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Protecting Casual Workers in British Labour Law: Employment Status and Beyond

1. *Introduction*

The growth of "atypical" forms of work has been one of the defining features of the UK labour market over recent decades, and regulating these evolving working arrangements represents an important challenge for labour law. There is now a considerable body of literature examining the legal treatment of these various atypical work relationships[1], which include fixed-term, part-time and agency workers[2], work performed via personal service companies[3], and casual forms of work. This article focuses on the regulation of this latter category of casual work and argues that the treatment of individ-

[1] See generally, Collins H., *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, in *OJLS*, 1990, p. 353; Fredman, *Labour Law in Flux: The Changing Composition of the Workforce*, in *ILJ*, 1997, p. 26; Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, in *OSLJ*, 2006, 44, p. 609; Prassl, Albin, *Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion*, in Freedland *et al.* (eds), *The Contract of Employment*, Oxford University Press, 2016.

[2] Davies, *The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity*, in *ELLJ*, 2010, 1, p. 307.

[3] Ford M., *The Fissured Worker: Personal Service Companies and Employment Rights*, in *ILJ*, 2020, 49, p. 35.

uals' working on a casual basis represents an ongoing and unresolved problem for UK labour law. The failure to adequately regulate casual work is a serious lacuna that has not been addressed by recent developments in common law or statute and requires the attention of the legislature. We further argue that in addressing the issue of casual work, the focus needs to move beyond the issue of workers' employment status and entitlement to existing rights to the question of what additional substantive rights are needed to address the specific vulnerabilities and harms faced by this group.

The article proceeds as follows. Section two briefly sets out the forms and prevalence of casual work in the UK, and its negative impacts for workers. Section three then considers the treatment of casual workers under the orthodox rules of UK employment law. It identifies two distinct failures to adequately regulate casual work, relating to the *protective scope* (i.e., to whom rights apply) and *substantive content* of statutory employment rights (i.e., what rights are actually available). While the question of protective scope and the employment status of casual workers has rightly received much attention, the matter of what substantive rights and protections should be available to this group of precarious workers is equally important but has been comparatively neglected.

Sections four and five then assess the extent to which developments in common law and legislation have advanced the position of casual workers from the orthodox approach. We argue that although the courts have adopted new and innovative approaches which should go some way to extending the *scope* of employment rights to casual workers, they are unable to fashion the *substantive* rights needed to address the risks and harms of casual work. Legislative action is therefore needed to provide this protection. However, the limited statutory interventions that have been made to regulate casual work fail to address either the problem of labour law's scope or substantive content. Nor is there any prospect of further significant reforms under the current Conservative Government. We therefore conclude that more radical and targeted statutory measures are required, and that identifying and introducing new regulatory frameworks to secure decent conditions for casual workers should be a priority for any incoming Labour Government.

2. *Casual work in the UK*

Although casualised forms of work are far from a new phenomenon in the UK's labour market, they have become more politically salient in recent years due to the rise of on-demand and zero hours contracting, and more recently the gig-economy and platform work. All of which have been the subject of extensive scholarly and public debate. However, UK law does not contain any distinct category of "casual work". Rather, all work is classed as performed by an employee, worker, or self-employed individual with different statutory rights attaching to each status. Moreover, as we discuss below, it is at least theoretically possible for casual work to fall into any of these categories.

The label "casual work" therefore lacks any legal content in the UK. Instead, it is an informal term that captures working arrangements where there is no obligation on the employer to offer guaranteed amounts of work or on the employee to make themselves available to perform work. Casual working relationships therefore involve individuals working "on demand", in contrast with traditional employment relationships where there are more stable and ongoing commitments for the provision and performance of work[4]. This understanding of casual work encompasses a wide variety of working arrangement in the UK.

Most notably casual work includes individuals on "zero hours contracts" (ZHCs), who lack any guaranteed hours or promises of future work and are offered work by the company on a (supposedly) *ad hoc* basis. Despite often being thought of as a paradigmatic example of casual work, ZHC arrangements are in fact frequently embodied in formalised written agreements and long term in nature. They nevertheless purport to be "casual" arrangements because they lack any obligation for either party to offer or perform work. In addition to ZHCs, casual work includes work performed on a sporadic, or even one-off, basis where the individual has no overarching agreement in place. Companies often rely on a pool of casual workers that are not guaranteed to be offered any work but who can be called upon as and when additional labour is needed to meet business demand. While this practice is particularly common in the retail, service and construction sectors it exists across all industries. Individuals may similarly be engaged on a casual and *ad*

[4] EUROFOUND, *New Forms of Employment*, in *Publications Office of the European Union*, 2015.

hoc basis to perform domestic work for households such as babysitting, cleaning and gardening.

The category of casual work will also often overlap with other forms of "atypical" work. Individuals working via online platforms, for instance, will generally be casual workers because they lack any guarantee that work will be provided to them, or commitment to continue performing work on/for the platform in future[5]. Other types of atypical work, such as agency work, homeworkers, and those contracting through personal service companies, may be working on either a casual basis or have stable ongoing commitments to perform work.

Casual work represents a small, but still numerically sizeable, portion of the UK labour market. According to the Labour Force Survey conducted by the Office for National Statistics 3.6% of the workforce are on zero hours contracts, amounting to just under 1.2 million people[6]. This represents a more than fivefold increase since the start of the millennium[7], but may well still understate the true number of these arrangements[8]. The ONS also reports there are 770,000 "on call" workers in the UK[9], although it is not clear how many of these are casualised rather than having standard employment contracts, as well as 300,000 temporary casual workers, and over 200,000 temporary agency workers[10]. In addition, a significant proportion of casual work in the UK now consists of individuals performing work on a casual basis via digital platforms. A 2018 study by the Department for Business, Energy and Industrial Strategy suggested around 2.8 million people had worked in the

[5] For discussion of platform workers as zero hours contractors see ROSIN, *The Right of a Platform Worker to Decide Whether and When to Work: An Obstacle to Their Employee Status?*, in *ELLJ,* 2022, 13, p. 530.

[6] ONS, *People in Employment on Zero Hours Contracts*, 2023, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/emp17peopleinemploymentonzerohourscontracts.

[7] *Ibid*.

[8] The ONS Business Survey put the number at 1.8 million in 2018, representing 6% of all contracts for work, ONS, *Contracts That Do Not Guarantee a Minimum Number of Hours*, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018, 2018.

[9] ONS, *People in Employment on Zero Hours Contracts*, n. 6.

