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TABLE OF CONTENTS

ZERO HOUR CONTRACTS

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LESS THAN ZERO? THE FRAGMENTATION OF WORKER PROTECTION IN UK EMPLOYMENT LAW AND THE PROMISE OF AN ALTERNATIVE ECONOMY

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INTRODUCTION

There is a considerable and diverse body of literature which examines the changing nature of work and the variety of contractual arrangements governing work relationships including: part-time work; fixed-term work; temporary agency work; dependent self-employment; and work on the basis of zero hour contracts (the focus of this article). Although precarious work has always been part of the British labor market, there has been extensive public, political, and scholarly debate in recent years on whether and how to regulate "zero hour contracts" as a result of their proliferation in the gig economy. The language used in these instances—atypical, precarious, insecure, or non-standard—all suggests that this "new" form of work arrangement differs from "standard" arrangements, i.e., a full-time, open-ended, year-round employment relationship with a single employer. However, this normative understanding of the standard employment relationship has always depended on particular parameters—the post-war growth of heavy manufacturing industries and clearly defined arrangements within households whereby men acted as primary breadwinners, and women stayed in the home with responsibility for care and other domestic duties. This model in terms of both the dominant industrial sector and household demarcation is increasingly obsolete. Although working arrangements have been disrupted as a result, expectations about the definition of "work" (performed and paid for under traditional contractual nexus) and its essential quality (secure = stable, full time and permanent) have not changed. Those workers who do not conform to the 'standard'

† The authors would like to thank David Cabrelli, Ruth Dukes, Eleanor Kirk, and Emily Rose for comments on an earlier draft. The usual disclaimers apply. †On zero hour contracts in particular, *see generally* Mark Freedland, Jeremias Prassl & Abi. Adams, *The 'Zero-Hours Contracts': Regulating Casual Work, or Legitimating Precarity?*, 11 OXFORD LEGAL STUD. 1 (2015); SIMON DEAKIN & ZOE ADAMS, RE-REGULATING ZERO HOURS CONTRACTS (2014); Elise Dermine & Amaury Mechelynck, *Zero-hour contracts and labour law: An antithetical association?*, 13 EUR. LAB. L.J. 339 (2022).

(male) worker model are considered "others," which results in exploitation and further levelling down of associated conditions.

In fact, labor law and labor institutions have been challenged by "non-standard" work since their inception: the alternatives to the full-time, permanent "job for life" which have now entered the mainstream have long been the norm for many women workers. Yet women's experiences and wider issues related to the gendering of work are still often missing from discussions of this latest workplace revolution, as evidenced by an increasing line of high-profile case law (e.g., *Uber BV v. Aslam* [2021] UKSC 5) which has focused on slotting workers employed on zero hours contracts into the standard work relationship. Although welcome for the legal certainty that they provide, such cases sit in sharp contrast to those concerning the rights of workers engaged under non-standard arrangements in what has traditionally been termed 'women's work' including social care and other service-related activities (e.g., *Royal Mencap Society v. Tomlinson-Blake* [2021] UKSC 8). Even where such cases have succeeded, judgments have often been restricted to the complex facts of individual cases[1] in contrast to the sweeping and impactful effects of the judgments given in cases concerning those characterized as "gig economy" workers. Furthermore, the unpaid care, which is often undertaken alongside paid work by the women in such cases, is never considered part of the equation leaving women more vulnerable to exploitative practices, such as being engaged on zero hours contracts. The reasons for this have their roots in an earlier era: during the Industrial Revolution and in its immediate aftermath, the fair distribution of the fruits of unprecedented economic growth led to state (and trade union) intervention in the form of employment regulation. However, in the shift to a market economy, the reproductive work, which enables capitalist production by sustaining humankind, was not accorded any value or credit in the development of processes aimed at measuring and rewarding human activity. It was thus absent from the emerging regulatory systems, and it remains absent from the resulting case law. Reproductive labor performed by women alongside formal paid work remained hidden from public view, despite the constraints it imposed on women's ability to conform to (male) normative standards related to workplace behavior and employer expectations. This has caused and entrenched gendered labor market segregation, now replicated through the case law, which is reshaping this area of the law.

Taking its lead from the Supreme Court judgments in *Uber* and *Royal Mencap*, this article will consider recent developments in the regulation of zero hours contracts and other irregular working arrangements with a focus on the application of statutory protection for those who work under such

1. *E.g.*, Glasgow CC v. Johnstone [2020] IRLR 908.

arrangements and, more specifically, how their working time is measured and remunerated. As this analysis shows, although the operation of zero hours contracts can be problematic, particularly in the context of determining whether employment protection applies, the diversity of irregular forms of work, including but not limited to zero hours contracts and the related fragmentation of rights, can result in reduced protection and greater precarity for many workers, even those whose contractual status is not in question. Furthermore, such variations, which originate from perceptions regarding the ways in which different types of work are classified, are highly gendered. This is because regulatory approaches and judicial interpretations assimilate and perpetuate social understandings of work and its perceived economic value within the labor market so that reproductive labor, even where it is performed for payment, is often excluded or viewed as being of low value. The academic and policy focus on the gig economy, welcome as it is as a means of disturbing exploitative practices, will not necessarily assist in this regard as the arrangements and assumptions surrounding this kind of care work largely predate the advent of technology as a management tool.

In the first section of the article, we consider the advent, challenges, and use of zero hours contracts in the UK. We review their regulation up to and including the Supreme Court's judgment in the pivotal case *Uber BV v, Aslam*,[2] in which it was determined that Uber drivers who worked under zero hours contracts were employed under contracts for services, rather than as independent contractors, and, as such, were entitled to a range of employment rights, including the national minimum wage ("NMW").

We then turn our attention to the Court's judgment in *Royal Mencap Society v. Tomlinson-Blake*,[3] the latest in a long line of cases concerning the application of the NMW to workers providing round the clock care for vulnerable adults. In ruling that such workers were not entitled to be paid the NMW for sleepover night-time shifts, the Supreme Court disturbed well-established jurisprudence on the matter. The worker in *Mencap* was not employed on a zero hours contract and could not be classified as a "gig worker" (although some care workers may be). Yet the conclusion reached by the Supreme Court highlights the existence of a fragmented approach to regulation for those who work under irregular arrangements, and it is therefore of relevance to a discussion of zero hours contracts more broadly where the legal position remains uncertain notwithstanding the decision in *Uber*.

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2. Uber BV v, Aslam [2021] UKSC 5. *See generally* Joe Atkinson & Hitesh Dhorajiwala, *The Future of Employment: Purposive Interpretation and the Role of Contract after* Uber, 85. MOD. L. REV. 787 (2022).

3. Roayl Mencap Society v. Tomlinson-Blake [2021] UKSC 8. *See also* LJB Hayes, *Discrimination by Legal Design? UK Supreme Court in* Mencap v. Tomlinson-Blake *Finds Care Workers Are Not Protected by Minimum Wage Law for Sleep-in Shifts*, 51 INDUS. L.J. 696 (2022).

In analyzing the different approaches taken by the regulatory framework and judicial interpretation, the article, in a final section, draws on the "alternative/diverse economies" literature, which makes a values-based argument for reassessing how society and its institutions measure, monitor and reward human endeavour.[4] This fresh thinking provides the opportunity to reimagine the societal arrangements and requisite values that are accorded to different forms of work, including reproductive work, and to consider an alternative to capitalist ordering in line with Erik Olin Wright's notion of "real utopias" as "emancipatory alternatives which can inform our practical strategies for social transformation."[5] In situating such reimagining within a feminist legal framework, we draw on the contributions of feminist theorists Nancy Folbre and Martha Fineman. We conclude by calling for a 'real utopia' for labor law that recognises the contribution of care giving and which is based on a fairer distribution of and reward for all forms of work.

ZERO HOURS CONTRACTS: CHALLENGES FOR UK LABOR LAW

Since 1979, labor law was increasingly used as a tool to "reduce the burdens on business," and thereby to facilitate a low-cost flexible workforce. Labor law policies were driven by the view that a low cost and highly flexible workforce was essential to increased competitiveness and lower unemployment.[6] This entailed the adoption of a series of measures, including the removal of minimum wage protection, weakening of trade unions, and diminishing the coverage of employment protection legislation in order to facilitate productive and committed non-standard workers.[7] In addition to these policy decisions, which reshaped the legal framework regulating the work relationship, factors such as the decline in manufacturing and the rise of a new economy based on modern information-based systems and technologies have all contributed to a "rapid disintegration of the old industrial model of employment."[8] In law, there has been a proliferation of contractual arrangements governing the work relationship, which differ from the traditional (i.e., full-time and open-ended) employment contract in that they tend to be characterized by limited legal regulation, flexibility, and precarity. Particular concerns have arisen in relation to so-called zero hours contracts.[9]

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4. See generally J.K Gibson-Graham, Diverse economies: performative practices for 'other worlds,' 32 PROGRESS HUM. GEOGRAPHY 613 (2008).

5. Erik Olin Wright, Envisioning Real Utopias (2010).

6. *See generally* Simon Deakin & Frank Wilkinson, Labour Standards: Essential to Economic and Social Progress (1996).

7. *See* David Harvey, The Condition of Postmodernity (1989).

8. Judy Fudge & Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, in Precarious Work, Women, and the New Economy: The Challenge to Legal Norms 3 (Judy Fudge & Rosemary Owens eds., 2006).

9. *See* DEAKIN & ADAMS, *supra* note 1.

The term 'zero hours contract' encompasses a wide range of different work arrangements and often overlaps with other atypical work such as agency work and "gig-work" performed via apps and online platforms.[10] The term therefore often serves "as no more than a convenient shorthand for masking the explosive growth of precarious work for a highly fragmented workforce."[11] As Adams et al explain, "[r]ather than forming a single or unitary category, [zero hours contracts] represent some of the many possible variations of employment, ranging from 'preferred choices, well-paid and secure' to 'vulnerable' or 'poor work.'"[12]At a basic level, zero hours contracts denote arrangements that constitute personal work relations where the employer is not obliged to provide any minimum working hours.[13] In 2021, it was estimated that just under 1 million people in the UK were employed in this way,[14] although it is likely that this understates the true number of such contracts.[15]

Although worker profiles on zero hours contracts vary from highly skilled IT and creative professionals to unskilled workers, their use is higher in certain industries, particularly hospitality, retail, and the health and social care sector, and among particular demographics of the labor market, especially younger workers and women workers.[16] Workers are often required to be extremely flexible (which is frequently cited as a positive aspect of the arrangement but which leads to increased competition between workers, very

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10. *See* Joe Atkinson, Zero-hours contracts and english employment law: Developments and possibilities, 13 Eur. Lab. L.J. 347, 348 (2022) (citing Mark Freedland & Nicola Kountouris, The Legal Construction of Personal Work Relations 318–19 (2011); Abi Adams, Zoe Adams & Jeremias Prassl, Legitimizing Precarity: Zero Hours Contracts in the United Kingdom, in Zero Hours and On-call Work in Anglo-Saxon Countries 43 (Michelle O'Sullivan, Jonathan Lavelle, Juliet McMahon, Lorraine Ryan, Caroline Murphy, Thomas Turner & Patrick Gunnigle eds., 2019).

11. Freedland, Prassl, & Adams, supra note 1, at 2.

12. Id. at 5 (citing Julia S. O'Connor, Twelve: Precarious Employment and EU Employment Regulation, in Social Policy Review 25: Analysis and Debate in Social Policy 238 (Gaby Ramia, Kevin Farnsworth & Zoe Irving eds., 2013); Nicole Busby & Morag McDermont, Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings, 41 Indus. L.J. 166, 167 (2012) (citing DTI, Success at Work: Protecting Vulnerable Workers, Supporting Good Employers: a Policy Statement for this Parliament 25 (2006); Tracy Shildrick, Robert MacDonald, Colin Webster & Kayleigh Garthwaite, Poverty and Insecurity: Life in Low-Pay, No-Pay Britain 24 (2012)).

13. Mark Freedland & Nicola Kountouris, The Legal Construction of Personal Work Relations 318 (2011). For different discussions of the term, see Abi Adams, Zoe Adams & Jeremias Prassl, Legitimizing Precarity: Zero Hours Contracts in the United Kingdom, in Zero Hours and On-call Work in Anglo-Saxon Countries 43 (Michelle O'Sullivan, Jonathan Lavelle, Juliet McMahon, Lorraine Ryan, Caroline Murphy, Thomas Turner & Patrick Gunnigle eds., 2019; Dermine & Mechelynck, *supra* note 1.

14. *Number of employees on a zero-hours contract in the United Kingdom from 2000 to 2022(in 1,000s)*, STATISTA (Aug. 2022), https://www.statista.com/statistics/414896/employees-with-zero-hours-contracts-number/.

15. *See Contracts That Do Not Guarantee a Minimum Number of Hours: April 2018*, OFF. NAT'L STATS. (Apr. 23, 2018), https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018.

16. Abi Adams & Jeremias Prassl, *Zero-Hours Work in the United Kingdom*, INT'L LAB. ORG. (2018), https://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-travail/documents/publication/wcms_624965.pdf.

long hours worked, and extremely low earnings), are afforded few if any employment law protections, and are remunerated only for actual time worked and work completed, thus, leading in many cases to financial insecurity. Concerns have also been raised about the proliferation of zero hours contracts amongst workers who use the UK benefits system, which, following the introduction of Universal Credit, attaches stringent conditionality to payments thereby increasing "the pressure on individuals to accept casualised forms of employment."[17]

The extent to which individuals engaged under a zero hours contract are protected by employment law depends on whether they can be classed as working under a contract of employment. In English law, the contract of employment serves as the "cornerstone"[18] of the modern labor law system and those classed as employees benefit from the full range of employment rights and protections. The statutory regulation of the employment contract is limited, and in its absence, the common law has, over time, developed various tests to determine whether someone is an employee. Thus, a contract of employment requires a wage-work bargain between the parties, which confers rights on the employer to control performance and contains no terms inconsistent with employee status.[19] Other relevant factors include ascertaining levels of "control,"[20] the degree of an individual's "integration"[21] into the employing entity, and the "economic reality"[22] of the relationship. Finally, there must be an "irreducible minimum" of continuing obligations to offer and perform work, also known as "mutuality of obligation"[23] Freedland, writing in 1976, offered the following analysis on "mutuality of obligation:"

At the first level there is an exchange of work for remuneration. At the second level there is an exchange of mutual promises of future performance. The second level – the promises to employ and to be employed – provides the arrangement with its stability and with its continuity as a contract. The promises to employ and to be employed may be of short duration or may be terminable at short notice; but they still form an integral and most important part of the contract. They are the mutual undertakings to maintain the

17. *See* DEAKIN & ADAMS, *supra* note 1, at 24. On the interaction between the benefits system and ZHCs, *see generally* Virginia Mantouvalou, *Welfare-to-work, zero-hours contracts and human rights*, 13 EUR. LAB. L.J. 431 (2022).

18. O. Kahn-Freund, *Legal Framework*, in A. FLANDERS AND H. CLEGG, THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN 42, 45 (1954).

19. *Ready Mixed Concrete Ltd. v. Minister of Pensions* [1968] 2 QB 497.

20. *Yewens v. Noakes* [1880] 6 QBD 530.

21. *Steven, Jordan & Harrison Ltd. v. MacDonald and Evans* [1952] 1 TLR 101.

22. *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 QB 173.

23. *O'Kelly v. Trusthouse Forte Plc.* [1983] ICR 728; *Nethermere (St. Neots) Ltd. v. Gardiner* [1984] ICR 612 (CA); *Clark v. Oxfordshire Health Auth.* [1998] IRLR 125 (CA); *see also* Nicola Countouris, *Mutuality of Obligation*, in THE AUTONOMY OF LABOUR LAW (Alan Bogg, Cathryn Costello, ACL Davies & Jeremias Adams-Prassl eds., 2015).

employment relationship in being which are inherent in any contract of employment so called.[24]

In essence, Freedland suggests that the contract of employment consists not only of a work-wage bargain made whenever the employee goes to work but also a pair of promises that the employer will continue to provide future work which the employee will accept, thereby drawing the separate work-wage bargains into a global or umbrella contract. In subsequent case law, the courts have tended to apply mutuality of obligation in this way; without mutuality of obligation, that is to say a legal obligation on the part of the employer to find future work for the employee, there can be no contract of employment.[25]

The requirement for mutuality of obligation subsequently became a stumbling block for those hired on a casual, short-term, or intermittent basis to establishing employment status. Since 1997, a number of statutes have therefore applied not only to employees but also to "workers," which includes those who work under "any other contract . . . whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."[26] In applying the definition in Section 230(3)(b) of the ERA of 1996, the courts have also relied on the tests used to identify employee status, such as control, integration, and mutuality of obligation albeit the application of the tests has been more generous and "in the putative worker's favour."[27] More recently, the courts have moved away from using "preconceived ideas drawn from the employee case law,"[28] emphasizing the obligation on the part of the worker to perform work or services personally[29] This has meant that "worker" has become a distinct category, not a '"low-fat" version of employee: it is a different concept altogether.'[30] Those found to be workers under Section 230(3)(b) are entitled to a limited number of employment rights, including the minimum wage, working time and holiday pay regulations, rights under the agency worker regulations, and some anti-discrimination protections. Rights to redundancy and unfair dismissal protections, minimum notice periods, and maternity and parental rights are, however, reserved to employees.

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24. Mark Freedland, The Contract of Employment 21–22 (1976).
25. *See generally* ACL Davies, Employment Law (2015).
26. Employment Rights Act (ERA) 1996 § 230(3)(b) (Eng.).
27. *Byrne Bros. (Formwork) v. Baird* [2002] ICR 667 (EAT) [17]; *see Singh v. Bristol Sikh Temple Mgmt. Comm.* [2012] UKEAT/0429/11/ZT.
28. Davies, *supra* note 26, at 114.
29. See *Bates van Winkelhof v. Clyde & Co. LLP* [2014] UKSC 32.
30. Davies, *supra* note 26, at 114.

Individuals who fall outside the definitions of both employee and worker are self-employed independent contractors, which takes them outside the scope of employment protections. The extent to which individuals on zero hours contracts are considered employees, workers, or self-employed depends on the terms of the contract and the facts of the case. The orthodox common law position was that the overarching contract will not amount to a contract of employment, as there is insufficient mutuality of obligation, but an individual could be classified as a worker or employee while they are actually working provided they fulfill the requisite common law tests during that time.[31] Yet in some cases, the presence of a substitution clause—a clause which negates the need for personal service and allows the worker to provide a substitute—has led the courts to find that even those times when an individual was working did not endow employment or worker status, as the clause negated the "irreducible minimum of obligation" necessary in the provision of personal service.[32]

In recent case law, the courts have, in some cases, departed from this orthodox common law position to recognize the reality of many working relationships. In *Autoclenz v. Belcher*,[33] the claimants were car valets whose signed contractual documents contained statements to the effect that the claimants were self-employed. The claimants maintained that this did not reflect the reality of their relationship with Autoclenz,[34] and they sought a declaration that they were workers as defined under the Working Time Regulations of 1998 and the National Minimum Wage Regulations of 1999. On appeal, the Supreme Court agreed with the finding of the Employment Tribunal that the claimants were workers and, in doing so, had regard to "the relative bargaining power of the parties . . . in deciding whether the terms of any written agreement in truth represent what was agreed." In order to ascertain the true nature of the employment relationship, courts should therefore have regard to "all the circumstances of the case, of which the written agreement is only a part."[35] In *Pulse Healthcare*, this allowed the Employment Appeal Tribunal (EAT) to confirm that six healthcare workers were employees notwithstanding a zero hours term in their contract. The EAT found that "the written contracts – the "Zero Hours Contract Agreement" – did not reflect the true agreement between the parties."[36] The decision in *Autoclenz* has since been relied upon by courts to justify a finding of employee or worker

31. See Carmichael v. Nat'l Power Plc. [2000] IRLR 43; McMeechan v. Sec'y of State for Employment [1997] IRLR 353.

32. Express and Echo Publications Ltd. v. Tanton [1999] IRLR 367; Staffordshire Sentinel Newspapers Ltd. v. Potter [2004] IRLR 752; Comm'r's of Inland Revenue v. Post Office Ltd. [2003] IRLR 199; IWGB v. CAC and Roofoods Ltd. (t/a Deliveroo) [2018] IRLR 911.

33. Autoclenz v. Belcher [2011] UKSC 41.

34. Id. at 37.

35. Id. at 35.

36. Pulse Healthcare Ltd. v. Carewatch Care Services Ltd. & 6 Others UKEAT/0123/12/BA.

status where the facts of a case are at odds with formal contractual wording, especially in recent cases concerning the employment status of gig workers.[37] However, question marks remained over the extent to which courts could "disregard written contractual terms which are consistent with how the parties worked in practice but which it regards as unfairly disadvantageous (whether because they create a relationship that does not attract employment protection or otherwise) and which might not have been agreed if the parties had been in an equal bargaining position."[38]

In *Uber BV v. Aslam*[39], the Supreme Court provided some clarity. The question was whether drivers providing private vehicle hires whose work was arranged through Uber's smartphone application were independent contractors or workers for the purposes of the Employment Rights Act of 1996, the National Minimum Wage Regulations of 2015 ("NMWR 2015"), and the Working Time Regulations of 1998. The NMWR 2015, which we will return to in our analysis below, contain complex provisions governing the way in which time is to be reckoned for the purpose of establishing in any particular case whether the employer has paid the appropriate remuneration under the National Minimum Wage Act of 1998.

Uber argued that the drivers performed services under contracts made with passengers through Uber as their booking agent. The Employment Tribunal disagreed and found that the drivers worked under worker contracts for Uber London. This was upheld on appeal by the Employment Appeal Tribunal and the Court of Appeal. The Supreme Court unanimously dismissed Uber's appeal to also find that the drivers were workers and were considered to be working whenever they were logged into the Uber app within the territory in which the driver was licensed to operate and were ready and willing to accept trips. In reaching its conclusion, the Court recognised not only the inequality of bargaining power (as in *Autoclenz*) between the parties but also the protective purpose of the employment legislation to which individuals only become entitled once they have attained the requisite status. According to Lord Leggatt, labor laws "were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those designated by their employer as qualifying for protection."[40] This distinguishes employment rights from other contractual rights agreed between the parties. The Supreme Court therefore concluded that courts should, when assessing employment status, determine, on a broad reading of the facts, whether the individual was one that the statute sought to protect. Taking such a purposive approach

37. White v. Troutbeck [2013] IRLR 286; Pimlico Plumbers [2018] UKSC 29; Addison Lee Ltd. v. Gasgoigne [2018] ICR 1826; Addison Lee Ltd. v. Lange [2019] ICR 637; Dewhurst v. City Sprint UK Ltd. [2017] 1 WLUK 16; Leyland v. Hermes Parcelnet Ltd. [2018] 6 WLUK 464.

38. Uber [2019] IRLR 257 at [120].

39. Uber BV v. Aslam [2021] UKSC 5. See generally Atkinson & Dhorajiwala, supra note 3.

40. *Uber BV v. Aslam* [2021] UKSC 5 at [77].

implied that courts, in determining whether an individual is a "worker," should not take the contractual agreement as a starting point as that would "reinstate the mischief which the legislation was enacted to prevent."[41] Rather, courts are required to consider the facts of the case, including the level of subordination and dependency, and the purpose of the legislation in order to determine the true nature of the agreement. Any contractual wording remains relevant, but not determinative, in making such an assessment. The practical consequence of the decision in *Uber* is that any time periods when the driver is logged into the Uber app within the territory in which they are licensed to operate and are ready and willing to accept trips could count as "working time" for the purposes of the Working Time Regulations 1998 and as "unmeasured work" for the purposes of the NMWR 2015.[42] Periods of "unmeasured work" in any pay reference period are to be computed in accordance with regulation 45 of the NMWR 2015 and refer to the "hours . . . worked," meaning that a driver is to be paid during the whole period of work time rather than just when they are actually engaged in driving a passenger.

The decision in *Uber* is considered to represent "a dramatic shift in focus, replacing a more formalistic contractual approach with a broader 'relational' analysis that engages with the underlying goals and purposes of employment statutes."[43] Practically, it may lead to thousands of claims for holiday pay and national minimum wage claims. Although the case involved worker status in the context of the gig economy, the principles set out by the Supreme Court are broad enough to have the potential to be applicable whenever courts are determining employment status, including in other factual scenarios and should, in theory, make it easier for workers on zero hours contracts to claim employment rights and protections.[44]

The question then arises whether this refocus on the purposive rationale of employment protection measures *is* likely to benefit all of those who find themselves employed under precarious or insecure arrangements in the UK. When placed alongside another decision handed down by the Supreme Court in 2021, the answer would appear to be less certain. In the following section, we consider a contrasting parallel development in the Supreme Court's jurisprudence in order to show that the fragmentation which characterizes the UK's precarious workforce means that an enduring adherence to formulism can have divisive and devastating consequences for workers in specific sectors. Furthermore, this fragmentation, by which different types of work are classified in different ways in order to rationalize the maintenance of the

41. *Id.* at 76; *see also* the EAT decision in *Uber*.
42. *Uber BV v. Aslam* [2021] UKSC 5 at [138].
43. Atkinson & Dhorajiwala, *supra* note 3, at 799.
44. Although it remains to be seen how the principles set out in *Uber* will be applied where a substitution clause is present in the employment contract, *see IWGB v. CAC and Roofoods Ltd (t/a Deliveroo)* [2021] EWCA Civ 952, which, at time of writing, is under appeal to the Supreme Court.

status quo, gives rise to vastly different treatment of workers which is, de facto, deeply gendered.

