 7 (EAT)

¹⁰¹ *Deliveroo* (n 98) [91]

Another concern, albeit of a lower order, relates to the other tests that have been relied upon for employee or worker status. Although the proposed definition in *Rolling out the Manifesto* expressly aims to exclude concepts such as ‘control’ or ‘subordination’ as requirements for falling into its scope,¹⁰² there remains the concern that, by maintaining a distinction between work that is and is not genuine independent contracting, there is a possibility (though more remote) that tribunals may rely on tests such as control, subordination, economic reality or even dominant purpose to try and police the line between labour that is provided as part of genuine independent contracting, and that which is not. While this risk is lower, as one presumes that any implementation of the proposed status would be accompanied by guidance stating that control or subordination is not strictly relevant to determining whether the worker is a genuine independent contractor, it is nonetheless a non-negligible risk that tribunals and courts would approach the independent contractor question in the same way that the Court of Appeal approached mutuality in *Windle*: that though not determinative, the old tests could still guide the tribunals in determining whether the relationship was one of genuine independent contracting.¹⁰³

What this proposed status in *Rolling out the Manifesto* demonstrates is the difficulty of proposing reform for the system of work relationship status in a form that can be incorporated into the general scheme of English Labour Law as it currently exists. The proposal from the authors of *Rolling out the Manifesto* is perhaps the most progressive approach to the question of personal scope that could be taken without upending the analytical foundations of labour regulation in English law. However, where any status has to fit within a scheme that has developed a rich body of jurisprudence around how to distinguish between *inter alia* those who are or are not genuine independent contractors, it will be battling significant amounts of inertia which will attempt to reintroduce that jurisprudence back into the proposed status. For that reason, it is likely the case that any new proposed analytical model for assigning rights to work relationships must make a

¹⁰² Ewing, Hendy QC & Jones (eds), *Rolling out the Manifesto for Labour Law* (n 92) [6.14]

¹⁰³ *Windle* (CA) (n 20) [23] (Underhill LJ)

radial break from the foundations of English Labour Law, and refocus its attention on the nature of work relationships, and how to assign rights within them.

III *Relational Dynamics*

Hopefully, it has been demonstrated that there are significant drawbacks with the approach taken by English law with respect to defining the personal scope of workplace protections by reference to statuses that not only reinforce the idea of a paradigm work relationship,¹⁰⁴ but also rely on a fairly restrictive analytical foundation which is based upon common law contractual principles.

It is proposed that in order to appropriately assign rights to different work relationships, we need to break away from this model of reasoning, which relies upon status to allocate a conceptually muddled collection of different rights to a worker, and approach the question of how rights relate to work relationships through two analytical methods: first, a relational analysis of all the relevant relationships in a work relationship,¹⁰⁵ and the dynamics present between them; and second, a purposive interpretation of relevant rights, and how they relate to any identified dynamics in the work relationship.¹⁰⁶ One of the key weaknesses of English law's current approach is that it forces our analysis into a specific kind of reasoning, which in turn runs the risk of obscuring or even ignoring important relations within a work relationship, that would act to offer us a full understanding of how that relationship operates. What we need is an analytical model that allows us to embrace the full complexity of work relationships that exist beyond the paradigm relationship, and through that, offer us a way to assign rights to these relationships in a way that works *with* that complexity. As Freedland and Kountouris suggest, a new approach must have an

¹⁰⁴ Chapters 1 – 3

¹⁰⁵ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) ch 1

¹⁰⁶ Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) ch 6 and 116 – 117

“expansive and inclusive boundary or framing concept to designate the social and economic relations with which labour law should properly be concerned”.¹⁰⁷

Therefore, this section of the chapter is concerned with setting out the framework for a new approach to analysing and organising work relationships and rights, called ‘Relational Dynamics’. First, the scope of the model will be set out, discussing what the outer limits of the model would be with respect to the kinds of relationships it would be analysing. Second, the relational nature of the model, and its internal structure will be set out. Finally, this structure’s relationship with rights, and the method by which they would relate to that structure will be set out, based upon a purposive analysis of the workplace rights, and the symbiotic relationship between those identified purposes, and the dynamics identified in the work relationship. The aim of the following discussion is therefore to set out the basic principles of the Relational Dynamics analytical model, alongside the potential benefits that such an approach would offer compared the current analytical approach in English law.

III.i *Defining the Scope of the Analytical Model*

An important debate in recent (and historic) Labour Law scholarship, framed around the idea of the ‘death’ of labour law,¹⁰⁸ has required us to critically delineate the scope of the subject. As the “basic pillars that supported labour law ... have either weakened or been transformed”,¹⁰⁹ insofar as the workforce characteristics that moulded the traditional conception of Labour Law (*viz.* the paradigm work relationship, vertically integrated workplaces, or strong collective bargaining structures) have been weakened, and have started to intermingle with heterogenous non-paradigm work relationships and organisational structures,¹¹⁰ significant questions have arisen about what

¹⁰⁷ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 30

¹⁰⁸ Hugh Collins, ‘Labour Law as a Vocation’ (1989) 105 LQR 468, 468; Keith Ewing, ‘The Death of Labour Law?’ (1988) OJLS 293

¹⁰⁹ Judy Fudge, ‘Labour as a Fictive Commodity’ (n 4) 120

¹¹⁰ ONS, ‘Trends in self-employment in the UK’ (ONS 07 February 2018) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2018-02-07>> accessed 15 July 2020; and as explored in Chapter 2

the precise scope of the discipline of Labour Law (and in our case, an analytical model for labour rights) ought to be, and *how* we should go about defining it.

Judy Fudge is correct to point out that this expansion of work relationship forms has resulted in an attempt to “revitalise” the discipline, rather than eulogize it.¹¹¹ However, while there *has* been a surge of academic commentary on attempting to provide a definitive answer to the question of what the particular scope and purpose of Labour Law is more generally,¹¹² it has been accompanied by what Mark Freedland has called an “anxiety” about expanding the scope of the subject too far.¹¹³ The concern is that the broader the scope of Labour Law gets, such that it can for example expand in one direction to cover authentic business contracts, or in another direction to encompass labour done in a home environment, the increased likelihood of “foregoing the normative claim for labour law to constitute an autonomous legal domain”.¹¹⁴ It is these competing points that therefore require us to decide what the precise scope of any proposed analytical model is, before we outline what that model may look like.

III.i.i *Primary Work Relationships and Ancillary Relationships*

Defining the scope of the analytical model we are proposing is an important step in delineating those relationships which we *are* concerned with analysing in great depth (i.e. the focus of the analytical model), from those we are not concerned about analysing with the proposed model. When we talk about work relationships, it should be made clear that that discussion does not come with the associated normative assumptions of bilaterality that the word ‘relationship’ might carry. The relationships we will likely analyse might contain a number of “non-contractual vertical, horizontal, or diagonal links with other workers and managers within, or connected to, the

¹¹¹ Judy Fudge, ‘Labour as a Fictive Commodity’ (n 4) 120

¹¹² Guy Davidov, ‘The Goals of Regulating Work: Between Universalism and Selectivity’ (2014) 64 *University of Toronto Law Journal* 1 provides a comprehensive summary of philosophical theories; and more generally, Davidov and Langille, *The Idea of Labour Law* (OUP 2011); see also Chapter 4

¹¹³ Mark Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 *ILJ* 1, 28

¹¹⁴ *ibid*

employing enterprise”,¹¹⁵ all of which could be important in understanding the structures in which labour is provided, and should certainly not be excluded from the analytical scope of the Relational Dynamics model. This means that the scope of the model could include any entities that have some role in the determining the substantive provision of labour by the worker by exercising some employer function (even indirectly or in a manner that is only more-than-negligible): all of which shall be within the analytical scope of the proposed model.

An obvious starting point would be to state that those relationships that fit the standard employment relationship model of the wage-work bargain between a worker and a single employing entity would certainly fall within the scope of a new model; it should not exclude the old paradigm, even if it is in decline.¹¹⁶ However, as discussed in Chapter 2,¹¹⁷ work relationships are diverging from a structure that simply consists of a unitary employer in a direct contractual relationship with the worker. Moreover, as discussed in earlier chapters,¹¹⁸ and as brought into sharp relief by Prassl, the many functions of the employer will often be split between a number of parties in non-standard work relationships.¹¹⁹ So when considering how we delineate the scope of an analytical model, we need to make sure that we capture all of the relevant parties and entities that have some influence over the substantive terms of the provision of personal labour by a worker. It is therefore proposed that we can define these relationships as ‘primary work relationships’, and in the following manner:

‘Primary work relationships’ are the collection of relationships that are associated to the provision of an instance of personal labour by the worker, and include the employing entities that have a more direct role in the determination of the structure of that work relationship.¹²⁰

¹¹⁵ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 351

¹¹⁶ Mark Freedland, ‘Burying Caesar: What Was the Standard Employment Contract’ in Katherine V W Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation* (Russell Sage Foundation 2013) 83

¹¹⁷ Chapter 1

¹¹⁸ See Chapter 2 in particular

¹¹⁹ Jeremias Prassl, *The Concept of the Employer* (OUP 2015) 157

¹²⁰ A similarly helpful definition can be found in Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 31, where the authors define the boundary concepts of their Personal Work Relation model

It is hoped that a definition this broad should extend far beyond the standard employment relationship, and encompass work done in a multilateral relationship, through different platforms and media,¹²¹ and even those relationships which may not obviously constitute market labour.¹²² The importance of this definition of the primary work relationship is the centrality of the concept of personal labour. This is the touchstone for engaging the analytical model, and unlike the current approach in English law, means that so long as some personal labour is provided, then the whole relationship, including all associated employing entities, are liable to be assessed for the purpose of workplace rights. Therefore, the focus in a situation such the one in *Varnish* would initially be whether the relationship between a cyclist, their coaching team, and the body that funded the cycling would either be properly classified as one which was one of personal labour, or in the alternative, a relationship that was not in fact a work relationship.¹²³ Provided that the overall relationship could properly be characterised as one where there was a provision of personal labour, then the Relational Dynamics analysis would engage to characterise the relationship between the worker and each employing entity within the primary work relationship.

However, we should also expand the scope of the analytical model to encompass other ‘ancillary relationships’ that impact upon the primary work relationship less directly, but could nonetheless be relevant when considering how labour rights should attach to the work relationship. An ancillary relationship is one which does not directly impact upon the content and structure of the primary work relationship as defined above, but nevertheless has a subtle or indirect impact upon that relationship. One good example of an ancillary relationship could be the relationship between a worker and their trade union. Although the provision of labour (likely including the formal terms of that provision) will usually be determined by a number of employing entities and (perhaps) the worker, it is clear that trade unions will often have an ancillary relationship with a worker and the employing entities, either through their role in collective bargaining for the terms of employment,

¹²¹ Miriam A Cherry, ‘Beyond Misclassification: The Digital Transformation of Work’ (2016) 37 *Comparative Labor Law & Policy Journal* 577; Lilly C Irani and M Six Silberman, ‘Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk’ (CHI ’13: Proceedings of SIGCHI Conference on Human Factors in Computing Systems, 2013) 611

¹²² Catherine Barnard, *EU Employment Law* (OUP 2012, 4th edn) 149

¹²³ *Varnish v British Cycling & United Kingdom Sports Council* (2019) Case No 2404219/2017; see also the recent EAT decision which upheld the ET’s decision: *Varnish v British Cycling Federation T/A British Cycling* (2020) UEKAT/0022/20/LA (V)

direct regulatory roles when certain workplace rights are concerned,¹²⁴ or in the resolution of disciplinary and grievance issues. So if a worker was a member of a trade union, that ancillary relationship would have the result that trade union rights would become a relevant to the primary work relationship (such as rules about not suffering detriment as a product of being a trade union member).¹²⁵ This ancillary relationship may not have direct or significant influence over the content and nature of the primary work relationship, but nevertheless, it would have a *some* indirect influence over the latter. This approach is further justified by the foundational theory of the analytical model. As discussed in Chapter 4, an important part of the capabilities analysis is recognising the significance of conversion factors (*viz.* that the circumstances that surround particular situations may affect whether rights or opportunities can actually be exercised). This is of particular significance when we think about ancillary work relationships, as they related quite directly to this concept. Although they are not the subject of the analysis *per se*, they are still play a significant role in how we *do* analyse primary work relationships. Therefore, much like conversion factors in capabilities theory, it would be an incomplete analysis of a work relationship if we were to not consider how ancillary work relationships impact upon the primary work relationship and its internal content and structure.

What is hopefully apparent is that while these ancillary relationships may not necessarily exert a substantial influence over the primary work relationship, or the internal structure of that primary work relationship, the richness of the analysis of the entire work relationship would suffer dramatically if we were to exclude these ancillary relationships from the scope of the analytical model, because they do have some impact on the particular dynamics that exist in the primary relationship (as shall be explored later in this section). Thus, the scope of the proposed analytical model would be both primary work relationships, and their related ancillary work relationship.

III.i.ii *Beyond the Analytical Scope?*

¹²⁴ For example, see the role of collective agreements in a number of EU Law Directives, such as in Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9 which contains a number of powers to derogate from the term so the Directive through collective agreements.

¹²⁵ s 146, TULRCA 1992

By approaching the scope of the analytical model in a way that allows ancillary relationships to influence the analysis of primary work relationships without being the analytical focal point of the Relational Dynamics model, we can try to navigate between the Scylla and Charybdis of, on the one hand, over-inclusivity at the cost of the normative force of Labour Law, and on the other, a wilful blindness to socioeconomic relationships that clearly impact upon the nature of market relationships.¹²⁶ To base the scope of an analytical model on a conception of Labour Law that looks much more like ‘work law’ risks losing the particular normative force that Labour Law currently has when regulating work relationships that fall within its ‘traditional’ or ‘classical’ scope.¹²⁷ However, this cannot mean that we are insensitive to the clear relevance that social relationships in the private sphere may have upon our analysis of work relationships that do fall within our predefined scope.¹²⁸ Judy Fudge makes the very powerful point that many of the inequalities that women in particular face in the workplace, relating to matters of, for example, equal pay can to some degree be traced back to how care work and home work are obligations generally still fulfilled by women.¹²⁹ As such, an analytical approach to work relationships that only looks at the paid aspect of how women are engaged in the workplace without turning to the wider social context in which that engagement occurs would be lacking. Indeed, to break away from received orthodoxies of what is traditionally in the domain of Labour Law, versus, say, family law or social security law,¹³⁰ may in fact provide for a much richer analytical model for work relationships when it acknowledges the tension that paid/market labour has with unpaid/non-market labour.¹³¹

However, while an analytical model must be sensitive to these social relationships and contexts, its primary purpose is that of regulating the labour relationship between a worker and employing entities. As such, any proposed model does not aim to regulate those social relationships, such as

¹²⁶ Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (n 116) 29

¹²⁷ Brian Langille, ‘Labour Law’s Theory of Justice’ in Davidov and Langille (eds), *The Idea of Labour Law* (OUP 2011) 108

¹²⁸ Judy Fudge, ‘Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction’ (2014) 22 *Fem Leg Stud* 1, 17

¹²⁹ Fudge, ‘Labour as a ‘Fictive Commodity’’ (n 4) 131

¹³⁰ *ibid*

¹³¹ Sandra Fredman and Judy Fudge, ‘*The Legal Construction of Personal Work Relations and Gender*’ (2013) 7 *Jerusalem Review of Legal Studies* 112, 117

unpaid care work in the home, but looks to them as relevant context in the process of regulating market labour. While this may not be a satisfactory solution for those arguing (persuasively) for such work to be brought within the scope of the discipline of Labour Law,¹³² the reason for its exclusion relates to the “anxiety” articulated by Freedland earlier in the chapter. The wider the regulatory scope of Labour Law (and equally any proposed analytical model that operates within those boundaries), the less specific the normative justifications for the analytical model becomes. Even though we have loosely tied those normative justifications to an interpretation of Nussbaum’s capabilities model,¹³³ which in principle is a reasonably broad theory premised on the idea of maximising human freedom,¹³⁴ the internal structure of an analytical model that analysed *both* of these types of work would have to adequately focus on two significantly different forms of labour with qualitatively different regulatory concerns and social significance.¹³⁵ Primary work relationships, while heterogeneous, provide enough conceptual unity to allow for a sufficiently specific analytical approach to be taken (as shall be set out in the following subsections). That structural specificity would have to be sacrificed if the model also took ancillary relationships as part of its central concern, even if such an approach could nonetheless be broadly justified by the foundational capabilities theory that this project is based on.¹³⁶

However, although the Relational Dynamics approach would not consider ancillary relationships to be the focal point of its analysis, it certainly will not be inattentive to them either: they would still be within its analytical scope. A number of social and familial relationships will invariably be relevant when considering the dynamics at play in a primary work relationship.¹³⁷ For example, a person with familial caring responsibilities would see those responsibilities having a direct impact upon the nature of the work they can do outside of that caring context, and it will impact upon the nature and the content of a work relationship that a carer will have: be that the hours they work;

¹³² Fudge, ‘Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction’ (n 128)

¹³³ Chapter 4

¹³⁴ Amartya Sen, *Development as Freedom* (OUP 1999) 18

¹³⁵ Noah Zatz, ‘The Impossibility of Work Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 245 – 248

¹³⁶ Chapter 4

¹³⁷ See the idea of the ‘personal work profile’ in Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 340

the reasons they may need to take leave; or the fact that they may well require genuinely flexible working time to structure work around care obligations. Per the discussion in the previous subsection, while the analytical goal of the Relational Dynamics model will not be to assign rights and obligations to the caring responsibilities, they would nonetheless be considered insofar as they may well have a some impact upon the nature and function of the primary work relationship that is the focus of the regulation. It is hoped that this approach, which acknowledges the importance of relationships outside the primary work relationship without centring them in the analytical model will attempt to balance the obvious need to include them in our analysis, while retaining normative and regulatory focus by placing primary work relationships at the centre of the project.