[10] ONS, *Temporary Employees*, 2007, available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/temporaryemployeesemp07.

gig-economy during the previous year[11]. This number has likely increased, however, as more recent research conducted by Trade Union Congress indicated that around 4.4 million people were working on platforms on a weekly basis[12].

Casual work exists throughout the UK labour market, and in both public and private sectors, but is especially prevalent in certain industries and demographic groups. The health and social care, and accommodation and food industries, for example, together account for almost half of all ZHCs[13]. People working in elementary occupations are much more likely to have zero hour contracts than professionals or senior managers[14]. There are also age, gendered and racial dimensions to the distribution of casual work in the UK. Those between the age of 16 and 24 are more than four times as likely as any other group to work under a zero hour contract[15]. A significantly higher proportion of female workers also have ZHCs (4.4%) compared to male (2.9%), with this gap widening in recent years[16], and ethnic minority workers are significantly more likely to be in casual or insecure work[17].

There is nothing new about the presence of casual work in the UK labour market[18]. Indeed, the model of stable and long-term employment is contingent on a 20th Century industrial model and series of assumptions that increasingly no longer hold true[19]. In some sense, therefore, the growth of

[11] Department for Business, Energy and Industrial Strategy, *The Characteristics of Those in the Gig Economy*, 2018, available at https://assets.publishing.service.gov.uk/media/5aa69800e5274a3e391e38fa/The_characteristics_of_those_in_the_gig_economy.pdff.

[12] TDC, *Seven ways platform workers are fighting back*, 2021, available at https://www.tuc.org.uk/sites/default/files/2021-11/Platform%20essays%20with%20polling%20data.pdf.

[13] ONS, *People in Employment on Zero Hours Contracts* (n 6). The data here is limited to zero hours contracts as the ONS does not provide demographic breakdowns for other forms of casual work. See also Adams A., Prassl, *Zero-Hours Work in the United Kingdom*, in *Conditions of Work and Employment Series*, ILO, 2018, n. 101.

[14] *Ibid*.

[15] *Ibid*.

[16] *Ibid*.

[17] Trade Union Congress, *Insecure Work in 2023*, 2023.

[18] Fredman, *Labour Law in Flux*, cit., p.1.

[19] D'Antona M., *Labour Law at Century's End: An Identity Crisis*, in Conaghan, Fischl, Klare (eds), *Labour law in an era of globalization: transformative practices and possibilities*, Oxford University Press, 2004; Fudge, Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, in Fudge, Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, Hart, 2006; Arthurs, *Labour Law After Labour*, in Davidov, Langille, *The Idea of Labour Law*, Oxford University Press, 2011.

casual work can be seen as a return to earlier labour market conditions. However, it does seem clear that casual work has increased in the UK and other developed economies over the past decades, and that standard employment relationships have often been replaced with more casual and precarious arrangements[20]. This is part of a broader trend of labour market fragmentation and fissuring[21], but the increase in casual work has also been facilitated by new technologies that dramatically reduce the transaction costs that have historically incentivised employers to contract for labour on an ongoing basis within the firm[22]. Employers can now more easily adopt casual working arrangements because they have access to systems and algorithmic tools that accurately forecast business needs and match it with contracted labour, and that radically cut the costs of recruiting and deploying casual workers at short notice.

Casual work allows employers to avoid offering guaranteed hours to workers and contract for the minimum amount of labour that is needed to match business demand. This temporal and numerical flexibility clearly has potential cost benefits for employers. There are also some potential downsides for employers, however, such as decreased productivity and increased recruitment and training costs[23], as well as the risk (in tight labour market conditions at least) that there may not be an adequate supply of casual labour available to employers when needed. Despite this, casual work is regarded as an attractive option by UK employers, who view flexibility as vital for their economic competitiveness[24]. Casual arrangements might also sometimes benefit workers, where they are not reliant on stable work to meet their basic needs or do not want to commit to more traditional employment. Over a quarter of ZHC workers in the UK are in full time education, for example, and the

[20] ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects*, 2016; Farina, Green, McVicar, *Zero Hours Contracts and Their Growth*, in *BJIR*, 2020, 58, p. 507.

[21] Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, in OJLS, 1990, 10, 3, pp. 353-380; David Weil, *The Fissured Workplace. Why Work Became So Bad for so Many and What Can Be Done to Improve It*, Harvard University Press, 2014.

[22] Coase, *The Nature of the Firm*, in *Economica*, 1937, n. 4, p. 386.

[23] For an overview of the impacts of casual work on businesses see Eurofound, *Casual Work: Characteristics and Implications*, 2019, pp. 25-26. Kamalahmadi, Q. Yu, Y.P. Zhou, *Call to Duty: Just-in-Time Scheduling in a Restaurant Chain*, in *MS*, 2021, 67, 11, p. 6751 ff.

[24] Wood, *Flexible Scheduling, Degradation of Job Quality and Barriers to Collective Voice*, in *HR*, 2016, 69, p. 1989.

flexibility of casual work may help these individuals balance work with their studies[25].

More frequently, however, there are serious risks and harms arising from casual work. Most obvious is instability workers' experience over their time and income due to the unpredictable and fluctuating nature of casual work. The problem is well illustrated by TUC research, which found that 84 per cent of zero hours workers had been offered work with less than 24 hours' notice, and 69 per cent had had work cancelled at less than 24 hours notice[26]. This "just in time" approach to scheduling makes it impossible for workers to make plans and live their lives autonomously: how can someone commit to a mortgage, starting a family, or even smaller day-to-day projects, with this degree of uncertainty over their time and income? Employers' absolute discretion over the amount of work they offer to casual workers also creates an additional means of controlling them, thus heightening their level of subordination. This "flexible despotism"[27], together with the uncertainty and instability inherent in casual work, creates serious psychosocial risks to workers' wellbeing and health, as well as to their family and social relationships[28].

There are also less direct negative effects of casual work. These arrangements tend to have worse conditions than those in standard employment[29], both because casual work is concentrated in low paid sectors and because it is more difficult for casual workers to act collectively[30]. More broadly, casual work disrupts the equitable balance of interests that labour law attempts to strike, as it shifts the economic risk of business fluctuations from capital to workers[31].

[25] ONS, *People in Employment on Zero Hours Contracts*, n. 6.

[26] TUC, *Jobs and recovery monitor - Insecure work*, 11 July 2021.

[27] Wood, *Despotism on Demand: How Power Operates in the Flexible Workplace*, Corner University Press, 2020.

[28] Bender, Theodossiou, *The Unintended Consequences of Flexicurity: The Health Consequences of Flexible Employment*, in *RIW*, 2018, 64, p. 777; Henly, Lambert, *Unpredictable Work Timing in Retail Jobs: Implications for Employee Work-Life Conflict*, in *Ilr Review*, 2014, 67, p. 986; Eurofound, *Casual Work*, cit.

