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SMARTPHONE COMPATIBLE?  
EMPLOYMENT STATUS IN THE GIG ECONOMY

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Submitted in fulfilment of the requirements of the Degree of Master of Laws,  
by Research

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## ABSTRACT

This thesis provides a critique of the current tests for employment status contained at s.230 of the Employment Rights Act 1996 and proposes an alternative test. The particular focus of the critique is upon the failure of the current tests to adapt to new working relationships arising in sections of the gig economy. Recent case law in relation to status is considered along with a historical analysis of the development of employment law into a separate sphere of statutory regulation. This thesis argues that the main failings of the status tests arise in consequence of the requirement for workers to establish a contractual nexus. An alternative test is proposed which removes the contractual nexus altogether and creates a single-tier employment status. Consequential amendments to the definition of dismissal at s.95 of the Employment Rights Act 1996 are proposed with the aim of providing all employees with end-of-employment rights.

## AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution

Printed Name: \_\_\_\_\_

Signature: \_\_\_\_\_

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# CHAPTER 1

## 1.1: GETTING THE GIG

The Communist Manifesto was published by Karl Marx and Friedrich Engels in February 1848.<sup>1</sup> It was the first time Marx had set out his theories on both the means of production and how ownership of these means enabled the bourgeoisie to extract surplus value from the labour of their workers. Since then, “seize the means of production” has become a rallying call of the far left.

The manifesto was written in the period following the first industrial revolution. One hundred and seventy years later however a strange and different kind of revolution is underway. The means of production are not being seized by the workers, but are in fact being given over to them freely by the capitalists themselves. “Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content [...] and Airbnb, the world’s largest accommodation provider, owns no real estate”.<sup>2</sup> Instead of owning the means of production, the new bourgeoisie seek to dominate the customer interface and generate their income either by taxing transactions conducted at these interfaces (as in the case of Uber) or by selling advertising space at the interface (as in the case of Facebook). The speed with which these companies have come to dominate their respective markets is based to a large extent on their ability to exploit the ubiquity of smartphone technology. These aggressive new business models have allowed businesses to strip out the costlier features of the more traditional, capital-owning businesses.

One particular overhead these businesses models have been able to streamline is the cost of labour. Smartphones have allowed work in certain industries to be allocated on an *on demand* basis, making labour costs ultra-sensitive to fluctuations in demand. This change has created new ways of working which, in turn, have led to confusion as to the exact nature of the legal relationships which are being formed between companies and individuals who agree to provide labour on their behalf. Testament to this uncertainty is the volume of cases currently ascending the appellate ladder in the UK.

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<sup>1</sup> Marx/Engels Selected Works, Vol. One, Progress Publishers, Moscow, 1969, p. 98-137;

<sup>2</sup> Goodwin, Tom, *The battle is For the Customer Interface*, <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/>, 2015

The aim of this thesis is not only to explain and explore the current test for employee status, but also to propose an alternative test designed to give more certainty to workers and businesses alike. Part of this analysis will focus on attempts which have already been made by both the Supreme Court<sup>3</sup> and the Government<sup>4</sup> to solve the problem of employment status. I will argue that these attempts have been inadequate insofar as they have been unable or unwilling to remove the fundamental and insoluble paradox at the heart of the current test for status. This paradox is that the test for whether or not involuntary statutory obligations are engaged is based entirely on the law of voluntary obligations. Statute law and the law of contract are distinct legal disciplines. Each requires a separate approach. The mischief central to this thesis is how this confluence of involuntary and voluntary obligations has allowed employers in the gig economy (and elsewhere) to exploit the idiosyncrasies of the former in order to avoid incurring the latter. The second chapter will explain and explore both the current test for status and the ways in which this paradox has been exploited. The third will argue why reform is needed. The final chapter will propose an alternative which removes the contractual nexus from the status test altogether, housing employment rights wholly within the confines of statutory law and removing the paradox. With both rapid growth in the number of individuals participating in the gig economy<sup>5</sup> and British withdrawal from the EU less than one year away, revision of the existing law is both necessary and timely.

The specific focus of this thesis is the employment relationship in the emerging gig economy. A gig worker will be taken to be anybody working for a platform company. I will not seek to apply too prescriptive a definition to the term “platform company”, other than to give it two essential elements: the first is the existence of a tripartite relationship involving a customer, a company and an individual providing labour; the second is that the service of the individual is solicited digitally, whether through smartphone app, email or text message. Platform companies vary not only in the kinds of service they provide, but also in the nature of the relationships between the three elements in the tripartite structure. It is the nature of the relationship between the company and the individual providing labour that will determine the employment status of the individual providing labour.

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<sup>3</sup> Most notably in *Autoclenz Lrd v Belcher* [2011], ICR 1157

<sup>4</sup> See *Good Work, The Taylor Review of Modern Working Practices*, the Department of Business, Energy and Industrial Strategy, July 2017

<sup>5</sup> Recent analysis estimates that the number of individuals participating in the gig economy in London increased by 72% between 2010 and 2016 (Stephen Devlin, *Massive Surge in London's Gig Economy*, New Economics Foundation, 2016, <http://neweconomics.org/massive-surge-londons-gig-economy/>)

Platform work is not homogenous. The:

nature of the tasks performed on crowdwork platforms may vary considerably and very often involves the allocation of “microtasks”; extremely parcelled activities, often menial and monotonous, which still require some sort of judgment beyond the understanding of artificial intelligence. [...] In other cases, bigger and more meaningful works can be crowd-sourced such as the creation of a logo, the development of a site or the initial project of a marketing campaign.<sup>6</sup>

Similarly, “work on-demand apps” cater for “traditional working activities such as transport, cleaning and running errands [...] assigned through [smart phone] apps”.<sup>7</sup> Within both crowdwork platforms and work on-demand apps exists an entire spectrum of contractual relationships. At one end of this spectrum are companies such as eBay who provide little more than a virtual market place for individual buyers and sellers to contract with each other.<sup>8</sup> A person selling a second hand dress on eBay, say, is not in any sense an employee of eBay. There are few elements of control: the seller has complete autonomy over price setting, she is responsible for marketing the items she is selling (in terms of the description)<sup>9</sup> and what conduct rules exist are largely to ensure compliance with both the criminal and civil law.<sup>10</sup> There is no requirement for personal service: individuals may sell goods owned by and on behalf of third parties, and there is no requirement that menial aspects of the sale (for example, the parcelling up or posting of the goods) are carried out by the actual seller herself.<sup>11</sup> At the other end of this spectrum are companies such as the taxi firm, Uber. In contrast to the example of the relationship eBay has with its sellers, the relationship between Uber and its drivers does have many features which are clearly

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<sup>6</sup> De Stefano, Valerio, *The Rise of the “Just-in-time Workforce”: On-demand Work, Crowdwork and Labour Protection in the “Gig-economy”*, Conditions of Work and Employment Series No.71, International Labour Office, p.3-4

<sup>7</sup> *Ibid*, pg.4

<sup>8</sup> eBay describes itself on its website (<http://pages.ebay.co.uk/help/account/questions/about-ebay.html>) as being “the world’s online marketplace; a place for buyers and sellers to come together and buy or sell almost anything”

<sup>9</sup> The firms “minimum performance standards” are set out online at <http://pages.ebay.co.uk/help/policies/selling-practices.html>

<sup>10</sup> The policies make express reference to the Consumer Protection from Unfair Trading Regulations 2008, the Electric Commerce (EC Directive) Regulations 2002 and the Sale of Goods Act 1979. Activities such as “shilling up” (that is, bidding on your own items at auction in order to inflate the price) are prohibited

<sup>11</sup> There is dispatch guidance written in the second person (for example, “You should [...] post items immediately after purchase” (Minimum Performance Standards, *supra*), although it is submitted that this is stylistic and that delegating these elements of the transaction to a third party would not invalidate the contract of sale

consistent with traditional employment:<sup>12</sup> drivers are required to display the Uber logo on their cars (control); prices are set by the company (control); a driver who accepts a job is required to personally carry it out (personal performance) and the company has a code of conduct drivers are expected to abide by (control).<sup>13</sup>

The degree of entrepreneurial freedom enjoyed by an individual designing logos or selling second-hand dresses is comparable to that of the traditional *petite bourgeoisie* (for example, a high street accountant or an independent retailer). In the traditional economy, these individuals' economic autonomy remains largely unmolested by employment regulation. Conversely, the creative licence of the Uber driver is more restricted and consistent with that of an individual in an employment relationship with an employer. Such workers lack even basic creative and entrepreneurial freedom. Uber's claim that its drivers were in fact a mosaic of self-employed businesspeople was described by the Employment Tribunal in *Aslam* as being both "contrary [...to] simple common sense" and something which did "not correspond with practical reality".<sup>14</sup>

Therefore while the media of work assignment in the gig economy may be novel, the working relationships formed are not; "be it the breaking down of jobs into small tasks, to be completed by large crowds of workers, the role of powerful intermediaries, or the impact on wages and working conditions [...] the underlying business model [in the gig economy] is nothing new."<sup>15</sup> The primary practical distinction between traditional work and gig work is therefore that the marketplace has migrated from the High Street into an area of virtual real estate. This familiarity, however, is difficult to square with the recent glut of litigation (discussed below) concerning the legal status of the relationship between gig workers and the platforms from whom their work is solicited. The logical corollary must therefore be that the current status tests are simply not working.

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<sup>12</sup> See *Aslam & others v Uber*, 2202551/2015, paras.47 to 69; this first instance decision was upheld by the Employment Appeal Tribunal (UKEAT/0056/17/DA)

<sup>13</sup> The driver code of conduct is published online (<https://www.uber.com/en-GB/drive/resources/platform-standards/>).

<sup>14</sup> Para.53, *Aslam*

<sup>15</sup> Jeremias Prassl, *Humans as a Service*, Oxford University Press, 2018, p.75

## 1.2 EMPLOYMENT LAW IN THE U.K.

Employment law in the UK is a mosaic of disparate legal sources, traditions and techniques. The full suite of rights and obligations existing between a given individual and the person she works for will be derived from sources such as a written contract, primary acts of parliament, secondary legislation, the common law, EU directives, and decisions of the Court of Justice of the European Union (“CJEU”) and the UK domestic courts.

It was not always this way. Prior to the 1970s, “court-based sanctions played almost no role in the process of resolving industrial disputes, nor in the enforcement of collective agreements.”<sup>16</sup> Statutory interference was only exercised either (a) to set wages in industries where “no adequate machinery existed for the effective regulation of the remuneration of the workers concerned”, such as the Wages Councils Act 1945;<sup>17</sup> or (b) to implement “politically neutral measure[s] which largely sprang from a process of technocratic policy learning”, such as the Industrial Training Act 1964.<sup>18</sup> The workforce during this period was largely unionised. The law allowed unions to benefit from a number of statutory immunities to common law delicts/torts for losses relating to strike action while asking very little of them in return.<sup>19</sup> Statute even made it possible to force collective agreements upon unwilling employers under certain circumstances.<sup>20</sup> Employment and industrial relations policy up until then had been largely underpinned by the principles set out in the Beveridge Report published in 1942.<sup>21</sup> The report drew a distinction between two economically active groups: those who were employed and those who were self-employed, the latter being “understood by Beveridge to be [...] genuinely in business on their own account, and, therefore, needed less protection against the risks of unemployment, illness and old age than workers”.<sup>22</sup>

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<sup>16</sup> William Brown, Simon Deakin & Paul Ryan, *The Effect of British Industrial Relations Legislation 1979-97*, National Institute Economic Review, 1997, Cambridge University Press, p.70

<sup>17</sup> Brodie, Douglas, *A History of British Labour Law 1867-1945*, Hart Publishing, Oxford, 2003

<sup>18</sup> Hugh Pemberton, *The 1964 Industrial Training Act: a Failed Revolution*, 2001 Economic History Society, Bristol, p.3

<sup>19</sup> For example, the Conspiracy and Protection of Property Act 1875 and the Trade Disputes Act 1906

<sup>20</sup> The Terms and Conditions of Employment Act 1959

<sup>21</sup> Social Insurance and Allied Services, November 1942

<sup>22</sup> Simon Deakin, *Does the “Personal Employment Contract” Provide a Basis for the Reunification of Employment Law?*, *Industrial Law Journal*, Vol.36, No.1, March 2007, p.77

This would change from 1970 onwards. Global and domestic economic crises led to growing “public pressure for legal intervention in labour-management relations”.<sup>23</sup> The Industrial Relations Act 1971 (“IRA”) was thus implemented in an attempt to “both restrict union abuses in the collective bargaining arena and provide statutory protection for [...] employees”.<sup>24</sup> This statutory protection took the form of rights, such as the right not to be unfairly dismissed. Where these rights were breached, employees could claim compensation from their former employer before an industrial tribunal. This new statutory regime created “a particular kind of juridical space populated by idiosyncratically designed personal work contracts, generally governed by a loosely pervasive set of discursive and casuistic common law principles [with a] separate and superficial normative layer” of statutory laws on top.<sup>25</sup>

Two years after the IRA was implemented, the UK joined the EEC. At this time, Europe was evolving from its neo-liberal roots as a mere common economic area towards more complex and bureaucratic and social space. The concept of a European Social Model was “a flexible idea which embrace[d] an eclectic range of policies from employment law, as narrowly defined, to the creation of the welfare state, including education, healthcare and social security”.<sup>26</sup> In the field of Employment law, this expansion led to the implementation of directives on maternity rights,<sup>27</sup> the right to a written statement of terms<sup>28</sup>, working time<sup>29</sup>, redundancy consultations<sup>30</sup>, transferring undertakings<sup>31</sup> and employer insolvency<sup>32</sup>. Jurisprudence from the European Court of Justice (in particular the decision in the case of *European Commission v UK*<sup>33</sup>) would also rejuvenate the Equal Treatment Directive of 1976. Europe-led reform of Health and Safety law<sup>34</sup> during this period would further enhance the rights of workers with respect to their employers.

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<sup>23</sup>William B Gould, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, Yale Law Journal, Vol.81, No.8, 1972, 1421-1486, p.1,429

<sup>24</sup> Gould, *ibid*, p.1,423

<sup>25</sup> Freedland and Kountouris, *Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe*, Industrial Law Journal, Vol.37, No.1, 2008, 49-74, p.63

<sup>26</sup> Catherine Bernard, *EU Employment Law and the European Social Model: The Past, the Present and the Future*, Current Legal Problems, Vol.67 (2014), p.200

<sup>27</sup> See, for example, the Pregnant Workers’ Directive, Council Directive 92/85

<sup>28</sup> Directive on An Employer’s Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, Council Directive 91/533

<sup>29</sup> See, for example, the Working Time Directive, Council Directive 93/104/EC

<sup>30</sup> Council Directives 75/192 and 92/56

<sup>31</sup> The Acquired Rights’ Directive, Council Directive 77/187

<sup>32</sup> Council Directive 80/987/EEC

<sup>33</sup> [1984] ICR 192

<sup>34</sup> In particular, see Directive 89/391/EEC

Domestically, the 1980s would see widespread reform of industrial relations law. The statutory immunities would remain, but unions would now have to work harder in order to benefit from them. These reforms (later consolidated into the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”)) included strict record keeping obligations upon the trade unions,<sup>35</sup> enforced democratisation of the organisations<sup>36</sup> and rigorous, prescriptive balloting and notification procedures to be carried out in advance of industrial action.<sup>37</sup> The definition of a trade dispute was also narrowed. Members were given rights enforceable against their trade union, including the right not to be unjustifiably disciplined.<sup>38</sup> These measures were introduced as part of a “series of initiatives sought to reduce the coherence of trade unions as collective organisations”.<sup>39</sup>

Neither the provisions of the IRA nor any of the European employment rights directives fundamentally altered the legal principles at the heart of labour law, based as they were in the law of voluntary obligations. Instead, they added a further layer of regulation. UK employment law became a hybrid of both contract and statute law. These two legal disciplines required fundamentally different approaches: the role of the courts in the law of voluntary obligations “is to determine the contents of the agreement reached by the parties throughout a process of construction by which the terms of the contract are identified”, while statutory rights require a process of “interpretation [which] involves analysis of legislative text, where different considerations apply”.<sup>40</sup> This paradox would eventually cause the boundary between employees and self-employed to blur. The structural cogency of the binary divide was no longer compatible with the changing industrial paradigm.

