

*Some reflections on the ‘personal scope’ of collective labour law*

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**Abstract:-**

The purpose of this article is to celebrate Bob Simpson’s scholarship in the field of labour/employment law by pursuing his special interest in collective labour law into an aspect of labour/employment law which is usually regarded as an individual one, namely that of its personal or relational scope. A first introductory section proposes a normative framework for this inquiry, arguing for a more inclusive approach to relational scope where collective labour rights are engaged and finding a basis for this approach in ILO Recommendation No 198. A second section demonstrates the way in which the relevant jurisprudence of UK labour/employment law has seemed to be out of accord with that normative approach. A third section demonstrates how the case-law of the ECJ and CJEU has also in its own way been unsympathetic to claims that self-employed workers should be brought within the fold of collective labour law, particularly with regard to collective bargaining. A fourth section further develops a supranational perspective upon these arguments, concentrating on arguments and pronouncements emanating from the European Committee for Social Rights. A fifth section considers ways in which novel scenarios of differentiation between ‘labour’ and ‘capital’ are presenting themselves in the context of the so-called ‘gig economy’, focusing on the very recent UK Employment

Tribunal decision in the *Uber* case. A sixth concluding section expresses the hope that the article has opened up a largely untrodden path towards an authentically collective view of the debate about the personal scope of labour/ employment law. (249 words)

## 1. Introduction

We are both very pleased to have been given the opportunity to contribute to this symposium.<sup>1</sup> The hallmark of Bob Simpson's scholarship in the labour law field has been its high awareness of and sensitivity to the collective dimension of employment relations, even when he is writing about areas of regulation normally regarded as aspects of 'individual' employment law, such as the Minimum Wage legislation. So we welcomed the obligation to follow suit and concentrate on that collective dimension; we have found it interesting and, we hope, productive to try to do this by shifting the focus of our recurring gaze upon 'personal scope'<sup>2</sup> from the individual aspects to the collective aspects of labour law.

The effect of shifting one's focus in that way is immediately to realise to what an extent individual employment law has constituted not merely the prime location but actually the engine-room and driver of the 'personal scope of labour law' discussion, to the effective exclusion of collective labour law. We have a very well-rehearsed and well-developed analytical and normative debate about the personal work relations which are and

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<sup>1</sup> This is an updated and slightly rearranged version of a paper originally presented on 11 October 2013, on the occasion of the academic symposium 'The Changing Face of Collective Labour Law', organised to celebrate the scholarship of Bob Simpson, at the time of his retirement from his long held position at the London School of Economics.

<sup>2</sup> In presenting this topic, we begin by enclosing in quotation marks its identification in terms of 'personal scope'; this is in order to make the point that our concern is not so much with the *persons* who come within the scope of collective labour law as with the kinds of *work relations* which fall within that scope. Having made that point, we accept that the terminology of 'personal scope' is the received and familiar one by which to identify this discussion, so that it is unnecessary to continue to distance ourselves from it by treating it as the words of others.

should be within the scope of particular aspects of labour law's regulation; but that debate unthinkingly settles upon areas such as unfair dismissal law and employment equality law, regarding them, in a way which is itself very questionable, as the embodiments of 'individual employment law' rather than collective labour law. Our analytical and normative perceptions of the personal scope discussion have become very largely confined in that way, so that we found when we embarked on this topic that we had not really thought through the analytical or normative issues of personal scope on the collective side. In the perception that we might not be alone in having suffered from this tunnel vision, we seek to make a few observations on the collective aspects of the personal scope of labour/employment law which we hope may be slightly unfamiliar ones.

Thus when we started concentrating on the collective aspects of personal scope, we found ourselves coming up with one or two interesting curiosities. For example, in some aspects at least of UK collective labour law a significantly different definition of the 'worker' is used from that which is used in individual employment law. The definition of the 'worker' in section 296 of the Trade Union and Labour Relations (Consolidation) Act ('TULRCA') is wider than the Employment Rights Act ('ERA') definition in that it equally begins by extending to all contracts for personal work, and equally contains the 'profession to client' exception but does not contain the further 'business to customer' exception which the ERA definition – the familiar one – does.<sup>3</sup>

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<sup>3</sup> See *R (British Broadcasting Corporation) v Central Arbitration Committee and another* [2003] EWHC 1375 (Admin) [2003] I.C.R. 1542. Also cf. the analysis in K. Arita, 'Legal Concept of "Worker" under Trade Union Law in Britain and Japan' (2013) *The Seinan Law Review*, Vol.45, p.41.

Then again, if we turn to EU collective labour law, we find that whereas EU individual employment law has tended, latterly at least, to distinguish reasonably carefully between the ‘worker’ concept and the ‘employee’ concept (admittedly treating them as somewhat convergent, but nevertheless recognising that they are not one and the same), ‘EU collective labour law’ (to the debatable extent that such a concept exists) seems, on occasion at least, to treat the two notions as completely synonymous and interchangeable, for example in Article 9 of the Recast European Works Councils Directive which speaks of ‘cooperation between the central management and *employees*’ representatives in the framework of an information and consultation procedure for *workers*’.