III.ii *A Relational Model*

Now that we have set out the scope of the Relational Dynamics model, the internal analytical structure of the model will be explained. The aim of this structure is to be able to set out the full complexity of the primary work relationship (by reference to ancillary work relationships, if necessary), in a way that does not rely upon the bilateral analytical approach that status questions in English law, to this point, have remained tied to.¹³⁸ Moving away from this specific way of thinking and analysing work relationships would allow us to avoid “over-simplification ... at the cost of obscuring a more complex reality to which it is quite hard to assign a single legal shape”;¹³⁹ and it is proposed that the Relational Dynamics analytical framework may offer a model that can do justice to the complexity that many work relationships now exhibit.

III.ii.i *A Worker-Centric Model*

¹³⁸ Countouris (n 6)

¹³⁹ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 325

The starting point for this analytical model is the worker. The reason for this decision is threefold. The first relates to the philosophical groundwork that was done in Chapter 4 of this thesis, which tied the analytical model to a modified version of Nussbaum's theory of central capabilities. As Nussbaum sets out in *Creating Capabilities*, the idea of maximising substantive human freedom is based upon an approach that takes "each person as an end".¹⁴⁰ This being the high-abstraction theoretical goal of the Relational Dynamics model, it follows that the analysis will centre on primary work relationships *that the worker has with other entities*, for the purposes of analysis and regulation. If the analytical model, ultimately, is attempting to ensure a kind of substantive freedom for a worker (to the extent that it can within its defined scope), then the worker ought to be the starting point of the analysis.

Second, what the doctrinal analysis has demonstrated up to this point is that the manner in which work relationships are organised,¹⁴¹ and the complexity found therein has been related, primarily, to the manner in which relationships and obligations have been distributed between different employing entities. Tripartite work relationships distribute employer functions between two entities,¹⁴² but there will nonetheless be a single worker for whom the questions of work conditions, remuneration, and rights will be important. Even as we add layers of further complexity, be that a digital platform,¹⁴³ or layers of subcontracting, those very same questions will be relevant to the worker. As the work relationship equation gets more complex and heterogeneous, the worker remains the constant in that ever-changing equation. For this reason, it is logical to use them as the starting point for analysing those complex relationships.

Finally, we can settle on the worker as the centre of the analysis as a matter of pragmatism. While the purpose of Labour Law as a discipline may not be *simply* about the worker and protecting their interests,¹⁴⁴ Freedland and Kountouris are correct to suggest that "labour law systems do in fact

¹⁴⁰ Martha Nussbaum, *Creating Capabilities* (HUP 2013) 18

¹⁴¹ Chapters 2 – 3

¹⁴² Jeremias Prassl, *The Concept of the Employer* (OUP 2015) 48; Deirdre McCann, *Regulating Flexible Work* (OUP 2008)

¹⁴³ Valerio de Stefano & Antonio Aloisi, 'Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers' (2018) Boccini Legal Studies Research Paper, No 1

¹⁴⁴ cf K D Ewing, John Hendy and Carolyn Jones (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (IER 2016) for a more worker-protective interpretation of the function of labour law

construct personal work relations around the worker”.¹⁴⁵ This “positivist” approach to the question of how we choose to analyse and regulate work relationships is a pragmatic answer to why we start our analysis with workers.¹⁴⁶ While the whole discipline of Labour Law might not be best thought of as overtly tied to worker protection *alone*, when we get to the brass tacks of the purpose and function of analytical model for assigning rights to work relationships, it is axiomatically focused on rights that relate to work relationships and rights that protect workers in those work relationships. This pragmatic approach also means that we have much more clarity in the structure of our analysis. As shall be discussed in the next subsection, having a relational approach that looks to the complexity of primary work relationships would potentially be a shapeless exercise if it did not have some analytical locus or anchor: a relation is only of some analytical or normative significance when we have some conception of the factual circumstances in which it exists, and this will usually be by reference to the constant presence of the worker in that relationship.

Therefore, it is for these reasons that a worker-centric model has been chosen as the starting point for the Relational Dynamics analysis: it offers some analytical clarity and structure, as well as offering a pragmatic choice for a model that is concerned with the specific task of assigning rights to work relationships.

III.ii.ii *Identifying Relations*

As discussed, the focal point of the Relational Dynamics model is primary work relationships; and they are the ones which will be subjected to the closest scrutiny by the analytical model. However, it is worth delineating the earlier discussion of scope from the separate analytical approach being set out here. The scope questions, which identified the primary work relationship as the subject-matter of this project, are concerned with defining the boundary of the analysis; that is, all the relationships that could possibly be considered and then analysed by the Relational Dynamics

¹⁴⁵ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 325

¹⁴⁶ *ibid*

model. At this stage, we are moving from the conceptual task of identifying that outer boundary, to the more specific task of looking *within* a primary work relationship that we are concerned with, and exploring its internal structure. In (very broad) summary, this is the aim of this subsection: to provide an analytical framework for how we explore and think about the internal structure of the primary work relationships we identified as the subject matter of the analytical model, so as to be better placed to then regulate either aspects of that primary work relationship or its entirety.

It is proposed that it is best to break the analysis down into three distinct stages: 1) the internal structure of the primary work relationship; 2) the influence of ancillary relationships; and 3) ascribing dynamics to relations within the primary work relationship. Stage one begins by starting with the worker, and identifying the relevant parties within the primary work relationship that is being analysed. This identification can be done by qualitative assessment of the work relationship by reference to the definition of the primary work relationship above. There will be a close relationship between the identification of the primary work relationship to be assessed as part of the analytical process, and the identification of the relevant employing entities within it. If, for example, a triangular work relationship fits the above definition of a primary work relationship (i.e. there is a provision of personal labour, with employing entities determining the structure of that work relationship), we are necessarily identifying the employing entities by circumscribing the primary work relationship as the subject of analysis. Take, for example, a multilateral work relationship such as an agency electrician being placed on a work site to work for an end-user that is a subcontractor for a larger firm. What we can see there is that in that situation, using the above definition of primary work relationship (and assuming some factual influence over how work is done, or deadlines are set, which are vested in the larger firm), by defining the primary work relationship as one which includes all of these entities, we are necessarily also defining the relevant parties to the analysis. Therefore, the relevant employing entities would then be the agency that supplied the worker, the end-user, and the larger firm.

From here, we can enter into the analysis of the relationship between the worker and all of these entities. The work of Freedland and Kountouris in *The Personal Work Relation* has been of

particular influence in setting out how the analysis of the relationships between the parties in the primary work relationship would proceed. They set out a rich approach for analysing the internal structure of what, within their typology, they refer to as a personal work relation.¹⁴⁷ That internal structure consists of the “personal work nexus”,¹⁴⁸ which is the “internal mechanisms or working parts” of the personal work relation,¹⁴⁹ which looks to a how parties within the personal work *relation* are linked together by “a particular set of legal connections, each of which has its own nature or character and its own duration”.¹⁵⁰ The authors elaborate further on the specific operation of their model, and add a further distinction between primary and secondary legal connections within the personal work nexus, but for our purposes, we shall focus on the concept of the nexus itself. What it offers is the kind of analytical foundation that has been lacking in the manner in which we think about work relationships in English law (i.e. bilateral contractual relationships being used as the building blocks of analysis, however that analysis manifested).¹⁵¹ Radically, what the personal work nexus approach did was introduce the possibility that individual bilateral legal connections,¹⁵² while relevant and contained within the legal analysis of a work relationship, should be no means hold specific privileged status within the analysis of what are demonstrably more complex, heterogenous work relationships.

It is by relying on this idea of the multilateral analytical approach within a work relationship that it is proposed that the internal structure of primary work relationships, as identified in this chapter, should be analysed using the fundamental unit of the ‘relation’. A relation, in our context, is a substantive connection between the worker and any of the employing entities that have been identified as being part of the primary work relationship (i.e. relevant to how work is done, in substantive and more direct way). This relation can take the form of a formal contractual connection (say, a written contract of employment) or an informal relationship (such as that between a worker and an end-user that has no contractual nexus); and the existence of one relation should not preclude the identification of other relations within the primary work relationship. The

¹⁴⁷ *ibid* 319

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

¹⁵⁰ *ibid* 320

¹⁵¹ Elias (n 57)

¹⁵² Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 320

very purpose of this analytical approach is to identify *all* of the relationships and linkages that exist within a work relationship, and at this first stage, we should not be concerned with placing any particular weight upon any specific relationship, nor should we attempt to characterise it any particular way.¹⁵³ The concern is that if weight is attached to a particular connection at the first stage of the analysis, it could undermine or affect the full assessment of what relations exist within the primary work relationship. Indeed, if a contract of employment is identified, it should not be a reason to cease further exploration to determine the full, complex internal structure of a primary work relationship. This is a particular concern given examples of tribunals using the existence of one formal work relationship to pay less substantive attention to other potentially-relevant relationships within a work agreement. For example, in *James*, the tribunal's conclusion that the formal contractual arrangements within a triangular work relationship "fully explained" the *entire* work relationship, while factually possible,¹⁵⁴ loses some analytical richness by not considering, for regulatory purposes, the significance of the relationship between the worker and the end-user in that triangular relationship. This potential 'foregone conclusion' approach is what we must avoid in the operation of the Relational Dynamics model.

Therefore, the first stage could even be referred to as an 'exploratory' stage: to find *all* the relevant relations within a primary work relationship, without giving them particular weight. To conceptualise this point by analogy, if we take a snapshot of the primary work relationship at a particular point in time, our job at this first stage is simply to place pins on the board, with a central 'worker pin', surrounded by all relevant 'employing entity pins', and then identifying the relevant relations between those pins with 'relation' threads. The thickness, colour, or texture of those threads, for now, is not our concern. We simply need to know that they are there.

This takes us to stage two of the relational analysis: the identification of ancillary relationships. This is, again, linked to the primary work relationship conception set out in the previous subsection; those relationships which are not classified as ones which fall within the primary work

¹⁵³ The question of characterisation is the next stage of the process, but cannot occur prior to this essential primary stage

¹⁵⁴ *James* (n 69) [42] (Mummery LJ)

relationship definition should still be considered with respect to how they might influence the relations within the primary work relationship. The discussion earlier explained the particular distinction between the primary work relationship, and those ancillary relationships which are in some way influential over the operation of the former, but not the subject-matter of the Relational Dynamics model. This is the stage at which we begin to consider the role and influence of those ancillary relationships. We should consider how certain non-employing ancillary entities relate to the worker, but that connection would *not* be a ‘relation’ within the taxonomies of this analytical model. Rather, we will consider how a relationship between a worker and those ancillary entities could potentially influence the network of relations that we identified in stage one. So, if we return to the work relationship example used at stage one, of the worker that was placed at an end-user’s worksite, then while the primary work relationship would be characterised as the network or relations between the worker and the identified three employing entities, we would then consider how any ancillary relationships could have an influence upon any of those identified relations. This process occurs prior to the normative third stage, which assigns dynamics to those relations, because it is necessary to have a full understanding of how all the parties within and outside the primary work relationship factually relate to each other before we begin any normative process of characterising any of the relations within the primary work relationship. So, for the worker in our example, while the primary work relationship would concern the relations that the worker had with the agency, the end-user, and the larger firm, the ancillary relationships that could be considered, which might influence those relations, could include the worker’s relationship with a trade union (which may influence the terms and conditions upon which the worker could be providing their labour),¹⁵⁵ or care obligations that the worker may have (which could for example relate to a right not to be discriminated against).¹⁵⁶

¹⁵⁵ A good example would be the Joint Industry Board, which sets a variety of detailed ‘National Working Rules’ for different sectors, which set the specific terms such as pay grades, hours, and recommended grievance procedures: The Electrotechnical JIB, ‘JIB Handbook’ (*The Electrotechnical JIB*, 2018) <<https://www.jib.org.uk/jib-handbook.aspx>> accessed 22 November 2018

¹⁵⁶ The idea of discrimination by association, for example, would be a good example of how a non-work relationship or care relationship could result in regulatory rules attaching to a work relationship, see: Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603

At this point, it is necessary to discuss the potential difficulties posed by this distinction between primary work relationships and ancillary work relationships. While in some instances there may be a clear distinction between those relationships which would be classified as primary or ancillary, it is accepted that these distinctions may sometimes not be entirely patent; and it will often be an exercise in factual assessment and some qualitative deliberation in deciding what relationships and entities may form part of the primary work relationship. Undoubtedly, in those hard cases where the decision needs to be made about what will, ultimately, be part of the regulatory analysis, and what will not, there will be some normativity in that exercise; and it is likely that normativity cannot be entirely avoided in that process. This issue is one which Freedland and Kountouris also discuss in their characterisation of primary and secondary relations within Personal Work Relations,¹⁵⁷ the former of which constitutes the “vehicle for the legal construction of the personal work relation”,¹⁵⁸ and the latter of which are relevant to the personal work relation, but do not act as an “identifier of a personal work relation”.¹⁵⁹ For reasons already discussed, we retain this distinction (either between primary and secondary, or primary and ancillary) for analytical clarity within our proposed models, and it is hoped that the application of the distinction in hard cases will be done by sensitively and contextually assessing whether a particular relationship has a direct or indirect influence upon the personal provision of work in a particular relationship;¹⁶⁰ even if that classification may well involve elements of purposive or normative interpretation of the primary work relationship test, and by reference to the underlying theoretical foundations of the model as set out in Chapter 4.

Finally, we look to stage three, which is the process of assigning dynamics to a work relationship. The idea of dynamics will be explored in greater detail in the next subsection (and the practicalities of how they are determined will be set out in Chapter 6), but for present purposes, a structural outline will suffice. At this stage, we have looked into the primary work relationship, identified the full complexity of relations within it, and additionally those ancillary relationships that may influence how we characterise those relations. At stage three, we finally decide how to characterise

¹⁵⁷ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 328

¹⁵⁸ *ibid* 328

¹⁵⁹ *ibid* 328

¹⁶⁰ Davidov, *A Purposive Approach to Labour Law* (n 106) 210

those relations. Ideally, this is the first point at which normativity enters the Relational Dynamics analysis (notwithstanding concerns about normativity in the primary work relationship classification process). The tool it is proposed we use to characterise the relations between the worker and various employing entities is the ‘dynamic’. Within the Relational Dynamics model, a ‘dynamic’ is a normative characterisation of a particular relation,¹⁶¹ and builds quite directly upon the concept first proposed by Freedland and Kountouris in *The Personal Work Relation* as an approach to characterising a relationship for “particular normative purposes”.¹⁶² This work provided a solid foundation for us to discuss *what exactly* those characterisations and purposes would be. As mentioned, a substantive discussion of this process will follow in the next chapter, but for present purposes, the idea of dynamics can be thought of as a normative or theoretical classification of a single relation within the primary work relationship, which will relate to a correlative dynamic identified within a regulatory framework, so as to relate particular regulations to specific relations within a primary work relationship. Again, if we refer back to our analogy of pins, and pieces of string running from the ‘worker pin’ to the ‘employing entity pin’, then the *characteristics* of that string become relevant at this stage (i.e. colour, thickness, etc).