By 1986, the binary divide had deteriorated to such an extent that a further category, that of worker, had to be introduced into the Wages Act 1986. The concept of a worker had existed in statute since the 1970s in matters peripheral to the core employment rights such as Health and Safety,<sup>41</sup> but the 1986 Act for the first time brought it into the field of rights proper. The forebears of 1986 Act were the Truck Acts, which had existed in various guises since 1464 and sought to prohibit employers paying wages in kind rather than in

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<sup>35</sup> Now found at Part I, Chapter III, TULRCA

<sup>36</sup> Part I, Chapter IV, TULRCA

<sup>37</sup> Part V, TULRCA

<sup>38</sup> Part I, Chapter V, TULRCA

<sup>39</sup> Paul Smith and Gary Morton, *The Conservative Governments’ Reform of Employment Law, 1979-97: Stepping Stones and the New Right Agenda*, HSIR 12 (Autumn 2001), 131-147, p.140

<sup>40</sup> Simon Deakin, *Labour Law and the Developing Employment Relationship in the UK*, Cambridge Journal of Economics, Vol.10, 1986, 255-246, p.223

<sup>41</sup> Such as the Health And Safety at Work etc Act 1975

“the coin of the realm”.<sup>42</sup> The 1986 Act’s most immediate ancestor was the Truck Act 1940, as amended by the Statute Law (Repeals) Act 1973. The protections of the 1940 Act extended to “workmen” rather than “workers” and covered only individuals involved in manual labour, to the exclusion of white collar workers.<sup>43</sup> The 1986 Act removed this qualification and defined a worker as any individual who worked under a “contract whereby the individual undertakes to do or perform personally any work or services for another party”<sup>44</sup> When the 1986 Act was consolidated into the Employment Rights Act 1996 (“ERA”), this new status would be replicated<sup>45</sup> and applied to other rights, such as the right not to suffer a detriment for having made a protected disclosure.<sup>46</sup> Many new employment statutes, such as the Working Time Regulations 1998 (“WTR”) would also borrow this definition in respect of provisions relating to the right to paid annual leave and daily rest breaks.<sup>47</sup> The status of “employee” would remain a formal and distinct status within the ERA, although it would also fall within the definition of “worker”, meaning all rights attaching to workers would also attach to employees. Table 1 provides an inexhaustive cross section of rights by status.

Table 1:

<b>Act</b>	<b>Right</b>	<b>Employee</b>	<b>Worker</b>
ERA	Unfair Dismissal	Blue	
ERA	Redundancy Payment	Blue	
1999 Act	Right to be Accompanied	Blue	Red
WTR	Rest Breaks	Blue	Red
EqA	Discrimination	Blue	Red
TULRCA	Trade Union Detriment	Blue	Red
ERA	Minimum Period of Notice	Blue	
WTR	Annual Leave	Blue	Red
TUPE	Right to be Informed and Consulted	Blue	Red
ERA	Protected Disclosure – Unfair Dismissal	Blue	
ERA	Protected Disclosure – Detriment	Blue	Red
ERA	Written Statement of Particulars	Blue	

<sup>42</sup> For a brief historical overview see Lord Ackner’s judgment in *Bristow v City Petroleum* [1987] 1 WLR 529 at 342

<sup>43</sup> Sch.2, 1973 Act

<sup>44</sup> S.8(2)(c), the 1986 Act

<sup>45</sup> Now found at s.230(3)(b), ERA

<sup>46</sup> Found at Part IVA, ERA

<sup>47</sup> Reg.2, WTR

It is clear from table 1 that even once an individual has the fold of statutory protection, she will encounter a further bifurcation of rights. Employment law in the UK is thus stratified into three tiers: at the bottom are those designated as self-employed. These individuals have no rights under statute and can only rely on the rights they have under the common law and contract; in the middle are workers. These individuals are protected by statute against some of the most egregious employment abuses but have no end-of-work protections, such as a minimum period of notice, payment in the event of redundancy and protection from unfair dismissal; at the top are employees. Employees have access to the full suite of rights. Qualification for these rights is therefore a matter of some consequence. The following chapter will examine both the legal tests for qualification (known as the status tests) and explore the techniques employers have deployed in order to prevent their otherwise workers or employees from qualifying for these protections.

## CHAPTER 2

### 2.1: THE STATUS TESTS

The introductory chapter consisted of two parts. The first introduced the themes this thesis will consider, including a working definition of gig work. The second gave a brief historical overview of the evolution of employment regulation from the 1970s onwards into a separate statutory space of workers' rights. The purposes of this thesis are to argue that the current tests for status – the legal passports into the statutory protections – are not working and to propose an alternative. This chapter will both explain these tests and consider ways employers can and do exploit aspects of these tests in order to deprive individuals of rights.

In order to bring a claim alleging a breach of any particular right, an individual must establish that they qualified for that right in the first place. For example, where party A terminates a contract it has with party B, party B may or may not be entitled to bring an action for a breach of the right not to be unfairly dismissed.<sup>48</sup> The legal basis of this right is s.94, ERA, which provides that “an *employee* has the right not to be unfairly dismissed”. B will only therefore be entitled to bring a claim for unfair dismissal if she can demonstrate that, at the time of her dismissal, she was an employee.<sup>49</sup> The definition at s.230, ERA, provides that an “Employee” is an individual “who has entered into or works under [...] a contract of employment”.<sup>50</sup> Similarly, where party A and party B have contracted for party B to carry out services in return for a consideration to be paid by party A, and which party A has not paid, party B may seek to claim that her right not to suffer unauthorised deductions has been breached. She must have regard to s.13, ERA, which provides that an employer “shall not make a deduction from wages of a *worker* employed by him”. A “worker” is defined as an “individual who has entered into or works under [...either] a contract of employment, or any other contract [...] whereby the individual undertakes to do or perform personally any work or services for another party whose status is not by virtue of the contract that of a client or customer of any professional or business undertaking carried on by the individual”.<sup>51</sup> Should party B be unable to satisfy either limb of this

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<sup>48</sup> There may also be claims for damages under the common law

<sup>49</sup> There are additional requirements necessary in order to qualify for this right, such as the individual having a sufficient period of continuous service in terms of s.108, ERA. There may also be issues as to whether or not the UK employment tribunal has geographical jurisdiction. Detailed consideration of these are beyond the scope of this work

<sup>50</sup> s.230(1), ERA

<sup>51</sup> s.230(3), ERA

definition, she will not have a statutory remedy for party A's failure to pay (although she may have a remedy under the terms of the contract).

The attainment of status is therefore crucial to the unlocking of the layers of statutory regulation. However, while status is a matter of statute, the determination of that status is a matter of contract. Qualification for employment rights therefore exists at a confluence of involuntary and voluntary obligations. This creates a paradox. An early attempt at resolving this paradox was made by the Court of Appeal in 1968, in the case of *Ready Mix Concrete (South East) Ltd v Minister of Pension and National Insurance*.<sup>52</sup> The case considered the provisions of the National Insurance Act 1965 and, in particular, the conflict between statutory duties and voluntary obligations in respect of whether or not a contract of service existed. The court held that in order to determine the identity of the contract (and with it the status of the individual) regard should be had to three features: one, whether the individual agreed "in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service"; two, whether he agreed "that in the performance of that service he will be subject to the other's control"; and three, whether "the other provisions of the contract are consistent with its being a contract of service".<sup>53</sup> From this point forward, at least in law, it was not possible for parties to fix their status. This would fix the conceptual framework for the rights incorporated by the IRA and subsequent employment law statutes.

The test for employee status set out in *Ready Mix Concrete* would be further refined through case law. The present state of the law requires an employment tribunal not to treat "any one test or feature [as] conclusive" but to "weigh all the factors in the particular case and ask whether it is appropriate to call the individual an employee".<sup>54</sup> This was further expressed by Mummery J in *Hall v Lorimer (C.A.)*<sup>55</sup> as being an exercise in considering "many different aspects of that person's work activity. [It] is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail, which is not necessarily the same as the sum total of the individual details."<sup>56</sup> However, while the approach is multifactorial, in order for a contract to be one of employment, irrespective of all other factors, it must contain three essential elements: (1)

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<sup>52</sup> [1968] 2 QB 497

<sup>53</sup> *Ibid*, per McKenna J

<sup>54</sup> Harvey on Industrial Relations and Employment Law, Div.AI, para.39

<sup>55</sup> [1992] ICR 739

<sup>56</sup> *Ibid* at 744

personal service; that is, the requirement that the worker will undertake to carry out the work personally;<sup>57</sup> (2) control; that is, that the employer has a sufficient degree of control over how the worker carries out the work;<sup>58</sup> and (3) mutuality of obligations; that is, that there are ongoing requirements for both the employer to pay the worker, and for the worker to be ready, willing and able to carry out work.<sup>59</sup> Longmore LJ described these criteria as “the irreducible minimum [of requirements] for the existence of a contract of employment”.<sup>60</sup>

When *Ready Mix Concrete* was heard in 1968, employment law was based on a binary divide: there were employees and there was everyone else. By 1986 however the new category of “worker” had been added. The definition of worker would include both individuals working under a contract of employment and individuals who had undertaken “to do or perform personally” work for another party.<sup>61</sup> The wider group, workers, qualify for a number of the basic protections, such as the right not to suffer unauthorised deductions from their salary<sup>62</sup> and the right not to suffer a detriment for her having made a protected disclosure<sup>63</sup>. However, only employees qualify for the end-of-employment rights, such as the right not to be unfairly dismissed<sup>64</sup>, the right to a minimum period of notice of termination<sup>65</sup> and the right to a payment upon redundancy.<sup>66</sup> This dual status reflects the different statutory origins of these rights.<sup>67</sup> This ERA definition of “worker” is replicated and cross referenced in a number of other employment law statutes (for example, the Working Time Regulations 1998 at reg.2(1), the Trade Union and Labour Relations (Consolidation) Act 1992 at s.230 and the Employment Relations Act 1999 (“the 1999 Act”) at s.13(1)) however, it is not universal in its application. TUPE, for example, applies to “employees” but defines an employee as “any individual who works for another person

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<sup>57</sup> For an up-to-date discussion on the law in respect of personal service, see the Court of Appeal’s judgment (subsequently upheld by the Supreme Court) *Pimlico Plumbers Ltd v Smith*, [2017] IRLR 323.

<sup>58</sup> See *Yewens v Noakes* (1880) 6 QBD 530. For a more up-to-date (and perhaps more nuanced) discussion on the current state of the law, see *White v Troutbeck SA*, [2013] IRLR 286. It is acknowledged that for certain professions – particularly ones requiring a certain degree of skill – will probably involve less control.

<sup>59</sup> Unsurprisingly, further nuance has again been added to this test throughout the meandering history of the case law. For an up-to-date discussion, see the judgment of Langstaff J in *Cotswold Developments Construction Ltd v Mr S J Williams*, [2006] IRLR 181

<sup>60</sup> *Montgomery v Johnson Underwood*, [2001] ICR 819 at para.46. In using the phrase “irreducible minimum”, he was recalling both Stevenson LJ in *Nethermere (St Neots) Ltd v Gardiner*, [1984] ICR 612 and Lord Irvine in *Carmichael v National Power Plc* [1999] ICR 1226

<sup>61</sup> s.230(3)(b), ERA

<sup>62</sup> s.13, ERA

<sup>63</sup> Part IVA and s.47B, ERA

<sup>64</sup> s.94, ERA

<sup>65</sup> s.86, ERA

<sup>66</sup> s.105, ERA

<sup>67</sup> Rights pertaining to unfair dismissal having been initially contained in the Industrial Relations Act 1971 and unlawful deduction being the various Wages Acts; for example, the Wages Act 1986

whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services”.<sup>68</sup> This definition is broad enough to encompass both employee and worker status. The Equality Act 2010 (“EqA”) similarly takes a slightly different approach in that it does not create the status of employee rather it defines “employment”; that is, employment “under a contract of employment, a contract of apprenticeship or a contract personally to do work”.<sup>69</sup> This EqA definition of employment is broader still than either TUPE or ERA: a commercial agent, for example, may be in employment in terms of EqA, but would not be an employee in terms of either TUPE or the ERA.<sup>70</sup>

The second limb of the worker definition is a “statutory extension” to this employee status.<sup>71</sup> In order to satisfy the definition of a worker, the individual will still be required to demonstrate elements of personal service and control however they will not be required to demonstrate that there is a mutuality of obligations.<sup>72</sup> The distinction between employee and worker is whether or not there is an ongoing mutuality of obligations between the parties or whether the engagements are piecemeal and isolated contracts.

By evoking the common law definition of a particular kind of contract, the definitions of worker and employee set out at s.230, ERA have allowed the courts to adopt a more fluid approach than they may have been able to had the statute taken a more prescriptive approach. There are two significant advantages to this. The first is that, as the creation of a “precise definition” of a contract of employment was acknowledged by Lord Denning as being “almost impossible”,<sup>73</sup> the broad, descriptive approach removes the need for this. This approach devolves a great deal of the discretion for determining what is (and, just as crucially, what is not) a contract of employment to the judiciary in general and, having regard to the limited grounds of factual appeal,<sup>74</sup> to the tribunals at first instance in particular. The success relies on the assessment of the nature of the task at hand; that is,

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<sup>68</sup> Reg.2, TUPE

<sup>69</sup> Ss.83(2)(a) and (4), EqA

<sup>70</sup> A commercial agent is defined as a “self-employed intermediary” in terms of reg.2(1) of the Commercial Agents (Council Directive) Regulations 1993. A commercial agent would therefore be excluded from TUPE (“employee [...] does not include anyone who provides services under a contract for services”, Reg.2) and ERA (which excludes “any work or services [...] whose status is not [...] that of a client or customer of any profession or business undertaking carried out by the individual”).

<sup>71</sup> Prassl, J., *Who is a Worker?*, L.Q.R. 2017, 133(Jul), 366-372, at p.367

<sup>72</sup> See *Wright v Redrow homes (Yorkshire) Ltd*, [2004] EWCA Civ 496, approving the EAT’s judgment in *Byrne Bros (Farmwork) Ltd v Baird*, [2002] IRLR 96

<sup>73</sup> *Stevenson, Jordan and Henderson v MacDonald and Evans*, [1952] 1 TLR 101, at 111 per Denning LJ

<sup>74</sup> Factual appeals can only be made where the decision of the tribunal was perverse. See paras. 2 and 3.8 of the Practice Direction (Employment Appeal Tribunal – Procedure) 2013, <https://www.judiciary.gov.uk/wp-content/uploads/2013/07/eat-pd.pdf>

that while a precise definition is elusive, “it is often easy to recognise a contract of [employment] when you see it”.<sup>75</sup>

The second is its flexibility. There are more things in heaven and earth than are dreamt of by statutory draftspeople. By avoiding the prescriptive approach, the courts and tribunals have (to some extent) been able to keep pace with technological and organisational changes which are constantly redefining the employment relationship. A number of recent, high profile cases such as *Pimlico Plumbers Ltd v Smith*<sup>76</sup> and *Aslam v Uber*<sup>77</sup> (both of which will be discussed in greater detail below) have showcased the adaptability of the status test to new working arrangements; both of these cases concerned business models arranged around the allocation of work by use of smartphone platform; a technology presumably far beyond the contemplation of the original statutory draftspeople. These gains in flexibility are, to some degree, offset by the losses in both legal certainty inherent in descriptive legislative provisions and consistency.<sup>78</sup> The volume of the above mentioned high profile cases currently climbing the UK’s appellate court ladder is perhaps an indictment of the degree of uncertainty (and perhaps even subjectivity) caused by this approach.

The purpose of parties reducing the terms of an agreement to writing is to create a record of the legal relations they intended to form. This in turn provides contracting parties with certainty. In a commercial context, such certainty is a necessary prerequisite to the conduct of business: a building company, for example, will be unlikely to part with the outlay required to complete large infrastructural projects where it knows the party it is contracting with may not be held to the terms agreed. While written terms are not quite sacrosanct,<sup>79</sup> they almost always create obligations on parties which are legally enforceable. The emphasis on certainty in contract law does however provide an opportunity for employers drafting contracts otherwise of employment to deprive workers of that status. The inclusion of an express term purporting to disavow any of the requisite elements of a contract of employment will, in some circumstances, have the effect of locking the worker out of her

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<sup>75</sup> [1952] 1 TLR 101

<sup>76</sup> [2017] EWCA Civ 51

<sup>77</sup> *Supra*. This decision is currently under appeal to the Court of Appeal

<sup>78</sup> The extent to which completely objective and consistent interpretation of statute is desirable or even possible is a matter of debate, irrespective of whether a prescriptive or descriptive approach is adopted in the statute. For an introduction to the arguments, see: Fiss, Owen M., *Objectivity and Interpretation*, Stanford Law Review, Vol.34, No.4 (Apr., 1982), pp.739-763

<sup>79</sup> There are limited grounds upon which a court will be persuaded to ignore them; see, for example, the law of error

statutory rights. The following section will consider both the legal mechanics of how this is achieved and the ways appellate courts (in particular the Supreme Court) have sought to prevent the practice.