[29] Eurofound, *Casual Work,* cit. One in seven people living in destitution in the UK are in casual or some other form of insecure work, Fitzpatrick *et al.*, *Destitution in the UK 2020*, in *JRF*, 2020.

[30] Trade Union Congress, *Living on the Edge: Experiencing Workplace Insecurity in the UK*, 2018; Eurofound, *Casual Work,* cit., p.6.

[31] Freedland, Prassl, Adams, *Zero-Hours Contracts in the United Kingdom: Regulating Casual Work, or Legitimating Precarity?*, in *University of Oxford Legal Research Paper Series* 19, 2015, n. 00.

Further societal harms include reduced economic performance[32], and the widening of inequalities faced by young, female and ethnic minority workers who are overrepresented in casual worker[33].

In sum, casual workers face distinctive risks and vulnerabilities in addition to those shared with other groups of workers. These acutely precarious arrangements result in social exclusion for workers[34], and undermine the values of stability, dignity, and non-commodification that labour law seeks to embody[35]. It is therefore wrong to view them as a "win-win" situation for workers and employers[36]: unless regulated appropriately casual work will have extensive adverse effects for both workers and society. The goal of labour law must therefore be to regulate casual work in a manner that counteracts its risks and provides secure and decent work to those who want and need it. The remainder of this article assesses the extent to which UK law achieves this.

3. *Orthodox position of casual workers: a failure to protect*

Unlike some other jurisdictions UK labour law contains no specific legal category or regulatory regime for casual and occasional work, such as a voucher payment scheme for these arrangements[37]. Nor are there any specific legal restrictions on when or how casual work arrangements can be used by employers, meaning it is entirely open to them to run their business using only casualised forms of labour should they choose, rather than having any standard employees who have guaranteed hours of work. In the absence of any specific legal frameworks these working relationships are governed by the standard rules of labour law, with the employment rights that casual

[32] Due to its negative impacts on productivity and spending, EUROFOUND, *Casual Work*, cit., p. 6.

[33] See TRADE UNION CONGRESS, *Living on the Edge*, cit., p.7 ; TRADE UNION CONGRESS, *Insecure Work*, cit., p.5.

[34] PRASS, ALBIN, *cit.*, p.1.

[35] FREEDLAND, KOUNTOURIS, *The Legal Construction of Personal Work Relations*, Oxford University Press, 2011, c. 9; SUPIOT, *Governance by Numbers The Making of a Legal Model of Alliance*, Hart, 2017, p. 250.

[36] EUROFOUND, *Casual Work*, cit., p.6.

[37] As is the case, for example, in Italy.

workers are entitled to (broadly) depending on their classification as employees, workers, or self-employed.

Although the focus here is on protection of casual workers by British labour law, the closest equivalent to the voucher schemes that exist in other jurisdictions lies in the field of social security law, in the form of the "Universal Credit" system. Universal Credit is a means-tested benefit that was introduced to replace a wide range of social security payments, and is designed to automatically increase or reduce benefits to take account of any variations in worker income. In theory, the system should therefore benefit casual workers by smoothing over variations in their income resulting from fluctuating hours. This is far from the current reality, however, as universal credit system provides only an extremely low level of benefits, which falls far below what is needed for a decent standard of living[38]. In addition, claimants are required to apply for and accept casual work as a condition of entitlement to the benefit[39]. So rather than protecting casual workers the system forces more people into these precarious arrangements, and may cause people to become trapped in low paid and insecure work. That said, if the level of payments provided through Universal Credit were significantly increased, and the conditionality and sanctioning regime reformed, then the system has the potential to significantly benefit casual workers by providing them with a degree of security and stability over their income.

Turning to labour law, the regulation of casual work depends on the application of standard rules and doctrines regarding the *allocation* and *content* of statutory employment rights. Unfortunately, there are serious shortcomings with both these dimensions under the orthodox approach to casual work. The question of whether casual workers are entitled to statutory employment rights largely turns on their work relationship status[40], with some protections also having qualification periods rather than applying from day one[41]. There were previously two categories of employment status: "employ-

[38] Joseph Rountree Foundation, Trussel Trust, *An Essentials Guarantee: Reforming Universal Credit to Ensure We Can All Afford the Essentials in Hard Times*, 2023.

[39] Dwyer, Wright, *Universal Credit, Ubiquitous Conditionality and Its Implications for Social Citizenship*, in *JPSJ*, 2014, 22, p. 27; Mantouvalou, *Welfare-to-Work, Zero-Hours Contracts and Human Rights*, in *ELLJ*, 2022, 13, p. 431.

[40] We use this term interchangeably with the more common terminology of "employment status".

[41] Such as unfair dismissal and paid maternity leave.

ees" entitled to statutory rights, and self-employed independent contractors who fell outside the scope of employment law. But since 1997 many rights have been extended to an intermediary category of "worker"[42], who are performing work personally other than in the role of running a business[43]. Individuals classified as "workers" are now entitled to basic rights such as the national minimum wage, holiday pay and working time protections, and those related to trade union membership and industrial action. Some important rights remain reserved to "employees", however, such as some maternity and parental rights, and protections of job security provided through minimum notice periods, statutory redundancy pay, and the law of unfair dismissal.

Delineating "workers" from employees is a source of significant complexity in English law. Doctrinally, in English law, a work relationship will be one of employment where it broadly meets the guidance set out in *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance*[44]. In this case, McKenna J identified the three criteria for an employment relationship existing as: a) control; b) mutuality of obligation; and c) no terms of the relationship are inconsistent with the existence of an employment relationship[45]. In the context of "workers", essentially the same criteria are said to apply[46], albeit with a lower "passmark" to determine if a work relationship is one of "worker" status[47]. It is somewhat unclear how such a lower "passmark" can be applied to such questions, creating a risk that the criteria for worker states collapse into those for employee status. For example, it would be difficult to delineate the level of control needed to be a worker, but *not* and employee in any particular work relationship where, on a material level, a meaningful level of control is being exercised by the employer over the person doing work.

[42] Often referred to in short-hand as "limb-b" workers, due to their definition being contained in Employment Rights Act 1996, s 230(3)(b).

[43] Employment Rights Act 1996, s 230(3)(b). There are, however, slight variations in the definition of worker status for the purposes of whistleblowing, equality law, and trade union matters.

[44] 2 QB 497/1968.