The process of dynamics identification should be undertaken for each individual relation that is identified within the primary work relationship, and should be based on a thorough factual analysis of the nature of the identified relation between the worker and the employing entity (while also considering the precise influence of any related ancillary relationships on that relation). Multiple dynamics can vest in a single relation, and likewise, the same dynamic can exist across a number of relations identified in the primary work relationship; and in such a situation, the question then turns to whether the existence of a particular dynamic, if found in a number of relations within the primary work relationship, should be characterised as existing proportionally between the relevant parties, or joint and severally. Again, such an assessment would depend greatly on the particular context of the specific relation identified, and the employing entity with which that relation existed. By way of a straightforward example, in a purely bilateral work relationship, we would ask whether

¹⁶¹ Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 328

¹⁶² *ibid*

the relation between the worker and the employing entity was one in which the employing entity had influence over ensuring the worker would be treated in a dignified way (through a factual assessment of the relation in all the circumstances in which it exists), and if such a dynamic could be identified in that relation, that that would be *one* of the dynamics that would exist in that relation. As shall be explored in more detail in the next sub-section, there is a symbiotic link between the dynamics that we may choose to identify in a relation within a primary work relationship, and the dynamics that we identify as part of the process of purposive interpretation of regulations (i.e. the likelihood is that the identification of a dynamic in a work relationship will likely offer a clear route to a regulatory rule that has been identified as trying to address that dynamic).

However, for present purposes, it is hoped that this three stage analysis has set out how it is envisioned that the framework of the Relational Dynamics model would operate. The weaknesses of English Labour Law's restrictive bilateral analytical approach has been addressed, it is hoped, with a much more contextually sensitive analytical method, which seeks to set out the full complexity of the relational matrix between a worker and their employing entities, as well as how those may be influenced by ancillary work relationships, before normatively characterising those relations by associating dynamics with them (multiply, or jointly and severally if necessary).

II.ii.iii *An Overly Complex Model?*

One foreseeable consequence of the model set out above is that it could verge upon being excessively complex: rather than asking a limited number of questions for the purpose of, practically, establishing one status,¹⁶³ we are delving much deeper into work relationships to identify a matrix of relations, and the dynamics attached to each of those relations. This criticism is one that is entirely valid, insofar as it is factually accurate that the more sensitive that an

¹⁶³ i.e. employee, or UK worker, etc

analytical model becomes to the various connections within a personal work relationship, the less straightforward the analysis becomes.

However, it is suggested that this is a necessary and potentially unavoidable price to pay to achieve a sufficiently precise and appropriate analysis of work relationships for the purpose of assigning rights to them. A theme that has hopefully been apparent throughout this thesis (including this chapter) is the mismatch between the fundamentally contractual analytical tools that we rely on to assess work relationships and work relationship status (which almost exclusively vest status and rights in a single relationship between two parties), and the heterogeneous reality of the organisation of work, which involves a much less clear-cut distribution of obligations, powers, and rights between a variety of actors involved in the provision of labour. While in an ideal world, a simple set of questions or a single status would adequately capture all this complexity, and apportion responsibility in an appropriate way, the likelihood is that the complexity of these work relationship structures demands an analysis that explores that complexity, and assigns rights on the basis of what it discovers within those relationships. Even in a situation where we assume that a worker in a primary work relationship would be entitled to all possible workplace rights, there would still remain the question of *which* party or parties would be responsible for ensuring those rights. So for example, in a multilateral work relationship mediated through some form of digital platform, the purpose of working out who exercises what role *vis-à-vis* the worker in those relationships is to, among other reasons, establish who should be responsible for any rights that a worker may be entitled to. This is a more desirable approach that would rely on some kind of default rule for attributing responsibility for the rights a worker is entitled to.¹⁶⁴ Such an approach could have the result of shifting the responsibility for a worker's rights onto a party within a primary work relationship that may not be the best-suited to actually ensure those rights; and would offer ample opportunity for the most powerful parties within a primary work relationship to structure the work relationship in a way that could exploit a default rule to avoid liability on their part.

¹⁶⁴ Such as, making the person who receives the fruits of the worker's labour responsible for ensuring all workplace rights for that worker, for example

Seeking simple rules to apply to the sorts of complex relationships that we now see surrounding personal labour would result in a distortion in one of two ways. Either the worker would know they are entitled to rights certain rights, but be unable to know *who* they would vindicate them against; or the rights are vindicated against a certain party by virtue of a default rule, but they are the least suitable party to ensure those rights within that work relationship. If you have a multilateral work relationship, and hypothetically a default rule mandated that the party responsible for paying the worker must also be the party responsible for ensuring all relevant rights to that worker,¹⁶⁵ then there is the possibility that an entity who is primarily acting as a customer, but purportedly ‘remunerating’ the worker,¹⁶⁶ will be responsible for the full gamut of workplace rights in relation to that worker. Not only might this be an absurd conclusion to reach in many circumstances, but it also places an undue burden on customers of services offered by larger entities, the latter of whom would be far better placed to ensure any rights to the workers within that work relationship. Indeed, using default rules which assign rights based on pre-determined factual circumstances *alone* would offer ample space for certain employing entities to exploit their superior bargaining power to shift risk and responsibility onto other less-suitable parties within the work relationship in the same manner that has concerned us in cases such as *Kalwak* and *Autoclenz*.¹⁶⁷

It also is worth mentioning that one potential risk that we take by relying on this sort of analytical approach to work relationships is that a good faith analysis of the work relationship might *initially* give the impression that certain entities are primarily responsible for the rights a worker is owed, when there may actually be more desirable targets for that responsibility in the whole work relationship. To rework an example discussed earlier, work could be offered to a worker through a digital platform, such as Mechanical Turk, and the end-user of that work is a small company. One assessment of the primary work relationship might well place the majority of the responsibility for

¹⁶⁵ Crucially, this is framed as a non-rebuttable presumption, unlike the proposals for a presumption of rights in Chapter 6

¹⁶⁶ e.g. the formal argument that was run by Uber in *Uber (ET)* (n 13), in that the formal arrangement set out within the contractual agreement was that the passengers were ‘remunerating’ drivers directly (through Uber, less Uber’s service fee), rather than the reality that the passengers were paying Uber directly, who in turn remunerated drivers (*Uber (ET)* (n 13) [20] – [21])

¹⁶⁷ *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] ICR 1157; *Consistent Group v Kalwak* [2008] EWCA Civ 430

guaranteeing rights upon the small company, and not Mechanical Turk (and by extension, Amazon). In that situation, if the smaller company were to go insolvent, then it may prove troublesome to attribute responsibility for workplace rights to Amazon.

However, the solution to this potential problem is provided if one applies the full Relational Dynamics analysis. The three-stage process described earlier in this chapter states that once all the relevant relations have been identified within a work relationship, then the final stage involves *normatively characterising* those relations with dynamics. It is at this point that potential concern that a cleverly-structured work relationship could result in the Relational Dynamics assessment misfiring can be assuaged by the fact that the normative assessment of relations within the primary work relationship, which ascribes dynamics to particular relations, would be conducted with the underlying purpose of maximising human freedom of workers in work relationships (as set out in Chapter 4). What this means is that while the Relational Dynamics model does require us to take more analytical steps to get to the point where we understand what the internal structure of a work relationship *is*, this by no means precludes a situation where that structure, with all the relationships within it between the worker and other employing entities, can be *normatively characterised* to accommodate a situation where responsibility for rights could still pass onto Amazon, by way of identifying particular dynamics existing in the relation between the worker and Amazon. Indeed, if there is a good theoretical reason for a particular dynamic to exist between a worker and Amazon, then this could be accommodated by the Relational Dynamics model.

Therefore, the real strength of this (admittedly more complex) Relational Dynamics approach is that, by moving away from one or two work relationship statuses and towards a dynamics-based assessment of work relationships, we are no longer reliant on statuses that purport to capture the entire character of what a particular work relationship.¹⁶⁸ Rather, by shifting our focus to the internal structure of work relationships (as defined above), we can not only analyse these work relationships and their structure properly, but we can also assign rights more precisely within those

¹⁶⁸ Guy Davidov, 'The Reports of my Death are Greatly Exaggerated: 'Employee' as a Viable (Though Over-used) Legal Concept' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006) 143 – 144

relationships without needing to essentialise what a work relationship as a whole must look like in order to be entitled to any protections at all.¹⁶⁹

III.iii *The Purposive Interpretation of Regulations*

III.iii.i *Method of Purposive Interpretation*

As suggested earlier, the third stage of the Relational Dynamics analysis involves assigning dynamics to relations within a primary work relationship, in order to characterise the nature of a particular relation between a worker and an employing entity within the primary work relationship. Inevitably, an important element of this analysis is determining what the dynamics in a relationship are; and it is at this point that the Relational Dynamics model should be tied to the idea of the purposive interpretation of relevant regulations. Given the overarching regulatory purpose of the proposed analytical model, it is expected that there will be a very close relationship between the regulatory purpose of certain labour protections, and the dynamics that can be identified within a work relationship. In fact, it is suggested that there could be a direct correlation between the dynamics identified in a regulatory instrument, and the dynamics in a relation, which would allow the direct mapping of the former onto the latter. In essence, this is the manner in which it is proposed that the Relational Dynamics model can offer direct route to regulation, having concluded the analytical process of the three stage analysis. The specific mechanics of how this purposive interpretation will operate shall be discussed in Chapter 6, with the purpose of this subsection being to set out the justification and aims of a purposive interpretation of regulations, and how that is intimately linked to the effectiveness of the Relational Dynamics model.

The way that it is proposed that we achieve this aim of identifying dynamics in regulations is through a purposive interpretation of individual or similar groups of regulations that relate to the

¹⁶⁹ Adrian Brooks, 'Myth and Muddle – An Examination of Contracts for the Performance of Work' (1988) 11 UNSW Law Journal 48, 49 – 50

primary work relationship and the relations therein. A purposive approach, for this project, is one which centres upon an attempt to “understand the purpose of ... legislative terms and offer an interpretation based on such an analysis”.¹⁷⁰ There is distinct value to this sort of interpretive approach to labour regulation. As has been discussed in Chapter 2, the constitution and nature of the workforce and work relationships is generally in flux, and no doubt most noticeably during times of greater technological shifts which result in work relationships that may be mediated through different mechanism or technologies. Most recently, as gig economy platforms add additional layers of complexity to what we might analogise to traditional work relationships,¹⁷¹ or in the alternative mediate work done purely online,¹⁷² this presents new analytical difficulties for the current regime of Labour Law. This often precipitates discussions around whether the existing body of labour law is ‘fit for purpose’,¹⁷³ or at its most extreme, worries about the death of labour law.¹⁷⁴ However, it is proposed that most of the time, the real concern that these discussions have surround either the lack of adequate enforcement of rights that already do exist,¹⁷⁵ or issues surrounding the difficulty of accessing rights due to the high thresholds set by the statutes that determine access to these rights.

A purposive approach to specific regulations would likely go some way towards remedying this problem, as it is a process which focuses upon the purpose of labour protections situated in a particular socioeconomic context. As Albin has identified, one of the strengths of a purposive analysis of specific regulations is the “weight it gives to context, i.e. in the changes to social and legal assumptions” that exist around particular legal interventions.¹⁷⁶ Therefore, a particular regulation, while conceived of at a time where the labour market looked a particular way or had certain organisational norms (e.g. the widespread use of long-term, indefinite work relationships

¹⁷⁰ Guy Davidov, *A Purposive Approach to Labour Law* (n 106) 115

¹⁷¹ Such as work on demand, mediated through digital applications, as discussed in Chapter 3.II.iii; Mark Freedland and Jeremias Prassl, ‘Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom’ (2017) Legal Research Paper No 19/2017, 7 <<https://ssrn.com/abstract=2932757>> accessed 20 February 2018

¹⁷² Referred to earlier as ‘crowdwork’; Jeremias Prassl and Martin Risak, ‘Uber, TaskRabbit, & Co: Platforms as Employers?’ (2016) *Comparative Labor Law & Policy* (forthcoming) 5

¹⁷³ TUC, *The Gig is Up: Trade Unions Tackling Insecure Work* (TUC 2017) 3

¹⁷⁴ Hugh Collins, ‘Labour Law as a Vocation’ (1989) 105 LQR 468, 468

¹⁷⁵ IWGB, ‘Dead on Arrival: The IWGB’s response to the Taylor Review on Modern Employment Practices’ (IWGB 2017) [17]

¹⁷⁶ Einat Albin, ‘The Missing Context: Comments on *A Purposive Approach to Labour Law*’ (2010) JRLS 15, 16

in vertically integrated workplaces), could nonetheless be purposively interpreted in a new context to extend those protections to workers that provide labour in a system premised on different organisational models and norms. This flexibility of purpose and aim allows a purposive approach to adapt rights to their new contexts. Such an approach could prove invaluable in situations where the legislative impetus for adapting Labour Law to a contemporary labour market may not exist, or even where it does, to inoculate against the concern that labour standards, if left in an evolutionary cul-de-sac, would ‘ossify’ and become ineffectual.¹⁷⁷ To some extent this describes the state of English labour law:¹⁷⁸ contractual precepts and interpretive precedents surrounding personal scope have hemmed the discipline into a position where, short of some radical departure from the status-based approach, it is difficult to see how minor changes or modifications could address the serious coverage issues for non-paradigm work relationships discussed at length earlier in this thesis.¹⁷⁹

Of course this kind of approach, which assigns a purpose to a regulatory intervention based upon the context in which it exists inevitably raises questions around whether a purposive analysis would blur the line between “what the law tries to achieve and what the law should try to achieve”.¹⁸⁰ Inherent in the question that a purposive analysis is based upon is the tension between describing a purpose, and assigning a desired purpose; it would be impossible to argue that the process of assigning a purpose to a regulatory intervention would be purely descriptive, with no normative influence whatsoever. By the very nature of assigning a dynamic to a regulatory intervention, there is some degree of normative characterisation of that regulation.¹⁸¹ So some solution must exist which at the very least can balance the descriptive and normative elements of the purposive interpretation in a way that is amenable to the parties being regulated. The proposed solution is through the mechanism described in Chapter 6: briefly, by relying upon a tripartite mechanism

¹⁷⁷ Cynthia Estlund, ‘The Ossification of American Labour Law and the Decline of Self-governance in the Workplace’ (2007) 28 J Labor Res 591, 592

¹⁷⁸ Matthew Taylor, ‘Good Work: The Taylor Review of Modern Working Practices’ (BEIS 2017); Ewan McGaughey, ‘Uber, The Taylor Review, Mutuality, and the Duty not to Misrepresent Employment Status’ (2018) 48 ILJ 180

¹⁷⁹ See: Chapter 1

¹⁸⁰ Ruth Dukes, ‘Identifying the Purposes of Labor Law: Discussion of Guy Davidov’s *A Purposive Approach to Labour Law*’ (2010) JRLS 53, 54

¹⁸¹ Davidov, *A Purposive Approach to Labour Law* (n 106) 26; Davidov recognises that the approach he is proposing is one which is both descriptive and normative. See: Dukes (n 180) 54

that incorporates the views of parties with differing interests, there will be a natural limit on how far the assigning of a purpose to a regulatory intervention would constitute a purely normative purpose, rather than a descriptive one.

An additional problem with a purposive approach is that it is by no means a remedy to the complete absence of regulation: it cannot fill a regulatory gap that has wilfully been left unfilled. If for example we were to imagine a world where minimum wage rights existed, but working time regulations did not, then the scope of the purposive interpretation of the minimum wage rights would not allow for any meaningful regulation of working time, in the same way that specific regulations for working time would. The purposive interpretation remains, perhaps tautologically, an interpretive tool, but a promising one that can offer new life to regulatory interventions that may seem to have lost relevance to workplaces with different compositions to when the regulations were originally conceived.