## 2.2: THE RUSE:

### HIDING A CONTRACT OF EMPLOYMENT IN PLAIN SIGHT

The grounding of employment law in the law of voluntary obligations was, on first analysis, a liberal development: while the pre-existing master-and-servant laws imposed some degree of obligations upon the master, they were a two-way street: servants were liable to criminal censure for non-performance, and the “laws were used to [...] reduce the bargaining power of workers and shore up managerial prerogative”.<sup>80</sup> Master-servant laws were further stigmatised through their association with slavery in parts of the British Empire, as they had been in West Indian plantations and South African mineral mines.<sup>81</sup> Basing the new legal framework on the law of contract would, at least in theory, give parties the freedom to contract with each other as equals. The practice in twenty first century Britain is, however, different. The economic reality and current socio-political consensus is that, with the exception of those wealthy enough to survive solely upon the income generated from their wealth, at least one member of every household is required to engage in some form of remuneratory economic activity. The state provides a basic safety net of welfare provision to those either unable to do (whether through age, infirmity or familial care commitments) or unable to find work however the basic presumption is that every household must work in some capacity. It may therefore be said that while many individuals have freedom *of* contract, they have no freedom *to* contract. The exception to this is individuals who are self employed however for many trades and occupations, there are no practical or competitive ways to become self employed.

Contracts entered into where there is a lack of freedom *to* contract are often referred to in academic literature as “contracts of adherence”.<sup>82</sup> Contracts of adherence exist in areas of

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<sup>80</sup> Simon Deakin, *Legal origin, juridical form and industrialization in historical perspective: the case of the employment contract and the joint-stock company*, *Socio-economic Review* (2009) 7, 35-65, p.53

<sup>81</sup> *Ibid*, p.54

<sup>82</sup> The phrase “contract of adherence” is used exclusively in academic literature and is not recognised in either case law or statute as being a distinct class of contract. For a useful discussion of these kinds of contracts, see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, *Columbia Law Review*, Vol.43, No.5 (July 1943), pp 629-642

economic life such as car insurance, personal banking and residential property letting. Such contracts are characterised by an imbalance of power between the parties. One party will be a business and the other an individual who is required to contract through either legal or cultural norms (such as in the case of car insurance and bank accounts respectively), or through financial and practical necessity (such as in the case of renting a flat). The combination of this lack of freedom *to* contract, the imbalance of power and the dynamics of business efficiency ordinarily result in contracts of adherence rarely being entered into by means of open negotiation. They often contain standardised terms and are offered to the individual on *à prendre ou à laisser* basis.<sup>83</sup> In employment law, the practice of offering employment on the basis of a standardised contract is so widespread that “in the absence of a recognised union, it [is] extremely rare for any negotiation over terms and conditions” to take place.<sup>84</sup>

The policy response aimed at mitigating the imbalance of power in contracts of adherence is to construct a regulatory scaffold around these contracts, whether through the common law or through statute.<sup>85</sup> The latter creates relationships between the parties which are legal hybrids comprising both voluntary and involuntary obligations. These policy responses are often successful in redressing the imbalance. The extent to which the law should intervene in these relationships is a matter of political taste however the legal facility to intervene does exist.

Employment contracts as contracts of adherence do however pose a unique difficulty. Whereas it will be obvious if a party is contracting to insure a car or lease a property, the line between parties contracting for services under a contract of employment and parties contracting for services under an ordinary commercial contract is often unclear and indistinct. The problem this creates for the regulation of employment relationships is that the former is ordinarily convened under a contract of adherence (and is therefore apt for statutory regulation) and the latter under an ordinary, freely negotiated contract (and therefore falls outwith the policy scope of statutory regulation).

One purpose of this chapter is to illustrate ways in which an employer may try and disguise a contract in order to avoid it being one which would create a rights-attracting status for

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<sup>83</sup> *ibid*, p.633

<sup>84</sup> Hugh Collins, *Legal Responses to the Standard Form Contract of Employment*, *Industrial Law Journal*, Vol.36, No.1 (March 2007), pp 2-18, p.5

<sup>85</sup> See, for example, the Private Housing (Tenancies) (Scotland) Act 2016 in the case of private lets

their employee. Thus far, my analysis has considered a number of definitions of employee, employment and worker. For the sake of this sub-chapter, I will restrict our analysis to the two statuses created by the ERA: that is, employee and worker. By implication a third group will also exist of individuals who fit neither definition. I will refer to this group as independent contractors. In order to qualify for either definition, both employee and worker will be required to demonstrate the control and personal service elements of the test; only an employee will be required to demonstrate that there is any degree of ongoing mutuality of obligations. Of these three grounds, only mutuality and the personal performance requirement are absolute for employment contracts. The requirement for control is a matter of degree. The existence of “obligations on the employer to provide for the employee and on the employee to perform the work”, according to the Court of Appeal, is a “*sine qua non* which can be firmly identified as an essential of the existence of a contract of service”.<sup>86</sup> The insertion into a contract of terms which obscure or negate the existence of either of these facets will result in the individual providing labour forfeiting her statutory protections.

In the case of employee status, for example, an employer may insert a term into a contract for service denying the existence of any ongoing requirement to provide work. The individual providing labour will therefore be a worker and forego the rights she would otherwise have as an employee. I will refer to these as “zero hours” clauses. The factual reality of whether she actually works full time hours on a regular basis will be subverted by the existence of this express clause. Similarly, an employer may insert a term that confers a right onto the individual providing labour to sub-contract her work. Where this right is complete and unfettered, the personal service requirement will be broken and the individual will be an independent contractor and further forego all rights under the ERA. Again, whether or not she ever does sub-contract the work will be largely irrelevant provided the existence of the right can be demonstrated.<sup>87</sup> I will refer to these clauses as “substitution” clauses.

The correct treatment of these terms is currently unclear as the authorities do not speak with one voice. In large part, this lack of clarity is a product of the hybrid nature of employment law. The fact that the basis of the employment relationship is contractual and not statutory requires tribunals and appellate courts to construct the terms of the agreement

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<sup>86</sup> *Nethermere v Gardiner* [1984] ICR 612, per Dillon LJ, at 632

<sup>87</sup> This is subject to the recent “dominant feature” line of authority discussed by the Supreme Court in *Pimlico*. This will be discussed in greater detail below.

in accordance with ordinary principles of contractual construction (subject to the common law idiosyncrasies of employment contracts); that is that a court, in determining whether a particular contract is a contract of service, must consider “what people say” rather than “what [they] think in their inmost minds”,<sup>88</sup> The common law doctrine of *expressum facit cessare tacitum*<sup>89</sup> prevents a court or tribunal from implying terms into a contract where express terms already exist.<sup>90</sup> Therefore where a clause had been inserted into a contract that the employer was under no obligation to give, and the worker was under no obligation to carry out, a minimum amount of work, the courts would be prevented from implying mutuality of obligations.

There are exceptions to this. The first is where both parties have conspired to fix the statutory nature of their contracts by agreement in order to avoid some obligation to the state. This is frequently the case in contracts upon which employee/worker status may depend, where there may be mutual tax benefits for both parties at the expense of the treasury if their relationship is characterised in a particular way.<sup>91</sup> Where parties attempt to do this, “it is trite law” that their characterisation will not be determinative, as parties’ legal relationship is “an objective matter to be determined by an assessment of all the relevant factors”.<sup>92</sup> The second is where the contract is voidable because one of the parties only contracted on the basis of an error that had been induced by the other party.<sup>93</sup> The third is a new ground specific to contracts of employment and was created by the Supreme Court in *Autoclenz Ltd v Belcher*.<sup>94</sup> Lord Clark stated that in “deciding whether the terms of any written agreement in truth represent what was agreed [...] the written agreement is only a part” of the overall factual matrix that must be considered, and that “the relative bargaining power of the parties must [also] be taken into account”.<sup>95</sup> The decision in *Autoclenz* turned, to some extent, on the English contract law concept of “sham”.<sup>96</sup> Under this concept,

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<sup>88</sup> *Muirhead & Turnbull, supra*, per Dunedin LP at 694. For the even stricter English law equivalent of this doctrine, see *Storer v Manchester City Council*, [1974] 1 W.L.R. 1403, at 1408: “*In contracts you do not look into the actual intent of a man’s mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract[...] His intention is to be found only in the outward expression which is letters convey*”

<sup>89</sup> Literally, “*what is expressed makes what is implied silent*”

<sup>90</sup> For an example of *expressum facit cessare tacitum* being applied in the context of Scots contract law, see *Macari v Celtic Football and Athletic Co Ltd*, (1999) S.C. 628, per Lady Cosgrove at 634

<sup>91</sup> For an example of this, see *Massey v Crown Life Insurance Co* [1978] 2 All ER 576

<sup>92</sup> *Calder v H Kitson Vickers Ltd*, [1988] ICR 232, per Gibson LJ

<sup>93</sup> For a discussion on the extent to which good faith is now a contractual requirement within Scots law, see Hector MacQueen, *Good Faith in the Scots Law of Contract: An Undisclosed Principle?*, Scottish Law Commission, Working Paper Series No.2011/19

<sup>94</sup> [2011] ICR 1157

<sup>95</sup> *Autoclenz, supra*, at para.35

<sup>96</sup> See the courts reasoning in *Autoclenz, supra*, at paras.23 and 24

contract terms are unenforceable if the “acts done or documents executed by the parties to the ‘sham’ [...] are intended to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations [...] the parties intended to create”.<sup>97</sup> Prior to *Autoclenz*, the appellate authorities in cases relating to employment status had set their faces against allowing one party to a purported contract either of employment or for services to ignore express clauses on the basis of sham.<sup>98</sup> The reason for this was that the above quoted Diplock dictum required both parties to have conspired with the intention of deceiving a third party, rather than one party seeking to escape unilateral statutory obligations it would otherwise have in respect of the other. *Autoclenz* refines this test for employment contracts.

The “relative bargaining power of the parties” consideration will likely require further judicial refinement; the judgment gives no detail as to the factors tribunals should consider when assessing the relative bargaining power or the weight they should attach to each factor. While the direction of jurisprudential travel appears to be away from holding workers strictly bound to express terms in their contracts where they do not reflect the reality of their working arrangements, the extent to which *Autoclenz* allows tribunals at first instance to disregard express clauses in contracts for services is as yet unclear. Similarly, no guidance was given as to either what terms were apt to be ignored or how tribunals should set about constructing new terms in their place. This is particularly problematic insofar as the Supreme Court did not expressly overturn the Court of Appeal decision in *Stevedoring & Haulage Services Ltd v Fuller*.<sup>99</sup> Unlike *Autoclenz* and *Pimlico Plumbers*, which both concerned a substitution clause, *Stevedoring* concerned a zero hours clause. It had been argued by the claimants that this clause should be disregarded and replaced with a clause requiring the employer to provide “a reasonable amount of casual work”.<sup>100</sup> This argument was rejected by the Court of Appeal. Their reasons were expressed by Tuckey LJ as follows:

“If there was a contract we cannot see any way in which the ET’s implied terms could be incorporated into it. The implied terms flatly contradict the express terms contained in the documents: a positive implied obligation to offer and accept a reasonable amount of casual work (whatever that means)

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<sup>97</sup> *Snook v London and West Riding Investments Ltd*, [1967] 2 QB 786, per Diplock LJ at 802

<sup>98</sup> See the Court of Appeal in *Consistent Group v Kalwak*, [2008] EWCA Civ 430

<sup>99</sup> [2001] EWCA Civ 651

<sup>100</sup> *Ibid*

cannot be reconciled with express terms that neither party is obliged to offer or accept any casual work. None of the conventional route for the implication of contractual terms will work. Neither the business efficacy nor necessity require the implication of implied terms which are entirely inconsistent with a supposed contract's express terms"<sup>101</sup>

The extent to which *Autoclenz* goes as far as to either overturn the decision in *Stevedoring* or disapply the principle of *expressum facit* for the purpose of employment law must therefore be treated with caution: the Court of Appeal in *Pimlico Plumbers* subsequently quoted *Stevedoring* with approval and it must, for the time being, be considered good law. This is problematic in that it leaves the law in a state of uncertainty. The key distinction between *Autoclenz* and *Stevedoring* is that while the court in *Autoclenz* was considering the extent to which a clause in a contract could be ignored, in *Stevedoring* it was being further asked to construct a new one in its place. The extent to which an employment tribunal is entitled to construct terms is unclear and, at present, the subject of some contradictory lines of authority.<sup>102</sup> The Court of Appeal in 2010<sup>103</sup> held that a tribunal had been "exercising the power of the civil courts [when it sought] to declare what a contract meant or to rectify an error manifest in an otherwise binding contract" and that the court was "unanimously of the opinion that the words in the [ERA] do not mean and were not intended to mean that an industrial tribunal could rewrite or amend a binding contract".<sup>104</sup> The reasoning is, in one sense, legally sound: it would be *ultra vires* for a statutory court to go beyond what it has been empowered to do by legislation. It does however create a difficulty where a sham zero hours clause has been identified by the *Autoclenz* dictum, insofar as while the tribunal is empowered to ignore the clause, it is prevented from inserting a new one in its place. The mischief intended to be remedied (that is, the sham lack of mutuality) will remain. This creates difficulties for the individual seeking a claim of unfair dismissal. Whereas the individual claiming unpaid wages pursuant to a disputed zero hours clause has a choice of remedy between an action for unlawful deduction before the tribunal (who cannot construct a new clause) and an action for breach of contract in the civil court (who can), there is no civil court equivalent to a breach of the right not to be unfairly dismissed. The restricted facility to construct terms may therefore prevent an individual bringing a claim for unfair dismissal even in circumstances where the tribunal has identified the zero hours

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<sup>101</sup> *Ibid*, at para.11

<sup>102</sup> See, for example, the recent cases of *Agarwal v Cardiff University* and *Weatherlit v Cathy Pacific Airways*, UKEAT/0210/16/RN and UKEAT/0333/16/RN respectively

<sup>103</sup> *Southern Cross Healthcare Co Ltd v Perkins and Others* [2010] EWCA Civ 1442

<sup>104</sup> *Ibid*, at para.22 per Maurice Kay LJ

term denying her employee status (and with it the right not to be unfairly dismissed) as being an *Autoclenz* sham. While this seems unsatisfactory, that makes it neither illogical nor something that is contrary to parliamentary intentions: the disputed clause in *Autoclenz* was a substitution clause. Had the court not allowed this clause to be ignored, the claimant would have been removed from the field of statutory employment protection entirely. However as the clause in *Stevedoring* related to employee status, the claimant still retained the core protections of worker status, which was not in dispute. The public policy reasons for ensuring individuals obtain the basic worker protections are arguably greater than those for ensuring workers obtain employee status, particularly insofar as they relate to the right to get paid wages, and concern aspects of health and safety.

The *Stevedoring* decision, whilst complying with *expressum facit*, is not easily reconcilable with other existing authorities. The sole significance of mutuality, as espoused by Elias J in *Stephenson v Delphi Diesel Systems Ltd*,<sup>105</sup> is “that it determines whether there is a contract in existence at all”.<sup>106</sup> Note that Elias J does not say that it is not determinative of whether there is a contract *of employment*, but merely determinative of whether there is a contract *at all*. Mutuality has no wider application. Once a contract has been established, the tests of control and of personal service then determine whether it is a contract of employment or a contract of some other kind. Whether or not a mutuality of obligation exists is primarily a matter of fact. In this sense, when the court in *Stevedoring* did not treat mutuality as a factual indicator of the legal relations created when the parties contracted, it took it into the realm of the abstract and treated “mutuality” (or lack thereof) as being something self-evidently probative of a contract *of employment* rather than just of a contract *at all*. If one applies Elias J’s reasoning in *Stephenson* to the reasoning in *Stevedoring*, the logic of the latter collapses entirely: in determining whether a contract exists or not, the Court in *Stevedoring* relied upon a term in that contract denying its very existence.