EMPLOYMENT PROTECTION AND THE CARE WORKER CONUNDRUM

In *Royal Mencap Soc'y v. Tomlinson-Blake* (*Mencap*),[45] the Supreme Court was asked to consider how the number of hours of work undertaken by night-time carers were to be calculated for the purposes of applying the NMW. In one of two joined cases, the Court was asked to rule on whether the overnight hours in which a female carer who undertook sleep-in shifts for the Royal Mencap Society should be included in her total working hours under the NMWR 2015. She was permitted to sleep during these specified hours but was required to remain at the homes of the two adults with learning disabilities for whom she cared. She had no assigned tasks to perform during the night but had to keep a "listening ear" out and to respond to any incident that required her intervention. Over the sixteen months preceding the case, she had been required to respond six times and she received an allowance of £22.35 for the whole sleep-in shift plus one hour's pay in expectation of the amount of work she would undertake overnight, giving a total payment per sleep-in of £29.05. At first instance, the Employment Tribunal held that Ms. Tomlinson-Blake was entitled to be paid at the hourly NMW rate for each hour of her sleep-in shift. Mencap's appeal to the Employment Appeal Tribunal (EAT) was dismissed on the basis that she was working during the sleep-in shift. The Court of Appeal overturned that decision, leading to the appeal to the Supreme Court.[46]

The judgment of the Supreme Court was largely based on a technical reading of the NMWR 2015. The relevant type of work in *Mencap* is defined in the NMWR 2015 as "time work," i.e., work in respect of which a worker is paid by reference to the amount of time worked.[47] Regulation 32 of the NMWR 2015 states

Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

In paragraph (1), hours when a worker is 'available' only includes hours when the worker is **awake for the purposes of working, even if a worker**

45. Royal Mencap Soc'y v. Tomlinson-Blake (Mencap) [2021] UKSC 8.

46. [2018] EWCA Civ 164. For a scathing contextualised critique of the judgment, see LJB Hayes, Three steps too far in the undervaluing of care: Mencap v Tomlinson-Blake, UK LAB. L. BLOG (Aug. 15, 2018), https://uklabourlawblog.com/2018/08/15/three-steps-too-far-in-the-undervaluing-of-care-mencap-v-tomlinson-blake-ljb-hayes/.

47. National Minimum Wage Regulation 2015, art. 3 (Eng.).

by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping. (emphasis added).

Despite this provision, care workers had been found to be working during sleep-in shifts in a line of previous EAT judgments.[48] Justifications for this approach included that the workers concerned could not leave site and were present pursuant to a statutory obligation on the employer, for example, to comply with health and safety or other such provisions, which meant that the question of whether the work fell within the scope of Regulation 32 did not arise.[49] Furthermore, it had also been established that regardless of whether a worker was sleeping, a contractual requirement to attend and remain at a premises is a duty constituting "work" for the purposes of minimum wage protection, not least because the period of attendance is controlled by the employer and the worker is subject to discipline if they leave the premises or fail to perform other required duties during the shift.[50]

Taking a different approach in its judgment, the Supreme Court in *Mencap* drew a line between carrying out "actual work,"[51] when those of sleep-in shifts would be entitled to have their hours counted for NMW purposes, and being "available for work." The latter case, which applied to the appellant, would be caught by Regulation 32 with the NMW only applicable when the worker is awake for the purposes of working.[52] This approach overruled the Court of Appeal's decision in *British Nursing Ass'n v. Inland Revenue*,[53] in which it held that home-based night workers, who assigned "bank nurses" for nursing homes on an emergency basis via a twenty-four-hour telephone booking service, were entitled to the NMW even though the work was intermittent and they were permitted to sleep. The decision of the Inner House of the Court of Session in *Scottbridge Constr. Ltd. v. Wright*[54] was also overruled. In that case, a worker responsible for answering the phone and dealing with security alarms on an overnight shift was held to be working throughout the shift, even though it was very rare that he was not able to sleep.

WORK: CLASSIFICATIONS AND VALUE

The workers in the cases concerning overnight provisions were not classified either as working under zero hours contracts or as gig-economy workers and enjoyed the status of employees without any ambiguity. Indeed, Ms.

48. See Burrow Down v. Rossiter [2008] ICR 1172; Whittlestone v. BJP Home Support Ltd. UKEAT/0128/13/BA; Esparon v. Slavikovska UKEAT/0217/12/DA.
49. Esparon v. Slavikovska [2017] UKEAT/0217/12/DA [56].
50. Whittlestone v. BJP Home Support Ltd. [2017] UKEAT/0128/13/BA [56].
51. See National Minimum Wage Regulation 2015, art. 3 (Eng.).
52. See Mencap [2021] UKSC 8 [42-45].
53. British Nursing Ass'n v. Inland Revenue [2003] ICR 19.
54. Scottbridge Constr. Ltd v. Wright [2003] IRLR 21.

Tomlinson-Blake was salaried for the daytime care she provided, and the night-time sleep-in shifts were part of her regular rota. Such work and the arrangements under which it is performed are not new phenomena, nor are they unusual for those whose job it is to provide essential round the clock care for vulnerable adults. The long-term existence and inevitable continuation of such arrangements makes the lack of certainty concerning their rate of remuneration, despite legislation and related case law going back over twenty years of particular concern. The authority now given by the Supreme Court that care workers will be expected to provide their services overnight for considerably less than the NMW places them in an at least equally precarious position as those who endure unclear contractual status—a situation which previous judgments had sought to avoid. For example, the EAT in *Whittlestone* was aware of the important connection between employment status and the enjoyment of employment rights when, in finding that the care worker concerned should be entitled to the NMW for sleep-in shifts, it noted that "there had been agreement between the employer and the Claimant that she would work; she would have been disciplined if she had not been present throughout the period of time; she could not for instance slip out for a late night movie or for fish and chips."[55] In that respect, she was subject to the same expectations regarding the fulfilment of her contractual obligations whatever the time—day or night. Following on from that logic, why are such workers, following *Mencap*, no longer subject to the appropriate protection of the law in the same way as Uber drivers are now deemed to be during the time when they are at their employer's disposal and ready and willing to work? We suggest that the distinguishing factor is value, specifically the different values ascribed to different forms of work in terms of contribution and reward.

Related judgments (both judicial and societal) and underpinning rationale are imbued with perceptions and assumptions concerning the labor-wage exchange and the purpose of employment protection legislation, such as the National Minimum Wage Act 1998. In *Mencap*, the NMW was classified by the Court as only applying to those hours of active engagement prescribed as such by the employer, regardless of the institutional benefits, including legal compliance which directly accrued as a result of such work, whereas in *Uber*, the Court found that "[l]aws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it."[56] The Supreme Court in *Uber* agreed with the Employment Tribunal[57] that the Uber workers' hours were not "time work"

55. Whittlestone v. BJP Home Support Ltd. [2017] UKEAT/0128/13/BA [58].
56. Uber BV v. Aslam [2021] UKSC 5 [76].
57. Aslam and Farrer & Others v. Uber [2016] 2202550/2015/ET [122].

but "unmeasured work"[58] and, thus, the drivers were entitled to be paid the NMW from the point at which they turned on the app (or "clocked on") until they turned it off at the end of a shift, the intention being that they would be paid at the NMW rate for waiting time in between assignments.[59] This approach replies on what Bogg and Ford have described as a statutory purposive approach,[60] whereby the court asks "whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."[61] As outlined above, the determining factor for the Court in deciding on the status of the Uber drivers' time was the element of control present so that, following *Uber*, the factual matrix must be considered in deciding whether specific statutory protections will apply. If the same approach had been used in *Mencap*, the hours of work would surely have been classified as unmeasured work, rather than time work enabling the workers to benefit from the application of the NMW in the same way the *Uber* workers were able to.

The difference in the ascription of value by the Court in the *Uber* and *Mencap* cases is related to the nature of the work carried out and the general assumption that care, or the readiness to provide care, is an activity which is performed intuitively and without effort in a "homely" setting and thus does not amount to real work, whereas taxi driving, including preparedness to undertake a driving assignment, is always work. The fact that the former is performed predominantly by women and the latter is performed predominantly by men is both constitutive (work is sex-typed) and incidental (recruitment may be gender neutral and, in certain care situations, a male carer may actually be required[62]) but nevertheless results in the affirmation and perpetuation of low value "women's work."

It is perhaps also salient to note the difference in employer type: Uber is a private sector organization whereas, despite the widespread practice of the contracting-out of services to the private and third sectors,[63] care provision in the UK ostensibly remains the preserve of the public sector as it is inextricably linked to the provision of a public health service and access to social

58. Id. [138].

59. This remains an issue of contention with the company continuing to dispute the payment of the NMW from "clock on" to "clock off." See London: Hundreds of Uber drivers rally to protest the company's failure to protect workers from the cost of living crisis, FREEDOM NEWS (Jun. 23, 2022), https://freedomnews.org.uk/2022/06/23/london-hundreds-of-uber-drivers-rally-to-protest-the-companys-failure-to-protect-workers-from-the-cost-of-living-crisis/

60. Alan Bogg & Michael Ford, The Death of Contract in Employment Status, 137 LAW Q. REV. 392 (2021).

61. Collector of Stamp Revenue v. Arrowtown [2003] HKFCA 46, at 35.

62. The worker in the case originally joined with Mencap (Shannon v. Rampersad (t/a Clifton House Residential Home) was male, and his right of appeal was dismissed by the Court of Appeal.

63. Royal Mencap Society is a registered charity which provides various forms of support, including care provisions for people with a learning disability.

assistance "from cradle to grave" as part of a universal welfare state.[64] The judgment of the Supreme Court in *Mencap* was issued against a policy backdrop of claims by the care sector that the continuation of the policy of paying the NMW for sleep-in shifts could have put the whole care system in financial jeopardy. As Hayes has outlined in the context of the Court of Appeal's decision,[65] claims by employers that maintenance of the earlier EAT decisions would have resulted in a bill of over £400 million to redress underpayments[66] are difficult to confirm, but it does seem likely that the renewed approach, now confirmed by the Supreme Court, has vastly reduced the cost of care provision by the state. The passing on of liability for failure to meet the true costs of care provision to private and third sector organizations, through the long-term policy of the contracting-out of essential services, raises questions concerning the state's apparent distance from its "cradle to grave" commitments. The cutting of the ties between government policy and the performance of service delivery, obfuscates state liability for failure to meet statutory standards and to address worker exploitation, reaffirming homecare's status as "invisible labour."[67] As unfortunate as it might be for an already overburdened and under resourced third sector to have to bear the high cost of fully compensating care workers for their labor, it is more unfortunate that it is the workers themselves who are expected to bear that cost through reduced wages—an action, that when applied to those on minimum wage, can be classified as "wage theft."[68]

This brings us back to a consideration of the purpose of labor law, specifically in the context of subordination and dependency. Is dependency in the work context, as applied by the Court in *Uber*, a purely economic concept limited to the incumbent's reliance on the income generated, or does it also refer to "dependence on the work for other things such as social interaction and relationships, a sense of self-worth, or contribution to society?"[69] The latter would seem to incorporate the social and psychological value of the care-related work with which *Mencap* is concerned more accurately. The recognition that the contribution of such work goes beyond the mere performance of the tasks involved would surely require a more protective approach from the law in exchange than that applied by the Court in *Mencap*. The relevance of control in working relations also appears to be a slippery concept depending on what type of work is performed and by whom. The employees

64. Willian Beveridge, Social Insurance and Allied services (Beveridge Report) (1944).

65. Hayes, *supra* note 47.

66. *See Update on Payment for Sleep-In Shifts in Social Care*, Loc. Gov't Ass'n (May 2018), https://www.local.gov.uk/sites/default/files/documents/Sleep%20ins%20Brief%20May%202018%20updated.pdf.

67. Nancy Folbre, The Invisible Heart: Economics and Family Values (2001); Lydia J.B. Hayes, Stories of Care: A Labour of law. Gender & class at work 34-41 (2017).

68. Nicole Hallett, *The Problem of Wage Theft*, 37 Yale L. & Pol'y Rev. 93, 93–152 (2018).

69. Atkinson & Dhorajiwala, *supra* note 3, at 794.

in *Mencap* exercised a high degree of control over their working conditions and their employers presumably placed a particular value on their ability to do so right up to the point at which this changed so that, rather than "working" they were merely required to be present in case their services might be needed. As McCann has argued, when considered alongside each other, the Supreme Court's judgments in *Mencap* and *Uber* (and indeed the different factual bases and legal treatment of the claims themselves) highlight "fractures in how UK labour law prompts, sustains, and curbs temporal casualisation."[70] The judgment in *Mencap* illustrates "a regulated casualisation of night work"[71] or, to be more specific, care work that takes place at night, whereas *Uber* produces the potential for unification of other working arrangements. The singling out for different treatment of the care workers in *Mencap* is both sectoral and gendered, and one cannot help but wonder how a case which combines questions over the employment status and associated rights of contract care workers might play out post *Uber*. Nonetheless, it seems incongruous that the legal framework supports and sustains such sectoral and gendered fragmentation even where employment status is not in question.

This brings us to the question of what, if anything, can be done to challenge the status quo? The legal framework which regulates work in the UK is complex and obfuscate, and, as the preceding analysis shows, even where legal challenge is possible and results in success, outcomes may be piecemeal, lacking cohesion and consistency, and requiring further enforcement. Furthermore, the gendered nature of certain types of work and its ascribed value has proved to be stubbornly resistant to legal intervention despite decades of sex equality law. Precarity and insecurity, it seems, will always find a way to circumvent law's reach. This has made some scholars question whether, rather than attempting to regulate post facto the economic circumstances relating to work to accommodate different patterns and arrangements of work, the very economic foundations themselves should be scrutinized and alternatives considered. This seems a particularly timely juncture at which to concern ourselves with such fresh thinking, particularly as debates abound regarding the import of a "new" economy premised on contemporary arrangements concerning information-based systems and new technologies and the shift away from the industrial model of employment. In the next section, we explore some of the "alternative economies" literature to discern what it can tell us about the way things are and how they might be reimagined to produce more socially just outcomes for all workers regardless of gender,

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70. Deirdre McCann, *Mencap and Uber in the Supreme Court: Working Time Regulation in an Era of Casualisation*, OXFORD HUM. RIGHTS HUB (Apr. 1, 2021), https://ohrh.law.ox.ac.uk/mencap-and-uber-in-the-supreme-court-working-time-regulation-in-an-era-of-casualisation/.

71. *Id.*

race, class, or working arrangements and, in particular, the way in which the use of temporality as a means of measuring work can reproduce flawed assumptions regarding contribution and reward.

ALTERNATIVE ECONOMIES AND REAL UTOPIAS

The project of critiquing "masculinist visions of the economy and politics that overlook the care labour required for the reproduction of life for all of us"[72] is not a new venture for feminist scholarship.[73] It has long been recognized that the reallocation of care work—away from its association with low value and low (or no) pay—is required and this in turn calls for a reconsideration of what such work consists of and how it is measured, compensated and/or rewarded. Using a diverse economies approach enables attention to be paid "to the multiple and complex forms of 'compensation' and motivation that compel or invite us to perform this labour."[74] The performance of care is class-bound and racialized, as well as being gendered, and so the composition of the relevant workforce is as important as the motivation for undertaking such work and the forms of compensation received.[75] In other words, the *who* cannot and should not be separated from the nature of the work and the arrangements under which it is performed. This emphasises the need to look at economic ordering rather than legal regulation as a starting point for achieving meaningful change. Furthermore, the combination of paid work, unpaid work, and work which is paid for or compensated through hybrid or alternative means, for example, through reciprocity, which characterizes the provision of care can only be fully captured by its placement within the economic schema. Law and the legal regulation of work is confined to that which is paid and generally restricted to an obligatory framing based on a contractual nexus of responsibility,[76] hence the importance of status as a means of acquiring labor law's protection as demonstrated in *Uber*. The combination of the different types of labor and compensation encapsulated by care is acknowledged by diverse economies scholars who recognize that it

72. Kelly Dombroski, *Caring labour: redistributing care work*, in JK GRAHAM-GIBSON ET AL, THE HANDBOOK OF DIVERSE ECONOMIES 154 (2020).

73. JOAN TRONTO, CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE (2013); Joan Tronto, *There is an alternative:* Homines curans *and the limits of neoliberalism*, 1 INT'L J. CARE & CARING 27 (2017); *see also* CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1988); Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

74. Dombroski, *supra* note 73, at 154.

75. Kelly Dombroski, Stephen Healy & Katharine McKinnon *Care-full community economies* in FEMINIST POLITICAL ECOLOGY AND ECONOMIES OF CARE: IN SEARCH OF ECONOMIC ALTERNATIVES 3–4 (Wendy Harcourt & Christine Bauhardt eds., 2019).

76. NICOLE BUSBY, A RIGHT TO CARE: UNPAID WORK IN EUROPEAN EMPLOYMENT LAW (2011).

can be simultaneously capitalist and non-capitalist.[77] Indeed, such acknowledgement is a necessary step in making visible the range of economic relations that are "more-than-capitalist."[78]

In seeking to explore the relationship between work, value, and reward, Kathi Weeks has questioned the economic and social logic in placing primary importance on the value of waged work at a time when opportunities for individuals to secure jobs which pay a living wage are rapidly diminishing.[79] Under the status quo, the "work society" frames waged work as morally necessary and the imperative to engage in it provides the gateway to citizenship and the right to participate in the wider capitalist economy, thus providing the means by which the life that a person lives is legitimated. In Weeks's estimation, against the backdrop of growing global financial insecurity, this stance is, in itself, morally questionable particularly when so many are unable to achieve stable and secure paid work.

Of course, there is nothing new about the expectations that flow from this hegemonic conception of work and the different values ascribed to different forms of productive and reproductive work within the capitalist system. Debates about work have been prevalent since the Industrial Revolution, which heralded the birth of the particular model of employment protection that endures to this day. The invisibility of "women's work" in the shift to a market economy was reflected in its absence from the regulatory framework and this continued absence, or at best accommodation, of the different arrangements under which paid work is performed alongside high levels of unpaid care underpins the fragmentation of the labor market along gendered and sectoral lines as illustrated by the *Uber* and *Mencap* cases. In economic terms, these differences have been exacerbated, and the valorization of paid (productive) work has intensified since the global financial crisis.[80] Against this backdrop, it is clear that the digital revolution is only a revolution in so far as it has disrupted the ways in which some work is arranged and performed. Societal expectations about "work" and the parameters of its regulation, i.e.. that it is largely performed, measured and paid for under a contractual nexus, based on the ideal that it should be secure, stable, full time and permanent, have not changed. Such idealization has reinforced the act of "othering" those whose experiences of work do not conform, giving rise to exploitation, and the levelling down of associated conditions.

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77. Dombroski, *supra* note 73, at 154, 155; Jenny Cameron & J.K. Gibson-Graham, *Feminising the Economy: Metaphors, Strategies, Politics*, 10 GENDER, PLACE & CULTURE 145 (2003).

78. *Id.*; for examples of such scholarship, *see* Marilyn Waring, *Counting for something! Recognising women's contribution to the global economy through alternative accounting systems*, 11 GENDER & DEVELOPMENT 35 (2003); Gradon Diprose, *Radical equality, care and labour in a community economy*, 24 GENDER, PLACE & CULTURE 834 (2017).

79. KATHI WEEKS, THE PROBLEM WITH WORK: FEMINISM, MARXISM, ANTIWORK POLITICS AND POSTWORK IMAGINARIES (2011).

80. *Id.*

Although some of the literature on diverse economies, particularly when it aligns with feminist theory, calls for enhanced opportunities for more women to engage in different forms of waged work or for an increase in the value given to the types of work undertaken in the performance of care (both paid and unpaid),[81] there are other alternatives. As Cameron and Gibson-Graham note,[82] such analyses which are essentially rooted in traditional economic theory and tend to focus on "adding on and counting in" various forms of waged work using pre-existing measures of the economy rather than challenging the underlying economic system. As Gradon Diprose has noted, "in some instances, calls for more and better work for women have actually extended the contradictions of the work society,"[83] resulting in the raising of expectations about what women "should" be doing rather than the alleviation of the pressures of the "second shift."[84] Furthermore, in some occupations an increase in women workers has had a negative effect on wage rates overall.[85]

In reimagining the economic valuing of all forms of work and resulting changes to work arrangements, we are required to think deeply about how the current conditions under which work takes place are framed and thus perpetuated in the legal, policy, and public consciousnesses. As dominant contemporary processes such as automation and outsourcing reduce waged work to a minimum, our participation in waged work continues to be the core measure and source of wealth and social identity. This produces a paradox whereby workers are unable to participate in the prescribed form, that is under a full-time and permanent "standard" arrangement, not because of any reluctance on the part of the individual worker, but because such participation is not available to them: the secure and stable work model of the past has been replaced for so many by increasingly precarious, non-standard forms of work. The central question is whether the rise in precarity and related loss of job security offer new opportunities for a different way of life. In her blog post "Struggling with Precarity: From More and Better Jobs to Less and Lesser Work,"[86] Wanda Vrasti has posited that the crisis of capitalist productivity predicated by the onset of cheaper, automated production methods is, in fact, "a crisis of work or a crisis of a society built around work as the only

81. BUSBY, *supra* note 77.

82. Jenny Cameron and J.K. Gibson-Graham, *Feminizing the Economy: Metaphors, Strategies, Politics*, 10(2) GEND., PLACE & CULTURE 145, 147 (2003).

83. Gradon Diprose, *Radical equality, care and labour in a community economy*, 24(6) GEND., PLACE & CULTURE 834, 835 (2017).

84. ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (2012).

85. Emily Murphy & Daniel Oesch, *The Feminization of Occupations and Change in Wages: A Panel Analysis of Britain, Germany, and Switzerland*, 94 SOC. FORCES 1221 (2016).

86. Wanda Vrasti, *Struggling with Precarity: From More and Better Jobs to Less and Lesser Work*, DISORDER OF THINGS (Oct. 12, 2013), https://thedisorderofthings.com/2013/10/12/struggling-with-precarity-from-more-and-better-jobs-to-less-and-lesser-work/.

legitimate point of access for income, status and citizenship rights."[87] Through its association with this crisis of the society of work, "[p]recarity is a word for our time. It describes the slow disintegration of the historic bond between capitalism, democracy and the welfare state."[88]

This conceptualization relies on a Marxist understanding of late capitalism. As Marx observed, where labor time is stripped back to the bare minimum, "[c]apital itself is the moving contradiction, [in] that it presses to reduce labour time to a minimum, while it posits labour time, on the other side, as sole measure and source of wealth. Hence it diminishes labour time in the necessary form so as to increase it in the superfluous form."[89] In recognizing the relevance of this formulation to the current social stasis, Vrasti asks "[w]hat if instead of describing a shared experience all that the concept [of precarity] did was point to the absence of a common ground? Is there any way we could turn precarity around from a testament to our shared vulnerability into a positive affirmation of collective desire?"[90] In this reimagining, rather than framing the increased precarity surrounding work as representative of the loss of a societal utopia where work security was the norm, we could utilize it as a galvanizing force for imagining a different future. In the absence of a return to the traditional forms of regulation and measures of stability and security, "could we perhaps push the contradictions of the present into a future where flexibility and contingency are an expression of security rather than a form of punishment?" [91]

This reclaiming of the term and state of precarity in order to contextualize the experiential reality of our working lives has a certain resonance with Fineman's utilization of vulnerability as "universal and constant, inherent in the human condition" and her call for a legal framework that places the "vulnerable subject" at its core.[92] However, whereas Fineman's thesis relates to the human subject of law who experiences vulnerability through her embodied state and embeddedness within institutions which are themselves vulnerable, precarity is more usefully recognized as inherent to the experience of interacting with the processes and structures by and within which work is organized in a late capitalist system. In fact, to reject the idea of precarity as being potentially of value risks reaffirmation of post-war capitalism as the ideal economic model which "perpetuates the quite-common fantasy that Fordism was capitalism done right."[93]

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87. Id.
88. Id.
89. Karl Marx, Grundrisse: Foundations of the Critique of Political Economy (Rough Draft), Notebook VII Marxists, https://www.marxists.org/archive/marx/works/1857/grundrisse/.
90. Vrasti, supra note 87.
91. Id.
92. Fineman, supra note 74, at 2.
93. Vrasti, *supra* note 87.

In acknowledging precarity's positive qualities, we can point to the individual freedom that a decoupling from the full-time, permanent model of employment can bring. In the abstract, the appeal of this redefinition of precarity is obvious—the subject gains time to commit to the other activities that make a life complete including the pursuit of leisure and travel. In constructing such an ideal it is important that we take account of the proper place of care as a crucial and non-negotiable, yet variable, aspect of life. In setting out a case for including the non-monetized value of care in economic modelling, Nancy Folbre argues for recognition of the contribution made by the invisible heart of the carer[94] in contrast to Adam Smith's invisible hand of the market.[95] What such a shift in perspective would mean for labor law is difficult to estimate: the challenge to the free market ideology which underpins the capitalist system and around which the legal framework is constructed would at the very least reveal the mythology of so many of its central tenets including the autonomy and independence of the individual and the apparent neutrality of its key institutions including law. By embracing our common vulnerability, interdependency and innate precarity, we might seek to build a more inclusive and reflective legal and policy response capable of instilling sustainable social change and achieving gender justice.

CONCLUSION

This article took as its starting point the use of and regulatory challenges surrounding zero hours contracts in the UK up to and including the Supreme Court's judgment in *Uber*. This judgment was then contrasted with the approach taken by the Court in *Mencap* in order to highlight the existence of a fragmented approach to regulation for those who work under irregular arrangements. In analyzing the different approaches taken by the regulatory framework and judicial interpretation, the article drew on the "alternative/diverse economies" literaturem which makes a values-based argument for reassessing how society and its institutions measure, monitor and reward human endeavor. This process of thinking about the organization of work and how to develop an empirically-grounded contemporary model on which to base its future regulation can benefit from the reimagining of a "real utopia"[96] – an ideal that is grounded in the real potential for social change. Rather than "adding on" or "counting in" the activities associated with care so that they become subject to the same constraints that currently exist in relation to waged work, we need to consider alternative approaches that make it possible and desirable for all humans, regardless of gender, to engage with the care of

94. FOLBRE, *supra* note 68, at 231.
95. ADAM SMITH, WEALTH OF NATIONS (Wordsworth Eds., 2012).
96. ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS (2010).

themselves and others. Radical fiscal measures, such as a universal basic income or minimum income guarantee, may offer routes out of the paid work bind by enabling individuals to embrace the increasingly precarious nature of paid work, whilst ensuring that all of life's facets are accounted for. In accepting that we have reached the outer limits of late capitalism as foreseen by Marx and evidenced by the unsatisfactory treatment of temporality in cases such as *Uber* and *Mencap*, the necessary search for such alternatives has the potential to free us all.