We could go further down this trail of excavation for *examples* of difference between collective and individual labour law in the matter of personal scope; but it seemed to us more profitable to try to suggest the normative framework within which these developments might be taking place. That normative framework might be interestingly different from the one upon which we explicitly or implicitly rely when we debate the personal scope of individual employment law, if only in the sense that in the case of collective labour law, two competing or opposing possible normative positions seem to present themselves even more strongly and clearly than in the case of individual employment law. One of those possible normative positions points towards a tight confinement of the personal scope of collective labour law to dependent employees, the other towards a radically more inclusive approach. It is in that contestation that we can see one of the locations in which the issue of the ‘autonomy of labour law’ is most crucially at stake.

We can perhaps pin down this contestation between two possible normative positions in the following way. The exclusive normative framework would be the one which envisages the very purpose and basis of collective labour law, even more definitively than for individual employment law, as consisting in the redressing, by means of collective representation and collective action, of the inequality of bargaining power inherent in the subordinate employment contract or relationship. That would point towards seeing dependent employees as exclusively the proper subjects of collective labour law.

The inclusive normative framework, by contrast, would be the one which envisages the claims which collective labour law vindicates, grouped around the core notions of freedom of association and democratic representation, as essentially part of or continuous with the embodiment of those claims in the general political constitution. From that normative perspective, one might be far less inclined, perhaps even actively disinclined, to confine the personal scope of collective labour law precisely to subordinate workers, and more inclined to understand collective labour law as the manifestation of those general rights and freedoms in a more loosely and inclusively denominated domain of work relations.

This inclusive normative approach, a purposive or instrumental one, might be pursued in various different ways. The most obvious way to do so is to take a specially inclusive approach to the personal scope definitions which are embodied in the provisions of collective labour law as compared with those which apply to the provisions of individual employment law. That is what seems to have shaped the examples of ‘stand-out’, or divergent, personal scope provisions which we cited

earlier. Another less obvious way, for which admittedly one has to search hard for concrete examples, would be to treat the *special* need for effective protection of workers' collective rights as requiring a *generally* inclusive approach to the personal scope of labour/ employment law both individual and collective. If this approach were taken, it would not lead to differentiation between collective and individual labour law with regard to personal scope, but rather to a state of affairs in which the normativity of collective labour law formed a leading edge or cutting edge in the development of a broadly inclusive approach to personal scope in all the domains of labour law. In both these different modes, however, there would still be a tension between this approach and the contrastingly exclusive approach to personal scope which seems to find its main home or location in the individual employment legislation and its interpretation in the courts.

If we accept that there is this underlying normative tension with regard to personal scope in the collective sphere, how far and in what ways do we think that it manifests itself in the daily life of collective labour law? The answer has to be, we must admit, that it does not do so in very obvious ways. The examples we have given of deviations with regard to personal scope definitions between individual and collective labour law speak more to its not having been very carefully considered in the collective domain than to its having been forged in the heat of legislative or judicial debate. And yet this particular pot does boil, and from time to time bubbles of contention break through to the surface. We proceed to consider the development of this contention both in UK law and more widely in EU law; but before doing so we reflect upon whether support for a purposively inclusive approach with regard to collectively based

labour rights can be derived from the norms of international labour law, and in particular from the Conventions and Recommendations of the ILO.

We suggest that the basis for such an argument is to be found in ILO Recommendation No 198 of 2006 concerning the employment relationship. It will be recalled that this Recommendation aimed to set up a kind of ‘open method of co-ordination’ process for the continuing review and adjustment of national labour laws’ definitions of the personal scope of their provisions for the protection of workers: paragraph 1 enjoined that ‘Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.’ Paragraph 2 elaborates that ‘The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. (...)’, the Preamble having noted ‘all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship’ as part of the normative context in which the Recommendation was formulated.

The Annotated Guide to the Recommendation, which was issued by the ILO in 2007<sup>4</sup> presented in Annex IV a compilation of the relevant international labour standards, giving first priority to the provision of Article 2 of Convention 87 of 1948 on Freedom of Association and the Protection of the Right to Organise that ‘Workers and employers, *without*

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[http://www.ilo.org/wcmsp5/groups/public/@ed\\_dialogue/@dialogue/documents/genericdocument/wcms\\_172417.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/genericdocument/wcms_172417.pdf) (Consulted on 28 October 2016).