III.iii.ii *Purposive Approach in English Law?*

Superficially, the default approach in English law is to divorce the particular purpose of legislation from the tests that determine the personal scope of those regulations. The bundle of rights that would flow from, say, employee status being established may have some tenuous link to the tests and requirements that are necessary to establish that status, but as discussed at length in previous chapters,¹⁸² that exercise was closer to one which sought out a relationship of a particular type rather than a rational exercise in determining *what* about the relationship justified a *specific* regulatory intervention. However, in fairness to English employment law, and the judicial application and interpretation of it, there have been limited examples of the purposive interpretation: when applied to factfinding questions for status, and in a limited sense, when interpreting the content of specific regulations. In part, this was discussed in Chapter 1, where the

¹⁸² See Chapter 1 in particular for an in-depth discussion of the criteria for employment status and the reinforcing of the paradigm work relationship

limited conceptual fragmentation of UK Worker status provided the glimmers of hope of a quasi-purposive approach where that status was applied in differing regulatory contexts.

But perhaps the most explicit endorsement of a ‘purposive’ approach in English law can be found in *Autoclenz*. There, when setting out the interpretive principles to be applied when searching for the ‘true agreement’ in a work relationship, which included looking to “all the circumstances of the case” and not simply the formal contractual terms,¹⁸³ Lord Clarke stated that he was happy for his approach to be “described as a purposive approach”.¹⁸⁴ However, while he labelled this as a ‘purposive’ approach, it is important to note that this interpretive approach was squarely aimed determining how performance diverged from the formal contractual terms of the work agreement.¹⁸⁵ So “what Lord Clarke means by this ‘purposive’ characterisation is not entirely clear”;¹⁸⁶ and at best, we can suggest that this approach is ‘purposive’ in the sense that it seeks to achieve the purpose of analysing work relationship status in a way that rejects blatant formal misrepresentations of those relationships. However, even this generous conceptualisation is some way away from a truly ‘purposive’ approach as defined in Section III.iii.i above.

One step closer to a fully purposive approach can be seen in the treatment of UK worker status by Mr Justice Underhill (as he then was) in *Byrne Bros*. In that case, the EAT did at least acknowledge (while aligning the criteria for UK worker status with employee status) that “the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position” as employees.¹⁸⁷ Here the ‘purposive’ interpretation is more closely aligned to an approach which considers the purpose of a regulatory intervention when considering its application. In that case the purpose of *the new work relationship status is that it is wider in scope than employee status*, and so the relevant tests applied to access that status should also be wider in scope. This may be a closer proxy to the idea that the purpose of particular regulations should form some part of the court’s analysis (i.e. if the bundle of rights are accessed through the wider

¹⁸³ *Autoclenz* (n 167) [35] (Lord Clarke)

¹⁸⁴ *ibid*

¹⁸⁵ *Uber BV v Aslam* [2018] EWCA Civ 2748 [77]

¹⁸⁶ Alan Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 ILJ 328, 341

¹⁸⁷ *Byrne Bros* (n 9) [17(5)] (Mr Justice Underhill)

status, then they must in principle apply to a wider set of work relationships), but it still stops well-short of the kind of purposive analysis that focuses its attention on *specific regulations*. While there may at times be hints that the court may be considering the purpose and aims of the regulations that they are interpreting and applying (a rich vein of this approach can be seen in the approach taken to the application of the contours of working time protections, albeit more plainly seen when the CJEU interprets the connected Directive),¹⁸⁸ it still remains the case that a direct purposive analysis is neither central nor an institutionally foundational part of the adjudication process in English Labour Law.

Indeed, by comparison, even the US courts have taken a more robust approach to the purposive interpretation of labour regulations than English courts. In *Dynamex*, a case concerned with the classification of couriers as employees or independent contractors, the Superior Court of LA County paid specific attention to the “fundamental purposes and necessity of the minimum wage and maximum hour legislation” that employee status would determine access to. This purpose assisted the court in construing the application of the relevant tests, and determining that the couriers in that case were indeed employed by Dynamex. While even this approach falls short of the more rigorous purposive approach being proposed in the Relational Dynamics model, what it does help to demonstrate is how even the most ambitious purposive approach to the applicability of labour rights in English law still remains fairly conservative.

III.iii.iii *Proposed Purposive Approach in a Relational Dynamics Model*

Therefore, it is an institutionalised purposive analysis of *specific regulations* that would be at the centre of a complete Relational Dynamics model. The aim or purpose of a regulatory intervention directly affects whether it should extend to a particular work relationship. There is some limited doctrinal support for this kind of approach. For example, the textually wide personal scope for

¹⁸⁸ ACL Davies, ‘Getting More Than You Bargained For? Rethinking the Meaning of ‘Work’ in Employment Law’ (2017) 46 ILJ 477; Lisa Rogers, ‘The Notion of Working Time’ (2009) 38 ILJ 80; See *Harpur Trust v Brazel* [2019] EWCA Civ 1402 for a recent discussion surrounding holiday pay and working time

English discrimination law acknowledges that,¹⁸⁹ at least prior to the *Jivraj* interpretation, equality legislation should have a wider personal scope than, say, minimum wage regulations. While part of the reason for this textual scope (which is wider than employee or worker status) could relate to the EU law origins of that definition,¹⁹⁰ it is equally worth thinking about why, regardless of regulatory origin, the personal scope for equality law was textually defined as widely as it was: perhaps a tacit acceptance that unlike other regulatory interventions, the purposes and aims of equality law demand a wider protective scope.¹⁹¹

Therefore, for a Relational Dynamics model to function optimally, it is necessary to start rigorously assessing the aims and purposes of *specific legislative and common law labour protections* in order to identify the particular dynamics in work relationships that they relate to. The reason that the same taxonomy of ‘dynamics’ is used here, as within the primary work relationship analysis, is that it is envisaged that the mapping of regulations to relations within the primary work relationship would occur in a manner which allowed regulations, quite simply, to be matched to the dynamic that was defined as the purpose of a particular regulation. Linking this back to Chapter 4 and the proposal therein to use a capabilities approach as the foundation of this model, it is hopefully clear that the premise of the capabilities approach, which centres around maximising human freedom for individuals through the realisation of capabilities and functionings, links closely to the process of purposive interpretation that it is suggested that we adopt here: i.e. legislative interventions aim to remedy problems or deficiencies which are produced in a particular work relationships. To put it another way: if we want to understand what the most appropriate regulations might be for a particular work relationship, we need to first identify the dynamics within it, and then by extension, the relevant regulations that relate to those dynamics so as to remedy the particular wrongs or imbalances that could occur *because* particular dynamic exists in a primary work relationship.

¹⁸⁹ Equality Act 2010, s 83(2)

¹⁹⁰ See, for example, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, Art 3(1)

¹⁹¹ Dhorajiwala (n 22) 276

As a practical example, we could see a situation where (per the current taxonomy in English Labour Law) an ‘independent contractor’ could have a purely bilateral work relationship with a putative employing entity (i.e. one relation), and following the three-stage analysis of the primary work relationship, that relation could be identified as containing dynamics X, Y, and Z. Regulations relating to equal treatment law could be identified as serving the purpose of addressing dynamic Z; and unfair dismissal regulations could exist to address dynamic A. This would mean that in the relation between the independent contractor and the employing entity, the presence of dynamic Z would allow us to map equal treatment protections that address dynamic Z to that relation; whereas unfair dismissal regulations, which do not address dynamic X, Y, or Z would not attach to that same relation. As will be discussed in more detail in Chapter 6, this process of determining *what* the purpose of a regulation would be, and by extension what dynamics a regulation would address, will be a deliberative process based on informed discussion about the aims, purposes, and functions of particular regulations. The outcome of this process could well even be that a number of dynamics could be addressed by a single regulatory measure, allowing a single regulation to apply to a diverse collection of primary work relationships. Moreover, the likelihood is that the normative characterisation of a particular relation within a primary work relationship will be a process very closely related to dynamics already identified in that deliberative process;¹⁹² the relationship between purposive interpretation and the dynamics identified in a work relationship will truly be a symbiotic one.

However, for the avoidance of doubt, it is worth being clear that model so far described should not be used as a template for arguments that certain rights ought to only apply to specific *forms* of work relationships. There is a fine but important distinction that the Relational Dynamics model draws between, on the one hand, the form of a work relationship, and on the other, the internal structure and dynamics present within that form. The essential purpose of the model is to identify dynamics within a primary work relationship, however constituted, in order to determine what regulations should attach to that relationship. That necessarily requires an analysis of individual primary work relationships, and in turn to give due weight to any diversity that may exist between

¹⁹² Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 63) 328

two primary work relationships which may *prima facie* have similar or even identical forms. The overall aim of this model is to sensitively direct rights to those relationships that exhibit the relevant dynamics within their *internal* structures, and such an aim is not readily served by applying blanket rules as to what dynamics will exist in what forms of work relationship.

Therefore, to summarise the above, it is hoped that this analytical framework, which first identifies the relations in a primary work relationship, then seeks to include any ancillary relationships that affect those relations, and finally identifies the relevant dynamics within that primary work relationship through a normative process that is symbiotically linked to the purposive interpretation of relevant regulations addresses some of the problems that have been identified in the doctrinal analysis throughout the previous chapters. It is argued that the neutrality of the analysis at stage one of the analytical process breaks away from the paradigm work relationship model and the contractual analytical norms that have been embedded in English Labour Law to provide a full account of the complexity of a labour relationship before it attempts to regulate any aspect of it. By doing this, it is hoped that regulations can attach to situations based on a genuine need for those regulatory interventions in that particular work relationship, rather than the association of work relationships to regulation by proxy through work relationship status and rights-bundling through the definition of personal scope.

IV *Conclusion*

This chapter has aimed to argue two distinct but related points. The first was that the method of reasoning that had been adopted in English Labour Law, and its analytical foundation, drew heavily from the principles of the law of contract. These principles which centred around the ideas of bilaterality and wage-work exchange could be identified in a number of areas, and a notable (and for our purposes, particularly relevant) instance in which this was the case was in the criteria and tests that were relied upon to establish work relationship status in English law. Beyond the obvious

contractual implications of a criterion like mutuality of obligation, the questions that were asked to determine whether a relationship was one of, say, employer and employee were still subtly influenced by ideas of the exchange of work for a wage. This, along with other examples of the contractual approach in Labour Law led us to discuss the limitations of this approach; limitations such as the inherent formalism of such an analytical approach, as well as the indirect reinforcement of the paradigm work relationship, results in the approach being ill-suited to properly analyse heterogeneous work relationship structures that have significant internal complexity. Moreover, so established is this contractual foundation that proposals for reform that aim to work compatibly with these established norms struggle to offer a truly open, revolutionary analytical approach.

To that end, the Relational Dynamics model was proposed. It is hoped that this model can address some of the problems that have been identified with the analytical approach taken by English Labour Law throughout not only this chapter, but the doctrinal portion of this thesis. The proposed analytical model aims to explore the full complexity of the internal structure of work relationships before attempting to give specific relations within a primary work relationship any normative shape or character. By approaching the descriptive exercise of setting out this internal structure as neutrally as possible, it helps address a persistent issue encountered in the current approach which is the specific normative weight placed upon those relations within a work relationship which tend towards a paradigm work relationship model (i.e. a contract of employment) or a particular relational norm such as a contractual agreement to the detriment of other important relations within a work relationship. Only once this process has been concluded, and any relevant ancillary work relationships have been considered, will any normative characterisation of those relations be done. The vehicle for this characterisation, which will also be explored in the next chapter, is the concept of 'dynamics'. This is a general term used to determine the particular characteristics of an identified relation between the worker and the employing entity. This assessment process should be done for every identified relation within a primary work relationship. Closely related to this third stage is the purposive interpretation of the aims and goals of regulations that apply to work relationships. The same language of 'dynamics' is proposed for identifying these purposes as it is envisaged that the dynamics identified within specific regulations will be mapped directly onto the

Relational Dynamics

dynamics found within primary work relationship: it is a common language that will bridge the gap from regulation to work relationships. This model, it is hoped, will offer a method of analysing and understanding work relationships in a way that embraces their complexity and their heterogeneity in a neutral and purposive way.

Chapter 6

Relational Dynamics in Practice

I *Introduction*

The final chapter of this thesis aims to address some of the practical issues that arise if the Relational Dynamics model outlined in Chapter 5 was to be implemented as the method by which rights are assigned to work relationships. While the previous chapter set out the broad theoretical foundations of how the Relational Dynamics system would operate, this chapter aims to focus on the necessary mechanisms and processes that would have to be put in place for a Relational Dynamics model to work in a way that is not only efficient, and easy to navigate, but is also structured in a way that does not place undue burden on a worker to demonstrate their eligibility for rights, as the present contractual approach in English employment law will often require if the contractual terms of engagement state that the worker does not have any employment status with respect to their relationship with the employing entity engaging them to do work.¹

Following a brief recap of the Relational Dynamics model, this chapter will consist of two sections. The first section will look at the necessary institutions and mechanisms that will be necessary in order to implement the Relational Dynamics model. In particular, the section will argue that the method by which we determine what dynamics are addressed by what workplace rights is best done through a tripartite deliberative process. This would offer a mechanism by which nominated parties would be able to agree on which dynamics would attach to particular rights, so that per the

¹ See: Chapter 5.II for the detailed arguments made in relation to the heavily contractual foundations of work relationship statuses in English law; and specifically, the fact that where there is a dispute over a work relationship status, the burden will lie with a claimant employee to demonstrate that the relationship has been misrepresented as independent contracting

Relational Dynamics model, when the dynamic exists in ‘relation’ within a primary work relationship, the right would attach to it. This proposal will build upon some of the principles outlined in *Rolling out the Manifesto for Labour Law*, which proposes the introduction of sectoral collective bargaining for the purposes of terms and conditions at work. While the tripartite mechanism proposed here is not an analogue of sectoral collective bargaining, the proposals in this section will draw of some of the underlying principles of the sectoral collective bargaining model, and apply them to the deliberative process proposed for designating dynamics to workplace rights.

The second section will consider a presumption that *all* workplace rights will apply in a work relationship where it is one which falls within the scope of the Relational Dynamics model. It will be argued that if a personal work relationship falls within the broad definition of primary work relationship as set out in Chapter 5, then there are powerful pragmatic and normative arguments that suggest that an employing entity within that primary work relationship should be rebuttably presumed to be responsible for all available workplace rights that would apply to a work relationship of that character.

II *A Summary of the Relational Dynamics Model*

Before this chapter enters into the discussion of the practical mechanisms necessary for the Relational Dynamics model to operate properly, it may be worth briefly summarising some of the conclusions of the previous two chapters. Chapter 4 discussed what the foundational theory for a Relational Dynamics model should be, and settled on a modified version of the capabilities theory.² The specific version of the capabilities theory that is proposed as the foundation for Relational Dynamics was one which involved a degree of constitutional entrenchment,³ and specifically constitutional principles that related to labour rights and principles deemed to be of particular

² Chapter 4

³ Martha C Nussbaum, *Creating Capabilities* (HUP 2011) 31 – 33

constitutional significance within the scope of the discipline of Labour Law.⁴ The value of this theory as the foundation of the Relational Dynamics approach set out in Chapter 5 derives from the fact that it is, as Bogg suggests, a “radically *underspecified*” theory.⁵ This was considered to be of particular importance for this project due to the fact that it is unlikely that any theory of Labour Law, at a more specific level of abstraction than the general idea of maximising human freedom within certain constitutional limits,⁶ could offer an adequately broad theory for the proposed model. Chapter 4 therefore concluded by arguing that this interpretation of the capabilities approach was sufficiently broad to act as a foundation for the Relational Dynamics model, while also offering a concrete purpose for that model, and being of use when guidance is needed for understanding how the analytical model should operate.

It is on this foundation that the Relational Dynamics model was built. The capabilities model, which defines the general aims and purpose of labour law, therefore provides guidance for what a model for assigning rights to work relationships within the discipline would look like. It was proposed in Chapter 5 that the model that best achieves the aims of maximising human freedom, with regard to the constitutional entrenchment discussed Chapter 4 would be the Relational Dynamics model. The Relational Dynamics model is a worker-centric model, which aims to analyse primary work relationships.⁷ It does this by first defining the outer limits of the primary work relationship and the relevant actors within it. At this stage, note is made of any ancillary work relationships which fall outside the scope of the primary work relationship: they are not the subject of the analysis in the Relational Dynamics Model, but may still be considered when thinking about what impact those ancillary relationships will have on the primary work relationship being analysed in detail.⁸ The specific justifications for limiting the main focus of the model to primary work relationships are explored in Chapter 5, but in short, they relate to maintaining the normative

⁴ One of the more plain examples being those labour rights entrenched as human rights, see: Virginia Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) ELLJ 151

⁵ Alan Bogg, ‘Labour Law and the Trade Unions: Autonomy and Betrayal’ in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 88

⁶ Examples of such theories may include characterising labour law as a project in social democracy, inequality of bargaining power, or dignity; see: Guy Davidov, ‘The Goals of Regulating Work: Between Universalism and Selectivity’ (2014) 64 *University of Toronto Law Journal* 1

⁷ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 31

⁸ Chapter 5

force and coherence of labour law by not over-extending the territory of the discipline to those subject matters and relationships that may be better regulated by legal disciplines other than labour law.