ZERO-HOURS WORK IN AUSTRALIA: THE CHALLENGE OF FRAGMENTED WORKING-TIME

IAIN CAMPBELL

JOO-CHEONG THAM

Zero-hours work arrangements (ZHWAs), broadly understood as work arrangements in which workers lack assurance about the number and timing of their paid working hours, are a stark example of on-demand work at the service of business needs.[1] Their presence in many industrialised societies testifies to the increasing impact of working-time changes driven by employer rather than worker interests.[2] Partly as a result, researchers and policy makers are giving greater attention to ZHWAs,[3] which often figure in wider debates about labor restructuring, framed in terms such as the spread of precarious or poor quality work, the rise of fragmented time systems, the transfer of risk to workers and the emergence of unacceptable forms of work.[4]

This article examines the case of Australia – an intriguing case, which, in cross-national comparisons, is sometimes presented as a 'world leader' in the extent of zero-hours work.[5] It focuses on what we identify as the two main

1. Elise Dermine & Amaury Mechelynck, *Zero-Hour Contracts and Labour Law: An Antithetical Association?*, 13 EUR. LAB. L.J. 339 (2022); EUROFOUND, NEW FORMS OF EMPLOYMENT (2015).

2. Peter Berg, Gerhard Bosch & Jean Charest, *Working-time Configurations: A Framework for Analyzing Diversity Across Countries*, 67 INDUS. LAB. REL. REV. 805 (2014); JON MESSENGER, WORKING TIME AND THE FUTURE OF WORK (2018).

3. *E.g.*, Dermine & Mechelynck, *supra* note 1; EUROFOUND, CASUAL WORK: CHARACTERISTICS AND IMPLICATIONS (2019); ILO, NON-STANDARD EMPLOYMENT AROUND THE WORLD: UNDERSTANDING CHALLENGES, SHAPING PROSPECTS (2016); ZERO HOURS AND ON-CALL WORK IN ANGLO-SAXON COUNTRIES (Michelle O'Sullivan, Jonathan Lavelle, Juliet Macmahon, Lorraine Ryan, Caroline Murphy, Thomas Turner & Patrick Gunnigle eds., 2019).

4. Janine Berg, *Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work*, 41 COMP. LAB. L. & POL'Y J. 69 (2019); ARNE KALLEBERG, PRECARIOUS LIVES: JOB INSECURITY AND WELL-BEING IN RICH DEMOCRACIES (2018); Jill Rubery, Kevin Ward, Damian Grimshaw & Huw Beynon, *Working Time, Industrial Relations and the Employment Relationship*, 14 TIME & SOC'Y 89 (2005); JUDY FUDGE & DEIRDRE MCCANN, UNACCEPTABLE FORMS OF WORK: A GLOBAL AND COMPARATIVE STUDY (2015).

5. Egidio Farina, Colin Green & Duncan McVicar, *Zero Hours Contracts and Their Growth*, 58 BRIT. J. INDUS. REL. 507, 514 (2020); *see* Nikhil Datta, Giulia Giupponi & Stephen Machin, *Zero-hours Contracts and Labour Market Policy*, 34 ECON. POL'Y 369, 375 (2019).

forms of zero-hours work in Australia: on-demand casual work and location-based platform work.[6]

The article is structured as follows. Section 1 introduces the concept of zero-hours work. In our preferred conceptualisation, which starts with the 'factual' level of employment relations practice, the lack of guaranteed working hours signals that the employer exercises a high degree of control over the worker's schedule, including not only the number of working hours and their timing but also the degree of variation in the number and timing of hours and the degree of predictability of any schedule irregularity. This in turn indicates a high level of *temporal fragmentation* for workers.

Section 2 introduces law and labor regulation, including recent legislation by the federal Labor government. Though the term "zero hours" is unfamiliar, we suggest that zero-hours practices are prominent in Australia, due to the presence of two permissive regulatory frameworks, casual work and self-employment, which provide space for cost-minimizing employers to impose on-demand schedules on workers.

Section 3 summarises evidence concerning the extent of the two main forms of zero-hours work in Australia. On-demand casuals constitute a substantial proportion of the workforce, but location-based digital platform work, measured in terms of the number of persons in their main job, is relatively insignificant.

Section 4 looks more closely at policy. We argue that the policy record has been poor. Recent legislative efforts to improve wages and conditions for insecure workers have produced progress for platform workers in sectors such as ride hail and food delivery, but measures in relation to casual work have been disappointing, overlooking the needs of the many zero-hour workers who are on-demand casual workers.

Concept

Zero hours work, in most definitions, centres on the lack of a guaranteed minimum number of hours.[7] This broad conceptualisation works well as a

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6. Digital platform work is understood as "paid labour intermediated by online labour platforms." Zachary Kilhoffer, *State of the Art. Data on the Platform Economy*, INGRID-2 (2021), https://www.inclusivegrowth.eu/files/Output/D12.3_EIND.pdf. It is commonly divided into two main variants according to where the work is performed, whether on-line or in a physical locality. ILO, WORLD EMPLOYMENT AND SOCIAL OUTLOOK 2021: THE ROLE OF DIGITAL LABOUR PLATFORMS IN TRANSFORMING THE WORLD OF WORK (2021). We are primarily interested in the latter variant, *i.e.*, "location-based platform work" in sectors such as personal transport ("ride hail"), delivery of food and other goods, and household services such as (domestic) cleaning and domiciliary care work, where the labor service is mediated by software applications ("apps") but physically undertaken in a local area. This is the dominant variant in Australia and the one that most closely approximates to zero-hours work.

7. Abi Adams, Zoe Adams & Jeremias Prassl, *Legitimizing Precarity: Zero Hours Contracts in the United Kingdom*, *in* ZERO HOURS AND ON-CALL WORK IN ANGLO-SAXON COUNTRIES, *supra* note 3, at 42.

starting point for research. It provides a useful frame that can bridge national and sub-national differences and overcome terminological diversity. One point of tension, however, concerns whether conceptualisation should be oriented to the legal framework or the employment relations practice. We follow the scholarly mainstream in arguing that the employment relations practice – what is sometimes called the "factual" level – should be a focal point, because it allows research to align with worker and employer experiences and to grasp the distinctiveness of zero-hours work, its multiplicity and its likely impacts.[8]

Focusing on the employment relations practice means examining the implications of the lack of guaranteed minimum hours of work. At this level, zero-hours work is revealed as less a distinct type of employment contract and more an organising principle for working-time schedules. It represents an important example of *on-demand work*,[9] in which work schedules are structured so that they provide employers with labor time as and when needed.[10]

Though by no means a new phenomenon, on-demand work has grown in significance, partly due to advances in information and communication technologies, which facilitate the application of just-in-time principles to production inputs, including labor itself.[11] Digitalisation enables employers, especially in large firms, to disaggregate both tasks and time, dividing human labor in complex labor processes into small parcels, to be matched as closely as possible to fluctuations in demand and other employer requirements. Where the regulatory and labor market context is favourable, eg by supporting types of employment that allow payment according to individual tasks or very short shifts, disaggregation allows employers to distribute small parcels of labor in complex ways amongst a pool of available workers. Sometimes presented as just a step forward in production efficiency, disaggregation is more broadly significant because of the way it functions in a dynamic of capitalist competition to reduce labor costs. Disaggregation promises an

8. Dermine & Mechelynck, *supra* note 1. Consistent with an argument about prioritizing employment relations practice, we prefer to speak of zero-hours "work" or "work arrangements" rather than zero-hours "contracts."

9. On-demand work is sometimes labelled "on-call" work. EUROFOUND, *supra* note 1, at 46. However, this terminology risks confusion with cases of after-hours availability amongst professional workers such as medical personnel or IT consultants, whose main schedule is framed in terms of standard full-time hours. *See also* Madeline Sprajcer, Sarah Appleton, Robert Adams, Tiffany Gill, Sally Ferguson, Grace Vincent, Jessica Paterson & Amy Reynolds, *Who is "On-Call" in Australia? A New Classification Approach for On-Call Employment in Future Population-Level Studies*, 16 PLOS ONE 1 (2021).

10. On-demand work practices, including ZHWAs, are one component in a more general diversification of working-time schedules in contemporary societies. SANGHEON LEE, DEIRDRE MCCANN & JON MESSENGER, WORKING TIME AROUND THE WORLD: TRENDS IN WORKING HOURS, LAWS AND POLICIES IN A GLOBAL COMPARATIVE PERSPECTIVE (2007); MESSENGER, *supra* note 2; Brendan Burchell, Simon Deakin, Jill Rubery & David Spencer, *The Future of Work and Working Time: Introduction to Special Issue*, 48 CAMBRIDGE J. ECONS. 1 (2024).

11. Berg et al., *supra* note 2, at 808–09.

immediate benefit for cost-minimising employers through effects such as avoiding payment for less productive hours (including hours of holidays, paid leave and training), avoiding premium payments for non-standard hours, facilitating intensification of each remaining hour, converting paid labor into unpaid labor time and indeed creating new forms of unpaid labor time as part of the pressure on the worker to be available to the employer.[12] As a further step in reducing labor costs, information and communication technologies can be assembled into a package of digitalised or "algorithmic" management, which carries out standard management functions such as direction, evaluation and discipline of workers. Techniques of digitalised management in the service of on-demand work are most often documented for platform work, but they are also evident in many conventional employment settings, such as in retail, warehousing and care work, where they similarly operate to shift risk and costs to workers.[13]

In analysing on-demand work, including ZHWAs, at the level of practice, it is useful to consider the varied ways in which employers can organize (and re-organize) a worker's schedule. Four dimensions of schedules are relevant:

The first concerns the *number* (or duration) of working hours, measured according to the day, week, month or even year.

The second is to do with the other major axis of schedules: the distribution of working hours over the day, week, month or year. Employer control of the number of working hours is generally intertwined with employer control of the *timing* of those working hours, including their occurrence within non-standard times such as nights and weekends.

The third dimension concerns the variability of schedules. Employer control of the number and timing of hours could in principle lead to regular schedules, perhaps even regular schedules similar to those experienced by most employees. But a strong implication of on-demand work is *irregularity*, which can apply to either or both the number and the timing of working hours.

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12. Agnieszka Piasna, *Algorithms of Time: How Algorithmic Management Changes the Temporalities of Work and Prospects for Working Time Reduction*, 48 CAMBRIDGE J. ECONS. 1 (2024); *see also* Jill Rubery, Damian Grimshaw, Gail Hebson & Sebastian Ugarte, *"It's All About Time": Time as Contested Terrain in the Management and Experience of Domiciliary Care Work in England*, 54 HUM. RES. MGMT. 753 (2015).

13. Piasna, *supra* note 12; *see also* Sara Baiocco, Enrique Fenandez-Macías, Uma Rani & Annarosa Pesole, *The Algorithmic Management of Work and Its Implications In Different Contexts* (ILO/European Commission, Background Paper No. 9., 2022). For a case study of algorithmic management in a conventional setting in the UK, based around ZHWAs, *see* Sian Moore & L J B Hayes, *Taking Worker Productivity to A New Level? Electronic Monitoring in Homecare – The (Re)Production of Unpaid Labour*, 32 NEW TECH. WORK & EMPL. 101 (2017).

A fourth dimension concerns the *predictability* for employees of schedule irregularity. This aspect pivots on the degree of effective notice, whether long or short, provided to employees concerning forthcoming shifts.[14]

This schema suggests that on-demand work is likely to comprise multiple scheduling practices, shaped by the varied ways in which employer control takes effect across the four dimensions of working-time schedules. Thus, on-demand work can include intermittent day labor, as in construction and agriculture, irregular shifts at mealtimes, as in restaurants, and very short shifts at any time of the day or night, as in domiciliary care work. The crucial dimension of irregularity can itself occur in different ways and to differing degrees. Irregularity in the number of working hours can in principle incorporate long hours beyond the full-time threshold. But the dynamic of disaggregation to cheapen labor costs points to a likely overlap between on-demand work and *reduced* daily and weekly hours, where fluctuations in the number of hours tend to fall within the boundaries of part-time work.[15]

Work schedules associated with disaggregation are sometimes described as "flexible",[16] but we prefer to describe the outcome in terms of "temporal fragmentation" or "fragmented work time arrangements'.[17] This is also described as 'atomised and punctuated working time', which produces "a patchwork of ever-shorter units of paid working time scheduled in irregular and discontinuous patterns according to business demand and intertwined with unpaid or non-work periods".[18] Researchers suggest that temporal fragmentation is most prominent in societies where working-time regulation is inadequate and the dominant configuration of working-time practices is characterised by employer control and in industry sectors where low-cost labor is

14. Effective notice is based not just on the initial notification of a forthcoming shift but also on whether the shift may subsequently be altered or cancelled without penalty by the employer.

15. ILO, *supra* note 3.

16. Use of the term "flexible" in relation to schedules can be opaque and confusing, since it fails to answer the obvious question: "flexibility for whom?" *See* Elaine McCrate, *Flexibility for Whom? Control Over Work Schedule Variability in the US*, 18 FEMINIST ECONS. 39 (2012). Many scholars clarify by distinguishing between two modalities of flexibility, *e.g.*, with "employer-led" flexibility counterposed to "employee-led" flexibility. *See* MESSENGER, *supra* note 2; *see also* Jill Rubery, Arjan Keizer & Damian Grimshaw, *Flexibility Bites Back: The Multiple and Hidden Costs of Flexible Employment Policies*, 26 HUM. RES. MAN. J. 235, 236–38 (2016).

17. Fragmentation is a term applied to labor market or employment changes in general, but we focus here just on working time. Fragmented time employment arrangements can be defined as "when employers use strict work scheduling to focus paid work hours at high demand . . . and do not reward or recognize work-related time between periods of high or direct customer demand." Rubery et al., *supra* note 12, at 754, 760. The concept is highlighted in ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR IN EUROPE 68–85 (2001); *see also* Rubery et al., *supra* note 4; Burchell et al., *supra* note 10; Agnieszka Piasna, *Standards of Good Work in the Organisation of Working Time: Fragmentation and the Intensification of Work Across Sectors and Occupations*, 31 MAN. REV. 259 (2020); François-Xavier Devetter & Julie Valentin, *Long Day For Few Hours: Impact of Working Time Fragmentation on Low Wages In France*, 48 CAMBRIDGE J. ECONS. 89 (2024).

18. Piasna, *supra* note 12, at 120.

dominant and trade unions and individual market bargaining power are weak.[19]

The preceding discussion of employment relations practice allows us to refine the understanding of zero-hours work. ZHWAs can be regarded as an *extreme* variant of on-demand work, in which there are few constraints on the ability of the employer to call in the worker as and when required, and workers only work when specifically requested by employers.[20] This suggests *extensive* temporal fragmentation in practice*,* marked by a high degree of employer control over the number and timing of work hours and a likelihood of pronounced irregularity in number and timing, often with little predictability and at short effective notice. As in the case of on-demand work in general, ZHWAs are likely to be multiple, shaped by the specific structure of individual employer interests (as well as by factors such as labor regulation and labor market structures). The link with reduced hours is likely to be strong; indeed, zero-hours work is often characterised as a prime example of marginal part-time or precarious part-time work.[21] The reduced number of hours may 'fit' the preferences of some employees, but the bias to very short hours, compounded by irregularity and lack of certainty in the precise number, means that zero-hours work is often associated with time-related underemployment.[22]

The label 'zero hours', which highlights the possibility that the worker may fail to obtain *any* hours of paid work, alludes to the extreme nature of ZHWAs. It could be objected that the label is one-sided, since duration is just one dimension of schedules, and in any case actual working hours under ZHWAs generally fluctuate within a positive zone and rarely fall to a base level of zero. This objection has some force and is a useful reminder that zero hours work comprises varied scheduling practices, some of which are more challenging for employees than others. On the other hand, however, highlighting the possibility, even if it is rarely realised, of the worker failing to receive any hours of paid work is justifiable, since it functions in practice as a crucial contextual condition, which threatens the employee not only with an abrupt loss of working hours but also with a loss of income and indeed

19. Rubery et al., *supra* note 16, at 237; Burchell et al., *supra* note 10; Berg et al., *supra* note 2.

20. EUROFOUND, LABOUR MARKET CHANGE: TRENDS AND POLICY APPROACHES TOWARDS FLEXIBILISATION 34 (2020); Michelle O'Sullivan, *Introduction to Zero Hours and On-call Work in Anglo-Saxon Countries*, *in* ZERO HOURS AND ON-CALL WORK IN ANGLO-SAXON COUNTRIES 7 (Michelle O'Sullivan et al. eds., 2019).

21. ILO, *supra* note 3; JON MESSENGER & PAUL WALLOT, THE DIVERSITY OF "MARGINAL" PART-TIME EMPLOYMENT (INWORK, Policy Brief No. 7, 2015); Jill Rubery, Damian Grimshaw, Philippe Méhaut & Claudia Weinkopf, *Dualisation and Part-Time Work in France, Germany and The UK: Accounting For Within and Between Country Differences in Precarious Work*, EUR. J. IND. REL. (2022).

22. ILO, WORKING TIME AND WORK-LIFE BALANCE AROUND THE WORLD (2022); Maria Koumenta & Mark Williams, *An Anatomy of Zero-Hour Contracts in the UK*, 50 IND. REL. J. 20 (2019).

loss of employment itself. It summarily encapsulates the lack of bargaining power of the worker, who is dependent on the employer for the next offer of a shift. As such, the term successfully draws attention to the disciplining effect of ZHWAs, as indeed of on-demand work in general.[23]

ZHWAs can justifiably be labelled as extreme, given the high degree of employer control over scheduling, but it would be wrong to conclude that employer control is total and workers are completely powerless in their schedules. This is almost never the case. Factors that can moderate employer control in practice include the framework of protective labor regulation. Though the existence of ZHWAs testifies to a certain disconnection from protective regulation (see section 2), most industrialised nations confer at least some protections, whether incidentally or deliberately focused, on zero-hours workers, and indeed differences in such partial protections help to explain cross-national variation in both the extent and substance of ZHWAs.[24] In this context, protective labor regulation can modify the power imbalance between employer and worker, functioning as an institutional power resource that provides workers with a degree of countervailing power, whether collective or individual. Another institutional power resource is the welfare system. Other factors that can moderate employer control include effective union representation, tight labor market conditions (scarce skills), strategic location in the production process, employer reliance on workers' soft skills and reliability, and worker access to alternative sources of income.[25]

As a result of such moderating factors, worker agency, even in the framework of a high degree of employer control, is never completely absent.[26] Constrained agency is most easily observed in basic decisions by workers to enter in or exit from an employment relationship, but agency can also be exercised within the employment relationship. One fundamental challenge for employers, given the lack of formal mechanisms to compel zero-hours workers to respond positively to specific offers of work, concerns ensuring prompt and cooperative responses from workers to irregular work demands. To achieve or consolidate worker availability and responsiveness typically depends on a range of mechanisms. Employers often rely on conditions

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23. ALEX WOOD, DESPOTISM ON DEMAND: HOW POWER OPERATES IN THE FLEXIBLE WORKPLACE (2020).

24. Datta et al., *supra* note 5; Koumenta & Williams, *supra* note 22; O'Sullivan, *supra* note 20; *see also* Jill Rubery & Damian Grimshaw, *Precarious Work and The Commodification of The Employment Relationship: The Case Of Zero Hours In The UK And Mini-Jobs In Germany*, *in* DER ARBEITSMARKT VERSTEHEN, UM IHN ZU GESTALTEN. FESTSCHRIFT FÜR GERHARD BOSCH (Gerhard B. . .cker, Steffen Lehndorff & Claudia Weinkopf eds., 2016).

25. Bjarke Refslund & Jens Arnholtz, *Power Resource Theory Revisited: The Perils And Promises For Understanding Contemporary Labour Politics*, 43 ECON. INDUS. DEMOCRACY 1958 (2022).

26. Neil Coe & David Jordhuis-Lier, *The Multiple Geographies Of Constrained Labour Agency*, 47 PROG. HUM. GEOGRAPHY 533 (2023).

of labor oversupply, and they may also target recruitment on categories of workers seen as relatively adaptable or acquiescent, such as temporary migrant workers. In addition, negotiations between employer and worker, generally informal, may take place during or after recruitment. Employers retain the upper hand in such negotiations, largely due to their power to withhold, reduce or adjust offers of work (and income). In favourable circumstances, however, workers may be able to exert pressure over the extent of their availability, extending even to rejection of unsuitable shift offers. In less favourable circumstances, eg. where workers are vulnerable and easily replaced, workers may exercise little pressure and instead be reduced to "incessant availability".[27]

There is widespread concern in many countries about the negative consequences of ZHWAs, especially for affected workers and their households. The impact of ZHWAs on workers is likely to vary according to the precise configuration of employer demands and the degree of countervailing power that workers can exert. In general, however, researchers identify pervasive problems of poor job quality or precariousness. The pivotal feature is *working-time insecurity*, which is in turn linked to *employment insecurity* and *low pay and income insecurity*.[28] As a result of the multiple and often severe deficits in job quality, zero-hours workers are commonly regarded as amongst the most insecure group of workers in any workforce.

There is no room to discuss the negative impacts on workers in any detail. However, it is useful to underline one implication of fragmented schedules, viz. the disruptive impact on work-life balance, which makes it harder for workers to plan and carry out activities, including caring, outside the workplace.[29] Given that unpaid caring is disproportionately taken up by women, this disruptive impact is a gendered phenomenon. Disruption starts with the impact of irregular and unpredictable hours, but researchers also point to the significance of a blurring of the division between work and non-work time, which multiplies segments of labor time that are work-related but unpaid.[30] The argument concerning *unpaid labor* is often noted for digital platform work, but it is also salient in conventional employment settings such

27. Piasna, *supra* note 12.

28. *See* ILO, *supra* note 3. Employment insecurity should be understood in a twofold sense, incorporating risks not only of dismissal but also of a partial loss of shifts.

29. ILO, *supra* note 22, at 59–62; Clare Kelleher, Julia Richardson & Galina Boiarintseva, *All Of Work? All Of Life? Reconceptualising Work-Life Balance for The 21st Century*, 29 HUM. RES. MAN. J. 97 (2019); Colette Fagan, Clare Lyonette, Mark Smith & Abril Saldaña-Tejeda, *The Influence of Working Time Arrangements on Work-Life Integration or 'Balance': A Review of the International Evidence* (ILO, Conditions of Work and Employment Series No. 32, 2012); Hyojin Cho, Susan Lambert, Emily Ellis & Julia Henly, *How Work Hour Variability Matters for Work-to-Family Conflict*, WORK, EMPL. & SOC. (2024).

30. Rubery & Grimshaw, *supra* note 24.

as those prevailing in domiciliary care, where employers implement temporal fragmentation and restrict paid time to direct client contact, while defining essential tasks such as travel between clients, administration, training and supervision as largely unpaid.[31] As a result, temporal fragmentation involves both a conversion of paid to unpaid labor time and the production of new forms of unpaid labor time, such as long waiting periods, eg between clients or, more fundamentally, long hours of waiting for offers of shifts. This leads to a common puzzle that, while pressures of time-efficiency compress the time designated for paid work, the time that the worker needs to make available often expands.[32] The disruptive effect can be described as time theft or indeed care theft, defined as robbery of a worker's care giving resources and options.[33] This in turn impels major adaptations, which are not confined to the worker but extend to other members of the household.[34]

This section stresses the multiplicity of ZHWAs, which share a common feature of temporal fragmentation but nevertheless encompass varied scheduling practices. A related point concerns the multiplicity of *adjacent practices*. It would be wrong to presume that ZHWAs are an isolated phenomenon, an aberrant exception to normal working-time patterns. On the contrary, ZHWAs are best seen as situated within a spectrum of poor quality working-time arrangements that deviate from a standardised model of working time.[35] Adjacent practices include other forms of on-demand work, often found in the same lower-skilled industry sectors, as well as other forms of intermittent work, short fixed-term work or casualised work in general.[36] The closest connection is to practices of waged work that encompass a small number of guaranteed hours, perhaps on a regular roster, but permit substantial employer control in "flexing up" schedules beyond this base point. These closely connected forms, variously called "near zero hours",[37] "minimum hours",[38] or

31. For platform work, *see* Valeria Pulignano, Damian Grimshaw, Markieta Domecka & Lander Vermeerbergen, *Why Does Unpaid Labour Vary Among Digital Labour Platforms? Exploring Socio-Technical Platform Regimes Of Worker Autonomy*, HUM. REL. (2023). For domiciliary care, *see* FIONA MACDONALD, INDIVIDUALISING RISK: PAID CARE WORK IN THE NEW GIG ECONOMY (2021); Fiona Macdonald, Eleanor Bentham & Jenny Malone, *Wage Theft, Underpayment and Unpaid Work in Marketized Social Care,* 29 ECON. & LAB. REL. REV. 80 (2018); Moore & Hayes, *supra* note 13**;** Rubery et al., *supra* note 12.

32. Piasna, *supra* note 12, at 116, 119.

33. Natasha Cortis, Megan Blaxland & Sara Charlesworth, *Care Theft: Family Impacts Of Employer Control In Australia's Retail Industry*, 44 CRITICAL SOC. POL'Y 106 (2024).

34. Valeria Pulignano & Glenn Morgan, *The "Grey Zone" at the Interface of Work and Home: Theorizing Adaptations Required by Precarious Work*, 37 WORK, EMP. & SOC. 257 (2023).

35. LEE ET AL., *supra* note 10.

36. EUROFOUND, *supra* note 1, at 46; *see also* EUROFOUND, *supra* note 3.

37. Gordon Cooke, Firat Sayin, James Chowham, Sara Mann & Isik Zeytinoglu, *Zero Hours and Near Zero Hours Work in Canada*, *in* M. O'SULLIVAN ET AL., *supra* note 3.