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

[46] *Byrne Bros (Formwork) Ltd v Baird*, ICR 667/2002 (EAT).

[47] For a critique of this approach, see: PRASSL, *Who Is a Worker?*, in *LQR*, 2017, n. 133, p. 366.

While much can be said about each of these criteria, the element that creates the greatest difficulty for classifying casual workers as employed is the mutuality of obligation criterion. The case law does not speak with one voice on precisely how mutuality of obligation is characterised, but broadly, it constitutes obligations on the employer to offer/pay for work and a correlative duty upon the putative employee to accept offers of work[48]. Within this, mutuality of obligation can exist as "umbrella" or "global" mutuality, where these obligations exist *between* individual wage-work bargains, or as "simple" mutuality which exists only for the duration of each individual engagement and is more akin to contractual consideration. On an orthodox analysis, the purported lack of ongoing obligations to offer or accept work in casual arrangements means that a casual worker would have great difficulty in establishing that there is a continuous employment relationship with their putative employer. Indeed, the standard contract law view of these arrangements is that they likely lack the mutual promises to constitute an overarching contract of any kind[49], and are instead a series of individual contracts for the performance of work that are entirely independent from each other.

However, the concept of "simple" mutuality of obligation means that casual workers will often have "worker", or even "employee", status for the duration of each *individual engagement*. Provided that there is a commitment to provide work throughout the individual shift or engagement, and the other criteria of control and no contrary contractual terms are satisfied, they may therefore be entitled to statutory employment rights during that period. This means, for example, that a casual worker may be entitled to minimum wage and holiday pay for the duration of each engagement, amongst other things such as a written statement of their conditions. The work relationship status of casual workers during each engagement will depend on their individual circumstances. But casual workers who are integrated into the employers' business and subject to their control in respect of how and when work is performed should generally be classed as workers or employees rather than self-employed. Importantly, however, casual workers who appear to be running their own

[48] *Cotswold Developments Construction Ltd v Williams*, IRLR 181/2006 (EAT).

[49] WYNN, LEIGHTON, *Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract*, *MLR*, 2009, 72, p. 91; COLLINS, *Employment Rights of Casual Workers*, in *ILJ*, 2000, n. 29, p. 73.

business, have significant levels of independence and autonomy, or are free to delegate the work to others as they choose, may be classed as self-employed and excluded from all employment rights[50].

While some, although importantly not all, casual workers are therefore entitled to basic "day one" employment rights their lack of overarching work relationship means they are not protected against employer discrimination between engagements, and that they will be unable to access protections that have qualifying periods of continuous employment. Protection against unfair dismissal, for instance, is available to employees only[51], and in most circumstances only to those continuously engaged for 2 years[52]. As such, even where a casual worker can establish that they are an "employee" for each engagement the absence of continuous employment between engagements will generally prevent them from establishing the necessary continuous service to bring a claim for unfair dismissal[53]. The same is true of statutory rights to paid maternity and parental leave. Moreover, on an orthodox contractual analysis there would be no breach of contract where the employer refuses to offer a casual worker any further hours[54]. By contrast, individuals with an overarching contract of employment would be able to claim for unlawful wage deductions in these circumstances, or could resign and attempt to bring a claim for constructive unfair dismissal. UK law therefore fails to provide any protection for casual workers' security of hours, or against *de facto* terminations by their employers withdrawing work.

The exclusion of casual work from the full array of employment law protections under the orthodox approach is the result of the UK's categories of work relationship status being largely premised upon the individual being in a long-term and bilateral wage-work bargain. This assumption is in turn the product of a "smooth evolution" of the law on employment contracts from the eighteenth-century common law concepts of the master and ser-

[50] *Stringfellows v Quashie*, EWCA Civ 1735/2012 (CA); *R (IWGB) v CAC*, EWHC 3342/2018 (Admin).

[51] S 94 ERA 1996.

[52] S 108 ERA 1996.

[53] For discussion of this problem and the possibility of linking periods of intermittent employment see Davies, *The Contract for Intermittent Employment*, in *ILJ*, 2007, 36, p. 102.

[54] *Western Excavating (ECC) Ltd v Sharp*, ICR 221/1998 (CA) 226; Freedland, Prassl, *Zero Hours - Zero Solutions*, in *Oxford Human Rights Hub*, 22 February 2016. By contrast, in a permanent employment relationship, such a breach could give rise to a constructive unfair dismissal claim.

vant relationship[55]. The master and servant relationship has heavily influenced the "conceptual question as to which apparatus" should be used to organise work relationships[56], and the choice of contract law as the appropriate analytical framework. This narrow paradigm of "employment"[57] on which UK employment law is based goes some way to explain why the legal tests which determine employment, particularly mutuality of obligation, speak to these more traditional conceptualisations of what a formalised work relationship *is*. It is therefore no surprise that work relationships that deviate from that conception, such as causal arrangements, struggle to fit within the still-rigid legal frameworks which take that understanding of work as their central-case.

Furthermore, the centring of traditional models of employment means that even if the problems of rights allocation are overcome the substantive rights and protections contained in UK employment law are not designed to address the specific vulnerabilities and harms faced by casual workers. Working time law, for example, aims at the problem of *overwork* by providing annual leave and rest breaks, but does not address the problem of *underemployment* which is equally pressing for casual workers, for instance by providing rights to minimum or stable hours. Nor is the law well suited to deal with the complex issue of holiday entitlements in genuinely casual work relationships[58]. A right to an hourly minimum wage might similarly be of less immediate interest to casual workers than having a guaranteed weekly income by having a stable number of hours, or a right to payment for cancellation of shifts at short notice.

The standard rules of UK labour law therefore create two key problems for the regulation of casual work[59]. First, the exclusion of casual workers from some, and sometimes all, statutory employment rights. Second, the absence

[55] Otto Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment*, in *LQR*, 1977, 93, p. 508; Freedland, *The Personal Employment Contract*, Oxford University Press, 2003, pp. 36-37.

[56] Prassl, *Autonomous Concepts in Labour Law? The Complexities of the Employing Enterprise Revisited*, in *The Autonomy of Labour Law*, 2015, p. 153

[57] Fredman, *Women at work: the broken promise of flexicurity*, in *ILJ*, 2004, p. 299.

[58] See, for example, the extensive litigation in the recent judgments of *Smith v Pimlico Plumbers*, EWCA Civ 70/2020, ICR 818/2022, or *Harpur Trust v Brazel*, UKSC 21/2022, ICR 1380/2022.