Once the primary work relationship has been identified, a three stage process is then proposed. First, the internal structure of the primary work relationship is identified, by simply by identifying the relations between the worker and employing entities. Second, ancillary work relationships are considered, and specifically the role and influence that those relationships might have on the relations that were identified as existing between the worker and an employing entity in stage one. These ancillary relationships are not ‘relations’ proper within the taxonomy of the Relational Dynamics model, nor are they themselves the *subject* of assessment or exploration; but rather they are important when considering how the relation between a worker and the employing entity may be coloured by a relationship formally external to the primary work relationship. Finally, once the primary work relationship has been explored, and relations have been identified (alongside ancillary relationships that may be relevant to them), the third stage of the analysis requires us to determine whether there are any particular ‘dynamics’ that we can attach to a particular relation within the primary work relationship.⁹ The dynamic represents the normative characterisation of a relation, which aims to explain the nature of the relationship in a way that makes it amenable to regulation.

It is at this stage that Chapter 5 discussed the symbiotic relationship between, on the one hand the identification of dynamics in relations within primary work relationships, and on the other hand the purposive interpretation of labour rights. The model envisages a system where the set of dynamics that might attach to relations would, in effect, be drawn from a pool of dynamics that is produced through the purposive interpretation of workplace rights.¹⁰ So, for example, if dignity was identified as a dynamic that a particular workplace right aimed to address or guarantee through its operation, then in turn, the dynamic of dignity may be sought in a relation within a

⁹ *ibid*

¹⁰ Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) ch 8; Chapter 5

primary work relationship. However, one of the deferred matters raised in Chapter 5 was the specific mechanism by which the purposive interpretation of those workplace rights would be done. This was done intentionally, as Chapter 5 aimed to focus on the theoretical dimensions of the Relational Dynamics model, setting out the ideas that would guide the process of designating rights to work relationships. In turn, Chapter 6 is now dedicated to looking at exactly what structures and mechanisms can be put in place in order to practically implement the Relational Dynamics model for real world work relationships. Therefore, the discussion that follows will centre around two ideas: a tripartite deliberative system to decide what dynamics are addressed by what workplace rights; and the necessity for a presumption of entitlement to all work relationship rights in English law.

III *Corporatism and Purposive Interpretation*

What is notable about the Relational Dynamics model is that it actively embraces the complexity of work relationships, and then attempts to regulate primary work relationships *having exposed* the full matrix of relations within it. Having done this work, to then use a straightforward system of work relationship statuses, akin to what is currently used in English law,¹¹ to try and regulate the primary work relationship would artificially smooth over the contours that the first analytical stages of Relational Dynamics assessment had identified. This is because the system of status either relies on restrictive criteria that reinforce a particular paradigm of work relationship,¹² or unitary conceptions of the employing entity.¹³ So the solution proposed by the Relational Dynamics approach was to move away from the idea of status, and rather to focus directly on the relations that a worker would have with employing entities, alongside the aforementioned symbiotic relationship with purposive interpretation of workplace protections. It is this purposive

¹¹ ERA 1996, s 230, s 47K; TULRCA, s 296; EqA s 83(2)

¹² Nicola Countouris, 'Uses and Misuses of 'Mutuality of Obligations' and the Autonomy of Labour Law' in Alan Bogg, Cathryn Costello, ACL Davies, and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2015)

¹³ Jeremias Prassl, *The Concept of the Employer* (OUP 2015)

interpretation that requires further detail, and specifically, a mechanism by which it can be achieved; and the proposed mechanism for this is a tripartite deliberative mechanism by which workers' representatives, employers' representatives, state bodies, and other civil society actors with an interest in this deliberative process can come to an agreement on what dynamic specific workplace protections or groups of protections aim to address.

Broadly speaking, corporatism can be understood as an “institutional arrangement for linking associationally organised interests of civil society within the decision structures of the state”,¹⁴ which Novitz and Sypris suggest involves two distinct elements: the organisational characteristics or structure of the deliberative mechanism; and the process through which policy is formed.¹⁵ Corporatist models can offer a powerful tool for the mediation of competing interests in a particular regulatory context,¹⁶ and the structure that they use will be intimately linked to the kind of policy the model will produce: heavily allied government and employer interests, for example, will result in policies that are less favourable to a third employee entity in a traditional tripartite system. What this means is that significant care has to be taken not only when deciding what structure the proposed deliberative structure being used should be, but also whether the participants within that structure are adequately representative in the regulatory context within which the mechanism is operating: in our case, the purposive interpretation of labour rights. The smaller the collection of entities, the more efficient its performance as a regulatory mechanism, but at the cost of democratic legitimacy and pluralism.¹⁷ However, the other side of the coin is that, if the structure becomes too inclusive or too plural, then the mechanism might become “unmanageable”.¹⁸ So the challenge is to find an appropriate balance between these two extremes which adequately represents interested parties, while also limiting participants so as to have some efficiency as well.

¹⁴ Paul Schmitter, ‘Still the Century of Corporatism?’ (1974) 36 *Review of Politics* 85, 86

¹⁵ Tonia Novitz and Phil Sypris, ‘Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism’ (2006) 35 *ILJ* 367, 371

¹⁶ *ibid*, 371

¹⁷ *ibid* 370

¹⁸ *ibid* 372

III.i *Starting from Tripartism*

A useful starting point for a mechanism to implement the purposive interpretation element of the Relational Dynamics model is the traditional and well-worn tripartite methodology. In the Labour Law context, tripartism involves a three-party deliberative structure which involves negotiation between employers and their representatives, employees and their representatives, and a third governmental entity.¹⁹ Perhaps the most notable example of this system is the one used by the ILO, which the organisation describes as a “unique forum in which the governments and the social partners of the economy of its Member States can freely and openly debate and elaborate labour standards and policies”.²⁰ However, tripartism is a mechanism not only used by the ILO within the context of supranational standard-setting, but also something that it advocates for at a national level. Fayoshin has identified a number of ILO instruments which exhibit that the ILO considers tripartism to be “the best approach to resolving conflicting positions on matters relating to the labour market and social policy”.²¹ One example this commitment is ILO Convention 144 on Tripartite Consultation. This Convention aims to ensure that ratifying member states ensure “effective consultations” with respect to ILO activities and the implementation of international labour standards,²² with administrative support for the process provided by the state.²³ Such an approach is typical for the ILO, which considers tripartite participatory mechanisms most desirable for the purposes of regulation and standard-setting;²⁴ and the organisation has acknowledged that while civil society actors do play an important role in that deliberative process, “tripartism should not turn into quatripartism or multipartism”.²⁵ The concern seems to be that while there is no question that entities such as NGOs or MNEs do have an important role to play in participatory mechanisms and labour standards implementation,²⁶ which the ILO certainly

¹⁹ Anne Trebilcock, *Towards Social Dialogue: Tripartite Cooperation in National Economic and Social Policy-making* (ILO 1994) 3

²⁰ ILO, ‘Tripartite Constituents’ <<https://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm>> accessed 25 July 2020

²¹ Tayo Fayoshin, ‘Tripartism and Other Actors in Social Dialogue’ (2005) 21 *IJCLLR* 37, 40 and fn 5

²² ILO C144 – Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144), preamble, art 2, art 5

²³ *ibid* art 4

²⁴ Fayoshin, ‘Tripartism and Other Actors in Social Dialogue’ (n 21)

²⁵ ILO, *Proceedings of the Resolution Committee of the 90th Session of the International Labour Conference* (ILO 2002) 5

²⁶ Adele Blackett, ‘Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct’ (2001) 8 *Indiana Journal of Global Legal Studies* 401, 403

recognises, their focus remains on maintaining a tripartite mechanism. This is potentially a result of the “anxiety” that the more actors that become involved in a participatory mechanism, the more diluted the mechanism might become.²⁷

This ‘anxiety’ is indicative of the deeper tension alluded to earlier in this chapter, which is that as a system that becomes more plural (and potentially more legitimate as a result), it may lose some of the regulatory effectiveness that was otherwise a hallmark of having a limited number of actors who have privileged access to a policy-making process.²⁸ Such a problem would only be exacerbated by the fact that the more plural such a mechanism becomes, the more it looks like a “voluntary, competitive non-hierarchically ordered and self-determined system”²⁹ envisaged by pluralist theories of governance.³⁰ Of course, to embrace civil society actors and NGOs beyond the traditional actors within a tripartite mechanism is unlikely to be an action that sees a corporatist model morph into an entirely pluralist system; especially where traditional actors retain a primary role, while acknowledging that their legitimacy and representativeness may in fact be bolstered if other actors are involved in a less-senior role within the participatory mechanism.

III.ii *An Appropriate Model for Relational Dynamics*

III.ii.i *A Corporatist Approach*

This tension is particularly relevant for the Relational Dynamics Model in English law, and specifically in the context of the employees and their representatives within a corporatist structure. The biggest problem a traditional tripartite mechanism would pose in the context of English employment law relates to the issue of union coverage and bargaining density in the UK. When thinking about the privileged role that trade unions would usually have in a tripartite participatory

²⁷ Fayoshin, ‘Tripartism and Other Actors in Social Dialogue’ (n 21) 38

²⁸ Novitz and Sypris (n 15) 366

²⁹ Schmitter (n 14) 96

³⁰ Novitz and Sypris (n 15) 372

system (as the workers' representatives),³¹ the statistically low membership and collective bargaining density in the UK would pose a serious legitimacy challenge to a structure that prioritised trade unions alone. Based on most recent data, trade union membership in the UK is 23.4%,³² with a comparatively low collective bargaining density of merely 26%.³³ The picture becomes even more troubling when we analyse the data further: in the private sector, union membership is merely 13.2%;³⁴ younger workers are at least half as likely than their older counterparts to be unionised;³⁵ and certain sectors such as the food service, IT and communications, and administrative and support all have union density below 10%.³⁶ What this materially means is that notwithstanding generally low union coverage to begin with, those sectors that traditionally exhibit higher use of atypical work relationships,³⁷ such as service industry work, and more recently platform-based gig economy work,³⁸ will also tend to have lower-than-average trade union density as well. Moreover, even when some of these entities do attempt to unionise, as the *Deliveroo* decision demonstrated,³⁹ this can be frustrated by the sorts of peculiarities in work relationship agreements that can be fatal to the finding of the necessary status that entitles those workers to request union recognition and in turn collectively bargain with their employing entity.⁴⁰

While this is a trend that is not peculiar to the UK,⁴¹ what it does mean is that given this drastic decline in the role trade unions *directly* play in the representation of significant proportions of the workforce,⁴² if these unions were given a privileged role within a proposed mechanism that

³¹ *ibid* 368

³² BEIS, *Trade Union Membership: Statistical Bulletin* (BEIS 2019) 1

³³ *ibid* 14

³⁴ *ibid* 12

³⁵ *ibid* 15

³⁶ *ibid* 11

³⁷ Abi Adams, Mark Freedland, and Jeremias Prassl, 'The 'Zero Hours Contract': Regulating Casual Work, or Legitimizing Precarity?' (2015) Oxford Legal Studies Research Paper No 11/2015, 8

³⁸ *Aslam, Farrar and Others v Uber BV* [2016] Case No: 2202550/2015 & Others (ET), *Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, Case Number TUR1/985(2016), 14 November 2017 (CAC); *Gascoigne v Addison Lee Ltd* (2017) Case No 2200436/2016 (ET)

³⁹ *Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, Case Number TUR1/985(2016), 14 November 2017 (CAC)

⁴⁰ This is discussed in specific detail in Chapters 1 and 3

⁴¹ Novitz and Sypris (n 15) 378; for a thorough assessment of declining union coverage in Germany, which operates a works council mechanism, see: John Addison *et al*, 'Declining Unions and the Coverage Wage Gap: Can German Unions Still Cut it?' (2015) 36 *J Labor Res* 301; more generally, see: Lon Fulton, 'Collective Bargaining' (*ETUI*, 2015) <<https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Collective-Bargaining2>> accessed 28 July 2020

⁴² K D Ewing, John Hendy QC and Carolyn Jones, *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (IER 2016) 1.4

determined what the purpose of specific workplace regulations were and what dynamics they related to, there would be significant legitimacy issue with that element of the mechanism.⁴³ It is highly unlikely that where unions represent around 23% of the population, and less so when representing precarious, migrant, or illegal workers,⁴⁴ that it is legitimate that these groups would be “afforded priority at the expense of other interested groups”.⁴⁵ This is not to say that larger established trade unions with nationwide coverage and organisational structures should not play an important role within any proposed deliberative mechanism for a Relational Dynamics model,⁴⁶ but the efficiency of limiting the employees’ representatives to *just* those specific actors would likely be outweighed by the legitimacy deficit created by relying primarily on larger trade unions alone. This issue is also exacerbated by the fact that there is notable plurality and disagreement between different entities that aim to represent workers’ interests: it is far from a monolith. As discussed in the previous paragraph, as larger unions seem to be better suited at organising in workplaces that demonstrate a higher concentration of workers who are in work relationships that tend towards or are paradigm work relationships, the interests they represent may tend to conflict with other unions or actors that aim to represent the interests of precarious, atypical, or migrant workers.⁴⁷

So what should a corporatist model that aims to assign dynamics to workplace rights look like? It could well be argued that we could try and persevere with a traditional tripartite model as the ILO has,⁴⁸ and attempt to implement part of Fashoyin’s “two-pronged” approach, which proposes the “aggressive recruitment of more wage earners and outright recruitment of non-wage workers in

⁴³ Novitz and Sypris (n 15) 377

⁴⁴ *ibid* 378 – 9

⁴⁵ *ibid* 377

⁴⁶ They do offer a degree of legitimacy to any conclusions arrived at through a corporatist mechanism, and would certainly be a fairly efficient entity within a corporatist structure with a narrower collection of actors

⁴⁷ Yvonne Roberts, ‘The tiny union beating the gig economy giants’ (*The Guardian*, 1 July 2018) <<https://www.theguardian.com/politics/2018/jul/01/union-beating-gig-economy-giants-iwgb-zero-hours-workers>> accessed 28 July 2020; and Simon Childs, ‘How Britain’s Biggest Union Undermined the Struggles of Migrant Workers’ (*Vice*, 13 June 2019) <https://www.vice.com/en_uk/article/nea4v8/union-strike-migrant-workers-london-university> accessed 28 July 2020

⁴⁸ Fayoshin, ‘Tripartism and Other Actors in Social Dialogue’ (n 21) fn 5: “The ILO’s view on tripartite cooperation and social dialogue is given legal backing in a number of international instruments, including the Tripartite Consultation (International Labour Standards) Convention (No. 144) of 1976, Tripartite Consultation (Activities of the International Labour Organization) Recommendation (No. 152) of 1976, and the earlier Consultation (Industrial and National Level) Recommendation (No. 113) of 1960. In subsequent years, the International Labour Conference has renewed its commitment to the promotion of tripartism and social dialogue among member States. At its 89th Session in June 2002, the International Labour Conference adopted a resolution in support of social dialogue in member States”

the informal economy and SMEs respectively into trade unions and employers' associations".⁴⁹ This could work to some extent, given the most significant problem with a formally tripartite model would be the reduced legitimacy caused by the present lack of union coverage. However, what is perhaps more promising is the other aspect of Fashoyin's 'two pronged' approach: the intensification of alliances and networks with civil society and non-governmental organisations in areas of mutual interest or with shared values.⁵⁰ This proposal does retain a tripartite model as the foundation for the deliberative process, but with the key difference being the elevated role alternative actors play within that structure.⁵¹ Depending on the nature of the other actors, they may be integrated into the deliberative model through "outright membership, networking, alliances or collaboration".⁵² As the roles of trade unions and other actors in the employment law field have changed in recent decades,⁵³ it does make sense to have a wider breadth of participation within a deliberative mechanism which reflects these evolving roles. Crucially, such an approach means that the efficiency that is central to a more selective deliberative mechanism is not entirely lost, but likewise the integration of actors that add legitimacy to that process is done in a way that gives them a proper institutional footing to contribute to that deliberative process. The result is therefore one where decisions about the dynamics that relate to particular workplace rights are taken by those most closely affected by those rights.⁵⁴