*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’ (emphasis added). We know that the framers of Article 2 attached great importance to the emphasised words: the Committee of Experts on Freedom of Association noted in its Report of 1994 that ‘In adopting the terms “without distinction whatsoever”, which it considered a more suitable way in which to express the universal scope of the principle of freedom of association than a list of prohibited forms of distinction, the International Labour Conference emphasized that the right to organise should be guaranteed without distinction or discrimination of any kind as to occupation, sex, colour, race, creed, nationality or political opinion.’<sup>5</sup> This specially firm insistence on the universal application of the principle of Freedom of Association and of the Right to Organise to all workers thus forms a significant part of the normative underpinnings of Recommendation 198, and should surely be an influence on the formation and interpretation of national definitions of the personal scope of labour laws, most especially whenever the protection of those fundamental rights is at stake.

## 2. The interpretative approach of the courts in UK law

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<sup>5</sup> [Report \(International Labour Conference\)](#), 81st Session, 1994 <3, 3 (pt. 4A, 5), 4 (1)-(2B), 6> at paragraph 45, citing the ILO Record of Proceedings of the 30<sup>th</sup> Session of International Labour Conference, 1947, at p.570.



It must be said that those hoping to find that any such inclusive purposive approach has been taken by the courts of the United Kingdom are in for a disappointment. There are a couple of older decisions which are apt to be regarded as manifesting an exclusive approach to personal scope in the context of collective labour law, but which turn out on re-examination to be equivocal or neutral in that regard. However, there is a more recent leading case which, to an extent that has not been sufficiently remarked, turns out perfectly to represent the narrow approach, albeit in an almost unconscious way.

Thus, the case of *Boulting v Association of Cinematograph, Television and Allied Technicians*<sup>6</sup> is apt to be remembered for Lord Denning's denunciation of the proposition that the Boulting brothers as the two joint managing directors of a film production company could be regarded as 'employees' within the meaning of the membership rule of the defendant trade union. However, it is equally to be recalled that this was rather a special case because it concerned the legality of a trade union closed shop which the union sought to enforce upon the senior managers of the work-group in question. It was decided at a time when closed shop practices had not been generally proscribed but were regarded as very controversial; and moreover it is specially to be noted that the appeal was decided in favour of the trade union, Lord Denning forming the dissenting minority in the Court of Appeal.

Somewhat more to the point, though still in its own way rather deceptive, was the decision of Plowman J in *Prudential Assurance Co v Lorenz*<sup>7</sup> in 1971. The case concerned industrial action taken by insurance agents

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<sup>6</sup> [1963] 2 QB 606.

<sup>7</sup> (1971) 11 Knight's Industrial Reports 78.

working for the Prudential who were members of the National Union of Insurance Workers; in the course of a dispute over a pay increase, the union sent all the agents a circular letter instructing them to withhold the submission of weekly accounts (while continuing to bank the premiums which they had collected). It was held that the trade dispute immunity conferred by section 3 of the Trade Disputes Act 1906 upon the inducing of breach of contracts of employment in the course or furtherance of a trade dispute was strictly confined to obligations arising under the contract of employment and did not extend to the fiduciary obligations of insurance agents. Here again, we find that the decision is apt to be remembered as manifesting a narrow approach to the personal scope of section 3 of the Trade Disputes Act: however, the exclusionary factor which operated here seems not to have been that the insurance agents were found not to be employees under contracts of employment, but rather that their fiduciary obligations to account for the monies they collected were not regarded as forming part of the terms of their contracts of employment. This can certainly be regarded as a narrow interpretation of section 3, but hardly as concerning the personal scope of that provision.

On the other hand, when we turn to the decision of the Court of Appeal in 1983 the case of *O'Kelly And Others v Trusthouse Forte Plc*<sup>8</sup> we are quite undoubtedly concerned with the personal scope of one of the central worker-protective provisions of UK employment legislation, namely the provision conferring the right not to be unfairly dismissed upon employees with the requisite length of contractual employment, of which the then prevailing personal scope definition was contained in section 153 of the Employment Protection (Consolidation) Act 1978. It remains as

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<sup>8</sup> [1983] ICR 728.

one of the leading cases, arguably the foundational case, in the development of a narrowly restrictive approach to the application of that personal scope definition to the situation of those working under casual work arrangements – in this instance, catering staff working on a casual basis for the banqueting department of the defendant hotel company, who were known as “regulars” because they could be relied upon to offer their services regularly and in return were assured of preference in the allocation of available work, but were nevertheless held not to be employees working under continuing contracts of employment and perhaps not under contracts of employment at all. The very notable feature of the case for the purpose of the present discussion is that, although it is clear that the plaintiff workers were alleging dismissal by reason of their trade union membership or activity, this crucial collective dimension of the facts is mentioned only once in passing<sup>9</sup>: there seems to have been no suggestion whatsoever that the engagement of this fundamental collective right should have commanded a specially inclusive approach to the construction of the personal scope provision. The negative tradition which was thus instituted seems to have persisted in the jurisprudence of the United Kingdom throughout the intervening thirty years. In the next section of this paper, our attention turns to the question of whether any different dynamic is to be found in EU law.