A final, further point on the issue of ignoring express terms is that there is Scottish authority for the position that where one party to a contract did not understand the “legal effect of words to which a very artificial operation is ascribed by a highly technical rule of law”, consensus was not reached.<sup>107</sup> The mechanism by which a contractual term excluding

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<sup>105</sup> [2003] ICR 471

<sup>106</sup> *Wright v Redrow Homes, supra*, at para.11

<sup>107</sup> “A man must be held bound by the plain meaning of words to which he puts his hand, but that is a different thing from holding that he must be assumed to know the legal effect of words to which a very

mutual obligations can lead to an individual not having the right either to a redundancy pay or to not be unfairly dismissed, even some 20 or 30 years down of employment down the line, is something which is arguably both an artificial operation of law and highly technical. Whether or not the individual contracting understood the legal effect of that term at the point of contract is a matter of fact, but whether that would be sufficient to render the clause unenforceable is a matter of law and, to the best of my research, is yet to be decided in a Scottish tribunal. It should be cautioned that both Gloag and McBryde treat the reasoning in *Harvey* with some trepidation; the latter going as far as suggesting that it was “wrongly decided”.<sup>108</sup>

This chapter has sought to explain the law relating to the status tests, with a particular focus on judicial treatment of terms whose purpose or effect is to deprive individuals of that status. The Supreme Court, both in *Autoclenz* and, more recently, in *Pimlico*, have stretched the ordinary principles of contract law in order to allow a more flexible approach to be taken in the case of contracts purportedly of employment. This is to be welcomed. However, there are limits to what can be achieved through case law alone: regardless of how far the Supreme Court is prepared to stretch the law of contract, it cannot overrule statute. Therefore provided the current statutory test remains, the paradox will remain and employers will retain the opportunity (at least to some extent) to deprive workers of their status. Removing this paradox entirely will only be achieved through statutory amendment.

While this thesis has argued that there are problems with the current status tests, it has not yet argued either why this is problematic or why reform is necessary. This will be the focus of the following, penultimate chapter. Once the case for reform has been made, the final chapter will set out those reform proposals.

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artificial operation is ascribed by a highly technical rule of law, when he knew nothing of the rule beforehand and when it was not explained to him at the time” *Harvey v Smith*, (1904) 6 F. 511, per Lord Kinnear at 522

<sup>108</sup> McBryde, William W., *The Law of Contract in Scotland*, 3<sup>rd</sup> edition, p.6-13

## CAPTER 3

### 3.1: BAD GIGS

The opening two chapters considered the contractual basis of the current status tests and considered how this contractual basis can be (?) exploited by employers in order to deprive their workers of employment rights. This chapter will argue that this is problematic, not only for individuals working in the gig economy, but also for other workers, other businesses and society as a whole. It will do so by considering three areas: protection of individual rights; rights of workers during a business transfer; and collective rights.

Gig workers have hitherto fallen into a political blind spot. This is likely the consequence of these workers being both too few in number and too economically marginal to force a specific political agenda. Indeed, the trade union antipathy towards casual work (discussed below) has perhaps deprived these workers of the one source of political advocacy other workers have come to rely upon. With participation in the gig sector on the increase however the issue will likely gain political momentum. Indeed, the issue of “zero-hours contracts”, a working concept exhibiting themes interchangeable with “the gig economy”, has already featured in the election literature produced by the Labour party during both the 2015 and the 2017 elections.<sup>109</sup> Criticisms of the sector have also featured in a number of recent scholarly works, notably by Prassl.<sup>110</sup> Whether or not gig workers can develop what a Marxist might refer to as “class consciousness” remains to be seen however as the sector grows, so will its political influence.<sup>111</sup> This chapter will make the case for such reform.

### 3.2: INDIVIDUAL RIGHTS

The existence of self-employed workers, in the sense of individuals who have made an informed and free choice to go into business on their own account, is something with no or

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<sup>109</sup> In 2015, Ed Miliband’s Manifesto promised to “ban exploitative zero-ours contracts” for those “who work regular hours for more than 12 weeks” ([http://action.labour.org.uk/page/-/A4%20BIG%20PRINT\\_ENG\\_LABOUR%20MANIFESTO\\_TEXT%20LAYOUT.pdf](http://action.labour.org.uk/page/-/A4%20BIG%20PRINT_ENG_LABOUR%20MANIFESTO_TEXT%20LAYOUT.pdf)) while in 2017 Jeremy Corbyn went further by dropping the “exploitative” and “regular hours” qualifications and promising a ban “so that every worker gets a guaranteed number of hours each week” (<https://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf>)

<sup>110</sup> See Prassl, *supra*

<sup>111</sup> Class consciousness has been defined as “an awareness of one’s position in the class structure [which...] enables individuals to come together in opposition to the interests of other classes” (Vincent N. Parrillo, *Encyclopedia of Social Problems, Vol.1*, Sage, 2008)

little political will to change. Despite the trend among small businesses such as shopkeepers, restaurateurs and farmers to move away from non-affiliated independent small businesses and towards either franchised or managed chains,<sup>112</sup> self-employed individuals still account for a large portion of the overall workforce.<sup>113</sup> Similarly, there is still a presumption in the UK that those of working age who are fit to work should.<sup>114</sup> The social contract between workers and the state therefore remains (to some degree) operational. Both for the wilfully self-employed and the fully employed, the orthodoxy holds. The problem however is the existence of a group of individuals who fall between these two extremes. Without straying too far into issues of nomenclature, I will avoid using the classification of “bogus self-employed” for this group both because it is unnecessarily emotive and because the legal status of individuals within this group will vary between “self-employed” and “workers” depending on the particular circumstances of the relationship. Similarly, there will be individuals within this for whom the flexibility of gig work is of genuine benefit. The oft-cited example of students being able to earn a living around their studies is the go-to cliché for the existence of this group.<sup>115</sup> This group will instead be referred to as gig workers, although it is appreciated that there are types of casual work that do not fit the definition advanced above for the gig economy.

The fact that *Aslam* is considered a victory for the gig workers and a defeat for Uber is, of itself, telling.<sup>116</sup> The decision unlocked for the claimants only the modest protections of worker status. The claimants did not even sue for full employment status, presumably on the basis that the area of law is so settled that unless they could demonstrate a clear, ongoing obligation to provide a minimum amount of work, employee status cannot be determined: gig work is characterised by the piecemeal allocation of tasks. By its nature, those engaged to provide labour have no ongoing formal legal obligations in respect of the companies. The Tribunal at first instance instead held that it is only when the app is turned

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<sup>112</sup> For an analysis of this trend in the UK’s independent retailer industry, see: Steve Baron, Kim Harris, David Leaver & Brenda M. Oldfield, *Beyond Convenience: the Future for Independent Food and Grocery Retailers in the UK*, *The International Review of Retail, Distribution and Consumer Research*, 11:4 359-414

<sup>113</sup> The Office of National Statistics estimated that there are 4.6m self-employed in the UK <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2001to2015>

<sup>114</sup> State benefits are only available to those who cannot work through illness or are willing but unable to find work.

<sup>115</sup> See, for example, two recent articles from the Guardian (<https://www.theguardian.com/uk-news/2017/sep/19/number-of-workers-on-zero-hours-contracts-drops-to-three-year-low> ) and the Telegraph (<http://www.telegraph.co.uk/business/2017/05/23/zero-hours-workers-may-get-right-ask-fixed-shifts/> )

<sup>116</sup> The Financial Times, for example, described the outcome as a “blow” to the company <https://www.ft.com/content/84de88bc-c5ee-11e7-a1d2-6786f39ef675>

on for the purposes of accepting tasks that they are workers.<sup>117</sup> The removal of the requirement to provide a minimum amount of work has consequences that go beyond mere legal taxonomy however. It will also allow the employer to transfer a portion of its economic risk onto the workforce: under conditions of mutuality, where an employer experiences a reduction in its requirement for labour, it is required to either continue paying its employees or dismiss a portion as redundant, incurring liability for notice and redundancy payments. In the case of the gig workers however, the business may simply adjust its labour costs accordingly by offering its workers (and consequently having to pay for) fewer or no hours of work. The economic consequences of the downturn as to the labour costs therefore will be borne exclusively by the gig worker, as they will receive less work and consequently a lower salary as a result.

This seems manifestly unfair, particularly when viewed in the context of the kinds of worker whose roles are vulnerable to demutualisation. Demutualisation is a feature of vertical disintegration. Firms vertically integrate into markets in order to obtain “a degree of insurance against the risk that the market will not provide sufficient numbers of adequate quality of services or products required”.<sup>118</sup> In a labour market context, engaging workers under permanent contract of employment represented the purchase of this insurance; the rights and guarantees gained by the worker in the bargain are the price the employer is willing to pay to avoid having to rely on the market to have good and available workers at the point of need. Vertical *dis*integration is therefore only possible where the work is of a kind that the labour market can be relied upon to produce. The rarer or more sought after the skill or qualification required by the role, the less likely a business is to rely on the market having available the right number and quality of those particular workers at any given time. Conversely, the lower the skill level required by the role, the easier it will be for the business to find workers when required

Workers in low skilled roles are accordingly the more at risk of losing their employment status than workers in higher skilled occupations. This is unsatisfactory. Workers with skills which are in demand are less likely to require statutory protection, as they will be in a stronger position to negotiate better voluntary terms with their employer at the outset of the relationship. The fact individuals with weaker negotiating clout may, in consequence of this weakness, end up not only with less favourable contractual terms, but also receive

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<sup>117</sup> *Aslam, supra*, at para.100

<sup>118</sup> Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, Oxford Journal of Legal Studies, Vol.10, No.3, 353-380, p.348

fewer or no statutory protection, doubles down on their misfortune. It simply cannot have been the intention of Parliament when legislating in favour of employment rights that they would only extend to individuals who were in a position to negotiate favourable terms in the first place.

Even where gig workers are able to demonstrate worker status, they will miss out on the end-of-employment protections and a guaranteed minimum amount of work. Such exclusion (and with it the lack of job and wage security) will often lead to further adverse consequences to individuals: mortgage providers' lending criteria often require individuals to be in permanent or long-term employment prior to approving a loan.<sup>119</sup> In consequence, gig workers may be excluded from the property ladder and, with it, the social and psychological benefits of homeownership.<sup>120</sup> This in turn may also have broader social consequences: econometric analysis from both the United States and Germany has shown a statistically significant correlation between homeownership and “variables that [...] measure good citizenship”, such as participation in local politics, the carrying out of home repairs and regular garden work, and volunteering.<sup>121</sup> Research also indicates that job and/or wage insecurity “may have as [psychologically] detrimental consequences as job loss itself” and can impact negatively on an individual’s “work attitudes and behaviour”.<sup>122</sup> The new model of platform companies such as Uber and Airbnb also operate on an entirely flat structure without area managers or supervisors. In consequence, workers in these models have little opportunity for career progression, as the only routes to increasing income are either to drive more hours or to rent out rooms more often. In contrast to the myth of gig economy creating a “wave of small-scale entrepreneurship”<sup>123</sup>, the market dominance of these platform behemoths will likely stifle small business by pricing out individuals who would otherwise have started their own taxi firm or B&B.

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<sup>119</sup> See, for example, the lending criteria published by Halifax Bank of Scotland <http://www.halifax-intermediaries.co.uk/print/criteria/mortgage/default.aspx?isfad=0>

<sup>120</sup> The materiality of the social and psychological benefits of homeownership is debated. One study found that while 85% of survey respondents claimed homeownership made them feel better about themselves and 71% said it increased the sense of control they have over their lives, other main measures of self esteem showed no statistically significant correlation with home ownership, when adjusted for other factors (Rohe, William M. and Stegman, Michael A, *The Effects of Homeownership: on the Self-Esteem, Perceived Control and Life Satisfaction of Low-Income People*).

<sup>121</sup> DiPasquale, Denise, and Glaeser, Edward L., *Incentives and Social Capital: Are Homeowners Better Citizens*, *Journal of Urban Economics*, 45, 354-384 (1999), p.385

<sup>122</sup> Sverke, Magnus and Hellgren, Johnny, *The Nature of Job Insecurity: Understanding Employment Uncertainty on the Brink of a New Millennium*, *Applied Psychology: An International Review*, 2002, 51(1), 23 – 42, p.31

<sup>123</sup> For an example of this myth, see <https://www.entrepreneur.com/article/288178>

The demutualization of the employment relationship may also have broader implications on the public purse: the UK has a range of both in- and out-of-work benefits, including Income Support, Working Tax Credit and Housing Benefit.<sup>124</sup> Where the effects of a business downturn are passed onto the worker by way of reduced hours and, in consequence, salary, a portion of these effects will be further passed in turn onto the public by way of increased cost of benefits. In a sense, this issue touches upon the policy question at the heart of employment law: where should the economic risk lie? That is, whether and to what extent it should be with the business owners or their workers. The United Kingdom's economic, social and legal infrastructure exhibit features which are conducive towards good business: it has world class education<sup>125</sup> and free health care systems; civil and criminal legal codes concerned with the protection of private property; separate legal personage for business entities and limited liability; and extensive financial, transport, telecommunications and export infrastructure. In return, the public places certain expectations upon businesses: corporation tax is levied in order that a portion of profits may be reinvested in the public services and infrastructure; a range of duties are imposed by statute upon company directors<sup>126</sup> and legislation provides employees with a range of rights enforceable against their employers. Therefore, while the basis of employment law is contractual in nature, the contract of employment has been recognised by Parliament (as identified by the Supreme Court) as distinct from other contracts, in that it is "characterised by an imbalance of economic power" in which the employee is vulnerable "to exploitation, discrimination, and other undesirable practices, and the social problems which can result."<sup>127</sup>

Features specific to particular platform business models may also have discriminatory consequences for workers which, by nature of the businesses' structure or data recording practices, render the worker without any form of legal recourse: some platform models, such as Uber, operate a "rating" system which allows passengers to rate their drivers between one and five. Drivers with a mean rating lower than 4.6 are at risk of being deactivated.<sup>128</sup> Drivers for whom English is not their first language may find it more difficult to gain a rapport with passengers than native English speakers and may receive lower ratings in consequence. Similarly, foreign born or ethnic minority drivers may receive lower scores from customers as a result of conscious or unconscious biases. While

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<sup>124</sup> <https://www.thinkmoney.co.uk/news-advice/what-benefits-can-i-claim-while-working-0-8460-0.htm>

<sup>125</sup> A 2014 report by Pearson ranked the UK's education at 6<sup>th</sup> in the world and 2<sup>nd</sup> in Europe

<sup>126</sup> Ss.171 – 181, Companies Act 2006

<sup>127</sup> *Regina, on the application of UNISON v the Lord Chancellor*, [2017] UKCS 51, per Lord Reed at para.6

<sup>128</sup> <https://www.uber.com/en-GB/drive/partner-app/>

less favourable treatment on the basis of an individual's nationality or language would fall within the scope of the protection of the Equality Act 2010,<sup>129</sup> the rating system which disadvantages minority, foreign-born or non-English speaking drivers would likely only fall within the definition of indirect (as opposed to direct) discrimination and would therefore be capable of being objectively justified by employers.<sup>130</sup> The worker would also be required to demonstrate that people sharing her protected characteristic would be likely to be placed at a disadvantage by the ratings system. In order to do this, she would be required to obtain large amounts of data from her employer detailing the both ethnic mark-up of their workforce and the breakdown of customer feedback; details that gig employers are often reluctant to keep, particularly where worker status is disputed.