In the United States, an approach that somewhat aligns with the framework Fayoshin sets out has been proposed by Kate Andrias, in the guise of a proposal for a 'New Labor Law'. Against a similar background of the decline of traditional collective mechanisms and unions,⁵⁵ Andrias explores the possibility of a refreshed approach to labour regulation which places the embraces the idea of 'social bargaining',⁵⁶ and places it within a system of sectoral collective bargaining for terms and

⁴⁹ *ibid* 50

⁵⁰ *ibid* 50 – 51

⁵¹ Tayo Fashoyin, 'Tripartite Cooperation, Social Dialogue and National Development' (2004) 143 *International Labour Review* 341

⁵² Fayoshin, 'Tripartism and Other Actors in Social Dialogue' (n 21) 51

⁵³ Fayoshin, 'Tripartite Cooperation' (n 51) 344

⁵⁴ Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (MIT 1997) 304 – 308

⁵⁵ Cynthia Estlund, 'Something Old, Something New: Governing the Workplace by Contract Again' (2007) 28 *Comp Lab L & Pol'y J* 351, 351 - 352; Paul C Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (HUP 1993) ch 4

⁵⁶ Kate Andrias, 'The New Labor Law' (2016) *Yale Law Journal* 1

conditions of work. Social bargaining reconceptualises the union as more than a representative of specific workers within a wage-work bargain, and rather, as an “advocate for workers more generally”.⁵⁷ One of the mechanisms by which this rejuvenated role can be realised is through the expansion and revitalisation of pre-existing tripartite mechanisms, the prime example given being wages boards at a State level in the US.⁵⁸ This proposal, it seems spurred by the success of organising around the \$15 minimum wage campaign, does however seem to underplay the need to involve social partners within this process; rather its conception of what ‘social bargaining’ is seems to be one of an expanded regulatory role for trade unions by placing those organisations within structures that can facilitate worker protective rules in particular sectors. While this certainly weakens the persuasive force of the model, what it also does is highlight the value that (specifically) a tripartite deliberative mechanism has within a non-European jurisdiction as well. Certainly, to limit the scope of that mechanism to tripartism alone may be a misstep, for reasons already discussed, but what this proposal does do is show the value that a multipartite mechanism for worker protection could offer in a jurisdiction where the health of collective bargaining is not dissimilar to (and potentially, given the Federal overlay in the US, worse than)⁵⁹ its English counterpart.

III.ii.ii *Between Deliberative and Pluralistic Models: Bogg and Novitz*

Another important dynamic to consider in relation to the question of corporatist models is the potential tension between pluralistic and deliberative collective bargaining. There has been a rich debate on this matter between, amongst others, Bogg and Novitz. This chapter seeks to engage with this discussion, but with the caveat that the context in which it engages with this debate is in relation to the Relational Dynamics model outlined in the previous chapter, and specifically not in the context of collective bargaining more generally. The considerations relevant for how the Relational Dynamics model, which seeks to create a floor of rights, would fit within the

⁵⁷ *ibid* 63

⁵⁸ *ibid* 84

⁵⁹ Cynthia Estlund, ‘The Ossification of American Labour Law and the Decline of Self-governance in the Workplace’ (2007) 28 *J Labor Res* 591

pluralism/deliberative debate are, of course, different to the considerations relevant to collective bargaining more generally. To that end, the view expressed for the purposes of the Relational Dynamics model should not be taken as an endorsement of that same view more generally in the context of collective bargaining.

The two sides this debate are as follows. On the one hand, a pluralist approach to political engagement conceives of democratic citizenship as “a natural corollary of self-interested interaction in the marketplace” which is premised on interest-group bargaining.⁶⁰ By contrast, a deliberative process is one which places emphasis on citizens not entering a forum with fixed interests, but rather, seeking a consensus on the common good by engaging in a shared dialogue in a “quest for the common good”.⁶¹ This involves providing the reasons why those subject to a decision should accept it,⁶² by ensuring citizens are engaging with each other with a mutual commitment of reciprocity in the deliberative process.⁶³ This distinction, while potentially a nuanced theoretical one, does have important implications for the structure of the mechanism by which rights and dynamics are paired together. Indeed, how the mechanism is structured, and the parties involved as part of that structure, will in part be informed by whether this aspect of the Relational Dynamics model is conceived of as one which is pluralistic or deliberative.

A model which tends towards a pluralistic approach may give rise to some of the issues identified by Bogg in his assessment of the critiques of the deliberative model. For present purposes, the most significant problem with a pluralistic approach is that the purpose of the process by which rights have dynamics assigned to them is not necessarily the sort of direct bargaining that is envisaged by a pluralistic approach. The process of purposive interpretation as envisaged by the Relational Dynamics model takes place at a level abstracted from the stage where a work relationship actually has rights assigned to it. While, of course, there is a process of discussion and deliberation that would take place between the relevant representatives as to what dynamics were relevant to any particular regulatory intervention, this process is a step removed from the later process of actually

⁶⁰ Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009) 245

⁶¹ *ibid* 246

⁶² *ibid* 248

⁶³ *ibid*

assigning rights to work relationships in the three-stage process as described in detail in Chapter 5. Therefore, although there will likely be differing views at the purposive interpretation stage in relation to particular regulatory interventions, it is unlikely that this would take as direct a form of bargaining as envisaged by a pluralistic approach. Therefore, the process more generally fits more closely to the process of purposive interpretation being characterised as a deliberative one.

Novitz has also made a number of other powerful arguments in relation to some of the possible deficiencies of the deliberative decision-making process. First, she argues that a problem with the deliberative model is that there is an unreality to the idea that the participants in that process can in any meaningful way leave their preconceptions at the door; and indeed that bargaining will be a (sometimes inevitable) consequence of any decision-making process with parties with antagonistic interests.⁶⁴ The second and more general objection from Novitz is that the deliberative democracy model may act to “cloak, and thereby legitimize, underlying cultural assumptions, economic discourse, and other sources of skewed power dynamics”.⁶⁵ The third objection is that by engaging with a deliberative approach which seeks some form of rational choice as its end-goal, “industrial weaponry, including the right to strike” must be dispensed with in order to prevent a deliberative model from turning into bargaining.⁶⁶

As already explained, it is beyond the scope of this thesis, and the purpose of this chapter, to engage in a discussion surrounding the merits of the deliberative model as opposed to the pluralist model *vis-à-vis collective bargaining*. The analytical lens for this chapter is whether the process of purposive interpretation of legislation, at a national level, ought to conform with a deliberative or pluralist view. To that end, the deliberative approach is the more favourable way to conceive of this process. Novitz’s criticisms, while certainly powerful in the context of collective bargaining, do not carry the same force when applied to *this* specific process. First, her concern in relation to the backdrop of a right to strike is less relevant when concerned with the high-level process of purposive interpretation of legislation, as opposed to specific disputes within workplaces or

⁶⁴ Tonia Novitz, *International and European Protection of the Right to Strike* (OUP 2003) 21

⁶⁵ *ibid* 22

⁶⁶ *ibid* 21

sectors. The remaining two objections raised by Novitz can be addressed together: initially by stating that they are relevant concerns. It is certainly true that there is an unreality in thinking that a party's preconceptions and vested interests can be left at the door; and that often the preconceptions of the parties who are participating in the purposive interpretation process will serve to replicate the socioeconomic assumptions within which those preconceptions might be situated. However, the question is whether those problems are less significant in the context of the purposive interpretation of legislation, and whether a pluralist approach would necessarily resolve these issues.

Dealing first with the significance of these concerns in relation to purposive interpretation, it is certainly true that there will be strategic advantages to applying a purposive interpretation in a particular way that will make it more or less worker-protective. Assigning wider, or fewer dynamics to a right mean that work relationships more readily qualify for those protections. As such, it is unlikely that employers' and workers' representatives would realistically dispense with their desires to make workplace regulations apply more narrowly or widely respectively. That being said, there is a crucial additional factor to consider when applying this critique to the process of purposive interpretation. This is that at the level of abstraction that we are dealing with when determining the dynamics that relate to the regulatory intervention concerned, there is a much less direct and immediate link between that process and rights being attributed to specific work relationships: indeed, identifying that a particular piece of legislation addresses a certain dynamic is not the same thing as saying that the dynamic exists within a certain class of work relationship. That being the case, it is more likely that even where the parties that are engaging in the purposive interpretation exercise may not be able to leave their preconceptions at the door, those preconceptions will be much less influential in this process than they may be in the more immediate context of collective bargaining. Moreover, as Bogg identifies, a deliberative approach is not one which will *necessarily* yield consensus,⁶⁷ but is one which aims to provide the framework within which the "civic distance" between the relevant parties may be somewhat narrowed. In the context of the purposive

⁶⁷ Bogg, *The Democratic Aspects of Trade Union Recognition* (n 60) 251 – 252; see also Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in James Bohman and William Rehg (eds), *Deliberative Democracy* (MIT Press 1997) 415 – 416

interpretation of legislation, which identifies the dynamics crucial for the operation of the Relational Dynamics model, a model which aims to narrow the ideological gaps between the participating parties to seek some form of consensus at this high level of abstraction is preferable to conceiving of the process as one which is more traditionally pluralistic.

As for the second concern identified by Novitz, this is one which is inescapable. Whether or not one views the process of purposive interpretation as one which ought to be approached through a deliberative process or pluralistic process, it is not possible to insulate the divergent views of the parties who are engaged in either process from the realities of the power dynamics that are otherwise at play between those parties. As discussed in earlier chapters of this thesis, much as inequality of bargaining power, though limited as an analytical tool, represents a fact of the power relationship between a worker and employer, similar power dynamics no doubt will exist as a matter of fact between the parties that will be engaged in the process of the purposive interpretation of legislation for the purpose of the Relational Dynamics model. The crucial point is that these dynamics will exist as a background fact, regardless of which conception we seek to use to conceptualise the process. Rather, the more important question for present purposes is whether the *mechanism* that we use to provide a purposive interpretation of legislation can somehow insulate against these power dynamics. The precise structure proposed is set out below, but suffice to say that by using a mechanism which allows parties with divergent views to participate in the process of deliberation, out of the shadow of the relative power relationships between those parties, will be conducive to a fairer deliberative process which does not act to reinforce those power dynamics, or centre conceptions of a common good that may guide a deliberative process around the conception of the common good of the more dominant party in the relationship.⁶⁸

Therefore, by way of a summary, the qualitatively different nature of the process we are concerned with (*viz.* the purposive interpretation of legislation at a national regulatory level) means that some of the powerful critiques of the deliberative approach offered by Novitz do not have as much traction as they may otherwise do in the context of collective bargaining. Rather, when seeking to

⁶⁸ Bogg, *The Democratic Aspects of Trade Union Recognition* (n 60) 254

attribute dynamics to regulations, it would be preferable to view the process as a deliberative one to try and arrive at an acceptable consensus between interested parties as to what dynamics relate to what legislation, and crucially, through a structure (as set out below) which aims to minimise the power differentials between the participating entities as much as possible.

III.ii.iii *The Proposed Model for Relational Dynamics*

This leads us to the aim of this section of the chapter: setting out exactly what the deliberative model for the purposive interpretation aspect of the Relational Dynamics model will look like. Drawing on Fashoyin's work,⁶⁹ and cognisant of the discussion in relation to deliberative democracy as set out above, it is proposed that the foundation for the mechanism should remain a tripartite structure involving: employers and their representatives; workers and their representatives; and a representative from the state (who principally act to administer the deliberations between the first two parties). There should be equal numbers of representatives for workers and employers.⁷⁰ In the context of workers' representatives, for the reasons discussed above, the primary vehicle for this representation should be trade unions,⁷¹ but supported by a system of temporary membership and affiliations with other actors and possibly also other trade unions that may claim that they legitimately cover workers affected by a particular workplace right being assessed. This system achieves the necessary performance efficiency that this process requires, while also not neglecting the views of other traditionally excluded groups that lend democratic legitimacy to the process. As the forces that impact on the nature of work relationships grow and become more complex, to not include groups that may have useful perspectives on those forces in the deliberative process would be inadvisable.⁷²

⁶⁹ Fayoshin, 'Tripartism and Other Actors in Social Dialogue' (n 21) 51

⁷⁰ K D Ewing, John Hendy QC and Carolyn Jones (eds), *Rolling out the Manifesto for Labour Law* (IER 2018) [4.7]

⁷¹ Note, however the other issue that union primacy may cause: multi-union conflict. However, following the proposals in Ewing, Hendy QC and Jones (eds), *Rolling out the Manifesto for Labour Law* (n 71) [4.13] – [4.14], it is possible that a statutory mechanism can be set up that requires larger trade unions that are seeking primary representation status to resolve coverage conflicts with other trade unions that may also be seeking to act as representatives in the same context.

⁷² Fayoshin, 'Tripartite Cooperation' (n 51) 344

Much like the proposed sectoral collective bargaining model set out in *A Manifesto for Labour Law*, this model will also operate in a way that protects against employer non-engagement. Essentially, once the parties are to be engaged in the process of determining what dynamic a workplace right aims to address, then a timetable for this process can be administered by the state body administering the mechanism. If a party, most likely employers' representatives,⁷³ refuse to engage with the process, then the mechanism can still operate, but with an 'empty seat' on their part. This is a slight departure from the more moderated approach proposed in *Rolling Out the Manifesto for Labour Law*, which rather contemplates the employer's seat being filled by a candidate nominated by the state. However, the more drastic empty-seat proposal suggested for the Relational Dynamics mechanism is intentional: in the face of a default position that allows employees' representatives to determine what dynamic a specific regulatory intervention may be seeking to address, employers will be less likely to act to boycott the process. Of course, there still remains the issue of employers engaging, but in a manner that is intentionally obstructionist. Here, the solution is reasonably straightforward: in the event that no agreement can be reached on identifying a specific dynamic, then the assumption will be that the right will apply universally to all primary work relationships, tied to the party that is responsible for remunerating the worker within the primary work relationship.⁷⁴ This second point relates to the discussion that will be explored more in the next sub-section relating to the presumptions that the Relational Dynamics model will be operating upon, but the essence of the two points raised in this paragraph is that the structure of the model is such that if there is a failure or a boycott within the mechanism, the redundancy is one which materially applies the regulation to all workers *without an ability to demonstrate the alternative*.⁷⁵ This approach, it is hoped, should ensure full participation within the deliberative process: it may not quite be a model of "bargaining in the shadow of the law",⁷⁶ but it will be bargaining in the shadow of the default.

⁷³ Ewing, Hendy QC and Jones (eds), *Rolling out the Manifesto for Labour Law* (n 70) [4.10]

⁷⁴ In the event that the work is for something other than monetary remuneration, then the source of the benefit the worker derives from work will be the responsible party.

⁷⁵ Save for situations where application would of course be manifestly absurd

⁷⁶ Brian Bercusson, *European Labour Law* (CUP 2009, 2nd edn) 374, fn 139: "The Maastricht Protocol showed how unions could be integrated at macro-level. Bargaining in the shadow of the law, negotiated legislation, raises the prospects for an integration of unions, state and employers into a neo-corporatist model"

Moreover, it is hoped that this model adequately addresses some of the criticisms that Novitz provided in relation to the deliberative approach. Plainly, it is imperative to the function of the Relational Dynamics model that legislation is purposively interpreted and has dynamics assigned to it. This means that a deliberative approach to that necessary step is much more attractive, as it is an approach which seeks, where possible, to try and produce consensus between parties with opposing viewpoints. By engaging employers' and employees' representatives as the central players in this process, with equal voting power within the proposed structure (and by penalising empty-chairing), concerns about power asymmetries that otherwise affect the deliberation process are addressed (so far as they operate within the confines of the process). As to the additional concern about the deliberative process imposing an idea of the 'common good' or compromise that favours the more powerful parties within the process, it is accepted that by making the tactical decision to centre the process primarily around the employer and employee parties will skew any compromise as one which is seen as mutually acceptable principally to those parties. This is done, as explained, in the interests of the efficiency of the process, which is central to the operation of the Relational Dynamics model. Nonetheless, by engaging other groups through temporary membership or affiliate status, in order to provide voices within the process that can potentially offer more diverse views on what an appropriate decision on what the purpose of a piece of legislation is, and what dynamic should therefore attach to it.