### 3. Labour law and the regulation of competitive markets – the emergence of a new binary divide in EU employment law

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<sup>9</sup> Ackner LJ giving the leading judgment and introducing the history of the appeal says at p 738 that ‘[the appellants] complained that the company unfairly dismissed them from their employment at the Grosvenor House Hotel, and that their dismissal was to be regarded as unfair by virtue of [section 58](#) of the Act of 1978, that is to say, they were dismissed for an inadmissible reason, the alleged reason for the dismissal being that they were members of a trade union and had taken part in its activities’.

Probably the best starting point for our inquiry into how, within the framework of EU employment law, the ‘binary divide’ between employment and self-employment intersects with the normative dilemma outlined in the opening section of this paper is to be found in the analysis of three leading decisions of the ECJ or CJEU, the *Albany* judgment<sup>10</sup>, the *Pavlov* judgment<sup>11</sup>, and the more recent decision in *FNV Kunsten*<sup>12</sup>. We venture to suggest that, *prima facie*, *Albany* and *Pavlov* provide the two antithetical approaches that the CJEU reserves to the exercise of collective rights by employees and the self-employed, respectively, with *FNV Kunsten* seemingly offering an attempt to reconcile these approaches in respect of working persons with employment statuses that struggle to fit the crude binary divide adopted by the Court’s jurisprudence.

*Albany* introduced an arguably narrow, if adequate, exclusion zone for pension funds set up through collective agreements between management and labour, from the strictures of EC/EU competition law. While the Court noted that it was ‘beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers’ it was also willing to concede that ‘the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [EU competition rules] when seeking jointly to adopt measures to improve conditions of work and employment’ (para 59). This concession was

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<sup>10</sup> Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

<sup>11</sup> Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, [2000] ECR I-6451.

<sup>12</sup> Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, [2014] EUECJ C-413/13

premised on various treaty based textual justifications but also on the understanding that the ‘nature and purpose’ of the agreement was that of ‘improving ... working conditions, namely ... remuneration’ in the form of pension benefits (63). The *Albany* exclusion zone, or ‘*Albany* exception’ (as AG Wahl describes it in *FNV Kunsten*) was thus created. It is worth noting that, as state in the judgment, the exclusion applied to what Dutch legislation referred to as ‘second pillar’ schemes, comprising ‘supplementary pensions provided in the context of employment or self-employed activity’.<sup>13</sup> But it is also worth noting that the exclusion was, ultimately, precisely that, a carve-out for collective agreements and an implicit restatement that EU competition law was to be regarded as the general rule.

A few years later, with *Pavlov*, the Court was eventually confronted with the question of whether a compulsory pension scheme set up by the representative organisation for the (mainly self-employed) Dutch medical profession, could benefit from the ‘*Albany* exception’. The Court decided that ‘such exclusion ... cannot be applied to an agreement which, whilst being intended, like the agreement at issue in the main proceedings, to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and employees’.<sup>14</sup> While the pension scheme eventually survived the day, this was not in recognition of its nature or the social objectives pursued, but rather in consideration of the fact that it

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<sup>13</sup> Paragraph 5 of the judgment.

<sup>14</sup> *Pavlov*, para 68

was not perceived as abusing of its dominant position.<sup>15</sup> In the view of the Court, the scheme could not rely on the *Albany* exclusion as the Treaty did not contain any provisions ‘encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions and providing that, at the request of members of the professions, such agreements be made compulsory by the public authorities, for all the members of the profession in question’.<sup>16</sup>

The third piece in this jigsaw is the judgment in the case of *FNV Kunsten*, another Dutch reference. The crux of the reference was the extent to which a collective agreement setting terms of employment, including minimum fees, for orchestra players offering their services as ‘self-employed substitutes’,<sup>17</sup> was compatible with Article 101(1) TFEU, or could benefit instead from the *Albany* exclusion zone. In this case, the Court was adamant that ‘in so far as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings’.<sup>18</sup> As such, and with the Treaties being silent in respect of the collective bargaining rights of ‘self-employed service providers’,<sup>19</sup> a collective agreement concluded for the benefit of such workers ‘cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU’.<sup>20</sup> However, the Court was open to the possibility of applying the *Albany* exclusion if ‘if the service providers, in the name

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<sup>15</sup> *Pavlov*, paras 120-130.

<sup>16</sup> *Pavlov*, para 69.

<sup>17</sup> *FNV Kunsten*, para. 8.

<sup>18</sup> *FNV Kunsten*, para 28

<sup>19</sup> *FNV Kunsten*, para 29.

<sup>20</sup> *FNV Kunsten*, para 30.

and on behalf of whom the trade union negotiated, are in fact ‘false self-employed’, that is to say, service providers in a situation comparable to that of employees’.<sup>21</sup> Having laid out the main principles and circumstances under which a person may be classified as a ‘worker’ under EU law,<sup>22</sup> the Court went on to suggest that it was for the referring court to ascertain whether the self-employed service provider musicians were in fact ‘false-self employed’ ‘in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement’,<sup>23</sup> in which case they could benefit from the Albany exception.