38. Iain Campbell, Fiona Macdonald & Sara Charlesworth, *On-demand Work in Australia*, *in* M. O'SULLIVAN ET AL., *supra* note 3; Sian Moore, Stephanie Tailby, Bethania Antunes & Kirsty Newsome,

"highly variable hours" (HVHs),[39] represent another variant of on-demand work. They elude the strict definition of zero-hours work, but they are characterised by similar features of schedule irregularity and unpredictability and often have similar negative consequences for employees. Analysis and reform should, in principle, consider ZHWAs in conjunction with such other variants of on-demand work.

2. Two permissive regulatory frameworks

This section considers how ZHWAs are accommodated within the Australian system of labor regulation. We suggest that ZHWAs, in the form of either on-demand casual work or location-based platform work, are facilitated by permissive regulatory frameworks. The section begins with a sketch of labor regulation in Australia before turning to consideration of the two relevant regulatory frameworks: casual work and self-employment.

Labour regulation

The principal labor law legislation in Australia, the federal *Fair Work Act,* establishes a multi-layered approach to labour regulation, with a minimum safety net comprising statutory rights (including the National Employment Standards) and modern awards.[40] Modern awards are arbitral determinations by the federal industrial commission, the Fair Work Commission (FWC), typically laying down industry standards.[41] The *Fair Work Act* also sets up a system of enterprise agreements centred upon single-enterprise agreements; these agreements displace the operation of modern awards, provided their terms result in the relevant employees being better off overall when compared to the conditions under the modern awards.[42]

Given that most layers of labor regulation, at least beyond the level of the common law, have a central aim of employee protection, guided by familiar principles of (partial) decommodification, the existence of ZHWAs in Australia is something of a puzzle. Their emergence suggests a curious disconnection from conventional protections. How does such disconnection occur? One broad answer is to do with the patchiness of much protective regulation. Patchiness is partly due to the multiplicity of layers, each with differing reach, but also important is the design of protective regulation, which tends to be oriented to standard employment and offers only

"Fits And Fancies": The Taylor Review, The Construction Of Preference And Labour Market Segmentation, 49 INDUS. REL. J. 403 (2018).

39. Andrew Smith & Jo McBride, *"It Was Doing My Head In": Low-Paid Multiple Employment and Zero-Hours Work*, 61 BRIT. J. INDUS. REL. 3 (2023).

40. *Fair Work Act 2009* (Cth) s 3 (Austl.). The main regulatory layers in the national system are described in Mark Bray & Andrew Stewart, *From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work*, 34 ADEL. L. REV. 21 (2013).

41. *E.g.*, Hospitality Industry (General) Award 2020 (Cth) (Austl.).

42. *Fair Work Act 2009* (Cth) s 193A (Austl.).

differentiated protection, i.e., protection in a selective and partial way, for categories of work and workers that fall outside the boundaries of standard employment.[43] The outcome is a set of regulatory gaps, often linked to forms of non-standard employment, which in effect *permit* the expansion of poor employment practices, such as ZHWAs.[44] Regulatory gaps are common and powerful in the case of working-time regulation (eg maximum hours, minimum breaks, rostering, flexible work arrangements, paid leave, etc), which can be judged as particularly weak and uneven in Australia.[45]

The Australian regulatory system is characterized not only by multiple gaps but also by a long-standing failure to develop policy that could close the more problematic gaps. One obstacle to policy discussion and implementation has been a reluctance to legislate directly for minimum labour standards. The traditional approach to legislative standards is aptly described as an 'abdication' of responsibility in favour of industrial tribunals and labor courts.[46] Though the standards set by industrial tribunals at federal level, most recently the FWC, are often innovative and carefully adapted to specific industry conditions, a one-sided reliance on tribunal processes has led to gaps and other disadvantages. The strongest standards tend to be confined to select groups in individual awards, leaving other workers with weaker or indeed missing protections. Establishing and revising *common* standards across individual awards has proven difficult because of the diversity of conditions at industry level, the priority given to dispute resolution, the decreasing influence of trade unions as an agent of change, and the erosion of the traditional

43. For Australia, *see* Campbell et al., *supra* note 38, at 70–71; Joo-Cheong Tham, *Towards an Understanding of Standard Employment Relationships under Australian Labour Law*, 20 AUSTL. J. LAB. L. 123 (2007). Another answer to the puzzle of disconnection is through employer non-compliance. This is significant in Australia, where it applies most forcefully in low-wage industries, *see* Tess Hardy & John Howe, *Out of the Shadows and into the Spotlight: The Sweeping Evolution of Employment Standards Enforcement in Australia*, *in* CLOSING THE ENFORCEMENT GAP: IMPROVING EMPLOYMENT STANDARDS PROTECTIONS FOR PEOPLE IN PRECARIOUS JOBS 221 (Leah Vosko & Closing the Enforcement Gap Research Group eds., 2020); Frances Flanagan & Stephen Clibborn, *Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?* SYDNEY L. REV. (2023) . However, we set employer non-compliance aside for the purposes of this discussion and confine our attention to forms of work with legal sanction.

44. DAMIAN GRIMSHAW, MATT JOHNSON, JILL RUBERY & ARJAN KEIZER, REDUCING PRECARIOUS WORK: PROTECTIVE GAPS AND THE ROLE OF SOCIAL DIALOGUE IN EUROPE (2016).

45. For labor regulation gaps and the weakness of working-time regulation in Australia, *see* Campbell et al., *supra* note 38, at 71; Iain Campbell & Sara Charlesworth, *Promoting Secure Work: Two Proposals for Strengthening the National Employment Standards*, 36 AUSTL. J. LAB. L. 232, 235–36 (2023). The unevenness of working-time provisions in awards and statute is noted in Sara Charlesworth & Alexandra Heron, *New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture*, 54 J. INDUS. REL. 164 (2012). Australia can be regarded as a "unilateral working-time regime", where the workplace is the most important level for the determination of working-time patterns, *see* Berg et al., *supra* note 2.

46. Ron McCallum, *Legislated Standards: The Australian Approach*, *in* WORK AND EMPLOYMENT RELATIONS: AN ERA OF CHANGE 6, 7, 10 (Marian Baird, Keith Hancock & Joe Isaac eds., 2011).

mechanisms for generalization of award standards such as test cases and, more recently, modern award reviews.[47]

Policy development is also complicated by the stance of the courts, especially in interpreting contracts of employment. The dominant approach can be described as contractualist—an orientation that ascribes significant weight to contractual terms (contractual obligations) in resolving legal issues. We can broadly distinguish between two types of contractualism according to the relative weight ascribed to contractual terms as distinct from working practices of the employment relationship:[48]

Ultra-contractualism which considers contractual terms as definitive and working practices as being legally irrelevant; and

Moderate contractualism which treats contractual terms and working practices as having comparable weight.

In the absence of relevant legislative guidance, even with respect to definitions of basic terms such as "employee" and "casual employee" (see below), both moderate contractualism and ultra-contractualism function to widen the spaces available for the emergence of poor employment practices, including ZHWAs. In section 1, we observed that a lack of guaranteed minimum working hours for zero-hours workers signals that the employer exercises a high degree of control at the factual level over the worker's schedule. The contractualist approach endorses a disjuncture between the factual and legal dimensions of work arrangements. At the extreme, this encourages an argument that the lack of guaranteed working hours, whilst suggesting that practical control is held by the employer, can be interpreted as an indicator that the employer *lacks* legal control, as the worker has no corresponding obligation to perform work. We can see here an example of fetishistic thinking,[49] which obscures the class relations between employers and workers—the "usual and unequal contest" with the "pressure for profit" on one side and the "pressure for bread" on the other.[50] It is an approach that ignores how this imbalance of power typically results in "contracts of adhesion" for workers,

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47. The number of awards of general application in the national system is currently just over 120. For more on awards and their role in establishing minimum standards at an industry or occupational level, *see* Andrew Stewart & Mark Bray, *Modern Awards under the Fair Work Act*, 33 AUSTL. J. LAB. L. 52 (2020). Advantages of standard setting through awards are described in Jill Murray, *Labour Standards, Safety Nets and Minimum Conditions*, 18 ECON, & LAB. REL. REV. 43 (2008). Variation in working-time provisions in 25 awards is documented in *Work and Care: Modern Awards Review 2023-24* (Fair Work Commission, Discussion Paper, 2024) [hereinafter *Work and Care*]; *see also* Meg Smith & Sara Charlesworth, *Literature Review for the Modern Awards Review 2023-24 Relating to the Workplace Relations Settings Within Modern Awards that Impact People When Balancing Work and Care* (Western Sydney University, 2024).

48. *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 206 [106] (Gageler and Gleeson JJ) (Austl.).

49. See DAVID HARVEY, SEVENTEEN CONTRADICTIONS AND THE END OF CAPITALISM (2015).

50. *Ex parte H.V. McKay* (1907) 2 CAR 1, 3 (Austl.).

whereby contracts drafted by employers (and their lawyers) are offered to workers on a "take it or leave it" basis.[51]

The reluctance to legislate directly for minimum labour standards has eased in recent years. One important change occurred in late 2022, with the election of a federal Labor government, committed to promoting more secure work through changes to the national system of labor regulation.[52] Two Acts, the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (***CL Act 2023***) and the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (***CL No 2 Act 2024***), are particularly relevant for our discussion.[53] Both Acts have been welcomed as helpful to insecure workers. Do they, however, offer policy advances for zero-hours workers? Though it is too early to determine the precise impact, it is useful to consider the most significant changes. This section examines the significance of the *CL No 2 Act 2024* in altering the definitions, first of "casual" and then, more fundamentally, of "employee". The potential contribution of both the *CL Act 2023* and the *CL No 2 Act 2024* to more direct improvements in terms and conditions is considered in section 4.

Casual work

The first permissive regulatory framework concerns "casual work," which is recognized in Australian labor law, and indeed in labor statistics, public policy and popular understanding, as a distinct form of waged work. It was first set aside in the 1920s when the Commonwealth Arbitration Court began to consolidate decent wages and conditions for "weekly hire" employees through the system of awards.[54] Casual workers were excluded from most entitlements, leaving a substantial (and growing) deficit compared to standard permanent employees. Casual employees have a basic entitlement to a minimum hourly wage rate, with a notional "casual loading," for each hour of labor provided for an employer; but, in contrast to permanent workers,

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51. Joellen Riley Munton, *Defining Employment and Work Relationships under the Fair Work Act* (Centre for Employment and Labour Relations Law, Melbourne Law School, Policy Brief 1, 2022).

52. Anthony Albanese, *Labor's Secure Australian Jobs Plan*, Media Statement, 2022, at https://anthonyalbanese.com.au/labor's-secure-australian-jobs-plan. We focus here on efforts to improve protective standards. The government has also passed legislation to strengthen the weak participative standards in the national system – see Greg Jericho, Charlie Joyce, Fiona Macdonald, David Peetz & Jim Stanford, *Labour Policies*, 92 J. AUSTL. POL. ECON. 35 (2024).

53. A single Bill was introduced in 2023, but the government lacked a majority in the Senate, and it therefore set aside and delayed the more contentious parts of the initial Bill to allow further discussion and negotiation with crossbenchers. The first part of the Bill was passed and given royal assent in December 2023. The second part, after successful negotiation and minor amendments, was passed and given royal assent in February 2024.

54. *Re 4 Yearly Review of Modern Awards—Casual Employment and Part-time Employment* (2017) 269 IR 125 (Austl.); ANTHONY O'DONNELL, INVENTING UNEMPLOYMENT: REGULATING JOBLESSNESS IN TWENTIETH-CENTURY AUSTRALIA (2019).

they lack basic employment and working-time security, as well as standard entitlements such as paid annual leave and sick leave.[55] Though less protected than standard waged workers, they are, however, more protected than self-employed workers, due to coverage by work health and safety regulation, rights to workers' compensation in case of injury or illness caused by work, and freedom of association and collective bargaining rights. In addition, casual employees have acquired in recent decades at least two special protections under awards or statute.[56] The first is an entitlement to a period of "minimum engagement," or more exactly "minimum payment," when called in for work. This is an effective and valuable, though uneven, protection found in modern awards.[57] The second concerns a right for certain casual employees, under restricted conditions, to convert to permanent status. This right has appeared in different versions, initially in scattered collective agreements and awards, then in all modern awards, and now in statute as one of the National Employment Standards. In contrast to the entitlement to a minimum engagement, the right to conversion has, however, proved to be a feeble and ineffective protection (see section 4).

Casual employment has become a major part of the employment structure with only limited analysis and public discussion.[58] It is characterised by few regulatory restraints and limited bargaining power for the casual employee, with the result that it has evolved into "an alternative payment and entitlement system available at the election of the employer upon engagement".[59] Casual work status, with its inferior rights and entitlements, is attractive to cost-minimizing employers for various reasons. Apart from the enhanced opportunities for wage underpayment because of the relative powerlessness of casual employees, two main categories of potential labor cost savings are associated with casual status. First, at the most basic level, without any fundamental change in the work itself, savings can emerge, e.g., either by keeping casual employees at low classification levels without

55. Campbell et al., *supra* note 38, at 71–74; Inga Laß & Mark Wooden, *The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data*, 57 BRIT. J. INDUS. REL. 453 (2019); Ray Markey & Joseph McIvor, *Regulating Casual Employment in Australia*, 60 J. INDUS. REL. 593 (2018); David Peetz & Robyn May, *Casual Truths: What Do the Data on Casual Employment Really Mean?*, 64 J. INDUS. REL. 734 (2022).

56. The "casual loading" on the hourly pay rate should not be interpreted as a special protection for casual employees; it is rather an attempt to ensure that the cost to employers of labor, irrespective of casual or permanent status, is *equivalent*, *see* Campbell et al., *supra* note 38, at 72.

57. Minimum payment periods range from one hour to four hours in a recent sample of twenty-five modern awards. *Work and Care*, *supra* note 47, at 73–80.

58. Dale Tweedie & Sharni Chan, *Precarious work and globalisation in Australia: Growth, risks, and future(s)*, *in* IDENTIFYING AND MANAGING RISK AT WORK (Colin Petersen ed., 2021). *But see* the recent discussion in SENATE SELECT COMMITTEE ON JOB SECURITY, THE JOB INSECURITY REPORT 61–129 (2022).

59. *Re 4 Yearly Review*, *supra* note 54, at [85].

promotion or by using a low formal comparator such as an award rather than an enterprise agreement in calculating the hourly wage. Second, because of the capacity to organize and pay for casual labor in short shifts, substantial cost reductions can be achieved through the re-organization of work and work schedules via temporal fragmentation.[60] In both categories of cost-saving, costs and uncertainties can be transferred from employers to workers (and sometimes to the state).

Australia is by no means the only nation to host non-standard waged work with inferior rights and entitlements in its employment structure.[61] Forms such as fixed-term work, marginal part-time and temporary agency work are present in many countries, where they are often criticized as occupying a "grey zone" and are subject to ongoing contestation over the precise status of workers and the extent of their entitlements.[62] Nevertheless, casual work in Australia possesses distinctive features as a result of: a) a deep deficit in rights and entitlements, compared to standard permanent workers; b) a large weight in the employment structure; and c) a wide-ranging diversity in work practices, which spills well beyond what is implied by conventional understandings of casualized work as "irregular or intermittent, with no expectation of continuous employment".[63]

Though casual work in practice is diverse, it is common in Australia to distinguish two main groups of casual workers, largely in line with the two main categories of potential labor cost savings open to employers.[64] Both groups are substantial in size (see section 3). First are what can be best described as *regular casual* employees, who are on regular rosters, notified well in advance, and who tend to be used in a similar way to permanent employees. Workers from this group, also called "long-term" or "permanent" casuals,[65] are widely deployed, but they offer the most significant cost savings in

60. As a result of the varied advantages, casual work can be used in varied ways amongst enterprises and even within the one enterprise, *see, e.g.*, Tom Barnes & Jasmine Ali, *Articulations of Workplace Precarity: Challenging the Politics of Segmentation in Warehouse Logistics*, 70 SOCIO. REV. 1163 (2022).

61. ILO, *supra* note 3; EUROFOUND, *supra* note 20.

62. EUROFOUND, *supra* note 20; Karen Jaehrling & Thorsten Kalina, *"Grey Zones" within Dependent Employment: Formal and Informal Forms of On-Call Work in Germany*, 26 TRANSFER 447 (2020); Ilda Durri, *The Intersection of Casual Work and Platform Work: Lessons Learned from the Casual Work Agenda for the Labour Protection of Platform Workers*, 14 EUR. LAB. L. J. 474 (2023). For a German case study that examines the range of advantages of different forms of non-standard employment to employers, *see* Chiara Benassi & Andreas Kornelakis, *How Do Employers Choose Between Types of Contingent Work? Costs, Control and Institutional Toying*, 74 INDUS. L. REL. REV. 715 (2021).

63. The definition of casualized work is in EUROFOUND, *supra* note 3, at 3–4; *see also* Durri, *supra* note 62, at 477–78; ILO, *supra* note 3, at 22. Discussion of distinctive features is found in Peetz and May, *supra* note 55; Tham, *supra* note 43; Iain Campbell, *Casual Work and Casualisation: How Does Australia Compare?*, 15 LAB. INDUS. 85 (2004).

64. Campbell et al., *supra* note 38, at 71–74.

65. Rosemary Owens, *The "Long-Term or Permanent Casual": An Oxymoron or "a Well Enough Understood Australianism" in the Law*, 27 AUSTL. BULL. LAB. 118 (2001).

high-wage areas such as mining and manufacturing, where employers can side-step the constraints of collective agreements by using casual employees supplied by "labor-hire", ie temporary agency, firms.[66] Workers in this group have schedules that are largely free from any pressure to temporal fragmentation. They have an implicit agreement about their roster and they are likely to have built up an expectation of continuing work in the short- or medium-term. The major differences in practice separating them from directly employed permanent employees in the same workplace do not concern their work patterns but rather the employment category, the employer (the labor-hire firm) and the lower wage rate. The existence of such regular casual work is at odds with conventional understandings of casualized work practices, and it has become a point of dispute in recent decades by virtue of its challenge to the integrity of the labor standards developed for standard full-time, permanent employees.[67]

Second are irregular or *on-demand* casual employees, who offer cost savings to employers primarily through temporal fragmentation. Conditions for these employees approximate conventional understandings of casualized employment. They have an irregular schedule and may be called in, often at short notice, as and when they are needed by the employer. Workers in this group are less likely to have reached an agreement with their employer on rostering and are less likely to be confident about the chances of continuing work. This group has been largely overshadowed in current policy debates by the focus on regular casual work, and indeed, under the label of "true" casuals, they often seem to be tacitly accepted as an inevitable part of a "flexible" workforce. It is important to stress, however, that such casual work is a major component of the employment structure in Australia, especially in low-wage service industries such as accommodation and food services and retail, and it is associated with substantial deficits across most dimensions of labor insecurity.[68]

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66. Stephen Whelan, *Wage-cutting Strategies in the Mining Industry: The Cost to Workers and Communities* (McKell Institute, 2020).

67. *Re 4 Yearly Review*, *supra* note 54. The group is sometimes called "long-term" casuals, but we prefer to prioritize schedule regularity rather than job tenure. The two aspects often overlap in practice, with regular casuals likely to build up a lengthy period of job tenure. It is true that elapsed job tenure proved important in determining access to the JobKeeper wage subsidy scheme during the COVID-19 pandemic. Rebecca Cassells & Alan Duncan, *JobKeeper: The Efficacy of Australia's First Short-Time Wage Subsidy*, 23 AUSTL. J. LAB. ECON. 99 (2020). Moreover, it has played a role as one condition of access to conversion processes for casual workers. Nevertheless, schedule regularity is the crucial feature from the point of view of both employers and employees; job tenure is more contingent and less fundamental.

68. Poor wages and conditions for on-demand casual workers in low-wage sectors are revealed in case-studies. For a selected overview of relevant research, *see* Iain Campbell, *On-Call and Related Forms of Casual Work in New Zealand and Australia*, 21–31 (ILO Conditions of Work and Employment Series No. 102, 2018).

It is readily apparent that casual work is closely related to zero-hours work.[69] Because all casual employees in Australia lack a formal guarantee of working hours and are generally paid only for the hours they work (nominally with a "casual loading" on the hourly rate of pay), casual work in aggregate matches closely to the familiar understanding of zero-hours work. It could therefore be argued that *all* casual workers should be counted as zero-hours workers.[70] However, as noted above, our conceptualization extends beyond the legal form into employment practice; in this more stringent definition, zero-hours work is characterized not only by lack of any employer assurance of work hours but also by extensive temporal fragmentation. In line with such a definition, regular casual work should not be counted as zero-hours work. It is better seen as an adjacent practice, which is indeed a significant injustice and burdensome to employees, but not in the same way as ZHWAs. The term "zero-hours work" should instead be reserved just for that component of casual work that involves irregularity in schedules, which we call "on-demand" casual work.[71]""""

At the heart of the permissiveness of Australian labor regulation towards casual work, including on-demand casual work, is the "regulatory tangle" associated with the failure of regulators to define the term "casual".[72] Partly as a result, casual employment for much of the twentieth century lacked a "settled legal meaning."[73] This ambiguity opened the way for reliance on the meaning of casual employment under awards, where a casual employee was defined as an employee "engaged and paid as such."[74] The award meaning, supported by the relative absence or erosion of quantitative restrictions on the use of casual employment, left the status of the worker up to the discretion of the employer. It rendered casual employment in practice a particularly

69. A mistaken view holds that casual work cannot properly be considered zero-hours work, given that casual workers, as noted above, have the special protection of a minimum shift engagement, cited in Markey & McIvor, *supra* note 55, at 612. Minimum shift engagements are a valuable working-time protection, which limit the employer's ability to pay for labour time in short bundles, but they should not be confused with a minimum-hours guarantee that would subvert the notion of "zero-hours" work. Minimum shift engagements ensure a minimum payment for casual workers only under limited circumstances, viz *once the worker has been called in to work*.

70. Daniel Tracey & Shae McCrystal, *Codifying the Meaning of "Casual Employment" in Australia*, 4 REVUE DE DROIT COMPARÉ DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE (2021), https://doi.org/10.4000/rdctss.2770; *see* Datta et al., *supra* note 5, at 375.

71. Campbell et al., *supra* note 38, at 78; *see also* Campbell, *supra* note 68.

72. Tracey & McCrystal, *supra* note 70, at 234.

73. *Doyle v Sydney Steel Company Ltd* (1936) 56 CLR 545 (Austl.); *see* Anthony O'Donnell, *"Non-Standard" Workers in Australia: Counts and Controversies*, 17 AUST. J. LAB. L. 89 (2004).

74. *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, 562-78 [114]-[192] (Austl.).

expansive category that could encompass both "regular" and "on-demand" casual employees.[75]

Gradually the courts stepped in to try to fix a legal meaning, consistent with common law understandings of casual as "informal, irregular and uncertain". In *Hamzy v Tricon International Restaurants,* the Full Bench of the Federal Court argued that "the essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work".[76] In a series of subsequent judicial decisions, Australian courts displaced the loose award meaning in favor of the legal meaning outlined in *Hamzy.* In two decisions, *Workpac v Skene* and *Workpac v Rossato,* the Full Bench of the Federal Court determined that workers employed on regular roster by a labour-hire firm in mining had been misclassified as casuals and that they were instead entitled to the rights and entitlements of permanent employees under the statutory provisions of the NES, such as paid annual leave. The decision adopted a legal meaning of casual employment where a worker is a casual employee when s/he has "no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work."[77]

One crucial question in the wake of these decisions concerned how the legal meaning of casual employment was to be applied, ie what weight should be given to contractual terms in considering the *indicia* of casual status. The judgment in *Skene* used an assessment based on "the real substance, practical reality and true nature of that relationship". This could be seen as an approach based on moderate contractualism, in which the contractual terms are relevant but not decisive.[78]

Consolidation of the legal meaning appeared to threaten the long-standing practice of regular casual work and to constrain employer choice. As an appeal in *Rossato* was being considered in the High Court, the federal Coalition government, in the *Fair Work Amendment (Supporting Australia's Jobs*

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75. RICHARD JOHNSTONE, SHAE MCCRYSTAL, IGOR NOSSAR, MICHAEL QUINLAN, MICHAEL RAWLING & JOELLEN RILEY, BEYOND EMPLOYMENT: THE LEGAL REGULATION OF WORK RELATIONSHIPS 56–58 (2012).

76. *Hamzy v Tricon International Restaurants (t/a KFC*) (2001) 115 FCR 78, 89 [38] (Austl.).

77. *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, 575 [172] (Austl.) (adopting the formulation in statement in *Hamzy v Tricon International Restaurants (t/as KFC)* (2001) 115 FCR 78, 89 [38] (Austl.) that "[t]he essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work"), followed in *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179 (Austl.).