[59] A further important issue not addressed here concerns the effective enforcement of casual workers' rights and protections, something which is also an ongoing problem in the UK.

of rights protecting against the specific risks and harms arising from casual work. Although the first question of employment status has largely dominated scholarly attention, the issue of what substantive rights casual workers should be entitled to is at least as important in ensuring adequate protection[60]. The following sections consider the extent to which developments in the courts and legislature have addressed these two issues and advanced the position of casual workers from the orthodox analysis.

4. *Judicial protection of casual work*

In this section we set out two innovative approaches to the law on employment status that are emerging in the UK courts, and which should extend statutory employment rights to more casual workers. Namely, the purposive and human rights approaches to casual work. These developments go some way to addressing the problem of casual workers entitlement to statutory protections. However, there has been no corresponding judicial development of substantive rights for casual workers, and the courts' ability to fashion such protections is limited. As a result, there continues to be a mismatch between the substantive rights and protections contained in UK law and those needed by casual workers.

4.1. The purposive approach to casual work

The first encouraging development is the emergence of a "purposive approach" to employment status, which will allow supposedly casual workers to be classed as having an overarching employment or worker contract where this reflects the reality of their working arrangement.

In some circumstances it was in fact already possible under the orthodox approach for a tribunal to find an overarching contract despite the employer claiming the work was performed on a casual basis. In the absence of any written contract, for instance, a tribunal could find on the facts that there was an agreement for the ongoing provision and performance of work[61]. Al-

[60] For an example of this type of enquiry in the context of working time law see KATSABIAN, DAVIDOV, *Flexibility, Choice, and Labour Law: The Challenge of on-Demand Platforms*, in *UTLJ*, 2023, 73, p. 348.

[61] *Newnham Farms Ltd v Powell*, All ER (D) 91/2003, EAT.

ternately, where the written agreement was one for casual work, a tribunal could find that it had subsequently been varied, either expressly or impliedly, so that the relationship had "crystallised" into a contract of employment[62]. The latter type of case was rare however, due to the high evidential threshold applied to determine whether the parties had varied the original agreement[63].

However, these earlier decisions could be reconciled with the standard rules of contract law, as they did not necessarily call into question the validity of the original written documentation. This is in stark contrast to the purposive approach developed in recent years, which represents a paradigm shift away from formalistic adherence to orthodox contract law principles, and towards a more relational understanding of employment[64]. One of the landmark developments came in the case of *Autoclenz Ltd v Belcher*[65], where the Supreme Court analysed the nature of the work relationship of car valeters whose written contracts purportedly engaged them as sub-contractors rather than employees. The Court found that the relevant written terms could be disregarded because they did not reflect the parties' true agreement, with Lord Clarke stating that:

" … 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"[66].

As such, the Supreme Court adopted a mode of analysis which took into account the manner in which the work relationship was *performed* to determine what the legal characterisation of the work relationship was. The *Autoclenz* approach is at its core a tool of contractual interpretation, which allows terms to be disregarded as a sham where they do not reflect the reality of the agreement. It is therefore less useful where there are no written terms between the parties to interpret, such as where casual work is fragmented

[62] *St Ives Plymouth Ltd v Mrs D Haggerty*, WL 2148113/2008.

[63] *Accountax Marketing Ltd v Halstead*, UKEAT 2003 n.0313/03/0611.

[64] Atkinson, Dhorajiwala, *The Future of Employment: Purposive Interpretation and the Role of Contract after Uber*, in *MLR*, 2022, 85, p. 787.

[65] UKSC 41/2011; ICR 1157/2011.

[66] *Autoclenz Ltd v Belcher* UKSC 41/2011, ICR 1157/2011.

across numerous employing entities or quasi-employing entities. Nevertheless, it was a welcome decision that allowed supposedly casual workers to more effectively challenge contractual terms that would deny them statutory employment rights where these terms bore limited (if any) true relation to the manner in which the relationship is performed[67]. This includes written terms that would prevent a finding of employment status during the duration of each engagement, such as substitution clauses[68], as well as those denying any overarching employment contract due to a lack of ongoing mutuality of obligations.

The *Autoclenz* principle was further developed in the Supreme Court judgment of *Uber BV v Aslam*[69]. There, the Court was asked to consider the work relationship status of drivers who provided their services through a multilateral contractual relationship with a variety of Uber entities. Specifically, the question was whether the drivers were workers vis-à-vis Uber London Ltd, with which the drivers seemingly had no direct contractual relationship[70]. The Supreme Court concluded that the drivers *did* in fact have a limb-b worker relationship with Uber London. Crucially, in doing so the Court provided further illumination as to the meaning of "purposive" interpretation in this context. It held that the purposive approach looks to the "general purpose" of employment legislation as being to "protect vulnerable workers" in positions of subordination from the variety of wrongs that could occur in the context of a work relationship[71]. Statutory employment rights should therefore be interpreted as being allocated to those working in positions of vulnerability and subordination. The Supreme Court further stated that it would be "inconsistent with the purpose of this legislation" to take the written terms of a work relationship as the starting point for determining whether a worker falls within the definition of a "worker". Instead, an individual's work relationship status must turn on the reality of that relationship, as demonstrated via its performance[72].

[67] Bogg, *Sham Self-Employment in the Supreme Court*, in *ILJ*, 2012, 41, p. 328.

[68] *Pimlico Plumbers Ltd v Smith*, UKSC 29/2018, ICR 1511/2018.

[69] *Uber BV v Aslam* UKSC 5/2021; ICR 657/2021. Formally this case concerned "worker" status, rather than "employee" status, but as we have argued elsewhere, the principles of *Uber* must apply to "employee" status: Atkinson, Dhorajiwala, *The Future of Employment*, cit., p. 14.

[70] *Ibid*.

[71] *Ibid*.

[72] Adams J., Prassl, *Uber BV v Aslam: [W]ork relations … cannot safely be left to contractual*

Bogg and Ford KC described these two dimensions of *Uber* as "statutory" and "contractual" understandings of the *Autoclenz* principle respectively[73]. As we have argued[74], however, these two strands of the *Uber* judgment should be seen as mutually reinforcing elements of a comprehensive purposive approach rather than competing interpretations. The purpose of the relevant employment *legislation* should guide courts in interpreting its relational scope, as embodied by the legal tests and principles applied by the courts to determine status. Whereas the *contractual* question of which category the parties' relationship falls into on the facts involves a more granular assessment of the reality of the relationship (i.e., whether the reality of a particular casual work relationship was consistent with employment or "worker" status). Both aspects are necessary if labour law is to effectively protect those in need of employment rights.