Leaving aside arguments based on fairness, the degree of legal uncertainty arising in cases where employee or even worker status is unclear can be detrimental to both worker and employer. Employment status is determined by operation of a set of legal principles which are often both esoteric and contradictory. This again is unsatisfactory. A business will plan financially according to its liabilities. If an employer mistakenly believed it was engaging self-employed contractors rather than hiring workers, it may find itself unexpectedly responsible for redundancy payments in the event of it terminating their contracts. Such an unanticipated outlay may cause the business problems with cash flow which in turn might compound the initial problem. Greater certainty of this relationship would have allowed the business to hold back a reserve of cash in order to meet its liabilities. Similarly, the purpose of statutory minimum notice periods and redundancy payments is to cushion the financial impact of sudden forced unemployment. An individual may be entitled to but not actually receive these protections until some time after the termination of her contract where an employment tribunal has to determine her status. The entire business model of a company can turn on the subjective application of a wide set of facts to a number of vague rules. This has left the law in a state of chronic uncertainty, not only for lay individuals but also for their advisors. The volume of cases currently ascending the UK's appellate ladder attests to this uncertainty. Contrast the decision of the Employment Tribunal in *Aslam* with that of the Central Arbitration Committee in *Independent Workerts Union of Great Britain*

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<sup>129</sup> "Nationality" is expressly provided for as falling within the definition of "race" at s.9(2)(b), EqA while an individual's language has been held by the EAT as similarly falling within the scope (*Kelly v Covance Laboratories Ltd*, [2015] UKEAT 0186\_15\_2010)

<sup>130</sup> A provision, criterion or practice which puts individuals sharing a protected characteristic at a particular disadvantage will not be unlawful where it can be shown "to be a proportionate means of achieving a legitimate aim" (s.19(2)(d), EqA)

*(IWGB) v RooFoods Limited T/A Deliveroo*, for example.<sup>131</sup> In both cases, the companies (Uber and Deliveroo respectively) have identical work allocation methods: individuals are offered and accept individual work assignments via smartphone app. However in the case of the former, the individuals were said to be s.230(3)(b) limb workers; while in the latter the individuals were held to be independent contractors. This uncertainty is a further case for reform and simplification of the position.

Further evidence of uncertainty can be observed in two recent judgments of the EAT. These decisions will briefly be considered by way of illustration; these are *Blakely v On-site Recruitment Solutions Limited & Heritage Solutions City Limited*<sup>132</sup> and *Dynasystems for Trade and General Consulting Limited v Mosley*.<sup>133</sup> *Blakely* concerned a tripartite relationship between a building contractor (H), a worker (B) and an employment agency (OS). On the face of it, B had been supplied by the agency, OS, to work for H. The EAT overturned the decision of the Employment Tribunal at first instance which found that B and H could not have intended to form legal relations separate to the legal relations formed between either B and OS, or H and OS. Such a line of authority potentially opens the door for tribunals to imply entire contracts where ostensibly none existed.

*Dynasystems* on the other hand concerned an employer operating under a “labyrinthine” corporate structure.<sup>134</sup> Despite having signed a contract of employment with one corporate entity, the claimant claimed that he had in fact been employed by another entity altogether. Applying *Autoclenz*, the employment judge held that the contract the claimant had signed with the first company could be disregarded as all the other facts were consistent with the claimant in fact having been employed by the second company. On appeal, the EAT refused to interfere with this finding. The effect of *Autoclenz* has in some respects added to the general uncertainty in respect of the law of employment status. The error of law identified by the EAT in *Blakely* was the Tribunal’s failure to consider using the discretion provided to first instance courts by the Supreme Court in *Autoclenz* to depart from the strict common law position of *James v Greenwich London Borough Council*.<sup>135</sup> The Court of Appeal in *James* had held that “the question of whether an “agency worker” is an employee of an end-user must be detailed in accordance with common law principles of

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<sup>131</sup> Case Number: TUR1/985(2016)

<sup>132</sup> Unreported, UKEAT/0134/17/DA

<sup>133</sup> Unreported, UKEAT/0091/17/BA

<sup>134</sup> *Ibid*, para.1

<sup>135</sup> [2008] ICR 545

implied contract and, in some very extreme cases, by exposing sham arrangements”.<sup>136</sup> The power of a tribunal to disregard contractual terms (or, in the case of *Dynasystems*, an entire contract) has thus created a twin-track approach to status tests which is entirely contingent upon the willingness of the particular tribunal to apply an *Autoclenz* disregard to a contractual term. Where a tribunal is willing, it has licence to construct the terms of the relationship in such a way as conforms with the factual reality; where the tribunal is not, the parties will be held to the stark formalities of the contract.

### 3.3: THE TUPE LACUNA

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) are a statutory instrument made under s.2(2) of the European Communities Act 1972 in order to give domestic effect to Council Directive 2001/23/EC. The 2006 regulations replaced the previous regulations made in 1981,<sup>137</sup> which themselves had given effect to an earlier European Council Directive (“the 1977 Directive”).<sup>138</sup> By the time the 2002 Directive came about, the provisions of the earlier Directive had been significantly expanded by the case law emanating from the ECJ.<sup>139</sup> The 2002 Directive gave legislative effect at EU level to this judicial expansion. The 1981 Regulations had been enacted by a Conservative government with a self-confessed “remarkable lack of enthusiasm”<sup>140</sup> and had suffered censure from both the House of Lords<sup>141</sup> and the ECJ.<sup>142</sup> By contrast, the 2006 Regulations would go beyond what was required by the 2002 Directive: case law from the ECJ began moving in the opposite direction to that which it had previously, notably in *Alemo-Herron & Others v Parkwood Leisure*.<sup>143</sup> Similarly in 2014, the coalition government moved to

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<sup>136</sup> *Ibid*, para.51

<sup>137</sup> The Transfer of Undertakings (Protection of Employment) Regulations 1981

<sup>138</sup> Council Directive 77/187/EEC

<sup>139</sup> For example, the case of *Spijkers v Benedik* ([1986] 2 CMLR 296) saw an attempt by the ECJ to set down a formula for defining an undertaking capable of transfer. The broad formula allowed the ECJ to hold that the Directive could have application where the identity of service providers changed. The British exclusion of non-commercial ventures from the scope of the 1981 Regulations was in line with the Directive was also deemed unlawful by the ECJ in the case of *Dr Sophie Redmond Sticking v Hendrikus Bartol and Others* (Case C-29/91), where it was held that regard should only be had to “whether the functions performed [following a purported transfer] are in fact carried out or resumed by the new legal person with the same or similar activities.” (Case C-29/91, para.2 I -3222)

<sup>140</sup> Bob Hepple, *The Transfer of Undertakings (Protection of Employment) Regulations*, (1982) *Industrial Law Journal* 11; 29, p.29

<sup>141</sup> *Lister v Forth Dry Dock Co. Ltd* ([1989] ICR 341, at 350 per Lord Keith)

<sup>142</sup> *Commission v United Kingdom* ([1994] ICR 664) which had found the 1981 Regulations to have failed to properly implement the 1977 Directive in 5 key areas

<sup>143</sup> [2014] 1 CMLR 21

trim “gold plating” from the Regulations.<sup>144</sup> that is, domestic provisions with protections “exceeding the requirements of EU legislation”.<sup>145</sup>

The current incarnation of TUPE, as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (“CRATUPE”), operates to protect the rights and employment of employees assigned to organised groupings of resources subject to a relevant transfer in terms of reg.3, TUPE. There are three ways by which these protections are achieved. First, reg.4 operates to recreate the contractual relationship the transferring employee had with the transferor, including “powers, duties and liabilities under or in connection with the contract,<sup>146</sup> in a new relationship with the transferee. Variations made to these terms made because of a relevant transfer which are not economic, technical or organisational changes entailing a change in the workforce (“an ETO defence”), will be void. Second, reg.7 makes dismissals because of a transfer automatically unfair, subject to the employer being able to demonstrate an ETO defence. Third, reg.13 imposed an obligation upon an employer to provide affected employees with prescribed information prior to a transfer taking place. Where the transferee envisages taking measures in connection with the transfer, the employer will also be subject to a duty to consult.

“Employee” is defined within TUPE as “any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services”.<sup>147</sup> The definition is therefore broader than that of “employee” within s.230(1), ERA, which restricts the definition to those working under a contract of employment (see above). Therefore, someone whose status is that of a s.230(3)(b) limb worker should in principle qualify for the protections of TUPE. There is however a difficulty: a quirk of the Regulations is that the first and second protections do not create any rights of action in and of themselves, but instead create statutory mechanisms by which rights of action conferred under other statutes will be breached: for example, where TUPE operates to void a purported contractual variation, payment at the lower rate will breach an individual’s right not to suffer unauthorised

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<sup>144</sup> The metaphor first seems to have entered the political lexicon in around 2004 ([http://news.bbc.co.uk/1/hi/uk\\_politics/3575556.stm](http://news.bbc.co.uk/1/hi/uk_politics/3575556.stm)), although it was not until after 2011 that its usage truly entered the political mainstream (<https://www.theguardian.com/business/2012/feb/28/david-cameron-economic-recovery-nerve>)

<sup>145</sup> Commission Communication: Review of the "Small Business Act" for Europe, COM(2011) 78 final, 23 February 2011

<sup>146</sup> Reg.4(2)(a), TUPE

<sup>147</sup> Reg.2(1)

deductions for which is a right she has under s.13, ERA. Her right of action will be under s.23, ERA. Similarly, where an individual is dismissed because of a transfer, it will breach her s.94, ERA right not to be unfairly dismissed. Her right of action will again be under s.111, ERA. Therefore in order to bring any claims, the individual must refer back to the status tests within the ERA.

This quirk removes the teeth not only from the reg.7 protection against dismissal because of a transfer, but also from the reg.4 protection of transferring contract terms. While any purported change to a term contained in a transferring contract will still be void, a transferee could circumvent this simply by only offering the transferring workers employment (in the reg.2, TUPE sense of the word) on new terms. As these new terms will be distinct contracts and not purported variations to existing terms, the voiding mechanism contained within reg.4(4), TUPE will not have effect. So while the provisions of TUPE apply to gig workers in principle, there is no way to enforce the reg.7 right and reg.4 is easily disarmed. The only real, enforceable right TUPE confers upon workers without employee status is the right to be informed and consulted in advance of a transfer.<sup>148</sup> This is a lacuna in the Regulations: individuals who habitually work for an employer under contracts of service but who lack the ongoing mutuality of obligations required to identify such an engagement as being under a contract of employment, are therefore considerably more vulnerable to dismissal and variation by incoming employers than employees.

In a gig economy context, this again places workers at a disadvantage compared to employees in traditional employment. While gig economy workers are not unique in only being able to establish s.230(3)(b), ERA limb status, this growing (and likely to grow further) constituency places this lacuna in the context of the policy debate surrounding status. TUPE's absence from the debate is likely a product of the fact that most of the high profile cases concern the boundary between s.230(3)(b), ERA limb and self-employed status (which unlocks only the basic worker protections of the ERA) rather than between s.230(3)(b), ERA limb workers and s.230(1), ERA employees. The extent to which this is a product of the requirement to establish a contractual nexus prior to establishing full employee status follows from the fact that the reg.4 and reg.7, TUPE protections are only enforceable through rights of action contained within the ERA. What is true for status tests within the ERA is therefore true of TUPE. By removing this contractual basis of this test and replacing it with a single status statutory test, this lacuna can be avoided. However,

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<sup>148</sup> Reg.13, TUPE

while such a test will mitigate the reg.7 difficulty, further reform to reg.4 will be required. Reg.4 operates by voiding purported variations made because of a transfer. If the underlying contractual position remains the same regardless of the status test, transferee employers may again simply offer the transferring employees work on similar terms. Consideration will be given in the final chapter as to how this problem can be solved.

### 3.4 COLLECTIVE RIGHTS

The focus of my comparison between gig workers and employees in traditional employment has thus far been confined to the individual legal protections (or comparative lack thereof) given to the worker enforceable against her employer. These individual rights do not however exist in a vacuum, but comprise only one aspect of worker protection. The other is the collective industrial pressure the worker and her colleagues can bring to bear. That a gig worker is in a weaker position than a comparable worker in traditional employment as far as individual rights are concerned is not necessarily a bad thing in and of itself, provided there is a corresponding increase in her ability to exert collective pressure on her employer. In this sense however the gig workers again fare worse than those in traditional employment. The reasons for this are both legal and organisational. Legally, the primary vehicle for protecting a worker's right to strike is through the law of unfair dismissal: the dismissal of an individual for taking part in official industrial action will be automatically unfair, provided the worker's trade union has complied with the consultation, notification and balloting requirements of TULRCA.<sup>149</sup> Even where the trade union has not complied with these requirements, dismissal for taking part in official industrial action will be automatically unfair unless the employer dismisses every striking worker, adding a further layer of collective protection.<sup>150</sup> The law does not however provide a similar prohibition on subjecting a worker to a detriment short of dismissal for her having taking part in industrial action.<sup>151</sup> The legal protection is therefore only as good as a worker's right not to be unfairly dismissed; again, where a worker cannot show that she works under a contract of employment, she will not qualify for the right and, in consequence, will receive little statutory protection if she engages in industrial action. The

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<sup>149</sup> s.238A, TULRCA

<sup>150</sup> s.238, TULRCA

<sup>151</sup> The protection from detriment contained within TULRCA (s.145A to 145F) is qualified by the condition that the trade union activities are carried out "at an appropriate time", which is defined as a time "within his working hours at which, in accordance with arrangements agreed with or consent given by his employer", which would likely disapply the protection in the event that a worker was taking part in industrial action

sole statutory protection available to striking gig workers is under the Employment Relations Act (Blacklists) Regulations 2010 (“the Blacklisting Regulations”), which prohibit employers from keeping lists containing “details of persons who are [...] taking part or have taken part in the activities of a trade union”.<sup>152</sup>

Further to these legal difficulties, certain organisational and physical features of platform businesses also militate against workplace organisation. Trade unions have “failed to organise [...] and to gain recognition for collective bargaining purposes”, reflecting an “inability to organise [...] in the new kinds” of workplaces along similar lines to the organisation in industrial workplaces.<sup>153</sup> The allocation of work by app deprives workers of a central, physical hub where they otherwise might be able to congregate and form “the communal ties” that are often necessary for collective action.<sup>154</sup> Similarly, the “ratings” systems discussed above, whereby the likelihood of work being assigned to a given gig worker is based on feedback received from customers, may serve to punish workers involved in industrial action, as they will not be assigned (or will not accept) work during the period of strike. Failure to either accept or carry out tasks will result in workers being assigned less work or even having their account deactivated altogether. Either outcome provides a powerful disincentive for individuals to attempt to negotiate with the threat of industrial action. These are the sticks to discourage striking. There are also carrots: the ultra-market responsive nature of wages to any supply/demand fluctuations in the gig economy almost always works in the employer’s favour; companies that employ casual labour only do so because there exists an excess supply of labour. An excess demand for labour would mean companies would routinely struggle to fill positions. Under these circumstances, engaging as many workers as necessary under full contracts of employment would ordinarily be the reaction of a rational employer, as it would guarantee certain levels of staffing while allowing the employer to benefit from a status trade-off, whereby workers accept a lower wage in exchange for the actual and potential benefits of employee status. The only time this will not hold true is where the excess demand for labour is only in the short term; such as would be the case where strike action was being taken. Under these circumstances, strike-breaking employees may be able to exact a salary premium for continuing to work. Contrast this with the position of a strike-breaking employee in traditional employment, who will receive the same salary irrespective of whether her

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<sup>152</sup> Reg.3(2)(a), the Blacklisting Regulations

<sup>153</sup> Stephen Machin, *Union Decline in Britain*, Centre for Economic Performance, April 2000, p.6-7

<sup>154</sup> Rodgers, Brishen, *The Social Costs of Uber*, the University of Chicago Law Review Dialogue, [2002] 82:85, 85 – 102, p.100

colleagues are taking industrial action. The “strike-break premium” therefore locks gig workers into a prisoner’s dilemma with each other: where no workers strike break, all the workers will reap the benefits of their collective stance; however, where even a handful of workers strike break, the collective position will be fatally undermined, leaving the non-strike breakers with nothing while the strike breakers benefit from the strike-break wage premium.

While smartphones and gig working may be relatively recent phenomena, casual labour is not. Neither, for the reasons set out above, is trade unionist opposition to its use. Fee-charging employment agencies have long been perceived by the movement as being “a threat to the substantive and procedural interests of unionised workers [...who] undercut terms and conditions, promote the growth of temporary work, undermine collective bargaining and supply strike-breakers.”<sup>155</sup> The readily substitutable nature of much of gig work makes the workers again vulnerable to being replaced by strike-break agency staff. Some of the failure of the trade union movement to break significant ground in the new, post-industrial sectors in the UK is no doubt attributable to these organisational challenges to collectivism.

All of this is problematic, particularly insofar as the right to strike is now recognised as forming part of UK’s domestic code in consequence of British membership of both the EU and ECHR.<sup>156</sup> While the right for gig workers to join and, at an appropriate time, to participate in the activities of a trade union are, in theory, protected by law, such rights are futile if the workers’ bargaining position is not reinforced by their having ultimate recourse to industrial action. The absence of such a threat fundamentally undermines the worker-side negotiating credibility. The UK may therefore, despite having neither infringed nor (at least nominally) failed to safeguard these rights, remain in default of its obligations under both EU and ECHR. This is the case not only for gig workers, but also for casual work as a whole. As such, the lacuna between the UK’s supranational obligations in respect of industrial relations law and its execution predates the rise of platform work.