78. *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179, 194-95 [42]-[46] (Bromberg J) (Austl.). The phrase, ''the real substance, practical reality and true nature of that relationship" is from *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, 576-77 [180] (Austl.). For analysis of the impact of the Federal Court judgments, *see* Andrew Stewart, Shae McCrystal, Joellen Riley Munton, Tess Hardy & Adriana Orifici, *The Omni(bus) that Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda*, 34 AUST. J. LAB. L. 132 (2021).

and Economic Recovery) Act 2021 (Cth), introduced into section 15A of the *Fair Work Act* a legislative definition that aimed to calm employer concerns. It appropriated the legal meaning of casual employment as employment where there is "no firm advance commitment to continuing and indefinite work according to an agreed pattern of work", but asserted what can be called an ultra-contractualist approach towards assessment, insisting that any assessment should be based solely on the offer made by the employer and the acceptance by the employee, ie the express terms of the contract.[79]

Several months later, in its decision in *Rossato*, the High Court adopted a similar ultra-contractualist approach. It supported the legal meaning advanced by the Federal Court but argued that "the search for the existence or otherwise of a "firm advance commitment" must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement".[80] According to the High Court:

To insist upon binding contractual promises as reliable indicators of the true character of the employment relationship is to recognise that it is the function of the courts to enforce legal obligations, not to act as an industrial arbiter whose function is to synthesise a new concord out of industrial differences . . . It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain.[81]

The approach taken by the Federal Court was therefore, according to the High Court, erroneous and "strayed from the orthodox path".[82]

While the language of the legal meaning appeared to restrict the scope of casual work, the ultra-contractualist approach to assessment maintained room for employers to configure the contractual terms to suit their needs. As such, the effect of the Coalition legislation and the High Court decision was to preserve the traditional expansiveness of the category of casual employment. Nevertheless, one beneficial consequence of the Coalition intervention was to clear a path for alternative legislative definitions that could narrow the category. The need for a strong and direct legislative definition that would help to restrict the practice of casual employment had been championed for several years by trade unions and academics. For example, the Australian Council of Trade Unions (ACTU) called for "introducing a common sense

79. *Fair Work Act 2009* (Cth) s 15A (Austl.).
80. *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456, 477 [57] (Austl.).
81. *Id.* at 478-79 [62]–[63].
82. *Id.* at 477 [57], 480 [66].

definition of "casual employee" into the Fair Work Act that only covers work arrangements that are genuinely irregular, intermittent or unpredictable".[83]

The Labor Party responded to the opportunity with a cautious promise to amend the Coalition's legislative definition and instead "restore the common law definition".[84] The promise was subsequently fulfilled in the *CL No 2 Act 2024*, which adopted a (slightly-altered) legal meaning of casual employment as employment relationships characterized by "an absence of a firm advance commitment to continuing and indefinite work."[85] Most important, it restored the Federal Court approach to assessment, stipulating that whether

> the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work is to be assessed . . . on the basis of the real substance, practical reality and true nature of the employment relationship; and . . . on the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of *a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract*.[86]

As these amendments suggest, the Labor government failed to take up the recommendations for a substantive definition that would in effect supplant the common law approaches to casual work. Instead, the government endorsed a common law contractualist approach and maintained the reliance on labor courts to fix a legal meaning, merely setting parameters for courts to pursue their efforts within a framework of moderate contractualism rather than ultra-contractualism. The significance of this change as a new path of policy development is therefore limited. The new framework could be seen as re-opening questions concerning regular casual work, and it might indeed have a medium-term impact in triggering further litigation concerning practices of regular casual work. But, irrespective of whether and how this potential plays out,[87] it seems clear that the amendments do not have any

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83. ACTU, *Closing the Loopholes: Casual Work* (ACTU Research Note, May 2023); *see also* BRIAN HOWE, PAUL MUNRO, JILL BIDDINGTON & SARA CHARLESWORTH, LIVES ON HOLD: UNLOCKING THE POTENTIAL OF AUSTRALIA'S WORKFORCE 30–32 (2012); SENATE SELECT COMMITTEE ON WORK AND CARE, FINAL REPORT [8.151] (2023).

84. Albanese, *supra* note 52.

85. *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1, s 15A(1) (operative on 26 August 2024) (Austl.).

86. *Id.*

87. The detail of the amendments suggests that the impact on regular casual work is unlikely to be significant. The amendments hinder the possibility of legal challenges that depend on citing a practice of regular schedules. Thus, the assessment of whether the employment relationship is casual must refer to the time of the original offer. In this assessment, whether or not this original offer involves a regular pattern of work is not to be regarded as definitive. Moreover, if circumstances change after the time of the original offer, *e.g.*, the employee settles into regular and ongoing work, this does not mean that the worker ceases to be casual.

implications for on-demand casual work. In that sense, they are unlikely to have any impact on ZHWAs.

Self-employment

The second permissive regulatory framework is that of *self-employment*. A division between employee and non-employee status is fundamental to labor regulation. In contemporary labor regulation systems, most forms of worker protection, starting with a minimum wage and working-time standards, are reserved for those who can be classified as dependent workers or employees.[88] Self-employed workers in contrast are largely unprotected.[89]

Self-employment regulation is relevant to our argument because it provides space for "false" or "bogus" self-employment, i.e., situations where workers are treated as independent contractors though the work itself closely resembles dependent employment,[90] including practices that can be identified as ZHWAs. Bogus self-employment often involves a "grey zone," marked by ambiguity about employment status and worker entitlements, where employment practices have a hybrid quality, with some characteristics suggesting self-employment and others suggesting an employment relationship.[91] Bogus self-employment may arise inadvertently, but more frequently it emerges out of strategic employer practices that seek to manipulate the legal framework in order to avoid costs and other obligations associated with waged work.[92] Bestowing self-employed status on workers can open up the same dual set of advantages for cost-minimizing employers that were outlined earlier for casual work. First, it can produce substantial wage cost and tax savings without any underlying changes in the work itself.[93] Second, facilitated by the ability to pay by the task, it can generate opportunities for further cost savings through re-organization of work and work schedules.[94]

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88. SUPIOT, *supra* note 17.

89. Though partial protections are still evident: they may have access to some employment protection, such as in connection with occupational health and safety and anti-discrimination, and they may have access to social protection.

90. Annette Thörnquist, *False Self-Employment and Other Precarious Forms of Employment in the "Grey Area" of the Labour Market*, 31 INT'L J. COMP. LAB. L. INDUS. REL. 411 (2015); Jason Heyes & Thomas Hastings, THE PRACTICES OF ENFORCEMENT BODIES IN DETECTING AND PREVENTING BOGUS SELF-EMPLOYMENT (2017); SUPIOT, *supra* note 17.

91. Marie-Christine Bureau & Patrick Dieuaide, *Institutional Change and Transformations in Labour and Employment Standards*, 24 TRANSFER 261 (2018).

92. As such, it is also sometimes called "disguised employment." *E.g.*, ILO, *supra* note 3, at 98–102.

93. Cost savings in relation to tax can accrue to the worker as well as the employer. This point is stressed in an OECD definition of bogus or false self-employment as consisting of "people whose conditions of employment are similar to those of employees, who have no employees themselves, and who declare themselves (or are declared) as self-employed simply to reduce tax liabilities, or employers' responsibilities." Heyes & Hastings, *supra* note 90.

94. The potential of work re-organization is shown in a case study of UK parcel delivery, where a change to payment by delivery for owner-drivers and home couriers was associated with intensified work

Bogus self-employment takes varied forms, often embedded in fissured employment relations that result from sub-contracting, outsourcing and the use of labor intermediaries.[95] In recent years, discussion of ambiguous employment status has focused on new forms of multi-party employment relationships organized through digital labor platforms.[96] Digital platform work is often labelled as self-employment, especially by the platform operators, who point to worker access to temporal autonomy, e.g., in deciding when and for how long to engage in work, and who argue that they are merely supplying technologies that assist entrepreneurial workers to connect with clients or customers. In contrast, critics point to characteristics that indicate an employment relationship, such as control by platform firms over most aspects of the performance of work, and they argue that much platform work has been misclassified as self-employment, primarily in order to suit the interests of platform employers and to undermine the interests of workers.[97] In this perspective, misclassification allows employers to reap the twofold cost advantages offered by wage and tax savings and by re-organization of work and work schedules.[98]

Peering beneath the mask of bogus self-employment, labor organizations and critical scholars argue that much platform work, especially location-based platform work, functions to allow employers to draw on labor time as and when it is needed. It can be viewed as equivalent to on-demand or zero-hours work.[99] In this perspective, a first step—though only a first step—

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and expansion of unpaid labor. Sian Moore & Kirsty Newsome, *Paying for Free Delivery: Dependent Self-Employment as a Measure of Precarity in Parcel Delivery*, 32 WORK, EMP. & SOC'Y. 475 (2018).

95. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014); *see* Richard Johnstone & Andrew Stewart, *Swimming Against the Tide: Australian Labour Regulation and the Fissured Workplace*, 37 COMP. LAB. L. & POL'Y J. 55 (2016).

96. Valerio de Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, 37 COMP. LAB. L. & POL'Y J. 471 (2016); ILO, *supra* note 6.

97. Valerio de Stefano, Ilda Durri, Charalampos Stylogiannis & Mathias Wouters, *Exclusion by Default: Platform Workers' Quest for Labour Protections*, *in* A RESEARCH AGENDA FOR THE GIG ECONOMY AND SOCIETY 13 (Valerio de Stefano, Ilda Durri, Charalampos Stylogiannis & Mathias Wouters eds., 2022); Andrew Stewart & Jim Stanford, *Regulating Work in the Gig Economy: What are the Options?*, 28 ECON. & LAB. REL. REV. 420 (2017).

98. Jan Drahokoupil & Agnieszka Piasna, *Work in the Platform Economy; Beyond Lower Transaction Costs*, 52 INTERECONOMICS 335 (2017); *see* Xiliang Feng, Fang Lee Cooke & Chenhui Zhao, *Fragmentation of Employment Relationships, Fragmentation of Working Time: The Nature of Work and Employment of Platform Takeaway Riders and Implications for Decent Work in China*, 62 ASIA PAC. J. HUM. RES. e12398 (2024).

99. For example, Adams et al., *supra* note 7, at 43; de Stefano, *supra* note 96; *see also* Ruth Dukes, *On Demand Work as a Legal Framework to Understand the Gig Economy*, *in* A RESEARCH AGENDA FOR THE GIG ECONOMY AND SOCIETY (Valerio de Stefano et al. eds., 2022); Durri, *supra* note 62**.**

in remedying precariousness for workers is to challenge and revise the assumption of self-employment status for platform workers.[100]

Somewhat similarly to the case of casual work, the permissiveness of self-employment as a regulatory framework in Australia, is related to the failure of regulators to provide a clear definition in protective regulation of the fundamental term "employee".[101] For instance, the *Fair Work Act* states that "employee" is to be given its "ordinary meaning," a phrase that incorporates the common law meaning of "employee".[102]

Assuming that there is a contract for the performance of work, whether or not the worker is an employee under Australian labor law depends on the common law multi-factor approach. Consistent with moderate contractualism, this approach considers working practices as well as contractual terms. It is centrally based on:

the control test (whether or not the putative employer has the right to control the performance of work); and

the extent to which the worker is integrated into the putative employer's organization.

Also relevant are whether the worker:

must supply their own tools or equipment; or otherwise make a capital investment in order to earn the remuneration;

has the freedom to perform similar work for other parties during the contract;

bears the risk of financial loss from the work or conversely enjoys the opportunity to make a profit; and

is paid according to the completion of task/s as opposed to wage based on time worked.[103]

This multi-factor approach enables ZHWAs through bogus self-employment in two ways. First, the list of numerous factors gives rise to a *problem of indeterminacy* due to varied weight that can be given to each factor, especially when the factors invariably run in opposite directions. This means that a worker seeking to challenge the contractor status ascribed by their hirer chances impressionistic judgments on the part of the courts.

Second, there is a *problem of malleability*. As Stewart points out, the multi-factor approach allows a hirer of labor who enjoys superior bargaining

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100. de Stefano et al., *supra* note 97; Tammy Katsabian & Guy Davidoff, *Flexibility, Choice, and Labour Law: The Challenge of On-Demand Platforms*, 73 U. TORONTO L.J. 348 (2023).

101. Anthony Forsyth, *Playing Catch-up but Falling Short: Regulating Work in the Gig Economy in Australia*, 31 KING. L.J. 287 (2020).

102. *Fair Work Act 2009* (Cth) s 11 (Austl); *see C v Commonwealth* (2015) 234 FCR 81, 87 [34] (Austl.); *Cai (t/as French Accent) v Do Rozario* (2011) 215 IR 235 (Austl.).

103. *See* ANDREW STEWART, ANTHONY FORSYTH, MARK IRVING, RICHARD JOHNSTONE & SHAE MCCRYSTAL, CREIGHTON AND STEWART'S LABOUR LAW [8.20]–[8.25] (6th ed. 2016).

power to configure the *contract,* which would often be offered on a "take it or leave it" basis, so that the worker is (more likely) to be considered a contractor. The hirer could, for instance, require that the worker provide work through a corporate entity, thereby negating the personal commitment to work that is necessary for a contract of employment; the hirer could also require the worker to supply their own equipment and organize payment on a task-completion basis. It could also include a clause expressly allowing the worker to perform work for others, in full knowledge that the worker would rarely exercise this "freedom", given the dependence of the worker on work (income) provided by the hirer of labor (dependent contractors).[104]

As in the case of casual work, it is possible to detect a tug-of-war between moderate contractualism and ultra-contractualism in the approach of the courts to the interpretation of the regulatory framework of self-employment. Moderate contractualism is evident in the High Court decision concerning *Hollis v Vabu.* In that decision, the Court emphasized that in determining whether a worker is an employee at law:

the relationship between the parties . . . is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing "the totality of the relationship" between the parties.[105]

Moderate contractualism is also present as industrial tribunals wrestle with the issue of platform work and the ambiguous employment status of platform workers. The indeterminacy of the common law test of employment was illustrated by three tribunal decisions concluding that Uber drivers were not employees,[106] while one reached the opposite view in relation to a Foodora food delivery rider.[107]

In the leading industrial tribunal decision, *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd trading as Uber Eats,* a de-activated former Uber Eats driver (Ms Gupta) lodged an application for unfair dismissal under the *Fair Work Act.* The central question was whether she was an employee, a necessary circumstance for accessing the Act's unfair dismissal jurisdiction.[108] The common law multi-factor test was applied to deny employee

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104. Andrew Stewart, *Redefining Employment? Meeting the Challenge of Contract and Agency Labour*, 15 AUSTL. J. LAB. L. 235 (2002).

105. *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 33 [24] (Austl.).

106. *Kaseris v Rasier Pacific V.O.F. (2017) 272 IR 289 (Austl.); Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (Austl.); *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 (Austl.). For the similar view of the workplace enforcement agency, the Fair Work Ombudsman, *see Uber Australia Investigation Finalised*, FAIR WORK OMBUDSMAN (Media Release, 2019), https://www.fairwork.gov.au/newsroom/media-releases/2019-media-releases/june-2019/20190607-uber-media-release.

107. *Klooger v Foodora Australia Pty Ltd (2018) 283 IR 168 (Austl.)*; *see Foodora Case: First Definitive Australian Ruling that a Gig Worker was an Employee*, LAB. L. DOWN UNDER (2018), https://labourlawdownunder.com.au/?p=282.

108. *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246 (Austl.).

status to Ms Gupta. Key to the conclusion of the Full Bench of the Fair Work Commission were its findings that:

Portier Pacific exercised no control over when or how long Ms Gupta performed her work. Both as a matter of legal right and actuality, it was entirely within Ms Gupta's control as to when she logged onto the Partner App and for how long she remained logged on. Once logged on, there was no obligation upon her to accept any particular delivery request.[109]

At the same time, the Full Bench concluded with equal force that:

There was no aspect of her work which would permit it to be characterised as the carrying on of an independent business or enterprise: she had no means of independently expanding her customer base or generating additional work within the Uber Eats business or of establishing goodwill with any of the restaurants or customers with whom she dealt.[110]

Acknowledging that "it might be considered that there is some tension" between these two findings,[111] the Full Bench sought to square the circle by stating that: "It may be that the difficulty is answered by the proposition that Ms Gupta had the capacity to develop her own independent delivery business as a result of her legal and practical right to seek and accept other types of work while performing work for Uber Eats, but chose not to".[112]

These suggestions suggest that moderate contractualism is limited as a lever for resolving bogus self-employment and the penalties faced by location-based platform workers. But the scope for worse outcomes was amplified by the turn to an ultra-contractualist approach by the High Court in *CFMMEU v Personnel Contracting*[113] and *ZG Operations Australia Pty Ltd v Jamsek*.[114] Strongly influenced by the earlier decision in *Workpac v Rossato*[115] (discussed earlier), the majority in these decisions considered that "the principles governing the interpretation of a contract of employment are no different from those that govern the interpretation of contracts generally":[116]

Hollis v Vabu was distinguished with its "totality of the relationship" dicta limited to contracts partly oral, partly in writing; and

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109. *Id.* at 276 [69].
110. *Id.* at 275–76 [68].
111. *Id.* at 276 [71].
112. *Id.* at 276 [72]. For a compelling critique that draws attention to the practical constraints on Ms. Gupta's choices, *see The Uber Eats Decision: Australia's FWC Full Bench Misses the Chance to See Through the Gig Economy's Sophistry*, LAB. L. DOWN UNDER (2020), https://labourlaw-downunder.com.au/?p=846 (footnote omitted).
113. *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 (Austl.).
114. *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254 (Austl.).
115. *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 (Austl.).
116. *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 193 [60] (Austl.).

"[w]here the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract."[117]

Brodie has dubbed this a new "philosophy" of the Australian employment contract.[118] As two minority judges in these decisions explained, this (ultra-contractualist) approach sees "an overly weighted importance being given to emphatic language crafted by lawyers in the interests of the dominant contracting party . . . [which] will likely see formal legalism of the chosen language of such party supplant a practical and intuitively sound assessment of the whole of a relationship by reference to the elements of the informing conceptions."[119] It allows, according to these judges, the use of "a standard form written contract couched in language that might arguably have been chosen by the putative employer to dress up the relationship to be established and maintained as something somewhat different from what it might turn out to be."[120]

The Labor government responded to the High Court decisions with legislation that aimed to restore moderate contractualism and the conventional multi-factor approach. The *CL no.2 Act 2024* inserted into the *Fair Work Act* an interpretive principle, which requires that the ordinary meaning of "employee" is to "be determined by ascertaining the real substance, practical reality and true nature of the relationship" between the putative employee and the alleged employer. The legislation suggests that "for the purposes of ascertaining the real substance, practical reality and true nature of the relationship," the "totality of the relationship . . . must be considered"; and "in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice."[121]

As in the case of the amendments concerning the definition of 'casual', these amendments defer to labor courts in their efforts to develop common law meanings, merely setting parameters for courts to work within a tradition of moderate contractualism. This change could be seen as important in

117. *Id.* at 193 [59].

118. Douglas Brodie, *The Employment Contract: The Philosophy of the High Court of Australia*, 36 AUSTL. J. LAB. L. 213 (2023).

119. *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 215 [131] (Gageler and Gleeson JJ) (Austl.) (quoting Allsop CJ in the earlier Full Bench of the Federal Court decision in the same proceedings).

120. *Id.* at 215–16 [132].

121. *Fair Work Act 2009* (Cth) s 15AA (operative after 26 August 2024) (Austl.).

warding off dangers of ultra-contractualism. It restores, however, an approach that has demonstrated difficulty in resolving the status of location-based platform workers. As a result, the change is unlikely to be helpful in sorting out the increasingly contested area of bogus self-employment and the insecurities experienced by location-based platform workers.

3: Extent of ZHWAs

How significant are ZHWAs in Australia? One starting-point is to determine the prevalence of both on-demand casual work and location-based platform work. Though it is difficult to establish comparable estimates, existing data sources, including official data from the Australian Bureau of Statistics (ABS), allow us to reach a tentative conclusion.

The following sub-sections consider casual work and platform work in turn, before turning to a summary conclusion concerning ZHWAs in aggregate.

Casual work

Casual work, as noted in section 2, has a large weight in the employment structure. Labor Force Survey estimates for August 2023 indicate that almost 2.7 million persons are casual employees in their main job, which represents around 19% of all employed persons (or 22.4% of all employees).[122] The overall proportion increased sharply in the 1980s and 1990s, stabilised thereafter, but then fell away in the COVID-19 pandemic before starting to recover in the current period.[123] The estimate of 19% is robust and a good indicator of the current extent of casual work. Nevertheless, any discussion of significance needs to include two cautionary points. First, the data concern persons *in their main job*, thereby missing any count of second or third jobs. Multiple job-holding is substantial and growing in Australia, mainly as a combination of two or more part-time jobs.[124] Because many of the second or third jobs are casual, adding them to a count of main jobs would boost estimates of the

122. ABS, *Working Arrangements*, AUSTL. BUREAU STAT. (2023), https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/latest-release. Official statistics in Australia generally distinguish, within the category of employees, two groups: "permanent" and "casual" employees. The distinction, drawing on important aspects of the practice of casual employment, is framed in terms of access to paid leave entitlements, which is measured by means of survey questions on whether the employee is entitled in their job to paid annual leave and paid sick leave (where those who answered 'no' to both questions are classified as casual). The two categories have been re-labelled by the ABS as 'employees with leave entitlements' and "employees without paid leave entitlements," but the categories are commonly regarded as proxies for "permanent" and "casual" and we continue to use the latter terms when referring to ABS data.

123. ABS, *supra* note 122; *see also* Inga Laß & Mark Wooden, *Trends in the Prevalence of Non-Standard Employment in Australia*, 62 J. INDUS. REL. 3 (2020); GEOFF GILFILLAN, RECENT AND LONG-TERM TRENDS IN THE USE OF CASUAL EMPLOYMENT (Parliamentary Library Research Paper, 2021).

124. The latest figures suggest that 6.7% of employed people are multiple job-holders. ABS, *Multiple Job-Holders*, AUSTL. BUREAU STAT. (2024), https://www.abs.gov.au/statistics/labour/jobs/multiple-job-holders/latest-release.

significance of casual work. Second, because most casual workers in their main job (67.4%) are classified as part-time workers, a measure of significance in terms of the casual share of total hours worked in the economy rather than the number of either employed persons or jobs would depress any estimate.[125]

Our interest is in that component of the casual workforce which is composed of zero-hours workers. These are casual workers whose schedule is characterised *not only by lack of any employer assurance of work hours but also by fragmentation of work schedules.* To reach an estimate of the size of this on-demand component we need to disaggregate the data on casual workers (in their main job) according to the regularity of their schedules. According to ABS data for August 2022, the majority of casual employees stated that they worked the same number of hours each week in their main job, but a substantial group, comprising 40.3% of all casual employees, or just over a million (1,085,000) workers, replied that they did *not* work the same number of hours in their main job each week.[126] This latter figure can be taken as the best, albeit rough, indication of the number on on-demand casual employees (in their main job). As a proportion, on-demand casual employees would therefore total around 8.0% of the employed labor force.

Location-based platform work

Though data on platform work are sparse, a pioneering survey was initiated in March 2019, followed by special modules in the Household, Income and Labour Dynamics in Australia (HILDA) survey and in an Australian Bureau of Statistics (ABS) survey.[127]

The ad hoc survey conducted by the ABS in the financial year 2022-23 is the best source.[128] It confirms that most platform work in Australia is location-based platform work such as food delivery, personal transport, house

125. ABS, *Working Arrangements*, AUSTL. BUREAU STAT. (2022), https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/aug-2022; GILFILLAN, *supra* note 123, at 17.

126. ABS, *TableBuilder*, AUSTL. BUREAU STAT. (2021), https://www.abs.gov.au/statistics/microdata-tablebuilder/tablebuilder; *see also* Campbell, *supra* note 68, at 12–13. For results from similar questions in the HILDA survey, *see* Roger Wilkins, *The Labour Market*, i*n* THE HOUSEHOLD, INCOME AND LABOUR DYNAMICS IN AUSTRALIA SURVEY: SELECTED FINDINGS FROM WAVES 1 TO 19, 72 (Roger Wilkins, Esperanza Vera-Toscano, Ferdi Botha & Sarah Dahmann eds., 2021).

127. PAULA MCDONALD, PENNY WILLIAMS, ANDREW STEWART, ROBYN MAYES & DAMIAN OLIVER, DIGITAL PLATFORM WORK IN AUSTRALIA: PREVALENCE, NATURE AND IMPACT (2019); Roger Wilkins, *The Labour Market*, *in* THE HOUSEHOLD, INCOME AND LABOUR DYNAMICS IN AUSTRALIA SURVEY: SELECTED FINDINGS FROM WAVES 1 TO 20 (Roger Wilkins, Esperanza Vera-Toscano, Ferdi Botha, Mark Wooden & Trong-Anh Trinh eds., 2022); ABS, *Digital Platform Workers In Australia*, AUSTL. BUREAU STAT. (2023), https://www.abs.gov.au/articles/digital-platform-workers-australia.

128. Digital platform work is defined as "the provision of fixed duration labour services, in the form of tasks/ jobs which are accessed by the worker through digital platforms and are paid per unit of work delivered through the same platform." ABS, *supra* note 127.

maintenance and caring for people or pets. The survey allows an estimate of prevalence that is constructed on a similar basis to the more familiar types of employment measured in official LFS estimates, such as casual work (though participation in platform work is assessed in relation to a reference period of four weeks rather than the usual one week). According to this survey, the proportion of the employed population that undertook digital platform work as their main job over the previous four weeks is estimated as just below half of one percent (0.45%). This would seem to be the most reliable estimate for prevalence.

The two cautions noted in connection with estimates of the significance of casual work are also relevant here. First, multiple job holding is salient. The ABS survey indicates that, in addition to the 0.45% of the employed population for whom platform work was a main job, a slightly larger number (and proportion) undertook platform work over the previous four weeks as a *secondary job*, in additional to a more conventional main job.[129] Second, part-time hours are even more important in platform work than in casual work. Median weekly hours recorded by platform workers were modest (10 hours). A small minority participated for approximately full-time hours, but most participated for reduced part-time hours, generally for what would be classified as marginal part-time hours. In short, the significance of platform work as a proportion of aggregate (paid) labor time is likely to be even less than what the small number of workers would suggest.

These ABS data are broadly consistent with HILDA data from 2020, which produced a slightly lower estimate of 0.8% for the proportion of employed persons who had engaged in digital platform work in any way, whether as a primary or secondary job, over the previous four-week period. Again, the HILDA data suggest that the estimate was roughly divided into equal halves between those for whom platform is a main job and those for whom it is a secondary job.[130]

3.3 Summary

The available estimates indicate that almost all zero-hours workers are on-demand casual workers and only a tiny proportion are platform workers. Summing the two groups together produces an imposing figure, which amounts to around 8.5% of the employed population. In short, zero-hours work in Australia is undoubtedly a major phenomenon. Though we have

129. *Id.* The ABS points out that for many workers engaged in platform work, especially as a secondary job but even as a main job, participation could be extremely marginal. Thus, the vast majority of those undertaking it as a secondary job did not in fact acknowledge it as a job but saw it more as a "side hustle." This was also true for a minority of those for whom platform work was the main job.