Contrasting *Albany*, *Pavlov*, and *FNV Kunsten*, it is possible to identify three key principles in the Court’s analysis and approach. Firstly, it clear that collective agreements are subject to EU competition law and can only be exempted from it or - to use the evocative expression used by AG Jacobs in *Albany*<sup>24</sup> – receive a ‘limited antitrust immunity’, in specific circumstances. There is not, in other words, a positive ‘right’ for workers and employers’ associations to enter into collective agreements, the way for instance it would be understood in some continental legal systems, such as the German one, where such a right stems from the ‘supremacy of a fundamental right to bargain collectively’.<sup>25</sup> The Court judgment in *Albany* is admittedly less explicit about this approach than AG Jacobs Opinion is. But there is no denying that the Court will not apply standard competition law rules only when the ‘nature and purpose of the agreement ... justify its exclusion from the scope of Article

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<sup>21</sup> *FNV Kunsten*, para 31.

<sup>22</sup> *FNV Kunsten*, paras 33-36.

<sup>23</sup> *FNV Kunsten*, para 40.

<sup>24</sup> *Albany* Opinion, para 183.

<sup>25</sup> *Albany* Opinion, para 110.

[101(1)] of the Treaty’,<sup>26</sup> by reason of its nature and purpose. The purpose has to be that they seek ‘to improve conditions of work and employment’.<sup>27</sup>

Secondly, it is equally clear that the *Albany* ‘exclusion ... cannot be applied to an agreement which ... is not concluded in the context of collective bargaining between employers and employees’<sup>28</sup> as the Treaties do not contain any provisions ‘encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions’.<sup>29</sup> This qualification essentially goes to narrow down the ‘nature’ of collective bargaining to agreements concluded between employers and employees, since if the members represented by the union are self-employed, then the union will be seen as acting as an ‘association of undertakings’<sup>30</sup> and, therefore, the collective agreement concluded for the benefit of such ‘undertakings’ ‘cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU’.<sup>31</sup> So the ‘binary divide’ presiding over the fault lines between collective bargaining and EU competition law is not so much, and certainly not only, that between employment and self-employment, as that between dependent work and ‘undertakings’, displaying a far more polarised structuring of the labour market than the one labour lawyers are accustomed to.

Thirdly, and perhaps equally crucially, the Court is prepared to apply the *Albany* exclusion when the self-employed workers or, shall we say, ‘the

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<sup>26</sup> *Albany*, para 61.

<sup>27</sup> *Albany*, 59. Presumably, collective agreements that have a different purpose would not be covered by the exemption.

<sup>28</sup> *Pavlov*, para 68.

<sup>29</sup> *Pavlov*, 69.

<sup>30</sup> *FNV Kunsten*, para 28.

<sup>31</sup> *FNV Kunsten*, para 30.



undertakings’ covered by the collective agreement are, in its view and in the view of the referring court, ‘false self-employed’. The Court is open to this prospect on the basis that its established jurisprudence accepts that ‘a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal’,<sup>32</sup> and that in the case of *Allonby* the it had already held 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 ... if his independence is merely notional, thereby disguising an employment relationship’.<sup>33</sup> What is equally clear, however, is that unions concluding collective agreements on behalf of members that are self-employed are not excluded from the whim of EU Competition Law, as these workers are not recognised any bargaining rights by the Treaties and, according to the Court, are better understood and conceptualised as ‘undertakings’.

To sum up, according to the CJEU, the ability of self-employed workers to receive union representation for the purposes of collective bargaining processes aiming at improving their terms and conditions of employment flounders on three main obstacles: the absence of a rights based approach in respect of protecting collective bargaining either as a constitutional or as a fundamental right; the alleged absence from the Treaties of a right to bargain collectively for workers that are not employees; the very strict binary divide between dependent workers on the one hand and self-employed service providers, on the other, with the latter category being invariably classified as ‘undertakings’. The only apparent concession the Court is willing to make is for some false self-employed to be reclassified

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<sup>32</sup> *FNV Kunsten*, para 33, with an explicit reference to its judgment in Case C-217/05

<sup>33</sup> Case C256/01, *Allonby*, para 71, recalled in para 35 of *FNV Kunsten*.

as workers under its *Allonby* doctrine, and in this sense it may well be arguable, as we did in the introductory paragraph of this section, that *FNV Kunsten* seemingly offers a compromise, or a synthesis between the *Albany* and *Pavlov* approaches. However, as we are about to contend in the following section, it also reinforces that antithesis, and the crude dichotomy between subordination and business related economic activity.

#### 4. Collective representation and collective bargaining rights of self-employed workers – a supranational perspective.