Finally, the only remaining question is *what* this mechanism, as set out above, aims to determine. This has already been broadly indicated, in that the mechanism aims to determine what dynamics relate to what regulatory interventions through a process of purposive interpretation of those interventions. But beyond these general terms, this chapter and previous chapters have remained silent on specifically what dynamics should be considered. However, this was intentional. The very purpose of implementing this tripartite mechanism is to avoid prescribing a particular set or regime of dynamics that the parties must choose between. Parties are intentionally invited to determine what dynamic they believe a particular regulatory intervention aims to address. However, by way of guidance, it is suggested that the dynamics that the parties propose avoid the some of the language and idiosyncrasies that have become institutionalised in English Labour Law

at present. To that extent, references (for example) to concepts such as mutuality of obligation,⁷⁷ and the body of case law that has focused on that concept, should be avoided as a dynamic. Not only is this due to the normative baggage that these terms would carry across from the old regime of work relationship status, but also due to the points discussed in Chapters 1 and 5 relating to the operation of these concepts: they reinforce a contractual paradigm that the Relational Dynamics model is attempting to avoid, and so it would be highly advisable not to rely on those concepts and rather develop ones independent from the tests currently used.⁷⁸ This is not to say that the law as it exists cannot provide guidance for dynamics. By way of example, the concept of ‘dignity’ as used in equality law,⁷⁹ and also in wider human rights literature,⁸⁰ could be an example of a dynamic that the mechanism could assign to a particular regulatory intervention such as a particular element of equality law, or a collection of equality rights. This concept identifies a relationship of a particular character with sufficient specificity, but also allows space for the concept to be applied with sensitivity to the relation within the primary work relationship to which it may attach.⁸¹ Otherwise, the whole gamut of writing on labour theory may be used to determine whether a regulation refers to dynamics such as social democracy,⁸² economic dependence,⁸³ or stability,⁸⁴ for example. And concurrently, once dynamics are identified as the purpose of a particular regulatory intervention, they then enter the ecosystem in which those dynamics might be considered as attaching to a relation within a primary work relationship, as discussed in Chapter 5.

Once these dynamics are identified, they would of course eventually be subject to judicial adjudication, which would be aiming to interpret the dynamic and whether it would exist in a

⁷⁷ *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA)

⁷⁸ Brian Langille, ‘What is Labour Law? Implications of the Capability Approach’ in Brian Langille (ed) *The Capabilities Approach to Labour Law* (OUP 2019) 127

⁷⁹ For example, dignity as a concept is used when determining whether a person has been harassed in the Equality Act 2010, s 26

⁸⁰ Davidov, ‘The Goals of Regulating Work: Between Universalism and Selectivity’ (n 6) 23; Hugh Collins, ‘Theories of Rights as Justifications for Labour Law’ in Guy Davidov & Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 151 – 154

⁸¹ That is to say, a relation where the nature of the relationship is such that the employing entity would be liable to ensure the worker’s dignity was not violated by their actions or the actions of parties they might be responsible for

⁸² Keith Ewing, ‘Democratic Socialism and Labour Law’ (1995) 24 ILJ 103

⁸³ See, for example, the approach in Germany where a factor in determining whether a self-employed person will be entitled to bargain collectively will be determined by, *inter alia*, whether the relevant person will “provide their services to just one contracting party or generate 50% of their income from providing this type of service to just one contracting party”: Monika Schlachter, ‘Trade union representation for new forms of employment’ (2019) 10(3) ELLJ 230, 234

⁸⁴ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 371 – 382

particular relation. However, this is not a task that the courts would necessarily be ill-suited to. To recount the words of the Supreme Court in *van Winkelhof*,⁸⁵ there is no substitute for simply applying the words of the statute,⁸⁶ and with respect to this model the same principles would apply for the purpose of assessing whether dynamics would exist in a particular relation. The courts are already able to apply a contextual analysis for the purpose of applying statutory tests that will turn on the facts of the matter in the case.⁸⁷ Whether they do this in a manner that is adequate or appropriate will of course remain the subject of academic debate, but it is a problem that would be no more unique to the Relational Dynamics model than it would be to a personal scope-based system of access to rights, or statutory tests that are determined by specific linguistic constructions.

IV *Presumption of Application*

IV.i *The Value of Presumptions*

So far, the Relational Dynamics model and its supporting mechanisms paint a fairly complex picture. To some degree, this is intentional: the purpose of the Relational Dynamics model is an answer to the oversimplification that the current status-based model of work relationship status and rights has been based upon, with its thoroughly contractual foundations. However, an inevitable consequence of designing a model that exposes relational complexity, and then tries to regulate it, is that there may well be a number of relations and dynamics to contend with within a primary work relationship. Indeed, if like the current approach to workplace regulation, the onus is on the worker to demonstrate status that is denied within a contract, then the Relational Dynamics model would pose an almost-insurmountable obstacle for establishing the applicability of any rights to a primary work relationship.

⁸⁵ *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730

⁸⁶ *ibid* [39] (Lady Hale)

⁸⁷ *Pemberton v Inwood* [2018] EWCA Civ 564, [2018] ICR 1291 [89]

However, unlike the current approach in English law, the Relational Dynamics model would operate with a presumption of universal applicability. Of course this idea is not a novel one, and entities such as the TUC have consistently advocated for a statutory presumption of status that the employing entity must overturn.⁸⁸ Notably, it was one of the recommendations that the TUC provided in response to the Taylor Review as a solution to the problem of ‘bogus self-employment’.⁸⁹ Of course, given the model being proposed in this thesis is not based on concepts of status, the presumption that will be used is not one of status, but rather, a wider one based on the applicability of workplace rights. The reason for this approach centres around the legal certainty that is afforded to the worker in a situation where a presumption of some description applies to their work relationship. If a worker and the various employing entities know that all workplace rights will be assumed to apply at the inception of the work relationship,⁹⁰ then the rights and duties that both parties will have become “knowable, [and] certain”.⁹¹ Moreover, the presumption is structured as it is (i.e. that it would be for the employing entities to demonstrate a right did *not* apply to a particular relation) because of the distribution of bargaining power (broadly defined) within work relationships. Invariably, employing entities and those who materially structure work relationships will have significantly more bargaining power than the workers in those relationships,⁹² and therefore it is justifiable that the burden of ensuring rights apply to workers, or disproving that they do, should lie firmly with the employing entities in work relationships.

There is a significant amount of behavioural economics research which, while not entirely about work relationships,⁹³ provides useful evidence for the worker-protective capacity of a presumption that all applicable workplace protections *should* apply. The most important of that research for present purposes is that of ‘*status quo bias*’. Korobkin provides a through overview of the most

⁸⁸ TUC, *The Gig is Up: Trade Unions Tackling Insecure Work* (TUC 2017) 34

⁸⁹ TUC, *Taylor Review: Employment Status: TUC response to the BEIS/HMT/HMRC Consultation* (TUC 2018) 6

⁹⁰ Mark Freedland, *The Personal Employment Contract* (OUP 2005) 62 – 63

⁹¹ Langille, ‘What is Labour Law? Implications of the Capability Approach’ (n 78) 129

⁹² Paul Davies and Mark Freedland (eds), *Kahn-Freund’s Labour and the Law* (Stevens 1983, 3rd edn) 18; *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] IRLR 820 [35] (Lord Clarke)

⁹³ For a more general overview, see: Ewan McGaughey, ‘Behavioural Economics and Labour Law’ (2014) LSE Legal Studies Working Paper No 20/2014 <<https://ssrn.com/abstract=2460685>> accessed 10 August 2020

influential research in this area,⁹⁴ which in essence found that “people systemically favour maintaining a state of affairs that they perceive as being the status quo rather than switching to an alternative state, all else being equal”.⁹⁵ One notable piece of research in that overview was conducted by Rowe *at al*, which demonstrated that this *status quo* preference also extends to situations of legal *status quo*, with the study demonstrating a status quo bias in favour of pre-existing legal rules and powers in a hypothetical situation surrounding a corporation’s right, or desire, to pollute.⁹⁶ This research is relevant to the current project because it demonstrates the worker-protective capacity of using a legal presumption. Not only could the use of presumptions result in a *status quo* bias towards a settlement where workers are entitled to the full gamut of rights from their employer, but it also results in an increased threshold for challenging that settlement if the status quo is a presumption of all rights applying. Moreover, the application of this kind of presumption is not alien in other jurisdictions. For example, in California, for the purposes of whether a worker is considered to be ‘employed’ with respect to wage orders,⁹⁷ a presumption of employment applies, which an employing entity must act to rebut if they wish to argue that the worker was in fact an independent contractor, and therefore not subject to the minimum protections of the wage order. This approach was accepted by the Californian courts in part due to the “the history and purpose of the suffer or permit to work standard in California’s wage orders”,⁹⁸ which had an “intended expansive reach” for those protections.⁹⁹

IV.ii *The Presumption in a Relational Dynamics Model*

⁹⁴ Russell Korobkin, ‘The Status Quo Bias and Contract Default Rules’ (1997 - 1998) 83 Cornell Law Review 608, 625 – 630

⁹⁵ *ibid* 625

⁹⁶ Robert D Rowe, Ralph C D’Arge and David S Brookshire, ‘An Experiment on the Economic Value of Visibility’ (1980) 7 Journal of Environmental Economics and Management 1

⁹⁷ *Dnyamex Operations West v Superior Court of LA County*, 4 Cal.5th 903 (CA S Ct, 4/30/2018): wage orders being instruments which “impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees” (Cantil-Sakaue CJ)

⁹⁸ *ibid*

⁹⁹ *ibid*

On that basis, the following presumption is proposed for the Relational Dynamics model. Where a primary work relationship exists,¹⁰⁰ there will be a presumption that the party that is responsible for remunerating¹⁰¹ the worker will bear principal responsibility as the locus for ensuring all relevant workplace rights¹⁰² are provided to that worker. If the employing entity chooses to attempt to rebut this presumption, it would be done by applying the Relational Dynamics analytical model to the relevant work relationship. The decision has consciously been made not to place responsibility for ensuring rights on a more complex concept such as the one found in s 43K of the Employment Rights Act (ERA) 1996, which defines an employer as the party which has a role in substantially determining the terms under which the worker was engaged in a multi-employer context.¹⁰³ This construction is a valuable reform to the *existing* approach in English law which largely assumes a unitary employing entity with which a worker has a binary work relationship,¹⁰⁴ but not an ideal approach for the purposes of the Relational Dynamics model. Where the starting point is that a worker has to establish status where it may be denied in a contract, introducing a wider multi-party definition of the ‘employer’ concept is a useful tool to ensure rights can be vindicated against a particular party.¹⁰⁵ However, when task is to establish day-one rights through a presumption, then the idea of ‘substantially determining terms’ becomes a much more difficult concept to deal with. Rather, by tracing which party is responsible for (factually) remunerating the worker, it is easy for both the worker and the relevant entities within the work relationship to know who will initially be responsible for ensuring that the worker is guaranteed the rights they are entitled to. This presumption can also be joint and several between a number of employing entities, to protect against a situation where ambiguity around remuneration is intentionally engineered into the work relationship, or a number of parties designate themselves as the party responsible for remuneration. So the presumed responsibility primarily accrues with the remunerating party, but may then become joint and several where the source of remuneration is unclear; or by if reason

¹⁰⁰ Chapter 5; Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 84) 31

¹⁰¹ As above, if remuneration is not monetary, then this would be the party would be the source of the benefit the worker derives from the labour provided

¹⁰² i.e. all rights that would apply unless it would be manifestly absurd to argue that the right should cover the worker (e.g. a cis-man claiming maternity leave rights)

¹⁰³ Employment Rights Act 1996, s 43K

¹⁰⁴ ERA 1996, s 230; Countouris, ‘Uses and Misuses of ‘Mutuality of Obligations’ and the Autonomy of Labour Law’ (n 13); see also the discussion in Chapters 1 and 5

¹⁰⁵ Ewing, Hendy QC and Jones (eds), *Rolling out the Manifesto for Labour Law* (n 71) [6.19]; Mark Freedland and Hitesh Dhorajiwala, ‘UK response to new trade union strategies for new forms of employment’ (2019) 10(3) ELLJ 281, 289

of default,¹⁰⁶ the remunerating party cannot ensure workplace rights and as such passes liability onto the next-most-proximate employing entity in the primary work relationship. What this approach does is offer a clear and direct route for enforcement of rights, while also incorporating some failsafe for when it would be impractical for the party remunerating the worker to guarantee workplace rights.

A valid question to ask here is why the presumption operates on the basis of a primary work relationship, and not on some kind of assessment of whether the work relationship is or is not independent contracting. For one, the binary distinction that the concept of independent contracting is based upon is rejected by the Relational Dynamics model,¹⁰⁷ given that the model being proposed adopts no specific statuses for a worker to have. This in itself makes the idea of independent contracting meaningless in this context, as such a status is premised upon the absence of a collection of characteristics that are not relevant when looking at a work relationship through the Relational Dynamics approach. But in addition to this, there are also practical reasons why there should not be an initial filter for access to the presumption that workplace rights might apply; that being the fact that within the old binary divide some rights are designed to apply to workers classified as independent contractors. One example is collective rights, which on a ‘continuous’ interpretation of collective rights which sees them as existing as part of a more general right to freedom of association,¹⁰⁸ would require those collective rights to be extended to all workers, whether or not they were in a work relationship that was formally classified as being a kind of ‘employment’ broadly defined.¹⁰⁹ Similarly, a fair textual interpretation of equality law, such as the Race Directive (2000/43)¹¹⁰ or the Framework Directive (2000/78),¹¹¹ suggests that the personal scope of these laws extends protection to independent contractors, rather than those on the

¹⁰⁶ A useful example of this default can be seen in the facts of *McMeechan v Secretary of State for Employment* [1997] ICR 549

¹⁰⁷ Nicola Kountouris, ‘The Concept of the ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope (2018) 47 ILJ 192, 197

¹⁰⁸ Mark Freedland and Nicola Kountouris, ‘Some Reflections on the Personal Scope of Collective Labour Law’ (2017) 46 ILJ 52, 55

¹⁰⁹ ILO General Survey on the Fundamental Conventions concerning Rights at Work (2012), [209]; ILO Committee on Freedom of Association (2012) Report No 363, Case 2602, [461]. See also, Freedland and Kountouris (n 84), 64-7

¹¹⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, Art 3(1)

¹¹¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/1, Art 3(1)(a)

‘employed’ side of a binary divide.¹¹² Therefore, for these two reasons, the proposed presumption of applicability extends to all primary work relationships without distinction.

To work through an example, assume a worker is sent to work at workplace A, by agency B, the latter of whom is responsible for remunerating the worker. The worker has no contractual relationship with workplace A. On day one, the presumption would operate so as to make agency B the responsible party for ensuring that all applicable workplace rights were provided to the worker. Agency B would have the option of, perhaps, contracting with workplace A to ensure these obligations were satisfied. If a manager at workplace A were to discriminate against the worker, the presumption would be that the worker could sue agency B for the violation of the right not to be discriminated against at work. Given the operation of the presumption, agency B would be presumed to be responsible for ensuring the right was guaranteed to the worker, and crucially the relevant party liable in damages if the relevant discrimination were to be established. Agency B, in this situation, would be responsible unless it could demonstrate, through the operation of the Relational Dynamics model, that the relevant dynamic that relates to discrimination law either: *only* applied to the relation between the worker and workplace A; or that the dynamic did not exist in *any* of the relations in the primary work relationship.¹¹³

An obvious response to this mechanism is that if the responsible party for discriminating the worker was the manager at workplace A (i.e. an employee that workplace A was vicariously liable for), then no avenue exists for agency B to argue that they had no control over the manager, and only workplace A should be responsible for the discrimination. The response to this is the following: if workplace A and agency B agree to this work relationship structure, then the liability for violation for workplace rights should be viewed as the a necessary risk borne by the party supplying and remunerating the worker to the third party workplace. This is an acceptable cost to ensure there is a locus of enforcement for a worker; *mutatis mutandis* with respect to a party jointly

¹¹² Mark Freedland and Nicola Kountouris, ‘Employment Equality and Personal Work Relations: A Critique of *Jivraj v Hashwani*’ (2012) 41 ILJ 56

¹¹³ Highly unlikely in the context of anti-discrimination legislation; it is quite likely for the reasons discussed in the previous paragraph that equality law would be determined to apply in all contexts in which work is done, enforceable against all employing entities

and severally liable in a situation where the source of remuneration is unclear. Moreover, there is nothing preventing contractual indemnity existing between agency B and workplace A for the latter's violation of a worker's rights, which ended up being enforced against agency B. *A fortiori*, what is also important to remember is that the existence of a presumption does not preclude a worker from choosing to enforce a right against another employing entity within the work relationship, through the Relational Dynamics model. In the above example, the worker may well choose to enforce against workplace A, and (likely successfully) argue that the relevant dynamic existed in the relation between them and workplace A.