130. Wilkins, *supra* note 127, at 89–90.

narrowed down the concept, thereby limiting the estimate of its extent, it remains justified to refer to Australia as a 'world leader' in ZHWAs.[131] It suggests that ZHWAs constitute a substantial part of the large pool of part-time jobs in Australia.[132] Together with our knowledge of the negative impact of ZHWAs, especially for affected workers and their households, the estimate of its quantitative extent suggests a significant problem, which demands policy intervention.

4: Policy

How does Australia measure up in terms of policy responses to ZHWAs and temporal fragmentation in general? Its ranking as a world leader in the extent of zero-hours work suggests a sceptical response. This section looks first at the impact of recent legislative initiatives, before concluding with a few remarks on what could be the next steps in policy development.

4.1 Recent legislative initiatives

The prominence of ZHWAs in Australia is strongly linked to permissive labour regulation and a failure to develop effective policy that would close gaps in worker protection. It could be argued that the blockage in policy development is beginning to diminish, given recent legislative initiatives. Section 2 suggests that the amended definitions in the *CL no. 2 Act 2024* of "casual" and "employee" are welcome responses to dangers of ultra-contractualism, but they are unlikely to have significant implications for zero-hours workers, whether on-demand casuals or location-based platform workers. At the same time, it is necessary to consider the likely impact of more direct legislative efforts to improve wages and conditions for insecure workers. This section examines three components in the *CL Act 2023* and the *CL No 2 Act 2024* that affect the regulatory frameworks of casual work and platform work: a) "same, job, same pay"; b) new rules for casual conversion; and c) new regulations concerning "'employee-like"' work.

"same job, same pay"

The *Skene* and *Rossato* cases, cited in section 2, highlighted a regulatory gap that permitted employers to undercut minimum rates of pay in enterprise agreements through strategic use of casual workers under labor-hire arrangements. The *CL Act 2023* directly takes up the case of these workers by promoting a principle of "same job, same pay" and by empowering the Fair Work Commission to implement this principle by making orders applying to

131. Farina et al., *supra* note 5, at 514; *see* Datta et al., *supra* note 5.

132. The large group of part-time workers in the employment structure constitutes one component of what is described as a polarised and gendered structure of paid working hours. Smith & Charlesworth, *supra* note 47, at 18**;** *see also* Mark Wooden & Robert Drago, *The Changing Distribution of Working Hours in Australia*, *in* LAGGARDS AND LEADERS IN LABOUR MARKET REFORM: COMPARING JAPAN AND AUSTRALIA (Jerry Corbett, Anne Daly, Hisakazu Matsushige & Dehne Taylor eds., 2009).

labor-hire arrangements.[133] Specifically, the Commission can make "regulated labour hire arrangement orders" that require the labor-hire firm, as the recognised employer, to pay no less than the "protected rate of pay" to its employees—which is the full pay that would be payable to employees if they were directly employed and covered by the industrial instruments of the host employer.[134]

The process is somewhat indirect, requiring application to an industrial tribunal regarding specific practices of labour-hire firms, but the provisions themselves are straightforward. They are likely to have a positive impact in narrowing and perhaps even eliminating one avenue by which employers use casual work to achieve cost savings. The outcome may be a direct decline in the targeted labor-hire practices. Insofar as employers continue to use regular casual work via labor hire, the provisions are likely to be useful in promoting wage justice and equal treatment for this segment of casual workers. This is, however, only a small segment, even of the broad group of regular casual workers.[135] Most important for this article, the provisions are of little relevance to on-demand casual workers, most of whom are directly employed and are subject to alternative mechanisms of cost-minimisation centred on temporal fragmentation.

b) new rules for casual conversion

The *CL No 2 Act 2024* contains new rules for casual conversion to replace the provisions that had been introduced into the National Employment Standards by the previous Coalition government, as part of its *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*. The Coalition provisions had entitled certain casual employees, who had worked for 12 months for businesses larger than 15 employees, with regular hours over at least the most recent six months, to receive a written announcement from their employer concerning whether or not they will be converted to permanent status. Grounds for the employer deciding not to offer conversion needed to be "reasonable", which in turn included assessment of business needs.[136] The new provisions introduced by the Labor government entitle workers who commenced their employment as casual employees and

133. *Fair Work Act 2009* (Cth) pt 2-7A (Austl.).

134. *Id.* s 306F.

135. ABS data indicate that labour-hire workers are mainly full-time workers with regular hours each week. In August 2022 they constituted around 142,600 workers, the majority (83.6%) of whom were casual employees. As these figures suggest, labour hire casuals are mainly 'regular casuals' and they make up about 4.5% of all casual employees in Australia. ABS, *Labour Hire Workers*, AUSTL. BUREAU STAT. (2023), https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/labour-hire-workers/latest-release.

136. *Fair Work Act 2009* (Cth) ss 66A-66M (Austl.); *see* Stewart et al., *supra* note 78, at 17–19.

who have achieved the requisite length of service[137] to give a written notification to their employers when they believe their circumstances have changed and they are no longer casual employees.[138] The employer is obliged to provide a written response to this notification and may refuse to accept the employee's notification on the basis that:

The employee is still a casual employee; or

There are fair and reasonable grounds for not accepting the notification (including substantial changes being required to the way in which work in the employer's enterprise is organized; significant impacts on the operation of the employer's enterprise; and substantial changes to the employee's terms and conditions to ensure compliance with industrial instruments applicable to the employee as a full-time or part-time employee).[139]

Conversion is a long-standing theme in Australian employment relations policy, pursued over more than two decades through enterprise bargaining, award regulation and legislation. It can be seen as a special protection for casual workers, though one oriented not so much to improving the work itself but rather to providing an escape route for workers who feel discontented with their status. Though a worthy principle, it has been characterised in all its varied iterations by restrictive conditions, limiting access to the process to a small number of regular casual workers and providing extensive powers for the employer to deny conversion. In a context of strong power imbalance between the casual employee and the employer, an individualised process that depends so heavily on *employer* preferences, is weak and unconvincing, and it is not surprising it has rarely been successfully used by workers, even within unionised settings.

The process outlined in the *CL No 2 Act 2024* is labelled as an "employee choice" pathway to permanency, but it ignores the multiple constraints that affect the exercise of choice by casual employees. The provisions are amongst the narrowest to have been offered as conversion rules, and it is difficult to see how they can any longer be accurately described as a "conversion" process. For the small number of regular casual workers that might meet the access conditions, the new process represents a step backward. It appears to be of limited relevance for regular casuals and no relevance at all for on-demand casual employees.

c) new regulations for "employee-like" workers

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137. 12 months in the case of workers employed by "small business employers" under the Act (*i.e.*, employers engaging fewer than 15 employees: *Fair Work Act 2009*, s 23) and six months otherwise: *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1, s 66AAB(c) (Austl.).

138. *Id.* sch 1, s 66AAB(a).

139. *Id.* sch 1, s 66AAC.

The restoration of moderate contractualism in the interpretation of who is an employee is, as argued in Section 2, unlikely to be helpful in clarifying the ambiguous status of platform workers. The *CL No 2 Act 2024* also includes, however, provisions directly aimed at improving the wages and conditions of platform workers. The *Act* implements a proposal to give the Fair Work Commission powers to regulate "employee-like" workers.[140] To be an employee-like worker, a worker must:

perform all, or a significant majority, of the work to be performed under a services contract (which s/he may or may not be a party to);

the work that the person performs under the services contract is digital platform work;

the work is not performed as an employee; and

two or more of the following circumstances are present;

the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;

the person receives remuneration at or below the rate of an employee performing comparable work;

the person has a low degree of authority over the performance of the work;

the person has such other characteristics as are prescribed by the regulations.[141]

The provisions related to the new powers are long and complex but, reduced to bare essentials, they:

Empower the Fair Work Commission to make minimum standards orders and guidelines for employee-like workers;[142] and

Establish protection against unfair deactivation of employee-like workers;[143] and

Provide for collective agreements between employee-like workers and digital labor platforms.[144]

These provisions fall squarely within the Australian tradition of delegating responsibility for setting minimum standards to industrial tribunals. In the context of the regulatory disorder around bogus self-employment, they

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140. For background to the proposal, *see* Forsyth, *supra* note 101, at 298; SENATE SELECT COMMITTEE ON JOB SECURITY, *supra* note 58, at [8.91]-[8.92]; David Peetz, *Can and how should the gig worker loophole be closed*? 34 ECON. & LAB. REL. REV. 840 (2023). Peetz characterises this as "regulating gig work as a form of contracting". He notes the success of a similar approach in New South Wales to road transport owner-drivers and argues such an approach offers a sustainable way of improving regulation in the face of likely opposition from employer groups and indeed some gig workers to a direct change of employment status.

141. *Fair Work Act 2009* (Cth) s 15P (Austl.).

142. *Id.* pt 3A-1.

143. *Id.* pt 3A-3.

144. *Id.* pt 3A-4.

can be seen as a positive step, offering a way of side-stepping some of the debate and ongoing litigation concerning the employment status of location-based platform workers. It remains true that there is still room for legal dispute over who qualifies as a 'employee-like' worker. Most important, the provisions are limited, in the sense that the new FWC powers to set standards are confined to *certain terms*, primarily in relation to payment terms, deductions, record-keeping, cost recovery and insurance. The tribunal is explicitly excluded from setting standards regarding certain other terms, although excluded matters, such as rostering arrangements, are often the source of the most intense insecurities experienced by platform workers (and the basis for categorising them as zero-hours workers). This threatens to limit the positive impact of the new process, ensuring that any improvement in conditions will still fall well short of what is available to on-demand casual employees. It is true that the boundary between included and excluded matters may not be rigid. Payment by the task, for example, would seem to fall within the parameters of the new powers for the FWC, but such payments function as a crucial pivot for extended control by platform firms and fragmentation of workers' schedules. The full impact of the new provisions will depend both on how the parameters are interpreted and on the substance of the resulting standards set by the FWC.

4.2 Future steps

From the point of view of zero-hours workers, who constitute such a large and highly insecure component of the Australian workforce, recent legislative efforts to plug "loopholes" and promote more secure work have been disappointing. the small minority of zero-hours workers who are engaged in location-based platform work are likely to benefit, at least to some extent, from the new powers given to the FWC. The vast majority, however, of the zero-hours workforce, ie. on-demand casual workers, have received no attention or assistance in the current tranche of legislation.[145]

The mixed record of recent legislative initiatives raises questions concerning future steps in dealing with ZHWAs in Australia. Zero-hours work can be contested and transformed through regulatory initiatives that use a varied levers such as litigation, legislation, claims before industrial tribunals and collective bargaining, supplemented perhaps by use of government procurement policy and encouragement of industry codes of practice. Also important are reforms to **s**ocial protection. We remain convinced that legislation

145. Our focus is the two recent Acts. But it is worth noting the relevance of the addition of paid family and domestic violence leave to the National Employment Standards in the Labor government's *Fair Work Amendment (Paid Family and Domestic Leave) Act 2022 (Cth)*, which explicitly included casual as well as other employees. This represents a benefit for all casual workers, and it could be a useful model for future efforts to combat the exclusion of casual employees from basic paid leave entitlements such as paid annual leave and sick leave. Campbell & Charlesworth, *supra* note 45.

in relation to protective standards should be central, though not to the exclusion of other levers. Irrespective of the preferred lever(s), the need for better policy discussion remains pressing. Better analysis of casual work is especially needed, including close scrutiny of the needs and conditions of the large number of on-demand casual workers and the constraints on their labour market choices.

Development of policy for ZHWAs requires a broad perspective. From one viewpoint, limiting or even eliminating ZHWAs is a relatively straightforward task, which could be accomplished by ensuring that workers are guaranteed a minimum number of weekly working hours, either at the point of engagement or perhaps after a short period of time when the parameters of their schedule become more apparent. Such a guarantee would undoubtedly be useful to employees, and policy initiatives in several countries offer illuminating examples of how this could be achieved.[146]

Nevertheless, it is important to keep in mind that the underlying issue is the negative impact of temporal fragmentation, which is not confined to ZHWAs but can also be found in ancillary practices, especially other variants of on-demand work. The caution is pertinent in Australia, where temporal fragmentation has emerged even within the less permissive framework of permanent part-time work. In contrast to the extensive freedom available to employers with the category of casual work, permanent part-time work is governed by regulatory provisions in awards for "guaranteed hours and regular work patterns", which are designed to encourage stable part-time schedules in line with employee needs. The regulatory provisions follow a general template, but they vary amongst awards, and in some cases the provisions have been diluted in recent years in the course of neoliberal initiatives.[147] Inadequacies in some awards have left space for the emergence of what can be called "minimum-hours" work, characterised by a limited guarantee of a small number of weekly hours, either at a fixed time or floating, which can then be 'flexed-up' by the employer according to business needs. Such arrangements are widespread in retail, where permanent part-time workers may be guaranteed only 6 to 10 hours per week, and they are becoming more

146. For a description of relevant practices in the Netherlands and Finland, *see* Marrku Sippola, Paul Jonker-Hoffrén & Satu Ojala, *The varying national agenda in variable hours contract regulation: Implications for the labour market regimes in the Netherlands and Finland*, EUR. J. INDUS. REL. (2023). For Ireland, *see* Juliet McMahon, Lorraine Ryan, Michelle O'Sullivan, Jonathan Lavelle, Caroline Murphy, Mike O'Brien, Tom Turner & Patrick Gunnigle, *Legislation: A Double-Edged Sword in Union Resistance to Zero-Hours Work – The Case of Ireland*, *in* WORKING IN THE CONTEXT OF AUSTERITY (Donna Baines and Ian Cunningham eds., 2021). For New Zealand, *see* Iain Campbell, *Zero Hours Work Arrangements in New Zealand: Union Action, Public Controversy and Two Regulatory Initiatives*, *in* O'SULLIVAN ET AL., *supra* note 3.

147. Current provisions in seven key awards can be found in *Job Security, Modern Awards Review 2023-24* (Fair Work Commission Discussion Paper, 2023), at 84–90; *see also Work and Care*, *supra* note 47.

common in other sectors such as aged care and disability services.[148] The key to the functioning of such arrangements as a variant of on-demand work is to set guaranteed weekly hours at an artificially low level, so that affected part-time workers need extra hours to reach a preferred target of hours and income and are therefore willing to make themselves available for any offers of extra shifts, often with little regard to the length, timing, and degree of notice. The outcome is a substantial on-demand component in the jobs, which closely resembles the practice of zero-hours work and presents a parallel challenge for protective regulation.

The example of minimum-hours work is a useful reminder that inserting a guarantee of a small number of weekly hours into working arrangements is insufficient as a response to pressures of temporal fragmentation. More relevant is something like a *guaranteed schedule*, which would allow adjustment of all dimensions of working-time schedules to suit worker preferences, including total number of hours, timing, regularity and length of notice.

The mixed success of recent legislation may encourage new legislative initiatives. Background developments may also bear fruit in the medium-term. A Senate Select Committee, chaired by a Greens Senator and supported by Labor Senators, produced a stimulating Report in 2023 that centred on the need to develop better working-time standards.[149] The Committee was established to inquire into work and care, and this lens proved effective in focusing light on working-time arrangements and their impact on workers' lives outside the workplace. The Inquiry considered working-time issues at both ends of what it described as a polarised time structure in Australia, including examination of both long hours and reduced hours work. With reference to the latter, the Report cited the specific difficulties of insecure work and on-demand rostering for part-time workers, both minimum hours workers and on-demand casuals. Amongst recommendations to mitigate the resulting insecurities, it called for *roster justice* for all workers, based on rostering practices that are predictable, stable and focused on fixed shift scheduling (for example fixed times and days), consider employee views, and involve at least two weeks advance notice of rosters and roster changes.[150]

One recommendation from the Senate Report on working-time reform has already been taken up.[151] Others remain active. One significant

148. See Cortis et al., *supra* note 33; Campbell et al. 2019, *supra* note 38; SENATE SELECT COMMITTEE ON WORK AND CARE, *supra* note 83.

149. SENATE SELECT COMMITTEE ON WORK AND CARE, *supra* note 83.

150. *Id.* at 113, 121–22, 186–87.

151. After a last-minute agreement with the Greens, a *right to disconnect,* was included in the *CL No 2 Act 2024.* The new right allows an employee to refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of working hours, unless the refusal is unreasonable. The measure usefully tackles issues to do with unpaid labour and "availability creep," which are relevant for a wide range of workers, including zero-hours workers. It is, however, framed to meet the needs of high-

development is the government's request to the Fair Work Commission to undertake a targeted review of modern awards. The request covers four strands, but two are especially relevant to our topic: 1. consideration of whether modern award provisions support the objective of promoting job security; and 2. consideration of how award terms can impact workers with care responsibilities. The FWC, scheduled to report in or around June 2024 on the results, has solicited submissions from interested stakeholders, especially trade unions and employer associations, commissioned a literature review, and released important Discussion Papers.[152] The targeted review is significant because it promises to focus debate on the adequacy of existing working-time provisions in awards, including those related to rostering and hours of work, from the point of view of a modern workforce engaged in both work and care. In this sense, it promises a productive contribution to policy discussion. At the same time, the review is a spur for practical reform initiatives that can draw on the best and most appropriate award provisions in order to correct injustices and generalise good working-time standards.

skilled workers on a regular full-time roster, and it would be difficult to transpose to zero-hours workers, whose unpaid labor and pressure for availability takes a different form.

152. Smith & Charlesworth, *supra* note 47; *Work and Care*, *supra* note 47; *Job Security*, *supra* note 147.

ARE WE THERE YET? REGULATION ON ZERO HOURS AND CASUAL WORK IN IRELAND

JULIET MACMAHON AND MICHELLE O'SULLIVAN[†]

I. INTRODUCTION

Zero hours work, sometimes also referred to as hourly paid or on-call work, has been branded an unacceptable form of work.[1] Zero hours workers face employment status precariousness,[2] which has been described as "possibly the most radical legal determinant of precariousness" because it can "disenfranchise" workers from legal protections.[3] Common to both Ireland and the UK is a body of case law that has determined that an independent contractor will not normally be covered by much of the protective legislation that has been enacted in both jurisdictions[4] and, as such, transfers much of the social and financial risks associated with employment (such as sickness, holiday, redundancy, maternity, and pensions) to the individual worker.[5] This lack of access to employment rights and a lack of guaranteed hours leads to a situation of vulnerability.[6] The fundamental legal problem of zero hours work is that aspects of contracts/agreements crafted for the engagement of workers contain provisions that, when scrutinized, very often fail the legal tests for the existence of a contract of employment.[7] Workers who fail are

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1. JUDY FUDGE & DEIRDRE MCCANN, UNACCEPTABLE FORMS OF WORK: A GLOBAL AND COMPARATIVE STUDY (2015).

2. Nicola Kountouris, *The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective*, 34 COMP. LAB. L. & POL'Y J. 21, 26 (2012).

3. *Id.* at 28.

4. NEVILLE COX, VAL CORBETT & DESMOND RYAN, EMPLOYMENT LAW IN IRELAND (2022); Mark Freedland, *From the Contract of Employment to the Personal Work Nexus*, 35 *IND. L.J. 1 (*2006).

5. Sian Moore & Kirsty Newsome, *Paying for Free Delivery: Dependent Self-Employment as a Measure of Precarity in Parcel Delivery*, 32 WORK, EMP. & SOC'Y 475 (2018); Susan J. Lambert, *Passing the Buck: Labor Flexibility Practices That Transfer Risk onto Hourly Workers*, 43 HUM. REL. 1203 (2008).

6. Virginia Mantouvalou, *Legal Construction of Structures of Exploitation*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 189 (Hugh Collins et al. eds., 2018).

7. Antonio Aloisi, *'Time Is Running Out'. The Yodel Order and Its Implications for Platform Work in the EU. The Yodel Order and Its Implications for Platform Work in the EU*, 13 ITALIAN LAB. L. E-J. (2020); Lorraine Ryan et al., *The Same but Different: Regulating Zero Hours Work in Two Liberal Market Economies*, 38 IRISH J. MGMT. (2019); ZOE ADAMS & SIMON DEAKIN, REREGULATING ZERO HOURS CONTRACTS (2014).

legally consigned to a self-employed or independent contractor status, and, in contrast to other jurisdictions such as the UK where there is a statutory 'intermediate' category of worker, Ireland's legal system is often described as a binary one such that workers seeking to clarify their status face a high risk, high stakes situation leading them to qualify for "a panoply of employment rights or none."[8] Veneziani writes, the "more fragmented the temporal continuity of the activity and the juridical continuity of the obligation," the more vulnerable the worker is to losing labor and social security protections.[9] Individuals in zero hours arrangements risk being excluded from labor protections because of their sometimes intermittent employment, and they are often not accorded the status of an employee with a contract of service, which is usually required to access most protective employment legislation. Zero hours work typifies arrangements involving the "unilateral modification of working time" which has the effect of "upsetting . . . the 'original' and natural function of the contract," which was to plan for "personal" costs in employment relations.[10] Such work raises fundamental challenges for the protective function of the law and, more specifically, the standard tests that determine employment status, and this has generated significant scholarly debate over the most appropriate regulatory model for protecting workers.

In Ireland, as in other countries, there has been a marked decline in union membership and collective bargaining and an increasing individualisation of the employment relationship. Union density fell by 11 percentage points between 2005 and mid-2023, from 33% to 22%.[11] Ireland has the second lowest collective bargaining coverage in the EU14 (33.5%), and this is less than half of the EU14 average of 73%.[12] Thus, employment law has increased in importance as a mechanism for many workers to challenge perceived injustice in the workplace. The regulatory challenges of protecting zero hours workers are the subject of this article with reference to the evolution of the law in Ireland. Ireland is an interesting jurisdiction to assess regulatory approaches to zero hours work because the state has been

8. Eddie Keane, *Gigging in Ireland*, 31 KING'S L.J. 301 (2020).

9. Bruno Veneziani, *The Employment Relationship* in THE TRANSFORMATION OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF 15 COUNTRIES 1945-2004 123 (Bob Hepple et al. eds, 2009). For a review on the precariousness associated with different types of employment, *see* ANDREA BROUGHTON ET AL., PRECARIOUS EMPLOYMENT IN EUROPE (2016).

10. Veneziani, *supra* note 9, at 123. Veneziani, at page 127, notes that changes in the labor market toward atypical work in the twentieth century "exposed the paradox of the classical model of the employment contract, regarded as a container of social citizenship, and, at the same time, as a legal instrument for saving labor costs."

11. *Labour Force Time Series Union Membership Q2 2005 to Q2 2023*, CENT. STAT. OFF. (2023), https://www.cso.ie/en/statistics/labourmarket/labourforcesurveylfstimeseries/.

12. EU14 are those countries which were members of the European Union before 2004 when there was an expansion of Member States. DAMIAN THOMAS, REFRAMING COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS, NERI Seminar (Sept. 20, 2023).

comparatively active, introducing several pieces of legislation, some of which were triggered by national developments and some because of Ireland's obligation to transpose EU Directives. The presence of legislation of course does not necessarily equate to the effective protection of workers. The Organisation of Working Time Act 1997 first regulated zero hours contracts but was considered ineffective by unions, and they lobbied heavily for additional regulation while employer organizations maintained a discourse that zero hours work was an unproblematic issue.[13] The government introduced the Protection of Employees (Miscellaneous Provisions) Act 2018 with the aim of addressing "the challenges thrown up by the increased casualisation of work."[14] The Act was hailed as "groundbreaking" and a "win" for Irish unions[15] with unions in other countries noting its inspirational effect.[16] This article examines whether regulation in Ireland has addressed employment status precariousness for those undertaking zero hours work. In doing so, we must also consider the approach of common law given its importance in identifying whether individuals have a contract of service or not. Ireland is one of only two common law systems in the EU since Brexit, with the consequence that Ireland is influenced by EU law and the common law of a non-EU country since, historically, Irish courts have referred to British jurisprudence.

This article is structured as follows. We begin by reviewing the debate on the adequacy of the law in protecting workers in contemporary non-standard jobs. Given the centrality of employment status to the conferring of protections on zero hours workers, we examine the common law in Ireland. We consider definitions of employee in employment legislation and find that statutory definitions lack consistency and complicate our understanding of a contract of employment. We then assess the content and operation of the government's newest legislation regulating zero hours work, including an appraisal of the limited number of complaints that have been submitted by workers to assigned statutory bodies. While policymakers in Europe have been criticised for leaving casual workers excluded from labor regulation,[17] the EU Directive on Transparent and Predictable Working Conditions has introduced

13. MICHELLE O'SULLIVAN ET AL., A STUDY OF THE PREVALENCE OF ZERO HOURS CONTRACTS AMONG IRISH EMPLOYERS AND ITS IMPACT ON EMPLOYEES (2015).

14. *Employment Bill: One of the Most Significant Pieces of Legislation in a Generation*, DEP'T OF SOC. PROTECTION, https://www.gov.ie/en/press-release/044919-employment-bill-one-of-the-most-significant-pieces-of-workforce-legi/ (last updated Oct. 16, 2019).

15. *Irish Unions Win Ban on Zero Hours Contracts*, ETUC (2019), https://www.etuc.org/en/irish-unions-win-ban-zero-hours-contracts.

16. Matt Creagh, *A Ban On Zero-Hours Contracts – A Victory For Irish Unions*, TUC (Mar. 6, 2019), https://www.tuc.org.uk/blogs/ban-zero-hours-contracts-victory-irish-unions.

17. Valerio De Stefano, *Casual Work Beyond Casual Work in the EU: The Underground Casualisation of the European Workforce – And What To Do About It*, 7 EUR. LAB. L. J. 421, 422 (2016).

some protections for zero hours workers. We appraise Ireland's transposition of the Directive through secondary legislation and its implications for potentially bringing zero hours workers within the scope of statutory protections.