The two authors of this article, both jointly and individually, have devoted a considerable amount of their research to the critical understanding of the binary divide between employment and self-employment. The regression of this divide to one between subordinate work on the one hand and business activity on the other is, unsurprisingly, of considerable concern to us. This new divide would inevitably have the effect of depriving a large segment of working people of their rights to collective representation and collective bargaining in a way that is inconsistent with the normative development – let alone the normative foundations - of labour law.

In terms of labour law's normative development, it may be interesting to reflect upon the on-going dispute affecting the Irish CTU (ICTU) and the Irish Government (and in particular the Competition Authority of Ireland) in respect of the attempts by various unions (Equity and the NUJ) representing self-employed/freelance professionals to set collectively agreed terms and conditions of pay with a number of national and regional employers in the media industry. In 2004, the Competition Authority went as far as declaring unlawful and collective agreement

between Equity/SITP and the Institute of Advertising Practitioners,<sup>34</sup> on the ground ‘that self-employed actors are undertakings and that Equity is an association of undertakings when it acts on behalf of self-employed actors’ and as such subject to national competition law, rather than covered by the scope of the Industrial Relations Act. The Irish Government, having initially agreed to amend the Irish Competition Act to exclude freelance journalists, session musicians and voice-over actors from its coverage, has hitherto systematically refused to introduce an exclusion and motivated its stance by reference to EU competition law (and EU/IMF Bailout) requirements. These disputes have reached the ILO’s CEACR, that, since 2009, has systematically requested the Irish Government to comply with its obligations under Convention C-98.<sup>35</sup> In its observations of 2015, as published in the 2016 ILC Session, it went as far as stating explicitly that

‘Article 4 of the Convention establishes the principle of free and voluntary collective bargaining and the autonomy of the bargaining parties with respect to all workers and employers covered by the Convention. As regards the self-employed, the Committee recalls, in its 2012 General Survey on the fundamental Conventions, paragraph 209, that the right to collective bargaining should also cover organizations representing the self-employed’.<sup>36</sup>

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<sup>34</sup> [http://www.tca.ie/images/uploaded/documents/e\\_04\\_002%20Actors%20Fees.pdf](http://www.tca.ie/images/uploaded/documents/e_04_002%20Actors%20Fees.pdf)

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[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101\\_COMMENT\\_ID:3082151](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3082151) and

[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3082151](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3082151)

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[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101\\_COMMENT\\_ID:3082151](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3082151)

The dispute has recently culminated in a Complaint being lodged before the European Committee for Social Rights (ECSR) by the ICTU.<sup>37</sup> The complaint persuasively argues that ‘self-employed workers who are not sole-traders in business on their own account should not be regarded as business undertakings but as workers engaged under a different form of contract’.<sup>38</sup> However it also added that ‘Such an analysis would not preclude the application of Article 101 to sole-traders who are genuinely carrying on a business of their own without subordination to the individual customer or client’.<sup>39</sup> This qualification is of course tactically important, given the EU’s established jurisprudence in *Pavlov* and *FNV Kunsten*. But it may be adding an additional restrictive jurisprudential gloss to the seemingly broader and more universalistic approach taken by other international bodies, for instance the ILO Committee on Freedom of Association, that expressly require Members states to

‘hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that *workers who are self-employed* could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including *by the means of collective bargaining* [and] in consultation with the social partners concerned, to identify the particularities of *self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers*, if appropriate’<sup>40</sup>

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<sup>37</sup> Irish Congress of Trade Unions v. Ireland, Complaint No 123/2016, 10 October 2016.

<sup>38</sup> Para 133, page 55.

<sup>39</sup> Para 133, pp 55-56.

<sup>40</sup> ILO Committee on Freedom of Association (2012) Report No. 363, Case 2602, para 461. See further in the same report the recommendations in paras 508 and 1085-1087. Emphasis added.

There is undoubtedly a genuine case to be made for encouraging bodies such as the ECSR to develop a line of interpretative precedents that superimposes an autonomous worker definition on work relations that national authorities may have classified as business undertakings, genuinely self-employed, or sui generis relations that fall outside the scope of national labour law systems. But, arguably, it may be equally important to aspire to the development of more universalistic approaches in respect of the personal scope of application of particular fundamental labour rights, that ought to be enjoyed by all workers, including those offering personal work or services without a link of subordination to individual customers or clients. This is particularly so when, as in the case of freedom of association and collective bargaining, bodies such as the ILO CEACR and the ILO CFA have consistently argued that ‘workers who are self-employed [should] fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining’.<sup>41</sup>

The ECSR has notably already extended the scope of application of some of the Charter’s provision beyond the traditional binary divide between employment and self-employment. For instance, according to the Committee, ‘for the purposes of Article 3§1 of the Charter, all workers, including non-employees, must be covered by health and safety at work regulations.... . . . [The European Committee on Social Rights] has consistently maintained this interpretation, on the grounds that employed and non-employed workers are normally exposed to the same risks in this area’.<sup>42</sup> This is a fertile line of reasoning that ought to be deployed to

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<sup>41</sup> Ibid.