The benefit of this overall approach means that while it may not always be the best party in a primary work relationship that is responsible for ensuring a worker's rights, *someone* within that matrix of relations *will* be responsible. This approach would significantly reduce the risk of the much more absurd position found in English law where none of the employing entities in a work relationship would be an employer within the status-based system,¹¹⁴ and would place the burden of shifting or disproving the responsibility for a particular rights onto the employing parties, rather than the worker. Finally, per the suggestion in *Rolling Out the Manifesto for Labour Law*, it is possible that short "probation periods" could be set for rights, but applicable "only to the question of the workers' ability to do the job",¹¹⁵ so as to allow for some provision to terminate a work relationship where there was a genuine question of competence.

So far, the discussion has centred around the question of the presumption of the employer. There has been limited discussion of the question of the presumption of work, but this is a point can be dealt with briefly. The primary work relationship, as defined in Chapter 5 and repeated earlier in this chapter centres around the provision of personal labour by the worker. This central concept is considered to be sufficiently wide to capture all those relationships that would be subject to the Relational Dynamics framework. That being the case, there is no need to apply a further assumption or heuristic from the perspective of the worker, as the analytical framework will engage

¹¹⁴ *Dacas v Brook Street Bureau UK* [2004] ICR 1437 (CA) [78] (Sedley LJ): "the possibility that [a Claimant] had no employer defies common sense"

¹¹⁵ Ewing, Hendy QC and Jones (eds), *Rolling out the Manifesto for Labour Law* (n 70) [6.23]

once there is the provision of labour in a market context. The Relational Dynamics model was designed as a worker-centric analytical model,¹¹⁶ which broadly eliminates the need for further analytical steps beyond identifying the personal provision of labour.

In summary, the presumption of applicability set out above may seem onerous for the party remunerating the worker; and to a degree it is. But it is a cost reasonably borne by a responsible party within the primary work relationship, and provides the worker with the guarantee that they will have an entity against which to enforce all the rights they are presumed to be entitled to unless otherwise proven by the respondent party in a claim, by analysing the relevant primary work relationship through the Relational Dynamics model. More practically, this also means that unlike in the present situation, employing entities cannot simply contract out of status and rights through their agreements with workers, or their work relationship structures: the right will always attach somewhere, with the burden on a liable employing entity to demonstrate otherwise.

V *Conclusion*

The Relational Dynamics model, as set out in Chapter 5, was one which required further practical elaboration in order to properly understand how the theory of relations and dynamics could operate to actually assign rights to work relationships. It is hoped that this chapter has explained why the use of a tripartite mechanism to determine what rights relate to what dynamics provides the necessary structures for determining what certain rights will aim to achieve. The purposive interpretation of rights through a principally tripartite mechanism allows for labour, industry and government to negotiate what dynamics attach to regulatory interventions. However, an important caveat to this approach is that it must not exclude civil society and non-governmental actors from the tripartite mechanism. While the effectiveness of the negotiating system is ensured principally

¹¹⁶ Chapter 5.III.ii.i; Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (n 84) 324

through its reliance on three groups of actors, it can and *should* still integrate other interested parties that can assist with the process of assigning dynamics to regulations to add democratic legitimacy to the process of determining what dynamics are addressed by particular regulations.

The second important practical element discussed was that of presumptions. Presumptions play an important role in setting up the *status quo* for regulation and labour protection. As the research on *status quo* bias demonstrates, there is an inertia that is produced when a presumption or *status quo* has been put in place. To that end, it would be desirable for any proposed model for labour protection to work on the presumption that where a primary work relationship (as defined in Chapter 5) exists, the presumption is that all relevant labour rights shall apply unless the employing entity that objects demonstrates the converse. It was also proposed that the starting point would be that the party responsible for ensuring the worker's rights would be the party that remunerated the worker; a presumption operationally more straightforward than constructions based upon determining which entities substantially determine the terms of the engagement. While the presumption can be rebutted, and dynamics can of course be identified as existing between the worker and other parties within the primary work relationship, this proposed presumption is of the most utility for a worker seeking certainty as to who is *prima facie* responsible for ensuring their workplace rights.

Chapter 7

Conclusion

This thesis had two aims. The first was to assess critically how English employment law uses a system of statuses to assign rights to those who provide their labour. The focus of this analysis was upon the criteria that these statuses used and how those criteria struggled to analyse adequately a vast range of atypical and non-paradigm work relationships. Having explored the deficiencies of the current approach, the second aim of the thesis was to articulate the new proposed analytical model for work relationships: the Relational Dynamics model. Having identified how the bilateral analytical approach taken by work relationship status in English law fundamentally fails to assign rights to work relationships that show any degree of complexity beyond the most straightforward of bilateral work relationships, an analytical approach that was sensitive to individual dynamics within work relationships was set out. The Relational Dynamics approach identifies primary work relationships, and applies a three-stage analysis to ascertain what the internal structure of a work relationship is, and in turn, how to regulate it. This approach is then supplemented by two practical mechanisms that support the operation of the Relational Dynamics model: a proposed tripartite body to assign dynamics to regulatory interventions; and presumptions about the application of labour rights to primary work relationships.

Chapter 1 acted as the foundational chapter for this project. It set out the three main work relationship statuses used in English law, and the criteria that those work relationships rely upon to assess whether work relationships fall within their scope. It was demonstrated that not only are the criteria which are used for the most restrictive of these statuses, employee status, ones which identify characteristics that are usually only present in paradigm work relationships, but that these criteria have also been transplanted to UK worker status and even partly into EU worker status.

Conclusion

This has resulted in the different statuses potentially collapsing into each other, given these overlapping criteria and the resultant thresholds that they apply. Notwithstanding this analysis, Chapter 1 also identified the phenomenon of the fragmentation of UK worker status in English law. By considering a number of developments, including the approach to UK worker status in *van Winkelhof*, the s 296 TULRCA ‘worker’ definition, and the developments found in s 43K ERA, it was possible to identify a vein of reasoning that demonstrated that, in very limited examples, UK worker status was being adapted to the regulatory context in which it was applied.

Chapter 2 then proceeded to consider those work relationships which fell outside the paradigm, namely tripartite work relationships and zero hours contracts. Both phenomena have partly been caused by a move away from heavily vertically integrated workplaces and towards employers engaging workers through the use of less secure, heterogenous work relationships that *inter alia* insulate employing entities from employment rights liabilities for workers. In the case of tripartite work relationships, the ability to genuinely fracture the source of remuneration and offers of work from the source of control within the overall relationship meant that all the necessary criteria for establishing status would not accrue with one entity, and could prevent a worker from establishing a work relationship status with any of the employing entities within that agency relationship. This in itself was a symptom of how work relationship statuses operate English law: the fact that they are all premised upon the existence of the paradigm bilateral work relationship means that where the whole relationship contains multiple employing entities, work relationship statuses struggle to regulate them. As for zero hours contracts, they exploit a much more specific criterion for work relationship statuses: mutuality of obligation. While there is no single ‘form’ for a zero hours contract, the thing they all have in common is that they purport to place no obligation upon the employing entity to offer work to the worker, and likewise place no obligation upon the worker to accept any offers of work that are made. On the face of it, such a contractual term would defeat any attempt to find mutuality of obligation *between* individual engagements, only leaving the option to establish mutuality of obligation *within* individual engagements. The effect of a zero hours contract is to create the *prima facie* contractual position that the work relationship does not continue between engagements, thus excluding workplace rights that are reliant upon continuity

Conclusion

of service. Moreover, given the heavy reliance upon the similar criteria between employee status, UK worker status and EU worker status, this is now a problem for almost every work relationship status in English law. By creating this contractual presumption of independence or self-employment, employing entities force zero hours workers into a position where they would only be able to vindicate workplace rights by resorting to litigation.

Chapter 3 turned its attention to the gig economy and how the existing approach to organising work relationships provides an illuminating case study for the synthesis of the techniques that were discussed in Chapter 2. The distinct work relationship models that were analysed in Chapter 2 (i.e. triangular relationships and zero hours contracts) are synthesised into the potent form that we see in gig economy work. An important factor to be conscious of when thinking about the gig economy is that there is nothing particularly novel about either offering work without any guarantee of future offers, or the fact that work relationships are fractured between a number of employing entities. However, the power of gig economy work is how these organisational techniques are synthesised into a single work relationship, aided by digital platforms to mediate the relationship, producing a chimera that is much more efficient at obscuring the nature of the work relationship than any one technique alone. As multiple structural techniques are applied to work relationships, it becomes all the more difficult to analyse accurately the work relationship because courts and tribunals are constrained by the analytical tools that they are forced to use, as outlined in Chapter 1. While in the context of work-on-demand via apps, it is possible that the court or tribunal may apply the *Autoclenz* doctrine essentially to draw an analogy between the work being done, and its traditional non-gig-economy comparator, this approach is not always guaranteed to succeed. Moreover, where we consider the platform work aspect of the gig economy, technique synthesis becomes even more troubling: where there is no plain analogy for the work relationship, and the relevant work relationship is as fractured as it is, the traditional tools that we would rely upon in English labour law to try and properly analyse these relationships would prove woefully inadequate. Indeed, consider the situation where a platform worker provides their labour to an employing entity that is also simultaneously a customer of the platform through which they receive work from the worker, and the platform itself also exercises employer powers over the worker

Conclusion

providing their labour. In a work relationship this fragmented, which is then obscured by the digital platform upon which the labour is provided, it is plain that the current analytical approach taken by English law would struggle to characterise properly such a work relationship and then assign rights to that relationship. Following this, Chapter 3 proceeded to assess two troublesome aspects of English Labour Law relevant to gig economy work: substitution clauses and the *Autoclenz* doctrine. In relation to substitution clauses, it was shown that it is possible to defeat employee or worker status for a relationship that is otherwise entirely consistent with that status by including a substitution clause that purports to offer a worker the nominal unfettered right to engage a substitute, even where the right may not realistically be exercised, as demonstrated in the *Deliveroo* decision at the CAC. Moreover, the ‘passmark’ for such a substitution clause to defeat status has been the same in the context of worker status as well as employee status. As for the *Autoclenz* doctrine, while determining the ‘true agreement’ in a work relationship has been of great utility, the doctrine is limited by the fact that any ‘true agreement’ will often heavily rely upon an analogy to other traditional work relationships, and additionally, it is still unclear what precisely Lord Clarke meant when he described the doctrine as a ‘purposive’ one.

The thesis then shifted from this doctrinal analysis to the normative half, where it set out the new proposed analytical model for work relationships. This began with Chapter 4, which considered the philosophical foundations of a new model for assigning rights to work relationships. This was a necessary step to undertake, as empiricism, vocationalism, or intuition would not be sufficient to justify why any proposed model would take the shape that it would. Therefore, this chapter engaged in an assessment of possible theoretical foundations for the Relational Dynamics project. It focused its attention on two theories that operate at a sufficiently high level of abstraction for a new proposed model: inequality of bargaining power; and capabilities theory. Inequality of bargaining power, often viewed as the traditional justification for the discipline of labour law more generally, was determined to be an inadequate theoretical foundation for this project. Even on the most generous interpretation of the inequality of bargaining power theory, its focus is still too closely tied to the concept of some form of bilateral bargaining, with a bias towards material welfare issues. Although the specificity of the model did offer some purpose and guidance, the fact that its utility

Conclusion

would likely be limited to a fairly narrow set of concerns and work relationship models meant that it would not be the ideal theoretical foundation for the Relational Dynamics model. Rather, it was the capabilities theory that Chapter 4 settled upon as the theoretical foundation of the new proposed model. This radically underspecified theory, proposed by Amartya Sen, had the worker as its focus, and offered sufficient generality to capture all manner of work relationships by centring the idea of human freedom *vis-à-vis* the worker, and taking into account the full range of socioeconomic factors that may influence the realisation of those freedoms. However, it was the subsequent interpretation of the capabilities theory by Martha Nussbaum that would have the Relational Dynamics model built upon it, because in addition to the theory as set out by Sen, it is also willing to recognise the importance of the constitutional entrenchment of core principles (which for this project would include, but not be limited to, labour rights that are human rights). This ensured that while this version of the capabilities theory retained the necessary generality that Sen's more generic capabilities theory offers, it also set important constitutional limits on how any proposed model would operate; and this made it the ideal theoretical foundation for the Relational Dynamics model.

Having established the theoretical basis for the model, Chapter 5 began setting out what the Relational Dynamics model actually looked like. This started by identifying how entrenched contractual analytical concepts of bilaterality and exchange had become in English employment law. For the purposes of this project, this was most notably seen in the context of the criteria that we currently use to determine access to the key work relationship statuses in English law. It was shown that it was the case that those relationships that tended towards the paradigm work relationship form would also be more likely to exhibit the kind of bilateralism and exchange that these criteria to establish work relationship status require. Therefore, it was suggested that any proposed model must move away from using the law of contract as its analytical 'language'. As a result, the Relational Dynamics model was proposed. This model sought to address a number of the failings that had been drawn out as part of the analysis in Chapters 1, 2, 3, and 5 by first aiming to explore the full complexity of the internal structure of a primary work relationship *before* attempting to give specific relations within that primary work relationship any normative shape or

Conclusion

character. Only once the full internal structure was set out, and the influence of any ancillary relationships connected to this internal structure was considered, was the process of the normative characterisation of those relations to be done. This characterisation was done with ‘dynamics’, which was proposed as the general term used to determine the particular characteristics of an identified relation between the worker and an employing entity. This assessment process will be done for every identified relation within a primary work relationship. In addition to this process, the symbiotic relationship between the Relational Dynamics model and the purposive interpretation of regulatory interventions was explained. The same language of ‘dynamics’ was proposed for identifying these purposes, as it was envisaged that the dynamics identified within specific regulations will be mapped directly onto the dynamics found within primary work relationship: it is a common language that will bridge the gap from regulation to work relationships.

Chapter 6 then moved to the more practical concerns that would arise if one were to implement the Relational Dynamics model. Therefore, this chapter first outlined the process by which the purposive interpretation of regulations would actually occur. It was proposed that the best way to achieve this would be through a deliberative tripartite mechanism, which would allow for industry, labour, and government to negotiate what dynamics would relate to what regulatory intervention. Crucially though, while these three actors would be the key ones in a tripartite model, it was suggested that the mechanism would nonetheless include civil society and non-governmental actors through a system of temporary memberships or affiliations with key actors. Such an approach was favoured as it meant that the crucial project of purposively assigning dynamics to regulatory interventions would retain operational efficiency, but also that it had some pluralistic legitimacy by involving entities beyond the core actors recognised by the mechanism. The chapter then moved on to setting out the importance of using legal presumptions when operationalising the Relational Dynamics model. Given the influence of status quo bias, it was proposed that where a primary work relationship exists, the source of remuneration within that primary work relationship would be presumed to be responsible for all relevant workplace rights in relation to the worker. This presumption could be rebutted by engaging the Relational Dynamics model, but

Conclusion

it would also mean that the starting point whenever labour is provided would be that the party remunerating a worker for that labour would be responsible for guaranteeing the relevant rights to that worker. This would broadly avoid situations where a worker would have a contractual agreement which purported to suggest that they were independent contractors, and as such, place the onus on the worker to vindicate their workplace rights in a tribunal or court.

Overall, this thesis has sought not only to identify why the existing approach to work relationship status and the incidental assigning of rights to work relationships is inadequate, but also to propose a new analytical model that aims to address the defects that were identified as part of the doctrinal analysis. However, it is worth reminding ourselves at the end of this project that this analysis and theory is only necessary because of the under-inclusion of work relationships within the protective scope of English Labour Law as it exists. This project is an attempt to offer a way to remedy that problem, and the stark human realities that flow as a result. It is hoped that some of these proposals may offer a solution to some of these problems, and to the people who are affected by them.

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