II. THE EFFECTIVENESS OF EMPLOYMENT LAW

An individual worker has bargaining power only in "exceptional cases" and typically they must accept what the employer offers.[18] Davidov argues that while inequality typifies many contractual relations, the employment contract is more accurately distinguished by the vulnerability of employees due to their dependency on, and subordination to, the employer.[19] In this context, the fundamental "received wisdom"[20] within labor law scholarship was that the law sought to, and was capable of, compensating "the inequality in bargaining power" between employers and workers,[21] and could prevent employer abuse of workers.[22] The employment relationship therefore is often characterized by the subordination of the worker to the employer, but an objective of labor law is to prevent subordination "from becoming domination."[23] The law can limit managerial prerogative, expand workers' freedom, and redistribute resources, power, and risk from employers to workers.[24]

There have, however, been substantial changes in employment arrangements since employment laws developed when many workers were in permanent full-time jobs.[25] The law primarily regulated long-term employment where the employer assumed risk and the worker expected some job security.[26] The standard employment relationship ("SER"), which was "the basis for, and outcome of, labor law and collective bargaining,"[27] distinguished between paid time spent at work and time in the private sphere and placed limits on "the share of the day, week or year" under the control of the

18. OTTO KAHN-FREUND, PAUL LYNDON DAVIES AND MARK ROBERT FREEDLAND, KAHN-FREUND''S LABOUR AND THE LAW 17 (1983).

19. Guy Davidov, *The (Changing?) Idea of Labour Law*, 146 INT'L. LAB. REV. 311 (2007).

20. Brian Langille, *Labour Law's Theory of Justice*, *in* THE IDEA OF LABOUR LAW 105 (Brian Langille & Guy Davidov eds., 2011).

21. Manfred Weiss, *Re-Inventing Labour Law?*, *in* THE IDEA OF LABOUR LAW 44 (Brian Langille & Guy Davidov eds., 2011).

22. Guy Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity*, 64 U. TORONTO L.J. 1, 10–13 (2014).

23. Cathryn Costello, *Migrants and Forced Labour: A Labour Law Response*, *in* THE AUTONOMY OF LABOUR LAW 194 (Alan Bogg et al. eds., 2015).

24. Davidov, *supra* note 19; Davidov, *supra* note 22; KAHN-FREUND ET AL., *supra* note 18.

25. Weiss, *supra* note 21.

26. Karl Klare, *The Horizons of Transformative Labour and Employment Law*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES (Joanne Conaghan et al. eds., 2000).

27. Judy Fudge, *The future of the standard employment relationship: Labour law, new institutional economics and old power resource theory*, 59 J. INDUS. RELS. 374, 380 (2017).

employer.[28] Increasingly though, work is taking placed during non-standard hours and the "temporal boundaries" associated with the SER are being "eroded" with employers increasingly avoiding paying premiums for hours outside of the SER.[29] In addition, the "quid pro quo…of subordination for security — has broken down"[30] and there has been a "blurring of the 'binary divide'" between employee and self-employed.[31] This blurring has exacerbated worker vulnerability as protective employment legislation enacted for much of the twentieth century presumed and required the existence of an employment contract that characterized the SER. The consequence is that workers in employment relationships "*objectively ambiguous* or *disguised"* can find themselves outside the scope of labor protection,[32] where the courts decide that they do not satisfy the criteria of employees. Employment status has been identified as the "very heart" of the issues of universality and effectiveness in labor law.[33] The problem for workers is exacerbated by well documented inconsistency of decisions regarding employment status: a situation identified as a major fissure in the debate on the regulation of employment. [34] Employment status tests can be rigid and ill-suited for non-standard employment,[35] becoming "detached from their normative foundations."[36] The law, for some, has become "irrelevant" for many vulnerable workers,[37] and the techniques of the courts and legislators are arguably disconnected from "the changing reality of employment relations."[38] When groups of workers are excluded from protection, the law itself places workers in "special structural vulnerability" by instituting or exacerbating unfairness, and this enables the exploitation of workers by the state and employers.[39]

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28. Jill Rubery et al., *Working Time, Industrial Relations and the Employment Relationship*, 14 TIME & SOC'Y 89, 91 (2005).

29. *Id*. at 91.

30. Alain Supiot, *The Transformation of Work And The Future of Labour Law In Europe: A Multidisciplinary Perspective*, 138 INT'L. LAB. REV. 31, 36 (1999).

31. Simon Deakin, *The Many Futures of the Contract of Employment*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES AND POSSIBILITIES 190 (Joanne Conaghan et al. eds., 2000).

32. ILO, THE EMPLOYMENT RELATIONSHIP 11–15 (2005).

33. Keith D. Ewing et al., *The Universality and Effectiveness of Labour Law*, 10 EUR. LAB. L.J. 334, 335 (2019)

34. Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 76 (2017).

35. BRENDAN BURCHELL ET AL., THE EMPLOYMENT STATUS OF INDIVIDUALS IN NON-STANDARD EMPLOYMENT (1999).

36. Guy Davidov, *Re-Matching Labour Laws with their Purpose*, *in* THE IDEA OF LABOUR LAW 181, 183 (Brian Langille & Guy Davidov eds., 2011).

37. *Id.* at 188; *see also* Guy Davidov & Brian Langille, *Introduction: Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?*, *in* THE IDEA OF LABOUR LAW 1 (Brian Langille & Guy Davidov eds., 2011).

38. Deakin, *supra* note 31, at 178.

39. Mantouvalou, *supra* note 6, at 189.

Despite criticism of the ability of existing law to deal with emerging forms of work, many view labor law as essential in combating exploitation and domination. Weiss argues that "the asymmetric structure of bargaining power remains" even if issues of work subordination have become more complex to determine and that the law is needed "to react to the needs of people in new forms of work by providing tailor-made regulations . . . ."[40] While Mantouvalou[41] recognizes that the law can "consolidate" exploitation, she also sees it as part of the solution, with the capability to address worker vulnerability. Similarly, for Rubery et al.,[42] individual employee rights are necessary to prevent total employer discretion over the organisation of working time in the absence of collective regulation, while Fudge[43] advocates for the role of labor law in realising decent work. For Davidov, the goals of labor law have not changed, but the problem has been the "mismatch between those goals and the actual application of labor laws."[44] Thus, a fundamental issue is not whether labor law is relevant but how it can adapt to change.[45]

III. JUDICIAL INTERPRETATION OF EMPLOYMENT STATUS

The classification of workers is "a juridical act" and courts and statutory bodies in common law countries face considerable challenges applying employment status indicators "in any consistent way to the multiplicity of fact situations."[46] Indicators of the existence of a contract of employment are considered by courts through tests, and, as Deakin notes in the British context, the choice of test applied can have significant implications.[47] For example, the economic reality test would extend the coverage of employment laws while the "continuing use of the mutuality test is going to fragment the application of labor laws."[48] Indeed, the mutuality of obligation test, which has been described as "unhelpful in distinguishing between different types of employment status,"[49] has been a key stumbling block for those challenging their ascribed employment status in Ireland (similarly to the UK). Broadly speaking, this test has been interpreted as indicating the extent to which the

40. Weiss, *supra* note 21, at 46–47.
41. Mantouvalou, *supra* note 6, at 204.
42. Rubery et al., *supra* note 28.
43. Fudge, *supra* note 27.
44. Davidov, *supra* note 22, at 2.
45. Supiot, *supra* note 30.
46. Simon Deakin, *Decoding Employment Status*, 31 KING'S L.J. 181, 185 (2020). Veneziani notes that in both common law and civil systems in the 20th century, "judges and academic doctrine realised that no single criterion is able to resolve the question. . ." of what defines a contract of employment. *See* Veneziani, *supra* note 9, at 111.
47. Deakin, *supra* note 46.
48. *Id.* at 191.
49. HUGH COLLINS, KEITH EWING & AILEEN MCCOLGAN, LABOUR LAW (2019).

employer has contracted into an obligation to provide work and the worker has an obligation to take that work.[50] This test has presented fundamental problems for those working in zero hours, casual and/or intermittent arrangements in Ireland, who have failed in establishing employee status if mutuality of obligation is found to be lacking on a contractual basis.[51]

Whilst cases have come before the Irish courts over many years, the 2023 Irish Supreme Court decision of *Karshan*[52] may prove to be a watershed in terms of the ongoing saga of employment status. The Supreme Court decision contains an in-depth critical analysis and clarification of the doctrine of mutuality of obligation. The case concerned pizza delivery drivers who were classified by their employer as self-employed, but the state tax collecting authority, the Revenue Commissioners, argued that the drivers should be classified as employees for tax purposes. After a lengthy journey through the court system, the case was finally decided in favor of the Revenue Commissioners at the Supreme Court. Whilst the decision is lengthy and complex, several key outcomes are significant.

Firstly, in arriving at the decision that the drivers should be classified as employees, Judge Murray affirmed the legitimacy of the hybrid contract approach in assessing the existence of a contract of service. A hybrid contract has been described as one comprising an overarching (umbrella) level that dictates the overall relationship, supplemented by a series of lower-level arrangements that dictate the relationship during episodes of work.[53]

Secondly, the judgment presented a comprehensive critique of the evolution of the legal test of mutuality of obligation, with Judge Murray stating that through "over-use and under-analysis," the term had become "a wholly ambiguous label" and should be discontinued.[54] The Supreme Court set aside the accepted view that 'mutual obligation' should be interpreted as a requirement that 'ongoing' obligations had to be present for a contact of employment to exist:

"I find it difficult to identify any reason in theory or practice *why* there should be a requirement of this kind before an agreement can be characterised as a contract of employment."[55]

Moreover, Judge Murray rejected any inference that mutuality forms a pre-requisite condition to the existence of an employment contract. While relevant to the question of employment status, mutuality of obligation, the

50. *Id.*; *see also* Brendan Burchill, et al., THE EMPLOYMENT STATUS OF INDIVIDUALS IN NON-STANDARD EMPLOYMENT (1999).
51. *Id.*
52. *Revenue Comm'rs v. Karshan (Midlands Ltd) t/a Domino's Pizza* [2023] IESC 24 (Ir.).
53. Keane, *supra* note 8.
54. *Karshan* [2023] IESC 24, ¶ 210–11 (Ir.).
55. *Id.*, ¶ 201.

court confirmed, is but one factor to be considered: "If applied as a hard rule, such a requirement is likely to both encourage the assertion of legal fiction over factual reality and undermine the overall objective of ensuring that all relevant circumstances of each case are faithfully assessed."[56]

Mutuality "should be viewed as doing no more than describing the consideration (payment) that has to be present before a working arrangement is capable of being categorised as an employment contract," and this, the Court decided, could simply be ascertained by asking the question: does the contract involve the exchange of wage or other remuneration for work?[57]

Conversely, the Court noted that "where a worker works intermittently for an employer it is possible for the worker to be an employee for those periods when they are actually working," but the answer to this would have to await a relevant case involving employment rights.[58]

Thirdly, the Supreme Court reflected in some detail on the issue of adopting a purposive approach in the Irish context, citing the UK cases of *Autoclenz*[59] and *Uber*[60] and the Australian case of *CFMMEU*.[61] A purposive approach in questions of employment status and access to employment protective legislation was adopted by the UK Supreme Court in the cases of *Autoclenz* and *Uber*. It is one by which "the relative bargaining power of the parties is taken into account"[62] in deciding "whether worker protective legislation, construed purposively, was intended to apply to the relevant relationship, viewed realistically."[63] Thus, "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."[64] In affirming that such an approach has never been adopted by the Irish Supreme Court, Judge Murray cautioned that the setting aside of a signed agreement of the parties would be considered "exceptional" usually involving some 'sham' or intent to circumvent statutory provision. He concluded that "usually the court is not entitled to look at how the parties conducted themselves with a view to interpreting a written instrument,"[65] but he did not conclusively close off the prospect of a purposive approach in the future.

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56. *Id.*
57. *Id.*, ¶ 253.
58. *Id.*, ¶ 194.
59. *Autoclenz Ltd v. Belcher* [2011] UKSC 41, [2011] 4 All ER 745 [32].
60. *Uber BV v. Aslam* [2021] UKSC 5.
61. *CFMMEU v. Personnel Contracting Pty. Ltd.* [2022] HCA1.
62. *Autoclenz supra* note 59, at ¶ 35; *see also* Alan Bogg & Michael Ford, *The death of contract in determining employment status*, 137 L.Q. REV. 392 (2021).
63. Bogg, *supra* note 62, at 392.
64. *Autoclenz*, [2011] UKSC 41, [2011] 4 All ER 745 [32], ¶ 35.
65. *Karshan* [2023] IESC 24, ¶ 241 (Ir.).

Finally, the Supreme Court adapted tests from previous case law[66] and set the following questions to "resolve" the issue of whether a contract is of service or for services:

(i) Does the contract involve the exchange of wage or other remuneration for work?

(ii) If so, is the agreement one pursuant to which the worker is agreeing to provide their

own services, and not those of a third party, to the employer?

(iii) If so, does the employer exercise sufficient control over the putative employee to

render the agreement one that is capable of being an employment agreement?

(iv) If these three requirements are met the decision maker must then determine whether

the terms of the contract between employer and worker interpreted in the light of the

admissible factual matrix and having regard to the working arrangements between the

parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.

(v) Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.[67]

What are the implications of the decision in *Karshan* for zero hours and casual workers? The case is an important one for clarifying the law particularly regarding the mutuality of obligation. The likely impact of the case, however, on the employment rights of intermittent workers is uncertain because it concerned liability for tax and, in this context, the single episodic contracts of employment were relevant to the outcome. The outcome may be different in a case considering access to protective employment legislation and the Supreme Court judgment emphasized this point. Judge Murray stated that in a case concerning employment rights, especially those requiring a period of service (such as unfair dismissals or redundancy rights), a requirement for consideration in the form of ongoing obligations might be a deciding factor. "The question of whether there is an obligation to offer and/or accept

66. *Ready Mixed Concrete (South East) Ltd. v. Minister for Pensions and National Insurance* [1968]; *Market Investigations v. Minister of Social Security* [1969]; *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1996] 1 ILRM 418 (High Court), [1998] 1 IR 34 (Supreme Court).

67. *Karshan* [2023] IESC 24, ¶ 243 (Ir.).

work may be relevant in ascertaining whether there is a period of time during which the worker is not actually working or being paid, but in which they are nonetheless 'employees' over an extended time."[68]

Nevertheless, the removal of 'ongoing' from the concept of mutuality and also the clarification that it is not a pre-requisite test may allow claimants to surmount what had become a problematic bar and have their cases considered using the broader five-point test set down in *Karshan*. This may allow zero hours workers or those deemed self-employed pursue cases for employment rights that accrue immediately upon employment. Keane[69] had previously suggested that the acceptance of an 'episodic contract of employment' could bring such workers within the remit of the Protection of Employment (Fixed-term Work) Act 2003 which seeks to prevent abuse arising from the use of successive fixed-term employment contracts. Moreover, in parts of the Supreme Court decision, the hardening of ongoing regular work into a contract of employment was identified as a factor that could be considered under the 'control' element. Yet there seems to be clear reservations within Irish courts in following British courts' adoption of a purposive approach and in recognizing the inequality inherent in the creation of a written work bargain. This means the signed agreement remains a central element for consideration and will not be set aside except in exceptional circumstances (albeit with the caveat that this could potentially be considered in a future case involving employment rights). Overall, the *Karshan* case does not immediately change the employment rights landscape for zero hours and casual workers. It remains quite daunting for workers to challenge their status through the court system and the number of cases on employment status before the courts is limited. Disputes under employment legislation where employment status is considered are most often presented to statutory bodies with quasi-judicial functions,[70] and we now turn to examine the legislative treatment of an employee.

IV. IRISH STATUTORY REGULATION: EMPLOYMENT STATUS AND ZERO HOURS WORK

Employment Status

If courts find it difficult to achieve consistency in decisions, they are not necessarily helped by statutory definitions of employee which can be

68. *Karshan* [2023] IESC 24, ¶ 212 (Ir.).

69. Eddie Keane, *Providing access to job security legislation for intermittent workers*, 25 KING'S L.J. 332 (2014).

70. Since 2015, the two statutory bodies are the Workplace Relations Commission and the Labour Court.

"vacuous or circular."[71] The statutory landscape in Ireland on employment status is complicated because, like in other jurisdictions, there can be an "erratic use of the terminology of employment status" across individual laws.[72] Important definitions of 'employee' and 'casual' vary in Irish employment legislation with the following designated forms of contract (see Table 1):

A contract of service

A contract of service that includes people working for an agency

An employee working on a casual basis

Someone working on a casual basis who is not an employee

Zero hours contract of employment

Definitional or coverage variance in employment legislation is not unique to Ireland and can be because of "historical accident" or because laws are targeted at correcting specific problems.[73] Alternatively, in Ireland, definitions in some employment laws have been influenced by EU Directives. For example, the definition of a contract of employment in the Employment Equality Act 1998 was confined to a contract of service or apprenticeship and agency workers.[74] It was amended in 2004[75] to include an individual who agrees with another person personally to execute any work or service and this was added for the purpose of including self-employed persons as required by the EU Racial Equality Directive and Equal Treatment Directive.[76]

71. Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL'Y J. 7, 16 (1999).

72. COLLINS ET AL., *supra* note 49, at 200.

73. *Id.* at 200.

74. Notably, the first piece of equality legislation in Ireland, the Anti-Discrimination (Pay) Act 1974 defined 'employed' as a contract of service or apprenticeship or a contract personally to execute any work or labour. The then Minister for Labour noted that this definition aligned with the definition of an employee in equal pay legislation in Britain and Northern Ireland. Dáil Éireann Debate, 274 (March 17 1974).

75. Equality Act 2004 § 3(a).

76. GOV'T OF IRELAND, EQUALITY BILL 2004 EXPLANATORY AND FINANCIAL MEMORANDUM 2 (2004).

Table 1 Statutory Definitions and Access to Employment Rights in Ireland

Statutory definitions (as they appear in various pieces of employment legislation)	**Coverage under Irish legislation**
A contract of service or apprenticeship, or any other contract whereby— an individual agrees with a person carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 to do or perform personally any work or service for another person (whether or not the other person is a party to the contract),	Unfair Dismissals Acts 1977; Redundancy Payments Act 1967; Organization of Working Time Act 1997; Maternity Protection Act 1984, Adoptive Leave Act 1995, Parental Leave Act 1998, Carer's Leave Act 2001; Protection of Employees (Part-time Work) Act 2001; Paternity Leave and Benefit Act 2016
A contract of service (excludes agency workers)	Protection of Employees (Fixed-term Work) Act 2003
A contract of service or apprenticeship, or any other contract whereby— an individual agrees with another person personally to execute any work or service for that person, or an individual agrees with a person carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 to do or perform personally any work or service for another person (whether or not the other person is a party to the contract),	Employment Equality Acts 1998-2021
A contract of service or apprenticeship, or any other contract whereby—	National Minimum Wage Act 2000

an individual agrees with another person to do or perform any work or service for that person or a third person	
Casual employee: He or she has been in the continuous service of the employer for a period of less than 13 weeks, and that period of service and any previous period of service by him or her with the employer are not of such a nature as could reasonably be regarded as regular or seasonal employment	Protection of Employees (Part-time Work) Act 2001
'Work of casual nature' (not defined) Whether or not the number of occasions of work would give rise to a reasonable expectation of the employee that they would be required by the employer do to do work	Organization of Working Time Act 1997
Zero hours contract (of employment) A contract where an employee is required to make themselves available to work for an employer in a week A certain number of hours As and when the employer requires them Both a certain number of hours and as and when the employer requires them	Organization of Working Time Act 1997

References to casual work in legislation are low in number and high in ambiguity. The Protection of Employees (Part-time Work) Act 2001 refers to a part-time 'employee' as casual where they have been in the continuous service of the employer for a period of less than thirteen weeks, and their service is not of a nature as could reasonably be regarded as regular or seasonal employment.[77] It was recognized by opposition politicians at the time of the Act's introduction that the definition of a part-time casual employee raised

77. Section 11(4) (Statute No. 45 of 2001). In addition, this section of the Act provided that a part-time employee would be regarded as casual where they were so regarded in an approved collective agreement. The Act provided that a part-time casual employee working on a casual basis could be treated les favourably than a comparable full-time employee on objective grounds. The Act transposed EU Directive 97/81/EC which provided that Member States could, for objective reasons, exclude wholly or partly from the Directive part-time workers who work on a casual basis.

more questions than answers, for example, whether someone who was not offered work every week over a lengthy period would be classified as casual.[78] To add to confusion, provisions relating to zero hours work in the Organization of Working Time Act 1997 exclude employees doing work "of a casual nature," but the Act does not provide a definition of casual.[79] The lack of clarity on the definition of a casual worker presents difficulties for statutory employment rights bodies tasked with resolving complaints around status and has led to varying outcomes in cases. For example, in *Contract Personnel Ireland v. Marie Buckley*, the Labour Court decided that under the Organization of Working Time Act 1997, a worker employed on an 'if and when' basis with a non-mutuality clause in an agreement was casual and not an employee, excluding them from protective legislation.[80] In *Irish Museum of Modern Art v. Joe Stanley,* the Labour Court concluded that while the claimant had employee status, they were a 'casual employee,' someone who was described as having contract of service and augments the work of regular or full time employees.[81]

Zero Hours Work

When the Irish government undertook to legislate on zero hours work, it had considered following the approach used in several other counties of having a statutory intermediate category of 'worker,' such as the UK, Canada, Germany, and Spain.[82] The intermediate category has been described as an attempt to combine selectivity of labor laws with an element of universalism.[83] Whilst workers within this statutory category are entitled to some employment rights, they are excluded from others. In recent years, this intermediate category has become the subject of some criticism. Observations of cases in the UK such as *Uber*, *Citysprint*, and *Pimlico*[84] were that courts/tribunals simply examined the status of the claimants as 'workers' and did not explore the possibility of them having contracts of employment,[85] and this

78. This was raised by the Labour Party in opposition. Dáil Éireann Debate, 530 (Feb. 14, 2001).
79. Organization of Working Time Act 1997 § 18(1).
80. DWT1145.
81. Labour Court Determination FTD146.
82. Guy Davidov et al., *The Subjects of Labor Law: ''Employees'' and Other Workers*, *in* COMPARATIVE LABOR LAW (Matthew W. Finkin & Guy Mundlak eds., 2015).
83. Guy Davidov & Pnina Alon-Shenker, *The ABC Test: A New Model for Employment Status Determination?*, 51 IND. L. J. 235 (2022).
84. *Uber BV v. Aslam* [2018] EWCA Civ 2748; *Dewhurst v. CitySprint UK Ltd ET/220512/2016*; *Gary Smith v. Pimlico Plumbers Limited* [2022] EWCA Civ 70.
85. Mark Freedland & Jeremias Adams-Prassl, *Employees Workers and the Sharing Economy: Changing practices and changing concepts in the United Kingdom*, OXFORD LEGAL STUD. RSCH. PAPER 19 (2017);
see also Christina Hiessl, *The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis*, 42 COMP. LAB. L. & POL'Y J. 465 (2021) (noting that, except for Pimlico, workers in other platform cases did not claim employee status because of the lack of mutuality). '

can lead to a swathe of workers being copper fastened into a somewhat grey zone of employment rights.[86] Adams et al. assert that vulnerable workers in high monopsony power situations may lose out on employment rights accorded to those with contracts of employment, notwithstanding that the underlying working relationship may be very similar or identical, and it is unclear how the addition of the worker category aligns with redistributive and market failure objectives of labor law.[87] In the UK, the intermediate category is viewed as making a complex area of law even more complex,[88] and creating more questions than it answers,[89] while in other countries with a third category, there has been more "misadventure" than success.[90] On the two occasions when the Irish government has introduced legislation to regulate zero hours work, it shied away from introducing a statutory intermediate status of worker and instead conferred compensatory rights to zero hours employees.

The Organization of Working Time Act 1997 obliged employers to pay compensation to zero hours employees who are not called into work, amounting to 25 % of the time they are required to be available, or fifteen hours pay, whichever is the lesser. As noted earlier, a clause in the legislation limited coverage to those employed under a contract of service and excluded those working on a 'casual basis,' despite objections to this exclusion by opposition political parties at the time of drafting the legislation.[91] Subsequent interpretation by the Labour Court of this clause between 1997 and 2018 (when the legislation was amended) was that a 'casual worker' was one not employed under a contract of service.[92] The mutuality of obligation test proved a specific sticking point and has provided a loophole for employers to choose a less regulated option.[93] Employers could engage workers if and when work became available, but there was no contractual obligation on the worker to

86. Juliet MacMahon, *How Effective Is The Statutory Legal Protection Governing Zero Hours Work In Ireland And The UK?*, (2019) (unpublished LLM. Dissertation, Northumbria University) (on file with author).

87. Abi Adams, Judith Freedman & Jeremias Adams-Prassl, *Rethinking legal taxonomies for the gig economy*, 34 OXFORD REV. OF ECON. POL'Y 475 (2018).

88. HUGH COLLINS, KEITH EWING & AILEEN MCCOLGAN, LABOUR LAW (2012).

89. Ewing et al., *supra* note 33.

90. Miriam A. Cherry, *The Cautionary Tale of the Intermediate Worker Category in Italy: A Response to Del Conte and Gramano*, 39 COMP. LAB. L. & POL''Y J. 639, 642 (2018) (referring to employers in Italy engaging in 'systemic arbitrage' and individuals lost rights as they were misclassified in the intermediate category and noting that the 2015 Jobs Act in Italy effectively reversed its efforts to have an intermediate category).

91. *Select Committee on Enterprise and Economic Strategy Debate*, HOUSES OF THE OIREACHTAS (Feb. 26, 1997), https://www.oireachtas.ie/en/debates/debate/select_committee_on_enterprise_and_economic_strategy/1997-02-26/5/.

92. *Contract Personnel Marketing Ireland v. Marie Buckley*, DWT1145.

93. Judy Fudge & Sandra Fredman, *The Contract of Employment and Gendered Work, in* THE CONTRACT OF EMPLOYMENT (Mark Freedland, ed. 2016).

accept that work, and no obligation on the employer's side to provide work. It was easy for employers to sidestep the Act by inserting non-mutuality clauses into agreements.