<sup>42</sup> European Committee of Social Rights, Conclusions XVI-2 (Austria), (Strasbourg, 2005), 11.

other risks inherent to all work relations and to various other areas of employment protection legislation that seek to eliminate or redistribute such risks in a more equitable way.

#### 5. Collective bargaining rights and the Labour v Capital divide in 21<sup>st</sup> century personal work relations.

In the previous section it was argued that collective bargaining rights ought to be extended across the binary divide and so that they would be enjoyed by employed and self-employed workers alike. This suggestion was developed on the basis of a critique of the rather crude and, in our view, unprincipled distinction between worker and undertaking developed by the CJEU, and of the certainly more universalistic aspirations of other international interpretative bodies that clearly seek to expand the scope of application of at least some labour rights, including collective bargaining, beyond employment. We noted, for instance, that the ILO CFA is willing to recognise such rights even to self-employed persons such as self-employed heavy goods vehicle drivers that, according to national authorities, ‘have the ownership of the vehicles, work independently without specific supervision and oversight by the company and bear overall costs incurred on the job’,<sup>43</sup> and many would therefore perceive as entrepreneurs, endowed with their own capital, and often providing their services to multiple clients or customers. Can an extension of labour rights, even fundamental labour rights such as freedom of association and collective bargaining, really be argued and justified in respect of these subjects?

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<sup>43</sup> ILO Committee on Freedom of Association (2012) Report No. 363, Case 2602, para 449.

In other, jointly written work, we have argued that labour rights ought to be guaranteed across a broader spectrum of ‘personal work relations’.<sup>44</sup> In an attempt to redraw the scope of application of labour law in a more principled and just way, we sought to trace its limits by reference to the idea of personality. In this context we noted that our concept of personality (and of personal work relations broadly) ‘goes to the exclusion of those service providers who are not operating mainly and *predominantly* on the basis of their personal work, but rather *primarily* through their ability to organize other factors of production (and often the factors of production of others), labour and capital in particular. The ability to do so, we believe, makes the person akin to an employer or a commercial entrepreneur, or both, even where some degree of personal work may be present in the actual activity performed’.<sup>45</sup>

We remain of the view, expressed already in 2011, that labour law should remain committed to protecting workers whose ‘personal work overwhelmingly shapes the service provided, over and above the amount of capital that he or she may be availing herself of to assist him or her, which ought to be marginal and ancillary’.<sup>46</sup> But we feel we ought to clarify the extent to which, in modern day work arrangements, capital can often remain marginal or ancillary to the provision of labour even when it is of essence to the personal work or service provided. We endeavour to do so by reference to the case of the many workers making a living in the so-called collaborative or gig-economy,<sup>47</sup> often relying on assets and

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<sup>44</sup> Freedland Kountouris 2011.

<sup>45</sup> Freedland Kountouris 2011, p 376.

<sup>46</sup> Ibid.

<sup>47</sup> V. De Strefano, ‘The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig Economy”’ (2016) CLLPJ.; J. Prassl and M. Risak, ‘Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork’ (2016) CLLPJ, 619.

other forms of capital that are hardly negligible and many could see as not exactly marginal.

The recent judgment by the London Employment Tribunal in *Aslam and Farrar v Uber*<sup>48</sup> helpfully reminds us of the considerable capital investment required by drivers seeking to provide their services through the company Uber. ‘The driver supplies the vehicle’.<sup>49</sup> The driver is also responsible for all costs incidental to owning and running the vehicle, including fuel, repairs, maintenance, MOT inspections, road tax and insurance’.<sup>50</sup> Drivers who own smartphones have free access to the App. Those who do not may hire one from [Uber]’.<sup>51</sup> Such levels of capital investment on the part of a driver have been typically understood as, in and of themselves, pointing away from employment and towards a contract of carriage performed by an independent contractor.<sup>52</sup> Typically, the ‘ownership of the assets’ is a key factor that will frustrate the successful deployment of a number of key ‘employment status’ tests and indicators, for instance the business integration test often in conjunction with the economic reality test, and often result in an assumption that a the driver-owner is subject to little or no control on the part of the putative employer.<sup>53</sup>

It is our view that it is possible and useful to offer a different perspective on this type of, seemingly capital intensive, personal work relations by reference to two important points. The first point is that an analysis of the nature of a work or other economic relation *in abstracto* and when the

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<sup>48</sup> *Aslam and Farrar v Uber B.V.*, Case No 2202550/2015 of 28 October 2016.

<sup>49</sup> *Aslam v Uber*, para 44.

<sup>50</sup> Para 45.

<sup>51</sup> Para 46.

<sup>52</sup> The classic example of this approach being that taken in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 QB 497 at 525-526.