We have yet to see authoritative applications of the *Uber* approach in the employment law field[75], and the interpretive doctrine has not yet fundamentally changed the legal tests applied to determine work relationship status. Nor is the decision wholly unproblematic, as a number of questions are left unresolved regarding the precise meaning of the Supreme Court's approach[76]. Nevertheless, there is cause for optimism that the purposive approach may be valuable for casual workers.

For example, a quarter of those with ZHCs report working "full time" hours[77], and there is plainly scope for these workers to now argue that the reality of their relationship is one of ongoing employment. In these circumstances the frequency and consistency of performance should generally be taken to undermine any contractual assertions of no ongoing obligation to offer work. In our (tentative) view, the approach set out in *Uber* should also

regulation, in *ILJ,* 2022, 51, p. 955. Cf. Atkinson, Dhorajiwala, *IWGB v RooFoods*: *Status, Rights and Substitution*, in *ILJ*, 2019, 48, p. 278 which does not suggest that written terms are *irrelevant* to this assessment.

[73] Bogg Ford QC, *Between statute and contract: who is a worker?*, in *LQR,* 2019, 347, pp. 353-354.

[74] Atkinson, Dhorajiwala, *The Future of Employment*, cit., p. 14.

[75] However, *cf.* the recent Court of Appeal judgment of *HMRC v Atholl House Productions Ltd*, EWCA Civ 501/2021; STC 837/2022, where the Court suggested that *Uber* did not apply to the "employee" concept as applied in relation to employment status for tax purposes.

[76] Adams I., Prassl, *Uber BV v Aslam*: *[W]ork relations … cannot safely be left to contractual regulation*, in *ILJ,* 2022, 51, p. 955.

[77] ONS, *People in Employment on Zero Hours Contracts*, n 6.

provide a powerful tool for other supposedly casual workers in positions of subordination and dependency who are in fact working on an ongoing and relatively stable basis. Such individuals should now be able to argue that their formal contractual documentation misrepresents the reality of their working relationship, and that these individuals should be classed as having an ongoing and overarching employment contract.

The purposive approach will be of less assistance in establishing a casual worker has an overarching employment contract, however, where the reality is that their working arrangement is genuinely of an occasional and *ad hoc* nature, with no legitimate expectation of being offered work in future. In addition to this, the open-ended way the purposive approach was articulated in *Uber* creates a risk of lower tribunals not fully embracing its logical implications for casual workers. Its consequences will therefore only become clear with future litigation.

4.2. The human rights approach to casual work

The second innovation that should help casual workers access statutory employment rights is the emerging "human rights approach" to employment status in the UK[78]. This human rights approach results from the obligation imposed on domestic courts and tribunals by the Human Rights Act 1998 to interpret and apply employment legislation in a manner consistent with the European Convention of Human Rights[79]. Crucially for the law on employment status, this includes the Article 14 right to non-discrimination, and the Strasbourg courts' jurisprudence on Member States' positive obligations to protect workers' Convention rights[80]. Both of which require that domestic employment legislation safeguarding workers' Convention rights must strike a fair and proportionate balance between all the competing rights and interests at stake[81]. The requirement to strike this balance applies

[78] For an extended discussion of the implications of the Human Rights Act 1998 for employment status see Atkinson, *Employment Status and Human Rights at Work: An Emerging Approach*, in *MLR*, 2023, 86, p. 1166.

[79] Human Rights Act 1998, s 3.

[80] As in, for example, *Siliadin v France*, ECHR 545/2005; *Vogt v Germany* EHRR 20/1996; *Barbulescu v Romania*, IRLR 1032/2017; *Demir and Baykara v Turkey*, ECHR 1345/2008.

[81] *Hatton* v *UK* Application, 36022/97; *Redfearn v UK* ECHR 1878/2012; *Gilham v Ministry of Justice*, UKSC 44/2019; *Vining v London Borough of Wandsworth*, EWCA Civ 1092/2017.

to the rules determining workers' *entitlement and access* to domestic protections of Convention rights as well as the substantive content of those rights[82]. Unless it can be justified, therefore, the exclusion of casual workers from domestic employment law frameworks that engage or safeguard Convention rights will breach the ECHR and trigger domestic courts' interpretive obligation under the HRA.

The result of this is that the HRA 1998 requires domestic courts interpret the personal scope of employment legislation to include casual workers unless, and until, their exclusion is shown to be justified as fair and proportionate. This human rights approach must be adopted in the broad range of cases where Convention rights are at stake, including cases involving employment rights relating to trade union membership and industrial action (Article 11), whistleblowing protections (Article 10), working time regulation and rights to maternity and paternity leave (Article 8). The human rights approach must also be adopted in discrimination and dismissal cases where a Convention right is engaged on the facts, such as where a worker has been dismissed or discriminated against because of how they have exercised a Convention right, or the effects are significant enough to engage the Article 8 right to private life[83].

Although still in the early stages of its development, the human rights approach has led to the expansion of statutory employment rights to previously unprotected groups, including collective labour rights for foster carers and parks police officers[84], and whistleblowing protections for judicial office holders[85]. While it has not yet been applied in the context of casual workers, it should similarly make it easier for this group to access statutory employment rights: the effect of the HRA is to create a *de facto* presumption that casual workers must be interpreted as having the status required for protection under the relevant legislation. The key question is then whether this presumption can be displaced by showing that the exclusion of the casual worker can be justified as striking a fair and proportionate balance between the competing rights and interests at stake. This is a question that will need to be resolved through further litigation. But we suggest that the courts

[82] As shown in *Opuz* v *Turkey* Application 33401/02; *Redfearn v UK* 1878/2012.

[83] Collins, *An Emerging Human Right to Protection against Unjustified Dismissal*, in *ILJ*, 2020, 50, p. 36.

[84] *Vining v London Borough of Wandsworth* 1092/2017.

[85] *Gilham v Ministry of Justice* 44/2019.

should be reluctant to identify any legitimate grounds for failing to protect casual workers' Convention rights, or to accept that doing so can be justified by reference to employers' interest in business freedom[86].

4.3. The limits of judicial protection

By empowering courts and tribunals to classify purportedly casual workers as having standard employment contracts, the purposive and human rights approaches might provide them with some additional substantive protections for job security. Casual workers may be able to access protections against dismissals that infringe their Convention rights by arguing the HRA requires them to be classed as employees with an overarching contract. Supposedly casual workers that in fact have an overarching contract under the purposive approach will also have contractual rights to be provided with work on an ongoing basis. A failure by the employer to provide, or pay for, the amount of work that reflects the parties' true agreement could therefore lead to claims for unlawful deduction of wages or unfair dismissal. A failure to give reasonable notice of any changes to these workers' schedules might also amount to a breach of the implied term of trust and confidence that exists in all employment contracts, allowing them to resign and bring a claim for wrongful or unfair dismissal.