In the aftermath of the global financial crisis and economic recession in Ireland, there was increasing pressure by unions on government to regulate on zero hours jobs again and a strike involving workers in Ireland's largest retailer, Dunnes Stores, drew attention to low and unpredictable working hours. The government commissioned an academic study on zero hours and low hours work in 2015 and subsequently introduced legislation. During the legislative drafting, there was an attempt by some Senators in the upper house of parliament to introduce an amendment which would recognize continuity for casual employees and effectively a statutory provision for the hardening of continuing work and reasonable expectation into a contract. There were also efforts to introduce clauses that would ban 'bogus' self-employment.[94] The proposal around continuity was ruled out of order in the Seanad (Senate) debate on the grounds that it would potentially pose a charge on the exchequer and members of the senate agreed to delete the section relating to bogus self-employment.[95]

The law that emerged, the Employment (Miscellaneous Provisions) Act 2018, amended previous legislation. First, it prohibits zero hours contracts except where the work is of a casual nature or where work done is in emergency circumstances or where work is done as short-term relief.[96] Second, where an employee is required to be available for work but was not provided with work, compensation would now be calculated at three times the national minimum wage rate or sectoral legal minimum rate.[97] Third, employers are now obliged to provide specific written terms and conditions to all workers within five days of a person commencing work.[98] Fourth, the Act introduced a 'banded hours' provision whereby employees on low hours have an entitlement to be placed into a higher band of hours where they can show that (within a reference period of twelve months from commencement of employment) the hours they have been contracted for do not reflect the hours they actually work. Seven specific bands of hours are contained in the legislation

94. *Dáil Éireann Debate*, HOUSES OF THE OIREACHTAS (July 12, 2018), https://www.oireachtas.ie/en/debates/debate/dail/2018-07-12/45/

95. Seanad Éireann Debate, Houses of the Oireachtas (Dec. 4, 2018), https://www.oireachtas.ie/en/debates/debate/seanad/2018-12-04/12/

96. Employment (Miscellaneous Provisions) Act 2018, § 15 (Statute No. 38 of 2018).

97. *Id.* at § 15.

98. *Id.* at § 7. The information required is the are the names of the employer and employee, the address of the employer, in the case of temporary employments its expected duration, the rate or method of calculation of an employees pay for the purposes of national minimum wage legislation and the number of hours which the employer reasonably expects the employee to work.

from the lowest band of three to six hours to the highest band of over thirty-six hours.[99]

V. AN ASSESSMENT OF LEGISLATION ON ZERO HOURS WORK

When the 2018 Act was introduced, it was presented by some social partners as a solution to workplace precariousness. The incumbent Minister for Employment Affairs and Social Protection claimed the law would "profoundly improve the security and predictability of working hours for employees on insecure contracts and those working variable hours."[100] Unions, keen to publicize their lobbying success, headlined the introduction of the legislation as "goodbye zero-hours contracts, hello guaranteed hours."[101] An analysis of the Act would, we suggest, warrant a more muted response. In terms of its content, research indicates that nothing has changed for those working on a zero hours 'if and when' basis and where there is no clear evidence of a contract of employment, they continue to be excluded from rights unless they can prove their status to be other than that identified in their contract.[102] As illustrated earlier, this is a complex area and one which many workers would find difficult to engage with, especially more vulnerable workers.

Where a weakness of legislation can be quickly identified, employers may act to exploit it and introduce avoidance mechanisms. It could be argued that the increased compensation for zero hours employees would cause employers to further shy away from considering contracts of employment. Thus, the actual effect of the 2018 Act could be contrary to its stated aims in that it could incentivize the use of precarious casual work arrangements.[103] Keane suggests that the requirement for written terms and conditions may have the unintended consequence of elevating the importance of the written documentation and thus the signature rule element, undermining the judicial tendency to look at "all the circumstances" of the relationship.[104]

Given the recency of the Act, there have been few worker complaints to the statutory body, the Workplace Relations Commission ("WRC"), for optional mediation or legally binding adjudication.[105] Adjudicated decisions are

99. *Id.* at § 16.

100. Regina Doherty, *Only Unscrupulous Employers Need Fear Bill*, IRISH TIMES (Dec. 20, 2018), https://irishtimes.com/opinion/regina-doherty-only-unscrupulous-employers-need-fear-bill-1.3737152.

101. *Goodbye Zero-Hours Contracts, Hello Guaranteed Hours*, IRISH CONG. TRADE UNIONS (Mar. 3, 2019), https://www.ictu.ie/news/goodbye-zero-hour-contracts-hello-guaranteed-working-hours.

102. Juliet MacMahon, *Plus Ça Change? Regulating Zero-Hours Work in Ireland: An Analysis of Provisions of the Employment (Miscellaneous Provisions) Act 2018*, 48 IND. L.J. 447 (2019).

103. *Id.*

104. Keane, *supra* note 8.

105. Decisions of an adjudicator can be appealed to another state employment rights body, the Labour Court, and can be appealed from there to the High Court on a point of law. The details of complaints resolved at mediation are not published.

publicly available and a search of the Commission decision database shows that twelve adjudicated decisions were issued by the Commission between 2019 and 2022 under the Organization of Working Time Act 1997 as revised by the 2018 Act. Of these, five related to workers on low hours seeking entitlement to the banded hours provisions and these led to positive adjudicated decisions for the employees concerned.[106] Most of the disputes in these cases centred around the calculation of the appropriate band[107] rather disputing the employee's entitlement to move band. Of the remaining seven cases relating to zero hours work, four were found in the workers' favor. Analysis of the decisions suggests a lack of clarity amongst state adjudicators on the application of the legislation. In *An Events Steward v. A Security Company*, the worker was successful, but there seems to have been some confusion over the compensation.[108] They won a claim for non-payment for an obligation to be available, but the adjudicator calculated his award as a percentage of the worker's hourly rate and not the minimum payment of three times the national minimum wage as stipulated by the legislation.

Worker complaints submitted under other employment laws illustrate how employers can try to circumvent the 2018 Act or indeed prevent workers in zero hours arrangements from accessing it. In *A Consultant v. A Service Company*,[109] the claimant submitted a complaint to the Workplace Relations Commission under the Terms of Employment (Information) Act 1994 in which they challenged a unilateral move by their employer to change their contracts from zero hours to 'casual.' This would have the effect of placing the claimants outside the remit of the 2018 Act, and the claimant had informed her employer she was seeking more stable and regularised hours under the banded hours provisions. The claimant was awarded compensation but only on the basis that the employer had breached their obligation to notify the worker of the change in their terms and conditions as per the Terms of Employment (Information) Act 1994. The actual question of status was not addressed. As the complaint was not submitted under the working time legislation, no decision was made on whether the employee's entitlement to banded hours was violated. In another similar case, however, the adjudicator stipulated that the correct designation of the worker's employment was a zero hours contract, thus opening up the possibility of the claimant pursuing a claim with the employer in relation to banded hours. [110] Contrast this with the case of *A Worker v. A Bar Owner*,[111] where the employer argued the

106. *Aer Lingus Ireland Ltd v. Cliona O'Leary* DWT207.
107. *A Member of Ground Staff v. An Airline* ADJ-00024905.
108. *An Events Steward v. A Security Company* ADJ-00025451.
109. ADJ-00021517.
110. *A Destination Consultant vs An Employer*, ADJ-00020471.
111. ADJ-00023134.

worker was employed on a 'casual as and when basis' in accordance with a non-mutuality clause contained in the terms of employment and as such had no entitlement to make claims under protective legislation. The adjudicator rejected this and interpreted the term 'casual' from the legislation governing part-time employees which defines someone as causal if they have been in continuous employment with the employer for less than thirteen weeks and could not reasonably be regarded as regular or seasonal. In doing so, the adjudicator assumed a contract of service and ignored the non-mutuality clause. It is debatable if this decision would stand on appeal to a higher court and indeed a decision from the Irish High Court could provide much needed clarity on this issue of what a 'casual' worker is. To date, however, no cases in relation to the Organisation of Working Time Act 1997 regarding zero hours/casual work linked to the question of employment status have been appealed to the higher courts leaving somewhat of a judicial lacuna in this regard.

VI. CAN THE EU MAKE A DIFFERENCE?

The stated aim of the EU Directive 2019/1152 on Transparent and Predictable Working Conditions was to "promote security and predictability in employment relationships while achieving upward convergence across Member States and preserving labor market adaptability."[112] The European Commission stated the EU Directive would include "**effective measures that prevent abuse** of zero-hour contract work" [113] but the extent to which this will happen depends on who will be covered by the Directive and national law. The Directive in its proposal stage was the subject of much contestation because the European Commission's original proposal included the following definition of a worker as developed by Court of Justice of the EU ("CJEU:) case law: "a worker is a natural person **who for a certain period performs services for and under the direction of another in return for remuneration."**[114] This definition did not emerge in the final wording of the Directive, which now applies to "every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the

112. Recital 4. The latter part of this aim on preserving labour market adaptability has been criticised for implying that "improvement of working conditions is achieved at the expense of adaptability…". **Bartlomiej Bednarowicz,** *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, 48 IND. L.J. 604, 611 (2019).

113. Press Release, European Commission, *Social Europe: More transparent and predictable working conditions for workers in the EU*, (Aug. 1, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4765.

114. Art. 2 Proposal for a Directive Of The European Parliament And Of The Council on Transparent And Predictable Working Conditions in the European Union.

case-law of the Court of Justice."[115] The changed definition undermines the original motive behind the European Commission's proposal for a worker definition which was to bring consistency across Member States whose definitions of employee risked excluding a growing cohort of people in non-standard employment.[116] The new definition in the Directive represents a "sort of *hybrid* legal definition of a worker unknown before in social *acquis*" because it leaves to members states' discretion to define the scope of employment protection under the Directive while also requiring them to consider CJEU case law.[117]

The Irish government transposed the Directive through the European Union (Transparent and Predictable Working Conditions) Regulations 2022, without parliamentary debate. In announcing the Regulations, the government reiterated the European Commission's claim that the Directive would lead to rights for "all workers in all forms of work," including those on zero-hour contracts and in casual work. [118] The Regulations amended the definition of a contract of employment in the Terms of Employment (Information) Act 1994. The 1994 Act covered employees in a contract of service of apprenticeship, and agency workers,[119] and the 2022 Regulations widened the definition of a contract of employment to include where "an individual agrees with another person personally to execute any work or service for that person."[120] Given the absence of debate or advance publicity on the Regulations, the government provided no rationale or explanation for its choice of amended definition but it was generally in line with previous changes to definitions of an employee in Irish law for the purpose of satisfying EU Directives. The expansion of the definition is an interesting one as it appears to bring a broader scope of people within the ambit of 'employee,' including those who would fall under the statutory definition of limb (b) worker within the UK.[121]

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115. EU Directive 2019/1152 Art. 1(2).

116. Proposal for a Directive Of The European Parliament And Of The Council on Transparent And Predictable Working Conditions in the European Union, at 11.

117. **Bednarowicz, *supra* note 112, at 613.**

118. Press Release, Department of Enterprise, Trade and Employment, *Minister Damien English Announces Approval for Transposition of EU Directive on Transparent and Predictable Working Conditions*, (Dec. 16, 2022), https://enterprise.gov.ie/en/news-and-events/department-news/2022/december/16122022c.html

119. Terms of Employment (Information) Act 1994 § 1 (Statute No. 5 of 1994).

120. EUROPEAN UNION (TRANSPARENT AND PREDICTABLE WORKING CONDITIONS) REGULATIONS 2022 § 3(a).

121. Limb (b) workers "have a more casual employment relationship and are entitled to a basic set of rights" such as minimum wage and holiday pay, *see* DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, EXPLANATORY MEMORANDUM TO THE EMPLOYMENT RIGHTS ACT 1996 (PROTECTION FROM DETRIMENT IN HEALTH AND SAFETY CASES) (AMENDMENT) ORDER 2021 (2021).

While the government claims the Regulations will apply to all workers, several challenges and unanswered questions remain. The definition, "an individual agrees with another person personally to execute any work or service for that person," does not indicate whether there should be an ongoing relationship, and relatedly, how intermittent or casual workers should be treated. The amended definition is limited to the Terms of Employment (Information) Act 1994, but as we have noted, statutory definitions regarding types of contract and who is covered/excluded differ across legislation. It is therefore unclear whether and how the amended definition will influence cases submitted under other pieces of legislation relating to, for example, unfair dismissals and redundancy, as most workers who make complaints on workplace rights violations do so under multiple pieces of employment law simultaneously.[122] In addition to changing the definition of an employee in the Terms of Employment (Information) Act 1994, parts of the EU Directive concerning unpredictable work have been operationalised through amendments to the Organization of Working Time Act 1997 and these are outlined below. That legislation, however, defines an employee as someone working under a contract of service and the links between both Acts could give rise to uncertainty in the future when questions as to which definition of employee will apply in the event of a dispute. Only future worker complaints and case law will decide these issues, but the optimistic scenario is that the new definition will influence the decision making of statutory bodies and the judiciary given that a statement of terms of employment is a fundamental document establishing the relationship between parties. In addition, the fact that the EU Directive notes that national definitions must consider CJEU case law may lead judiciaries to "make the notion of a worker usually embodied in hard law more flexible and open to new interpretations."[123] The pessimistic scenario is that current interpretations of casual work across pieces of legislation will continue to exclude may vulnerable workers.

The Irish Regulations provide that the Terms of Employment (Information) Act 1994 exclude workers who work less than or equal to three hours per week over four consecutive weeks but this exclusion does not apply "to employment where no guaranteed amount of work that is remunerated is predetermined before the employment starts."[124] While the European Commission sought not to apply the exclusion to people in on-demand work because

122. Michelle O'Sullivan, *The Expansion of Wage Theft Laws in Common Law Countries: Should Ireland be Next?*, 52 IND. L.J. 342 (2023).

123. Bednarowicz, *supra* note 112, at 613.

124. EU Directive Art. 1(3) and EUROPEAN UNION (TRANSPARENT AND PREDICTABLE WORKING CONDITIONS) REGULATIONS 2022 § 4; *see also* Art. 1 (3) and Art. 1(4) EU Directive 2019/1152.

the duration of their work is unknown,[125] the provision raises the somewhat puzzling scenario that someone working on low hours will not be entitled to specified information on their terms of employment, but they could be hired alongside someone working on-demand who will be entitled to that information. In addition, the exclusion of people working twelve hours or less a month gives the opportunity for some employers to avoid obligations under the Act by offering a low number of working hours.

Employers are obliged to inform employees with entirely or mostly unpredictable work patterns about the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours and that they are entitled to twenty-four hours notice of work. [126] The Regulations amend the Organization of Working Time Act 1997 by providing that workers without normal or regular stating or finishing times can only be asked by their employer to work within predetermined reference hours and the employee can refuse to work if they are not given appropriate notice or are asked to work outside of predetermined hours.[127] The Directive however provides no explanation of the concepts of predictable or unpredictable working patterns.[128] The Regulations transpose the Directive's provision on giving a right to an employee with continuous service of not less than six months to "request a form of employment with more predictable and secure working conditions where available and receive a reasoned written reply from his or her employer."[129] Employers are prohibited from placing restrictions/prohibitions on employees working for another employer outside of their contracted hours unless there are objective grounds for doing so.[130] While exclusivity clauses received considerable attention in debates on zero hours work in other jurisdictions such as the UK,[131] past research in Ireland found little evidence of their prevalence in zero hours work arrangements.[132] The optimistic view of the Directive's provision on predictable work is that it might help reduce

125. The European Commission had originally proposed that Member States could only exclude individuals who work 8 hours or less per month.

126. *Id.* at § 5(p).

127. *Id*. at § 13(a), (b).

128. Bednarowicz, *supra* note 112.

129. § 6F.

130. § 6E.

131. Abi Adams, Zoe Adams & Jeremias Adams-Prassl., *Legitimizing Precarity: Zero Hours Contracts in the United Kingdom*, *in* ZERO HOURS AND ON-CALL WORK IN ANGLO-SAXON COUNTRIES (Michelle O'Sullivan et al., eds., 2019). Legal instruments to prevent workers from engaging in other work are not new, with punishments for workers under Master and Servant Laws from the 1300s in England, *see* Douglas Hay, *England 1562-1875. The Law and Its Uses*, *in* MASTERS, SERVANTS AND MAGISTRATES IN BRTAIN AND THE EMPIRE 1562-1955 (Hay and Craven eds., 2004).

132. O'Sullivan et al., *supra* note 13.

precarious work, however, the stipulation that workers only have the right to request more stable working conditions undermines this.[133]

VII. CONCLUSION

The circumstances within which the courts and statutory bodies hear cases contextualizes the different treatment and outcomes of employment status in each. A limited number of cases on employment status are presented before the courts and have often concerned disputes between employers and state agencies on the employment status of an individual worker.[134] While the courts have examined employment status and issues of mutuality, they have not to date reached conclusions on what a casual worker is. They have applied tests to establish whether the individual was an employee or self-employed person, so the binary divide is clearly evident. The Supreme Court decision in *Karshan*, which clarified the meaning of mutuality and affirmed its place *within* rather than *above* other tests for the existence of a contract, may work to the benefit of some intermittent workers challenging their status within the court system. On the other hand, the Supreme Court decision means that, for now, the courts are generally more conservative than their British counterparts with regard to adopting a purposive approach to cases of employment status. In regard to legislation, the courts have noted the need for greater clarity of statutory definitions. The Court of Appeal in *Karshan*[135] approvingly quoted Underhill L.J.'s comments in the British case of *Uber BV v. Aslam*:

> Courts are anxious as far as possible to adapt the common law to changing conditions, but the tools are their disposal are limited particularly when dealing with statutory definitions . . . . . [I]n cases of the present kind the problem is not that the written terms misstate the true relationship but that the relationship created by them is one that the law does not protect . . . .[136]

Questions of worker coverage under employment legislation are normally presented to statutory bodies with quasi-judicial functions and here the lack of statutory clarity on the definition of a casual worker has become evident. Inconsistency across laws and the continued existence of the term 'work

133. Izabela Florczak & Marta Otto, *Precarious Work And Labour Regulation In The Eu: Current Reality And Perspectives*, *in* PRECARIOUS WORK: THE CHALLENGE FOR LABOUR LAW IN EUROPE 17 (Jeff Kenner, Izabela Florczak & Marta Otto, eds., 2019).

134. Issues of employment status of an individual can be considered by different statutory bodies depending on the issue. The taxation authority (the Revenue Commissioners) decides on employment status for the purposes of tax law. The Department of Social Protection decides on employment status for the purposes of social protection. The Workplace Relations Commission and Labour Court decide on employment status for the purposes of employment law.

135. *Karshan (Midlands) Ltd. T/A Dominos Pizza v. Revenue Comm'rs* [2022] IECA 124, ¶ 114. The Court of Appeal occupies a jurisdictional tier between the High Corut and Supreme Court.

136. [2018] EWCA Civ 2748, ¶ 114.

of a casual nature' within the Irish statutory framework would seem to allow a potential loophole for employers. The Irish experience shows that multiple pieces of regulation are ineffective where the definition of a contract of employment excludes a significant cohort of the working population.

Ireland is one of several countries where zero hours work has taken greater prominence in public and parliamentary debate and its legislative response through the Protection of Employees (Miscellaneous Provisions) Act 2018 has generally quietened this debate and union campaigns. The legislation, though, as we have noted, addresses a narrow issue for a narrow cohort of zero hours workers, namely those with contracts of employment. Research undertaken prior to the legislations' enactment had found little usage of zero hours work where workers were required to be available to employers, but more evidence of zero hours work where workers are not legally required to be available to employers. Yet the 2018 Act regulated the former and not the latter. The 'ban' on zero hours work in the Act addresses employment status precariousness for those 'who have to be available' and the legislative obligation on employers to pay workers for unworked hours addresses to a limited degree income precariousness. The Act though has little relevance to zero hours workers on constantly variable hours and represents a situation where the state "know or ought to know" that the legal system creates vulnerability[137] given previous critiques of zero hours provisions in the Organization of Working Time Act 1997.[138]

The EU Directive on Transparent and Predictable Working Conditions has led to an amended definition of employee in the Terms of Employment (Information) Act 1994, but other Irish statutory definitions have remained untouched. There are, however, some reasons to be optimistic about the potential of the widened definition of employee. Firstly, whilst the underpinning common law system would still require the application of multifactorial tests,[139] this definition of employee with its broader scope of coverage and emphasis on the 'personal work relation' may give the courts a statutory licence to adapt to changing conditions and modern employment relationships. Some suggest that it would be more useful to workers to revert to binary systems but to expand the definition of employee to a more universal one and have employee status as the default[140] or to have a rebuttal type system similar to the ABC test in the US.[141] Given the importance of terms of employment in establishing a common understanding of the nature of the hiring of a

137. Mantouvalou, *supra* note 6, at 203.

138. O'Sullivan et al., *supra* note 13; Richard Grogan, *The Organisation of Working Time Act 1997, Legal Effect and Cases*, (2016), www.grogansolicitors.ie.

139. Deakin, *supra* note 46.

140. Ewing et al., *supra* note 33.

141. Davidov & Alon-Shenker, *supra* note 83.

worker, the new wider definition of employee in Ireland has the potential for it to become more prominent.

Optimism over these protections, however, must be counterbalanced by the realpolitik of employment relations where the "enforcement of the legal provisions, or their avoidance, or amendment form new sites for struggle."[142] While workers may trust that the law will protect them in the event of workplace problems,[143] the new protections do not alter the fundamental imbalance of power between the parties and this can manifest in workers' reluctance to use the law.[144] The most vulnerable workers will probably continue not to challenge their conditions given evidence that in many areas of employment, a minority of workers who experience violations make legal complaints.[145] This imbalance of power is also observable through the tendency of some employers to avoid the provisions of various pieces of law. For example, it remains perfectly legal for an employer to employ people on full or partial variable contracts of employment. Should an employee wish to make a claim under the banded hours provisions of the 2018 Act, they must be able to show a consistency of regular hours that fit a particular band over a refence period, and this is open to manipulation by employers. Whilst zero hours/low hours workers have the right to challenge perceived wrongs by employers, there is always the possibility that employers can use the threat of reducing hours to exert control over employees.[146] Indeed, complaints made to statutory bodies have provided evidence of employers victimising employees for raising issues by reducing their hours.[147] Even in instances where workers win employment status claims, firms can use their resources to evade workers' rights.[148]

Fundamental factors contributing to labor market insecurity and worker exploitation are a lack of union organisation[149] and "vast structural and political inequality with firms."[150] Employment laws can discipline parts of

142. Grietje Baars, "*Reform of Revolution"? Polanyian versus Marxism Perspectives on the Regulation of the Economic*, 62 N. IR. LEGAL Q. 415, 422 (2011).

143. Eleanor Kirk, *Led Up the Tribunal Path? Employment Disputes, Legal Consciousness and Trust in the Protection of Law*, 7 OÑATI SOCIO-LEGAL SERIES (2017).

144. KAHN-FREUND ET AL., *supra* note 18, at 36.

145. Roddrick A. Colvin & Norma M. Riccucci, *Employment Non-discrimination Policies: Assessing Implementation And Measuring Effectiveness*, 25 INT'L. J. OF PUB. ADMIN. 95 (2002); O'Sullivan, *supra* note 122; Michelle O'Sullivan & Juliet MacMahon, *Migrant Workers and Wage Theft: Is Legal Action An Effective Form Of Collective Action?*, 51 IND. L.J. 927 (2022).

146. O'SULLIVAN ET AL., *supra* note 13.

147. *E.g.*, *A Worker v. A Cleaning Co*. ADJ-00023945.

148. Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 239 WIS. L. REV. 740 (2017).

149. As noted by Sheila Blackburn who linked the lack of union organisation with job insecurity in the nineteenth and twentieth centuries in Britain, *see* Sheila C. Blackburn, *'No Necessary Connection with Homework': Gender and Sweated Labour 1840-1909*, 22 SOC. HIST. (1997).

150. Dubal, *supra* note 148, at 748.

capitalism to some extent[151] but are inadequate for addressing these factors in a comprehensive way. We have considered the widening of the concept of employee arising from the EU Directive as a way of bringing more workers under the canopy of the law but whether this will lead to a nominal or a factual improvement in workers' lives will depend on their capacity to challenge employer decision making. Whilst recognising the necessity and usefulness of employment law,[152] there remains the caveat that the individualised nature of employment law can be an impediment, particularly for vulnerable workers, in challenging injustice, but it can operate effectively as part of hybrid regulation when in combination with collective workplace strength.[153]

151. Steven Spitzer, *Marxist Perspectives in the Sociology of Law*, 9 ANN. REV. OF SOCIO. 103 (1983).

152. Weiss, *supra* note 21; Fudge, *supra* note 27.

153. Roger Welch, *Into the Twenty First Century – the Continuing Indispensability of Collective Bargaining as a Regulator of the Employment Relation*, *in* LEGAL REGULATION OF THE EMPLOYMENT RELATION 615 (Hugh Collins, Paul Davies & Roger Rideout eds., 2000); Edmund Heery, *Debating Employment Law: Responses to Juridification*, *in* REASSESSING THE EMPLOYMENT RELATIONSHIP: MANAGEMENT, WORK AND ORGANISATIONS 71 (Paul Blyton et al., eds., 2011); Michelle O'Sullivan et al., *Is Individual Employment Law Displacing the Role of Trade Unions*, 44 IND. L.J. 222 (2015).

NOTICE OF ERRATA

Due to publication error,

The following should be consulted in connection with the discussion on pages 168-169 of issue 43.3 in the book review *Exit, Voice, and Solidarity* reviewed by Blandine Emilien. The passage should read as follows,

In the realms of employment relations (ER), scholars may have taken in their research either an ideational perspective or what Carstensen et al. 4 identify as a more materialist-institutionalist perspective. The former would bear a more significant focus on how unions mobilize beliefs, theories or discourses to (re-)construct their perceptions and actions in addressing specific struggles6 , while the latter would imply studies of institutional work or concrete experimentation by labor unions in their attempts to contribute actively to the (re-)regulation of work.5

The Comparative Labor Law and Policy Journal sincerely apologizes to the authors and to readers for any inconvenience or confusion this error may have caused.