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<sup>155</sup> Heery, Edmund, *The Trade Union Response to Agency Labour in Britain*, 2004 *Industrial Relations Journal* 35.5, at p.438

<sup>156</sup> Art.28 of the Charter of Fundamental Rights

### 3.5: CONCLUSION

This chapter has considered three separate areas where the protections available to gig economy workers are weaker than those available to workers in traditional employment. Even where gig workers can establish s.230(3)(b) limb status, they still receive much diluted protection following either a business transfer or industrial action. In large part, this is due to the lack of unfair dismissal protection; the protections of both TUPE and TULRCA are reinforced by creating automatic breaches of the s.94, ERA right not to be unfairly dismissed. The solution must therefore be to remove the two-tier gradation of rights and extend the right not to be unfairly dismissed to all workers.

The status test proposed in the following chapter will seek to achieve this by creating a single status of employment, divorced from the contractual nexus. The mere act of giving gig workers this right will not, of itself, remedy the issues considered in this chapter. This is because the definition of “dismissal” contained in the ERA is predicated on the termination of a contract.<sup>157</sup> The proposal will therefore also include a consequential amendment to this definition. In so doing, all workers will receive the full legal protections considered in this chapter. It will also lift gig workers into the s.103A, ERA protection from dismissal because of their having made a protected disclosure. This should have a wider social benefit: in order to qualify for this protection, the individual must have made the disclosure “in the public interest”.<sup>158</sup> The fact that there is currently no protection offered to gig workers reporting unsafe or illegal goings on in the gig economy should be a concern. This consequential amendment will be discussed in full below.

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<sup>157</sup> s.95, ERA

<sup>158</sup> s.47A, ERA

## CHAPTER 4

### 4.1: FUTURE REFORM AND THE PROBLEM WITH TAYLOR

In the foregoing chapter, I sought to build on the legal analysis advanced in the earlier chapters to provide a critique of both the structural and doctrinal soundness of the contract-status based hybrid nature of employment law. There were two elements to the structural critique. The first were the contradictions and shortcomings replete in the current status tests. The second was the ease with which employers, whether by accident or by design, have been able to circumvent these tests and deprive individuals providing labour for them of employment rights, both in terms of the full gamut of employee protection and the weaker protections afforded to workers. My doctrinal critique considered normative issues of both the lack of legal certainty and the unfairness inherent in allowing some individuals to be deprived of statutory rights on an arbitrary basis. Both in collective and individual protections, gig workers fare worse than those in employment. I have argued that while evolutionary reform may address some of the doctrinal issues in the meantime, the contractual basis of the relationship creates a fundamental structural weakness that can only be overcome by removing the contractual qualification from the statutory protections altogether. This chapter will present a conceptual basis for this new relationship.

A theme which has run through this thesis is the hybrid nature of employment law: that is, that the rights, duties and obligations incumbent upon parties involved in a working relationship are derived from both contract and statute. Of itself, a hybrid is not problematic. There are many areas of Scots law which combine both statutory and common law elements; the criminal law, for example, similarly draws upon both sources; an individual may be accused of both murder and rape under the same indictment, the former being a common law offence and the latter being statutory.<sup>159</sup> The difficulty with the employment law hybrid, I have argued, is that there is a statutory bridge between the two. This bridge is the contract of employment. This chapter will argue in favour of retaining the hybrid system, but removing the statutory bridge between the two.

While the contract of employment as the legal hook into statutory protection has always had the potential to be problematic, the gig economy has allowed this to escalate. Policy attempts to address these problems have been flawed in two respects. The first is that they

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<sup>159</sup> *Drury v HM Advocate* (2001 SCCR 538) and s.1 of the Sexual Offences (Scotland) Act 2009

have been evolutionary rather than revolutionary: the creation of a half-way status (the ‘s.230(3)(b) limb’ workers) mitigated rather than solved the problem. It also led to the creation of a two-tier workforce, as those with only half-way status would only benefit from some of the statutory protections. Another such evolutionary change was the Supreme Court’s decision in *Autoclenz*, which allowed courts and tribunals to disregard express terms in contracts of employment in certain circumstances. As argued above however this change has only led to further confusion and greater inconsistency. The proposal set out in this chapter seeks a clean break and removes the contractual vestige from the statutory test altogether.

The second is that the approach has been reactive rather than proactive: changes in the law have occurred only in response to changes in technology or workplace norms. None of the employment law changes have sought to anticipate market disruptions and plan ahead accordingly. To some degree, this has been mitigated by the commendable flexibility of the current approach. The proposed test will seek to retain this flexibility, but is designed with atypical workers in mind. The speed with which app based companies have come to dominate particular markets is a warning to both employees in other industries and policy makers.<sup>160</sup>

The Taylor Review published its recommendations in July 2017. The review had been commissioned by the Conservative government with a view to “tackling exploitation [...]; increasing clarity [...]; and aligning [the] labour market with [the] modern industrial strategy”.<sup>161</sup> Despite the high rhetoric, the recommendations were underwhelming. The main proposals included codification of the current common law status principles into legislation, purportedly with a view to making the test “simpler, clearer and to give individuals [...] a greater level of certainty”;<sup>162</sup> renaming s.230(3)(b) limb workers as “dependent contractors”, purportedly (and somewhat confusedly) to reflect the growth in the number of “independent relationships” outwith those of traditional employment;<sup>163</sup> and giving workers with no guaranteed hours “the right to request” a contract with fixed hours after one year.<sup>164</sup> None of these proposals get to the root of the problem. The first two are entirely cosmetic: in the absence of any explicit proposals as to how the test could be

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<sup>160</sup> Stephen Devlin, *Massive Surge in London’s Gig Economy*, New Economics Foundation, 2016, <http://neweconomics.org/massive-surge-londons-gig-economy/>

<sup>161</sup> Taylor Review, *ibid*, p.8

<sup>162</sup> *Ibid*, p.34

<sup>163</sup> *Ibid*, p.35

<sup>164</sup> *Ibid*, p.48

simplified, statutory codification simply takes confusing case law and transposes it into confusing legislation; similarly, re-branding s.230(3)(b) limb workers will, of itself, achieve little; a worker by any other name would still have no right not to be unfairly dismissed. The third is toothless. The right to request fixed hours already exists for individuals as citizens of a free and democratic society. Unless the right creates an obligation to accept under certain circumstances, then it is of little substantive import.

## 4.2 REPATRIATION OF EMPLOYMENT LAW INTO SOCIAL POLICY

In the opening chapter, I considered the issue of contracts of adhesion. I defined a “contract of adhesion” as being a contract characterised by two factors. The first was that there is an imbalance of power between the contracting parties. The second was that the weaker party is under an obligation to contract due to one or more legal, economic or cultural requirements: so while an individual has the freedom to choose with which insurance company she decides to insure her car, she is not free to drive her car unless she contracts with at least one of them. In the context of employment, this requirement arises in consequence of the cultural and economic requirement for each household to carry out some form of remunerated economic activity. Again, while households may chose to enter self-employment, the practical reality for many occupations is that this is simply not a workable or desirable option. The primary purpose of employment law is to mitigate the first factor; that is, to redress the power imbalance between the employer and employee. While the remainder of this chapter will argue in favour of removing the contractual basis from the status test altogether (and, in consequence, negating the problems caused by a contract of adhesion), I will first briefly consider a solution which would mitigate the second factor; that is, the cultural and economic requirement for each household to work.

The Universal Basic Income (UBI) is “an income paid by a political community to all its members on an individual basis, without means test or work requirement”.<sup>165</sup> By providing individuals with an income that is not dependent on the work requirement, those who chose to work under a contract for services do so in a manner that is truly voluntary. As

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<sup>165</sup> Pp.6, Philippe Van Parijs, *Basic Income: A Simple and Powerful Idea for the 21<sup>st</sup> Century*, published in “Redesigning Distribution: Basic Income and Stakeholder Grants as Alternative Cornerstones for a more Egalitarian Capitalism”, The real Utopias Project, Vol. 5, OPU Catalogue, 1996

such, the individual inherits not only the freedom *of* contract, but also the freedom *to* contract. The individual should therefore be in a stronger position to negotiate the terms upon which she provides her labour than when she has no choice but to work. The provision of UBI should also, in theory, mitigate the social impact of bad employment practices, thus allowing for a relaxation in the current regulatory regime surrounding employment law and giving businesses greater freedom as to how they form and regulate their relationships with workers.

A more in depth analysis of UBI is beyond the scope of this thesis however it is mentioned for the purpose of illustrating a further point: the problems caused by precarious employment are both social and individual. When the Beveridge report was published in 1942,<sup>166</sup> it placed the employment relationship within the context of the social contract between citizen and state: the citizen works and contributes taxes, and in return the state will educate her children, take care of her when she is sick and make provision for a financial safety net during periods of involuntary unemployment. Since this time, however, employment policy and employment laws have migrated away from the Rousseauvian paradigm and instead form part of the government's economic strategy.<sup>167</sup> This may, in part, explain the difference in both impact and scope between Beveridge and Taylor. Workers today are regarded in policy terms as being one interested party in a three-stakeholder business matrix. The role of government employment policy is to find a balance between the competing interests of these three stakeholders which is conducive to economic growth. The other two interested stakeholders are shareholders and creditors. Shareholders invest in companies. This investment, in turn, drives economic growth. Limited liability is the ultimate shareholder protection as it limits the level of personal exposure shareholders have in respect of both creditors and workers in the event the companies they have a stake in become insolvent. Creditors help stimulate growth in companies, as they allow companies to invest in capital stock and labour inputs beyond the value of the company's cash reserves. Creditor protection is provided by a variety of legal tools, including the right for creditors to apply for a company to be placed into insolvency,<sup>168</sup> the facility for creditors to have securities and floating charged granted in their favour and the imposition of a range of statutory duties upon company directors,

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<sup>166</sup> Beveridge report, *supra* 21

<sup>167</sup> As testament to this, see how legislative competency fits within the portfolio of the Department for Business, Energy and Industrial Strategy

<sup>168</sup> s.1, the Insolvency Act 1986

including to have regard to the interests of the company's creditors.<sup>169</sup> The third group in this balance are the workers. Statutory employment laws protect workers against the interests of the company (the legal embodiment of the shareholders) while the common law duties of fidelity and faithful service provide the company with reassurance and grounds for separation from the workers.

Any fundamental re-working of employment law should therefore retain, at its core, the principle that employment protections are a social imperative rather than simply a counterweight to the interests of big business. The necessary effect of this however is that the rights of businesses to arrange affairs on their terms will be curtailed to some extent. This may be politically unpopular and would certainly buck the trend of recent European case law which has placed the right of an individual to run a business alongside the workers' rights.<sup>170</sup> There is a context and a social need for this however: in the introductory paragraphs, I drew an analogy between the first industrial revolution and the current, ongoing gig-working revolution. This analogy only gets us so far. There are a number of crucial differences between these two events. In the first industrial revolution, the creation of labour saving devices such as the mechanised looms and the steam engine, allowed the cost of production to be significantly reduced. The creation of such machines along with both the capacity to mass produce and the willingness of countries to share technology across international borders created a genuine and global market disruption. By contrast, the smartphone revolution has done very little to decrease non-labour production costs: the price of driving someone in a car and driving them from A to B has not been significantly reduced by the advent of the app-based ordering service. Replacing the telephone operator with a downloadable app will likely have a negligible impact on the overall cost of production, as the marginal cost of a telephone operative for each journey is small and these costs will have been replaced to some extent with the cost of developing, maintaining and marketing the app. The primary advantage to a business of hiring gig workers is that it creates ultra-efficiency in its labour costs: by making "employment and wages more flexible, gig employments shift the risk of economic fluctuations onto the workers", allowing employers to increase and decrease staffing levels to precisely match demand.<sup>171</sup>

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<sup>169</sup> s.172(3), the Companies Act 2006

<sup>170</sup> See, for example, *International Transport Worker's Federation and the Finish Seamen's Union v Viking Line ABP* ([2008] IRLR 143), *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ([2008] IRLR 160) and *Alemo-Herron v Parkwood Leisure* ([2013] ICR 1116)

<sup>171</sup> Gerald Friedman, *Workers Without Employers: Shadow Corporations and the Rise of the Gig Economy*, Gerald Friedman, Review of Keynesian Economics, Vol.2 No.2, Summer 2014, p.172

The market disruption caused by the smartphone revolution has therefore been achieved largely by paying those providing labour less rather than by any genuine innovation.

This should be regarded as separate and distinct from technological advancements which achieve gains in efficiency through increased automation. Such advancements represent genuine innovation. Workers in certain roles will undoubtedly lose jobs and suffer a reduction in their bargaining power (resulting in lower wages) in consequence however there is little political will or social impetus to stifle such innovation.<sup>172</sup> Further, it is difficult to identify a way in which such advancements could be deterred by changes in employment law: the most obvious solution would appear to be through the imposition of a “robot tax” upon companies making use of automation.<sup>173</sup>

The gains in efficiency caused by atypical working relationships make workers’ rights in any industry vulnerable. In any given industry, a company is only required to find a workable formula for the digital allocation of work and obtain a critical mass of market capitalisation. It can then rely on market forces to achieve dominance.

None of this is to say however that there cannot be a business case made for this proposed rationalisation of the test for employee status. There are two arguments in favour. The first is certainty. A growing number of business models will find themselves in a position where they are unable to determine with any degree of certainty whether they are engaging employees, workers or self-employed contractors to carry out work on their behalf. In some cases, this uncertainty will only be definitively answered upon exhaustion of the UK’s appellate court structure. Businesses like certainty, even in cases where there is a premium by way of increased regulation to be paid. This was evident in responses to the coalition government’s consultation in advance of the 2014 amendments to TUPE: proposals to remove the service provision change (“SPC”) were roundly rejected by business respondents who broadly considered that the benefits [of SPC], in particular the legal certainty [...], outweighed potential benefits that may arise from their removal.”<sup>174</sup>

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<sup>172</sup> See, for example, the “driver only” train dispute between the trade union ASLEF and Southern Railways in 2016. The worker side concerns focused largely on risk such automation posed to both health and safety of customers and the effect it would have on disabled customers, as opposed to the effect it would have on jobs in the industry, see <http://www.theguardian.com/technology/2016/dec/17/robotic-technology-advances-ousting-white-collar-workers>

<sup>173</sup> For a summary of the arguments for and against, see VP Vishnevsky & CD Chekina, *Robot vs. Tax Inspector, or How the Fourth Industrial Revolution will Change the Tax System*, Journal of Tax Reform, 2018

<sup>174</sup> *Ibid*, para.4.2

The current glut of case law in relation to employee status is reminiscent of the state of the law in relation to disputed transfers immediately prior to the enactment of the SPC provisions; the law was, according to the EAT, “in a state of critical uncertainty. It [was] almost impossible to give accurate advice to employees, trade unions, employers or others involved in possible transfers with any degree of certainty.”<sup>175</sup> A similar rationalisation of the status tests providing greater certainty of outcome would assist businesses with planning and financing their models.

The second is consistency. The ability of one business to gain a competitive advantage over another solely by manipulating the contractual status of its workers is not only unfair to the workers, but also to the businesses in competition with it. Businesses who engage workers under contracts of employment will find themselves with no way of competing other than to ape the manipulations of their competitors. By closing off the loopholes caused by the vagaries and inconsistencies in the current law, businesses will compete with each other on a level playing field.