However, individuals who genuinely work on an occasional and *ad hoc* basis, with no legitimate expectation or implicit agreement that they will be provided with work in future, will not have an overarching employment contract under even the purposive approach. While they may still be workers or employees for each individual engagement the reality of their relationship is that it is a casual one rather than ongoing employment. As there remains the problem that UK law lacks well-targeted and *sui generis* rights for genuinely casual workers, this group continues to lack protection against the precarity and instability created by their working arrangements. Moreover, the subsidiary role of the courts to Parliament in the field of employment law[87], and the incremental nature of common law development, means they

[86] See Atkinson, Dhorajiwala, *IWGB v RooFoods*: *Status, Rights and Substitution*, in *ILJ*, 2019, 48, p. 278.

[87] Bogg, *Common Law and Statute in the Law of Employment*, in *CLP*, 2016, 69, 1, p. 67; Davies, *The Relationship between Contract of Employment and Statute*, in Freedland *et al.* (eds), *The Contract of Employment*, Oxford University Press, 2016.

are not capable of fashioning the far-reaching new protections needed to counteract the vulnerabilities faced by genuinely casual workers. If this group is to be provided with secure hours and decent working conditions then legislation is the only viable way of achieving this.

5. *Legislative protection of casual work*

Since the 1980s, Government policy in the UK has largely been to regulate the labour market for competitiveness[88]. As part of this, casual and other atypical forms of work have been viewed uncritically, even positively, by both Conservative and Labour Governments[89]. But although there has been no comprehensive regulatory regime introduced to regulate casual work in the UK, there have nevertheless been some recent legislative developments aimed at casual work[90]. As we shall see, however, the practical value of these frameworks for workers is severely limited.

One area where there has been a notable absence of statutory intervention is in respect of casual workers' access and entitlement to employment rights. This is despite the Government commissioned "Taylor Review of Modern Working Practices" identifying employment status as an area in need of reform[91]. Although the Government did hold a consultation on the Taylor Review proposals, it subsequently declined to implement any of its (limited) recommendations on employment status and

[88] DAVIES, FREEDLAND, *Labour Legislation and Public Policy: A Contemporary History*, in *CLJ*, 1993, 53, 2, pp. 397-398; DAVIES, FREEDLAND, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s*, Oxford University Press, 2007.

[89] See for example, BOARD OF TRADE, *Fairness at Work*, 1998, par. 3, pp. 14-15; DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, *Zero Hours Employment Contracts*, 2013.

[90] While not discussed here, it might also be possible for casual workers to leverage or make creative use of statutory frameworks aimed at protecting other groups of workers, such as those regulating part-time and fixed-term work. See ATKINSON, *Zero-Hours Contracts and English Employment Law: Developments and Possibilities*, in *ELLJ*, 2022, p. 347 and pp. 368-71.

[91] TAYLOR *et. al., Good Work; The Taylor Review of Modern Working Practices*, Department for Business, Energy & Industrial Strategy, 2017, p. 62. Moreover, note academic criticism of the inadequacy of even the proposals in the Taylor Review: MCGAUGHEY E., *Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status*, in *ILJ*, 2019, 48, p. 180; BALES, BOGG, NOVITZ, *"Voice" and "Choice" in Modern Working Practices: Problems With the Taylor Review*, in *ILJ*, 2018, 47, p. 46.

has instead merely published non-statutory guidance on the existing law for employers[92].

In terms of substantive rights, the first recent intervention aimed at casual work was a ban on "exclusivity clauses" for zero hours contracts and other low paid workers[93]. The legislation provides that any contractual clause that "prohibits the worker from doing work or performing services under another contract or under any other arrangement", or that requires the employer's consent for doing so, will be unenforceable. Subsequent regulations also protected individuals who have taken on work from another employer in breach of an exclusivity clause against dismissal and victimisation[94]. Although exclusivity clauses are undoubtedly exploitative, this ban "falls drastically short" of being an adequate response to casual work[95]. It addresses an issue that effects only a small minority of casual workers, while ignoring the most pressing problems of casual work[96]. Furthermore, these terms were likely already unenforceable at common law[97].

The second piece of legislation aimed at regulating casual work is the Workers (Predictable Terms and Conditions) Act 2023, which provides a right for employees and workers to request a more stable working pattern. This legislation was initially introduced as a Private Members Bill but passed into law with support from the Government. It is expected to be brought into force in 2024. Under the legislation workers who lack predictability in their work pattern, meaning the hours or periods they are contracted to work, can submit a written request for more stable hours which the employer must treat in a reasonable manner and only refuse where they consider one of six business-related grounds applies[98]. The permitted grounds for refusal

[92] See https://www.gov.uk/government/consultations/employment-status.

[93] Small Business, Enterprise and Employment Act 2015; Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015.

[94] Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2023.

[95] Atkinson, *Zero-Hours Contracts*, cit., p. 20.

[96] Estimates are that under 10% of zero hours workers have such terms in their contracts, Chartered Institute of Personnel and Development, *Zero Hours Contracts: Myths and Reality*, 2013.

[97] Kenner, *Inverting the Flexicurity Paradigm: The United Kingdom and Zero Hours Contracts*, in Ales, Deinert, Kenner (eds), *Core and Contingent Work in the European Union: A Comparative Analysis*, Hart Publishing, 2017, p. 176.

[98] Workers (Predictable Terms and Conditions) Act 2023, s 4. Amending the Employment Rights Act 1996.

include the burden of additional costs, a detrimental effect on ability to meet customer demand, insufficient availability of work, or some other detrimental impact on the employers' business[99]. Casual workers can attempt to use this framework to gain a more stable contract with guaranteed hours or shifts patterns.

The substantive content of this new right is limited, however, and in practice it will not be of much benefit to casual workers. It only applies where individuals have worked for the employer in the month preceding a specified period to be determined by the Secretary of State, which is expected to be set at 26 weeks[100]. The worker will therefore need to have worked for the employer at some point in the month preceding that 26-week period: effectively introducing a qualifying period that they must have been working for the same employer. This also means that it will be difficult for casual workers to access the statutory framework if they sometimes work for the employer on a less than monthly basis, and that employers will be able to avoid the right if they choose by changing their pool of casual workers on a 6 monthly basis.