<sup>53</sup> *Ibid.* See also the cases cited in *Aslam v Uber* esp at paras 81-82.



parties of the relationship are not engaging in the actual activity being assessed is, to say the least, an artificial and unproductive exercise. So for instance, it is artificial and unproductive to pass judgment on the status of a ‘driver owner’ unless that driver is actually performing the service on behalf or for a particular party and in furtherance to a particular arrangement. *In abstracto*, the owner of a taxi, or goods vehicle, or other similar substantial asset is almost by definition bound to be perceived as a small entrepreneur, or an undertaking, and not a personal work or service provider, relying on considerable assets, or on assets of considerable value. But when the various parties to an arrangement *actually* engage through that complex set of contractual and non-contractual nexuses and relations that underpin the functioning of the Uber model, in other words ‘when the App is switched on, the legal analysis is, we think, different’.<sup>54</sup>

When the App is switched on - and this is our second point - when the owner-driver is *actually* performing her or his service then, in our view, the personal nature of the work relationship comes through very neatly indeed. Each particular ride, each particular ‘driving service’ or series of services, is manifestly predominantly characterised by the provision of personal work rather than by the availability of capital assets and their being supplied to third parties. Capital assets are of course not irrelevant, but they are ancillary to the provision of the service and, overall, quite marginal, even considering additional capital costs such as fuel, asset depreciation, insurance, and servicing. At the end of the working day, the driver will have received payments that, if broken down, overwhelmingly derive from the units of personal work and labour provided rather than from the fraction of capital deployed or consumed for and in the course of the performance of the service in that particular day. The driver’s

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<sup>54</sup> *Aslam v Uber*, para 86.

contribution to the service reveals itself as being, mainly, one of personal work, rather than capital. The driver is thus performing his work or services under a personal work relation, and not as a business undertaking.

## 6. Conclusions

The present article has largely concentrated on the extent to which self-employed workers may be entitled to ‘collective labour rights’, and in particular to the right to bargain collectively. We began our enquiry by arguing for a more inclusive normative understanding of collective labour law as essentially part of or continuous with the embodiment of fundamental claims to freedom of association and democratic representation claims in the general political constitution.

There is a generalised understanding, with regard to collective labour law in the UK that the ‘worker’ definition contained in TULRCA s. 296 does sustain quite an inclusive concept of the worker which embraces a broad range of individuals, including self-employed workers, who contract to provide personal services, except for those who do so as a professional to a client. Unlike the ‘worker’ definition in the individual rights context of the National Minimum Wage Act, it does not go on to exclude those who provide their services as a business to a customer. We noted that this slightly broader scope is sustained by a careful reading of a number of international instruments, including Recommendation R-198 and Conventions C-87 and C-98; but this approach is clearly rejected by EU competition law, which tends to regard non-subordinate workers engaging in collective relations as undertakings potentially acting in restraint of trade, without regard to the question of whether they may be

acting as professionals or businesses. By contrast, the ILO supervisory bodies seem to us to suggest that self-employed workers ought to be entitled to collective bargaining rights, without regard to whether they are acting as professionals to clients or businesses to customers. We submit that this more expansive approach accords better with the inclusive normative framework for which we have argued. This approach is clearly hard to reconcile with the more restrictive approaches which we have encountered, in the course of this article in various areas of UK domestic<sup>55</sup> and European law.

Our more inclusive normative framework has its roots in our earlier work which has been developed around the concept of personal work relations and their legal regulation. From that starting point, section 5 explored the extent to which it may be justifiable to leave outside the scope of application of collective labour law such personal work relations as are accompanied by a seemingly substantive asset and capital contribution, as is often the case in many of the work relations prevailing in the so-called collaborative economy. We concluded that for most of these relations, the ‘slices’ of capital necessary for the actual provision of each service are such as to appear marginal and ancillary to the element of personal work that overwhelmingly shapes the provision itself.

Other articles in this symposium have in various ways pursued Bob Simpson’s special interest in collective labour law. This one has sought to follow that pre-occupation into an aspect of labour/employment law which is all too readily perceived as a purely individual one, namely the question of its ‘personal’ or relational scope. This represents a leap into rather unfamiliar territory, in which the explorer might easily feel rather

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<sup>55</sup> A further recent instance is to be found in *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209.

lonely and misunderstood. Arguments for an approach to personal scope which is specially inclusive by reference to collective labour rights are apt to seem out of place or even counter-intuitive in a jurisprudence of personal scope which has primarily been developed outside the zone of collective labour law and moreover with a considerable insouciance with regard to collective labour law. It is unlikely that our arguments will have succeeded in countering that insouciance, but we hope that they may have placed the questions of freedom of association, freedom to take industrial action, and rights to collective bargaining, very firmly on the table of the personal scope discussion. This would seem to be a minimal and we hope compelling normative claim in a period when labour/employment law faces an intense struggle to adapt itself to the great turn towards 'flexible', precarious, and often deceptively autonomous patterns of personal work contract or personal work relation.