### 4.3: RETURN TO A TWO TIER STATUS

As alluded to earlier in this chapter, the advent of the s.230(3)(b) limb worker status extended protection for certain statutory rights to those who were not working under contracts of employment but who nonetheless contracted to personally provide labour. The advent of this status protected workers from some of the most egregious abuses of their employment rights, such the non-payment of wages and their being dangerously overworked.<sup>176</sup> It stopped short of providing the financial security of the end-of-employment protections contained within the ERA. It also left these workers vulnerable in the event of their being assigned to an organised grouping of resources undergoing a relevant transfer in terms of reg.3 TUPE. Workers are also locked out of the benefits of maternity leave and shared parental leave; indeed the partners of workers will, under some circumstances, also be locked out of being able to take advantage of shared parental leave.<sup>177</sup>

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<sup>175</sup> *Complete Clean Ltd v Savage*, [2002] All ER (D) 277, at para.10

<sup>176</sup> Part 5, Chapter 1 of the EqA, Part II of the ERA and the WTR, respectively

<sup>177</sup> The exception to this is where the mother is classified as working self-employed

The Taylor Review began by setting out “seven steps towards fair and decent work”, the first two of which read respectively that “the same basic principles should apply to all forms of employment” and that for individuals involved in “platform based working [s.230(3)(b) limb] worker status should be maintained”.<sup>178</sup> This is a contradiction in terms. Maintenance of the three tier structure will by definition provide greater levels of protection to some forms of employment than to others. My proposal in this chapter test seeks to go beyond Taylor and argues in favour of a single employment status.

The creation of a single status will provide gig workers with the right not to be unfairly dismissed. As discussed in the previous chapter, the lack of unfair dismissal protection has a knock-on effect for other protections. Extending the right to all gig workers will provide them with meaningful protection in the event of a transfer or industrial action; two of the areas considered in the previous chapter where legal protections for gig workers were lower than those in traditional employment.

This will of course create a further difficulty: under the current ERA scheme, in order to exercise end-of-employment rights, the individual seeking will not only have to demonstrate that she was employed under a contract of employment, but also that that contract was terminated, whether by the employer, by expiry or by her in circumstances where she was entitled to do so.<sup>179</sup> Without a contract, there can be no termination; without a termination, there can be no dismissal; without dismissal, there cannot be a breach of either the right not to be unfairly dismissed or the right to a redundancy payment. This presents a legal challenge. This challenge and the proposed solution will be considered in detail below.

## 4.4: THE STATUTORY TEST FOR EMPLOYMENT STATUS

### 4.4.1: THE ROOT

Thus far, I have argued that the current statutory test for employee or worker status is in need of reform. In particular, I have criticised the contractual basis of the test for status. The remainder of this chapter will concentrate on the creation of a new test for employment status. There is nothing in Scots law which prevents individuals from forming

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<sup>178</sup> Taylor Review, *ibid*, p.9

<sup>179</sup> S.95 for the right not to be unfairly dismissed and s.136 for the right to redundancy payment

relations with and discharging obligations in respect of one another which are not based on contract. In the case of *Dow v Tayside University Hospital NHS Trust*<sup>180</sup> for example, it was held that a pursuer was not entitled to damages against her doctor under the law of contract as contractual relations had not been formed. The relationship was based on the duty owed by the defender to the pursuer imposed by statute<sup>181</sup> rather than pursuant to any obligations voluntarily entered into between the parties. While this statutory relationship was not to the absolute exclusion of the parties forming separate contractual relations, the principle did “no more than leave the door [...] slightly ajar”<sup>182</sup> and “any additional contract [...] would require to be expressed in clear terms”.<sup>183</sup> Applying this reasoning to the statutory based employment relationship, parties would still be free to engage in contracts which fit the current definition of a contract of employment.

The proposed test is based on a number of principles. The most important of these will be the removal of the discretion to determine the character of any relationship away from the parties themselves and giving it to the tribunal. In essence, it will complete the task which began with *Ready Mix Concrete*. The justification for this is that in practice the terms of a contract of employment are rarely negotiated freely between the parties but are ordinarily set by the employer. The contractual scheme has allowed employers to include terms which sought to deprive individuals of their status, either as workers or as employees. Prior to *Autoclenz*, there was little scope for challenging these terms. Even after *Autoclenz* however, courts still appear reluctant to disregard express contract terms (see, for example, *Deliveroo*). The second principle is that, where an individual works for another in an employment relationship, her statutory rights should not be any less than those of any other individual in employment on the basis of a highly technical term buried within a contract, particularly where that term has been put there in order to deprive her of those rights in the first place. The purpose of the proposed test is not to put gig economy workers in a position which is advantageous to individuals working under traditional and obvious contracts of employment, but merely to bring them into line with those workers. The third is that balance should be struck which still provides employers with a degree of flexibility. Similar to the second principle, the purpose of the proposed test is not to unduly punish gig economy employers, but to simply bring their statutory obligations into line with those of other employers. The fourth is functionality. The more Byzantine statutory provisions

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<sup>180</sup> 2006 SLT (Sh Ct) 141

<sup>181</sup> The National Health Service (Scotland) Act 1978

<sup>182</sup> *Dow*, at para.19

<sup>183</sup> *Dow*, at para.20

become the more difficult they are to enforce. The proposed test therefore seeks to avoid unnecessary formality; for example, using a “reasonableness” qualification rather than prescribing values such as time or quantities of work.

The first subsection of the proposed test will read as follows:

*“A person, A, is an employee of another, B, where B has offered to provide, and A has agreed to carry out and has carried out, work in an employment relationship”*

There are four basic elements to this definition: the first is that B must have offered to provide work. It is not anticipated that this offer requires to be bespoke to A. By sending out offers of work on a digital platform, an employer is offering to provide work, even if the precise identity of A is not known at the time the offer was made; the second is that, following this offer, A must have agreed to carry out the work. The basis of the statutory test will therefore retain the contractual character of an “agreement” between two parties (*“where B has offered to provide and A has agreed”*), but shorn of the common law baggage associated with the law of contract. The basic bilateral character of the contractual relationship has also been retained, subject to the implications of the below discussion in respect of agency workers; the third is that, while the agreement by A to carry out work for B is the genesis of the employment relationship, it must be consummated by A actually carrying out the work. There is no requirement however that the work be carried out for B. The test is therefore broad enough to cover employment agencies. The linguistic vehicle for this is by use of the verb “to carry” in its past imperfective tense (*“A [...] has carried out”*). The purpose of using the past imperfective as opposed to the past perfective (that is, *“A carried out”*) is to connote the ongoing nature of the relationship. In some senses, this limb evokes the requirement for mutuality of obligations as its original form by Elias J in *Stephenson*, as discussed above; that is, it is simply a test for some form of ongoing relationship (in the case of *Stephenson*, a contract of employment), rather than being determinative of the type of contract in consideration (which a zero hours’ clause in a contract seeks to achieve). What a tribunal will be attempting to establish in these cases is whether or not there is or was an ongoing relationship between the two parties; the fourth is that the work must have been provided *“in an employment relationship”*. The proposed test will not contain an exhaustive or prescriptive definition of what and what is not *“an employment relationship”* however it is proposed that the following subchapter should contain a list of factors a tribunal must have regard to when determining whether or not the

relationship between A and B is one of employment. The proposed content of this subsection will be considered in the following subchapter.

#### 4.4.2: “AN EMPLOYMENT RELATIONSHIP”

While the test for whether or not one individual is working for another is contained within the first three limbs of the proposed test set out above, the fourth will be the key to determining whether or not he is working as an employee or in some other capacity. It is proposed that a checklist of factors which a tribunal must have regard to is set out in a separate subsection. This element of the test for status has sought to retain the essential freedom of the tribunal to use its discretion in order to determine whether or not any given working relationship is one of employment or not. For this reason, I have avoided using any prescriptive approach other than to require the tribunal to have regard to certain factors.

*In determining the question of whether or not a relationship is an employment relationship for the purposes of subsection (1), regard shall be had to-*

- (a) The terms of any document relating to the relationship between A and B, including:
  - (i) The terms of any written agreement between A and B;*
  - (ii) The terms of any collective agreement between B and a Trade Union representing a bargaining unit of which A is a member;*
  - (iii) Any policies produced by B in order to govern its relationship with A;*  
*and*
  - (iv) Any other relevant document;**
- (b) Whether or not there is a clear expectation that A will carry out the work personally;*
- (c) The degree of entrepreneurial freedom A has as to the manner in which he carries out the work;*
- (d) The nature of B’s business;*
- (e) Any other relevant circumstances consistent with an employment relationship.*

*In considering any term contained within any document for the purposes of (a)(i), regard should be had to the relative bargaining power between A and B at the time the terms of those documents were either agreed, amended or came into force.*

The structure of this subparagraph of the test borrows heavily from the statutory test for unfair dismissal.<sup>184</sup>

#### 4.4.2.1: “THE TERMS OF ANY DOCUMENT”

As discussed in the previous chapter, the *Autoclenz* test is a constructive tool, exclusive to contracts of employment and service, developed by the Supreme Court, which allows tribunals to ignore express contractual terms under certain circumstances.<sup>185</sup> A distinction should be drawn at this point between the contract of employment as a legal concept, which comprises the entire body of rights, duties and obligations existing between an employer and an employee; and the contract of employment in the narrower sense of a written document bearing the title “contract of employment”. The latter is perhaps a misnomer: the document is not the contract but merely a written record of the terms the parties have agreed to contract upon. A general principle of contract law is that parties will be bound by the terms of any written agreement (see above). *Autoclenz* allows a tribunal to disregard terms contained with written agreements under certain circumstances by having regard to the relative bargaining power of the parties.

This consideration alone cannot be determinative of the enforceability of any contractual provision: many commercial contracts are characterised by an imbalance of power: where a large local authority procures services from a self-employed electrician, the local authority will be in stronger position. Similarly, where a dairy farmer agrees to sell milk to Tesco, it will be the supermarket who largely dictates terms. Conversely, many contracts of employment are not characterised by an imbalance of power: an exceptionally talented soccer player, for example will be in a position to negotiate terms above and beyond her salary (for example, the squad number she will wear or the existence of a buy-out clause). The purpose of the test should instead be to identify whether the relationship more closely resembles a contract of adherence rather than a genuine contract freely negotiated between two parties. In the examples given above of commercial contracts characterised by an imbalance of power, while the more powerful side may be in a position to negotiate a price

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<sup>184</sup> s.98(4), ERA: “the determination of the question whether the dismissal was fair or unfair [...] depends on whether in the circumstances [...] the employer acted reasonably or unreasonably [...] and shall be determined in accordance with equity and the substantial merits of the case”

<sup>185</sup> *Autoclenz*, at para.35

that is more favourable to them, it is unlikely that they will exhibit any other features of a contract of employment: the contract between the self-employed electrician and the local authority, for example, will likely not include a disciplinary policy that the electrician agrees to subscribe to; the farmer will similarly not be likely to have to operate a punch-card.

The significance of *Autoclenz* is rooted in the primacy of the contracts of employment and service (and hence to written agreements which purport to record their terms) to the current test for status. The proposed test will remove the primacy of the contract to status however will seek to retain the utility of written records as a guideline to what the true agreement was; more often than not, a written record will be a fair truthful reflection of the relationship between the parties. The first paragraph of the above subsection therefore requires regard to be had to the terms of “*any document relating to the relationship between A and B*”. Sub-paragraphs then go on to list particular documents or types of document that should be considered, including any agreement between A and B directly. The *Autoclenz* approach should be retained as an interpretative tool for this limb of the statutory test.

Sub-paragraph (ii) concerns collective agreements between the employer and any trade union negotiating terms on the employee’s behalf. “Collective Agreement” will have the same statutory definition as contained within s.178, TULRCA. Again, the nature of the inquiry is not to treat one factor as being determinative, but to amass as many relevant facts as possible and reach a conclusion. The presence (or indeed absence) of a collective agreement should assist in this endeavour.

Sub-paragraph (iii) requires the tribunal to consider any documents produced by B in order to govern its relationship with A. Where matters such as standards of conduct and possible sanctions for failing to attain those standards have been committed to writing by one party, it will tend to show in favour of the relationship being one of employment. This consideration links in with the issue discussed above of “contracts of adherence”; while disciplinary policies are almost ubiquitous for employees of medium size and large firms, they are a relative rarity as addenda to commercial contracts. Codes of conduct and dress codes are, of course, not the exclusive preserve of employment relationships; a golf club may, for example, have written guidelines as to standards of dress and behaviour, and retain the right to expel or exclude members for breach of those standards. The mere

existence of a disciplinary policy will therefore never be determinative in and of itself of status, but it is a further factor that anybody should have regard to in assessing status.

The final sub-paragraph directs a tribunal to have regard to any other relevant. This is a catch-all, to prevent the scope of the inquiry being artificially narrowed by overly-prescriptive statutory draftsmanship.

#### 4.4.2.2: “CLEAR EXPECTATION” OF PERSONAL PERFORMANCE

The deciding factor in the *Deliveroo* case was that the CAC found the riders’ right of substitution to have been genuine, absolute and unfettered.<sup>186</sup> The panel did however remark that this feature had “puzzled [them] considerably”.<sup>187</sup> In order to subcontract any particular task, the rider would have to trust the person to whom he was substituting both with her mobile phone and with the equipment she had leased from the company. Further, it was not clear to the CAC why this right either existed or was used: it could not identify any particular incentive to substitute either on the part of the rider or the person to whom she was substituting. It would not make sense for the substituter to take a percentage of the fee paid to the substitutee, because the substitutee could increase their fee by simply contracting with *Deliveroo* directly. Even if they did, each individual can only engage with the company once, so there are no economies of scale which can be taken advantage of. It also made little sense to the company, insofar as it would make “a mockery of the extensive training given to riders”.<sup>188</sup> The existence of this curious right however was sufficient to score a technical victory for the company. The riders were therefore held to be self-employed and not workers.

The outcome was arguably correct under the law as it stands.<sup>189</sup> The personal service requirement has existed in the definition of a contract of employment since the *Ready Mix Concrete*.<sup>190</sup> This does not however make it sacrosanct. By permitting the mere existence of this right to be determinative of the riders’ status, regardless of how widely it was known about or how infrequently it would or could be used, the court failed to take

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<sup>186</sup> *Deliveroo*, para.100

<sup>187</sup> *Deliveroo*, para.97

<sup>188</sup> *Deliveroo*, para.97

<sup>189</sup> The decision in *Devlieroo* pre-dates the Supreme Court’s endorsement of the “dominant feature” test in *Pimlico* (see above). The CAC may conceivably have found differently if the case was heard today

<sup>190</sup> [1968] 2 QB 497; see also *MacFarlane v Glasgow City Council* [2001] IRLR 7 and *Pimlico Plumbers*

account of the reality of their relationship with the company. The riders were not self-employed in any meaningful sense of the words: they wore the uniforms of the company and subscribed to the company's rule book; they could not negotiate with either customers or with the company over the fee for any particular task; and they could not offer customers or the company special deals to incentivise trade (for example, discounts on a particular day of the week or free delivery where the customer has had to wait a certain length of time). The sole means by which an individual rider could increase her salary was by working longer hours. In all the circumstances, the entrepreneurial freedom of the riders was restricted by the company. Indeed, the only feature consistent with self-employment was the riders' little known ability to sub-contract. The personal performance requirement allowed all other factors indicating a working relationship to be overruled.

Since the CAC's decision in *Deliveroo*, the issue of personal performance has come before the Supreme Court in *Pimlico Plumbers and Another v Smith*.<sup>191</sup> Giving the leading judgment, Lord Wilson affirmed that the "sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test."<sup>192</sup> The judgment does however go on to suggest that in certain cases "it might be helpful to assess the significance of [a purported worker's] right to substitute [...] by reference to whether the dominant feature of the contract remained personal performance on [the purported worker's] part."<sup>193</sup> The personal performance requirement therefore remains absolute, although it may, on occasion, be assessed in light of this "dominant feature" consideration. At the time of writing, the Supreme Court's decision in *Pimlico* is very recent. The effect (if any) the "dominant feature" consideration will have on decisions at first instance is unclear. At one extreme, tribunals may take the view that the consideration will always be trumped by the requirement for personal performance (the "sole test"); at the other, tribunals may regard such authoritative approval for the "dominant feature" consideration as grounds to treat a substitution clause as a mere contractual right available to a worker rather than being descriptive of the basis of the parties' relationship.

The spirit (if not the substance) of the decision in *Pimlico* is in keeping with the Supreme Court's earlier decision in *Autoclenz*, in that it exhibits a willingness to single out terms contained within contracts of employment (or of service) as distinct cases within the law of

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<sup>191</sup> [2018]UKSC 29

<sup>192</sup> *Ibid*, para.32

<sup>193</sup> *Ibid*, para.32

voluntary obligations where the strict formalism of contract is not as robustly enforced. Such decisions help widen the net of employment protections, as it allows a more fluid approach to be taken in determining whether an individual falls within the definition of a worker or employee within the terms of s.280, ERA and closes drafting loopholes which allow businesses to achieve technical knock outs; however it is argued, as it has been throughout this essay, that the “dominant feature” consideration will be of limited import provided the sole qualifying criterion for statutory employment protection remains rooted in contract. Personal performance is, of course, fundamental to the employment relationship. Any statutory test should retain this principle at its core however should also seek to build in sufficient flexibility in order to prevent employers seeking to score a technical knock-out.