More fundamentally, a right to *request* stable working conditions is very different to having a *right to* stable working conditions. The statutory framework does not provide for substantive judicial scrutiny of whether the employers' reasons for rejecting requests are reasonable[101], only whether they have decided the request on accurate facts and one of the permitted grounds, or failed to follow the defined statutory procedure for responding to requests[102]. Employers can therefore easily refuse requests on business grounds by stating that they need the flexibility provided by casual work for costs reasons, to meet fluctuating business demand, or because there is insufficient work available for them to offer more stable employment.

As we have seen, successive UK Governments have failed to introduce meaningful protections for casual workers. On the contrary, the limited statu-

[99] Where the worker has ceased to be employed after submitting their request, as will be the case for genuinely casual workers who lack an overarching contract, the employer can also reject the request for the reason that their contract was terminated on reasonable grounds.

[100] As per Department for Business, Energy & Industrial Strategy, "Good Work Plan", 13.

[101] Although rejections of flexible working request may be challenged as directly or indirectly discriminatory, as in *Thompson v Scancrown Ltd*, ET2205199/2019; *Glover v Lacoste UK Ltd* 2023/EAT 4.

[102] Workers (Predictable Terms and Conditions) Act 2023, s 4; Employment Rights Act 1996 as amended, s 80ID.

tory regimes that do exist have the effect of legitimising casual working arrangements with a thin veil of regulation, rather than providing them with security and decent conditions[103]. UK law therefore continues to lack any substantive protections that would counteract and alleviate casual workers' position of precarity and vulnerability; such as rights to a contract with guaranteed hours, to minimum notice periods for scheduling changes, or for compensation for work being cancelled at late notice. This is despite the Low Pay Commission advocating such measures in 2018 in response to the Government's request that it make recommendations on addressing the problem of "one sided flexibility"[104]. Indeed, the current Government's lack of interest in addressing the issue of casual work is demonstrated by its failing to respond to its own 2019 consultation on the Low Pay Commission's proposals[105], and abandoning its commitment to introduce a new Employment Bill implementing the Taylor review[106].

As a result of this inaction, the regulation of casual work in the UK will soon diverge from EU Member States, who are now required to introduce protective measures for casual workers by the Directive on Transparent and Predictable Working Conditions[107]. This includes rights to reasonable notice of working schedules, compensation for work cancelled at short notice, as well as "limitations to the use and duration" of zero hours arrangements or a "rebuttable presumption of the existence of an employment contract" with a minimum number of guaranteed hours[108]. Further legal divergence is also likely to occur in the context of regulating casual work performed via online platforms if and when the draft EU Directive on Platform Work becomes law. Additional substantive protections of casual work are desperately needed in the UK, and designing a new legal framework to tackle the ongoing problem of casual work should be a priority for any incoming Labour Government.

[103] As argued by Freedland *et al* in the context of the exclusivity clause ban, FREEDLAND, PRASSL, ADAMS, *cit.*, p.7.

[104] Low Pay Commission, *Response to Government on "One Sided Flexibility*, in *LPC*, 2018.

[105] See https://www.gov.uk/government/consultations/good-work-plan-one-sided-flexibility-addressing-unfair-flexible-working-practices.

[106] The relevant Minister has stated the Bill is no longer "on the cards", BEIS Select Committee, *Oral evidence: The work of the Business, Energy and Industrial Strategy Department*, HC 13 December 2022 n.529, Q145.

[107] Dir. 2019/1152 on Transparent and Predictable Working Conditions.

[108] *Ibid.*, artt. 10-11.

6. *Conclusion: the future of casual work in the UK*

Despite recent developments in common law and legislation UK law fails to adequately regulate and protect casual work relationships. The application of orthodox employment law doctrines denies rights to many casual workers, either in part or entirely, and fails to provide substantive protections of stable and secure work. While judicial innovations regarding the work relationship status of casual workers are welcome the application of these new approaches to casual work remains uncertain, and there has been insufficient legislative action taken in respect of either the scope or the substantive protections that are available to casual workers. More extensive and targeted statutory intervention is needed to ensure that the flexibility provided by casual work benefits both parties rather than just the employer.

Addressing the longstanding failure to adequately regulate casual work should therefore be a priority issue for any incoming Labour Government[109]. At a minimum this must involve implementing the rights contained in the EU Directive on Transparent Working Conditions, such as minimum notice periods for scheduling changes and compensation for work that is cancelled at late notice. But it should also extend beyond this, and further thought is now needed on how best to protect casual workers in the UK, including those classed as self-employed, and to identify the precise shape that additional reforms should take.

In respect of the problem of rights allocation, the two approaches already developed by the UK courts provide helpful inspiration for further statutory developments. The relational approach taken by the Supreme Court in *Uber* might be strengthened by formally breaking the link between one's contract and entitlement to employment rights, and creating a new unitary and inclusive work relationship status that protects all those performing work personally in positions of subordination and dependency[110]. Or legislation could build on the emerging human rights approach by introducing a re-

[109] Although the Labour party previously committed to create a right for casual workers to be provided with a stable employment contract there are some indications that are now adopting a less ambitious approach, and it not yet clear what their policy position will be heading into the next election. Fisher *et al*, "Labour rows back on workers" rights to blunt Tory "anti-business" claims', Financial Times, 17 August.

[110] See, for example, the proposals in EWING, HENDY, JONES, *Rolling out the Manifesto for Labour Law*, The Institute of Employment Rights, 2018, for a unitary status.

buttable legal presumption that everyone performing work for another has an overarching contract of employment, with any denials of this status needing to be established on a case-by-case basis. In respect of the substantive protections available to casual workers, promising new measures include rights to an employment contract with guaranteed working hours after a certain period of time, a higher minimum wage for workers who lack a stable contract, and extensions of legal rights to act and bargain collectively to self-employed sole traders. Only if action is taken to address the existing failures of UK labour law in respect of both the allocation and substantive content of rights will casual work be adequately protected.

Abstract

The growth of "atypical" forms of work has been one of the defining features of the UK labour market over recent decades, and regulating these evolving working arrangements represents an important challenge for labour law. This article focuses on the treatment of one longstanding form of atypical working arrangement, namely casual or intermittent work in British labour law. It argues that the treatment of individuals working on a casual basis represents an ongoing and unresolved problem, and that the failure to adequately protect casual workers is a serious lacuna that has not been addressed by recent developments in common law or statute and requires the attention of the legislature. In addition, we argue that in addressing the issue of casual work the focus needs to move beyond the issue of employment status and entitlement to existing rights. While undoubtedly important, it is also crucial to answer the question of what additional substantive rights are required to address the specific vulnerabilities and harms faced by casual workers.

Keywords

Casual work, Labour law, Employment law, Employment status.