It is therefore suggested that the personal performance requirement as an absolute be replaced with a requirement that there be a “*clear expectation*” of personal performance. This test is contained within the second paragraph of the subsection listing factors relevant to the assessment of employee status. This maintains the personal service consideration, but deprives employers of the facility to use it as the sole ground for removing an individual from the statutory protections. The CAC in *Deliveroo* were able to identify that there was a clear expectation of personal service, through features such as the provision of training and the screening of candidates; and the fact it made little sense for either side for the rider to sub-contract assignments. Had the test required the court to find a clear expectation of personal service rather than an absolute requirement, the case would likely have been determined differently. “*Clear expectation*” was preferred to “*reasonable expectation*” however in order to preserve and reflect the centrality of personal service to the employment relationship. It should be read in conjunction with the words “*A [...] has carried out*” in the previous subsection: the basic requirement of the status is that A has provided personal service throughout the duration of her employment relationship with B. A clear (as opposed to a reasonable) expectation means that it would only be in highly unusual or highly irregular circumstances that A did not carry out the work herself. So, while an individual may contract with a glazier to replace a window pane in her home, she may *reasonably* expect that the individual with whom she contracted would carry out the work, it is not a *clear* expectation. If a third person were to actually replace the pane, this would not be irregular to the contract, in spite of the contracting individual’s reasonable expectation as to the identity of the person who would carry out the work. The individual and the glazier are therefore not an employment relationship; the glazier is an independent

contractor. Therefore even if the glazier with whom the individual contracted had carried out the work herself, that would not affect her status as an independent contractor, insofar as she would be unable to demonstrate a clear expectation.

The burden of proof in this limb of the test is neutral. The tribunal should have regard to all the factors before reaching a determination of whether there was a clear expectation of personal service.

#### 4.4.2.3: “*ENTREPRENEURIAL FREEDOM*”

The third paragraph requires regard to be had, in the assessment of whether a relationship truly is one of employment, to the degree of entrepreneurial or creative freedom the individual contracting has. Entrepreneurial freedom should not be assessed solely within the narrow confines of the relationship the worker has with her purported employer. It should instead be considered with broader reference to both industry practices and the individual’s portfolio of potential economic interactions. In the case of a barrister, for example, she may have limited entrepreneurial freedom within the confines of an individual instruction from a law firm: the firm will likely agree a fee with the barrister’s clerk and will often give detailed and fairly rigid instructions of what they would like the barrister to do and how they would like her to do it. However, in the context of the barrister’s broader professional landscape, there are a number of ways that she has licence to manage her affairs: she may specialise in an area of law that is under catered for; she may market herself through speaking engagements and training events targeting law firms operating within her specialism; she may seek out additional qualifications. By viewing her entrepreneurial freedom in this context, it is obvious that she is meaningfully self-employed.

The entrepreneurial freedom test is more nuanced than the current “control” test, which is all but disappplied for jobs requiring any degree of skill:<sup>194</sup> a brain surgeon, for example, will not be instructed on how to operate by the hospital manager. The new test will allow tribunals to look beyond the mere operational freedom the individual has and instead place his relationship with the purported employer in a broader economic context. It should also produce fairer outcomes for two reasons. The first is that only individuals who truly seek

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<sup>194</sup> See, for example, *White v Troutbeck SA* [2013] IRLR 949

out self-employment in order to obtain its benefits (whether financial, personal or creative) will forfeit the protections of employment law. Individuals who are currently classified as self-employed because that was the only form of arrangements offered to them by their purported employers but who do not have the ability to increase their salaries or operate with any degree of autonomy, will not. The second is that it will only create employer obligations in respect of firms who benefit from uniformity of performance. This is fair because under the current law such firms may benefit from the individuals' lack of entrepreneurial freedom without having to incur any of the obligations incumbent upon employers. Deliveroo for example benefits from the ubiquity of its branding. Brand identity is created (among other things) by their riders wearing the uniform bearing the Deliveroo logo. The riders are marketed as being unquestionably "Deliveroo" riders,<sup>195</sup> rather than as being independent, self-employed businessmen operating within a market place.

#### 4.4.2.4: THE EMPLOYER-FACING ELEMENT

A curious yet largely-uncommented-upon feature of the current test for employment status is this: despite the fact that the test concerns the identification of bilateral contract, the focus of consideration is almost exclusively upon one party to the contract; that is, upon the activities, rights and contractual freedoms of the employee or worker. There is little consideration, both in the common law or its attendant academic literature, to identifying a contract of employment by reference to the employer and its business.<sup>196</sup> This has the potential to distort the test.

One theme which this essay has sought to develop is the apportionment of economic and financial risk between interested parties in any business venture. I have argued that this apportionment is, in and of itself, policy neutral: the law should not prevent individuals from assuming greater risk in return for greater potential reward. Consider the commissioned salesperson: she may receive a modest basic salary but anticipates that a greater portion of her income will be made up by commission on sales. The employer enters into this bargain knowing that it may end up paying the employee more than it

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<sup>195</sup> Across the company's website, riders are referred to variously as "our riders". The website also refers to the process of delivery in the first person plural ("*loved by you, delivered by us*") <https://deliveroo.co.uk/>

<sup>196</sup> For an exception to this, see: Simon Deakin, *The Changing Concept of the "Employer" in Labour Law*, *Industrial Law Journal*, 2001, 72 - 81

would if it paid the individual a flat salary. It does so however both because such an arrangement limits the employer's exposure in the event its business is unsuccessful or experiences a downturn, and in order to obtain the productivity dividend of incentivised work. The arrangement is mutually beneficial and there is no moral or political mandate for the law to intervene.

However, this policy neutrality falls away where additional risk has been assumed by the worker with little or no corresponding increase in her potential rewards. I will refer to this as "unilateral risk assumption". Contrast the case of the salesperson with, say, a retail worker working on a zero hours' contract. The retail worker has no entitlement to a minimum amount of work; where her employer's business experiences a downturn, it will mitigate the impact by cutting the amount work it pays her to do. The business' losses are therefore passed onto the worker. Much like the salesperson, she has assumed a greater risk. However, unlike the salesperson, this risk is not traded off for potential reward: if the business is successful it will not share the profits with its staff. They will simply increase the number of hours the individual works, but her salary will remain capped at an hourly rate regardless of the success of the business. Again, while it is not suggested that employers should be forced to share their profits with their employees, what has happened in this instance is that the employer has passed the risk onto his employee simply because it can. This is particularly the case where such a reapportionment has arisen in consequence of the worker's weakened bargaining power when contracting with her employer. In circumstances such as these, the behaviour of the company may be regarded as predatory; taking advantage of the worker's need to earn a living and her limited vocational options.

The law in such circumstances should step in to protect the weaker party in order to prevent a "doubling down" of such inequity (that is, that the worker's limited bargaining power will not only result in her being less able to negotiate favourable contractual terms, but she will also miss out on some or all of the statutory protections available to employees). This should also be considered in respect of the near ubiquity of employer-drafted terms and conditions (see above section on Contracts of Adhesion): where the terms and conditions contained within contracts of employment are offered to individuals on a take-it-or-leave-it basis, both the means and the motive are present for the employer to engineer situations where individuals will be deprived of employee status. By failing to build any employer-facing considerations into the current test for status, the law has failed

in one important area to address this practice. Applying the current test to the above example of the retail worker, it is likely she would not qualify for employee status given the lack of mutual obligations between the parties.

It is therefore proposed that the current worker-specific focus will be replaced in the statutory test with a two-way approach that requires the allocation of economic risk in the relationship to be assessed in light of the reality of both the duties and functions of the employee, and the nature of the employer's undertaking. This will require the tribunal to have regard to the "*nature of B's business*". Such a test will essentially require the tribunal to have regard to the nature of the purported employer's business with reference not only to its relationship with the worker but to broader industrial norms. A key element of this will be for the tribunal to assess the risk/reward paradigm both as it *is* and as it *ought* to be. The purpose of this exercise is neither to re-write elements of workers' contracts nor to make any value judgements as to how risk and reward have been apportioned between the parties, but to gain a greater understanding of the nature of the relationship and, in consequence, whether the worker has assumed risks entirely voluntarily or not. Aspects both of the employer's business and of the industry it operates in will need to be considered.

There are a number of difficulties with this proposed model. The first is that rewards may not always be readily quantifiable in monetary terms. An individual may consider greater flexibility as to the hours she works or increased autonomy as to how, when and where she completes tasks to be rewards in-and-of themselves. A greater assumption of risk (that is, the loss of a guaranteed minimum amount of work) may therefore have been the result of a free and informed trade off for rewards which cannot be reduced to simple *pounds and pence* values. This problem is not easily resolved although it is anticipated that there is sufficient flexibility contained within the drafting.

The second is evidential. The employer will doubtless be better placed than the employee to furnish the employment tribunal with details of the industry in which it operates. This may create a disadvantage for the employee insofar as she might struggle to find ways to prove or argue what industry norms are. By providing a neutral burden for this, the tribunal will be entitled to take a more inquisitorial approach to determining this issue.

### 4.4.3: CONSEQUENTIAL AMENDMENTS

#### 4.4.3.1: EXPANDING THE DEFINITION OF DISMISSAL

Discussed above was the difficulty posed by removing the contractual test for status when considering whether or not an individual had been dismissed. This is in consequence of all three definitions of dismissals in the ERA all relating back to the contract of employment; these currently are where “:

- (a) the contract under which he is employed is terminated by the employer,*
- (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*
- (c) the employee terminated the contract under which he is employed [...] in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”<sup>197</sup>*

Under the proposed scheme, I would recommend two changes. The first is to replace the words “*the contract under which he is employed*” to “*his employment*” in s.95(1)(c) and s.136(1)(c). This kind of dismissal is often referred to colloquially as “constructive dismissal”. It is not anticipated that this amendment will affect the operation of this ground of dismissal. The second is that the definition of “dismissal” include the additional ground at s.95(1)(cc) and s.136(1)(cc) of “:

- (cc) the employee stops working for the employer for the sole or main reason that the employer stopped providing the employee with the amount of work the employee reasonably expected to have been given.”*

There are three elements to this dismissal. The first is that the employee had a reasonable expectation to a certain amount of work. Considered above was the case of *Stevedoring*, where the Court of Appeal held that a tribunal was wrong to have constructed a term of a contract of employment which obliged the employer to offer workers “a reasonable amount of casual work”.<sup>198</sup> Under this method however that is precisely what courts will be asked to do (thus overruling *Stevedoring* by statute insofar as it applies to the employment

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<sup>197</sup> s.95 ERA. This section relates to dismissal for the purposes of the right not to be unfairly dismissed. This definition is replicated in s.136 in respect of the right to a redundancy payment.

<sup>198</sup> *Supra*

relationship). It is also anticipated that these kinds of dismissals will be available not just to zero hours employees, but also to employees with contracts of employment providing for an artificially low amount of work. For example, where an individual works under a contract of employment providing a minimum for 5 hours per week, but where the employee habitually works overtime bringing her hours of work in line with full time employment. Under the current law, if the employer experiences a downturn, it can reduce her hours down to the minimum of five without terminating her contract. Under the proposed statutory test, this can amount to a dismissal, provided the employee stops working. In the case of workers with hours or amounts of work fixed by agreement or by contract, the determination of the reasonable expectation ought to be quite straightforward. The case of zero hours workers will be more difficult. This will require the tribunal to undertake a degree of factual inquiry in order to determine the amount of work that should have been given.

The concept of a “reasonable expectation” of an amount of work will provide tribunals with flexibility in determining whether or what work should have been given. This flexibility is greater than, say, the calculation of a week’s pay for the purposes of remunerating employees taking maternity leave, which prescribes a rigid averaging out of salary over a 12 week reference period.<sup>199</sup> This flexibility will allow tribunal to consider a wider time periods where relevant. Consider for example a maintenance engineer at a hotel. The hotel is only open between April and October and is closed between November and March. She is engaged at the start of the season on a zero hours’ contract and works on average 35 hours every week during the season. At the conclusion of the season, the employer does not give the employee any further work. She has not been dismissed for the purposes of this paragraph (although she may have been working under a contract which terminated by expiration), as she cannot have had a reasonable expectation to be have been given work during this period. When the on-season recommences the following April however the employee may reasonably expect to be given work on similar terms to what she had worked the previous year. If the employer does not provide her with work the following year, she may consider herself dismissed and seek a redundancy pay.

The second element is that the employer stops providing the employee with an amount of work that she had reasonably expected. There are two features of this element attracting comment. This first feature is that it is not an absolute concept (that is, that the employer

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<sup>199</sup> Reg.22, Maternity and Parental Leave etc. Regulations 1999

stops providing the employee with *a reasonable amount* of work rather than with *any* work). The reason for this is to provide employees with a potential remedy where the volume of their work (and in consequence, their earnings) has been substantially and unilaterally reduced by an employer. An absolute requirement would also have allowed employers to avoid the risk of dismissal by simply providing employees with a minimal amount of work.

The second feature is that there is no reasonableness qualification on this aspect of the test. Reasonableness is only relevant to the employee's expectation of the volume of work. There is no consideration given to the reasonableness of the employer's decision not to give work. It may be possible therefore for an employer to reduce an employee's hours of work to an unreasonable amount (meaning that she was dismissed for the purposes of this subsection), but to have done so in a way that is reasonable (meaning that she was not unfairly dismissed for the purposes of Part X, ERA). This employee would likely be entitled to a redundancy payment.

The third element is that the employee stops working. On some occasions, the employee will have no choice but to stop working (that is, where the employer has stopped providing her with work altogether). The sole or main reason for her having stopped working will have been because there was no work offered to her. It therefore fits within this definition of dismissal. However, where an employee's work has been reduced (consider the example given above of the individual with 5 contractual hours who habitually works in excess of this amount), positive action will be required on the part of the employee to refuse the offer of a reduced amount of work. In such cases, the determination of the "sole or main reason" for her stopping working will be a simple matter of fact to be determined on the civil standard of proof. The existence of this elective element for dismissal makes a species of the genus "constructive dismissal". This element is necessary as, without it, employees whose volume of work had been reduced to a minimum would be entitled to claim a redundancy payment while still working for the employer. Conceivably, this could occur every time the employee experiences a reduction in her hours of work. This element provides employees with a choice while not allowing them to obtain a windfall.

One issue that may arise is a situation where an employer reduces an employee's hours and she continues working for a period of time before stopping work and claiming that she either is entitled to a redundancy payment or has been unfairly dismissed. This may be

perceived as having the potential to disadvantage the employer insofar as there is no set limit on the length of time an employee is required to stop working after she has discovered that her employer is not providing her with a reasonable amount of work. There are two mechanisms within the provision which guard against this. The first is the “reasonable expectation” requirement: the longer the employee continues to work with her reduced workload, the less able she will be to establish that she reasonably expected to have been given more hours. This will provide employees a small window following the reduction in their workload to consider (in the hope that their workload will pick up again) whether or not they wish to stop working and claim redundancy, while not providing them with an indefinite period in which they may wish to stop working altogether. The second is the “sole or main reason” test. Again, the more time that passes, the more difficult it will be for the employee to establish through evidence that the sole or main reason for her stopping work is the fact that her workload has been reduced.

The test is broad enough to encompass any employer initiated termination, in a similar way to the manner in which s.95(1)(a) operates for individuals employed under contract of employment. Where an employer terminates the employment of an employee working in the gig economy on the grounds of (say) conduct, a necessary corollary of this termination is that the employer will stop giving the employee work. Assuming the other two elements can be made out (reasonable expectation and cessation of work) then this ground will be sufficient to enable the gig worker to claim unfair dismissal regardless of the purportedly fair reason for dismissal. Of course, this will create an additional hurdle for workers not employed on contracts of employment, insofar as they will be required to surmount the “reasonable expectation” requirement. However, as this is purely a factual matter for the tribunal to decide, it is submitted that this requirement is less onerous than what the employee would otherwise be required to do, which is demonstrate that she was employed under a contract of employment.

The codification of a statutory test for dismissal in circumstances where an individual has either no, or a misleadingly small, contractual entitlement to a minimum amount of work is challenging. The reason for this is that the statutory concept of dismissal under the current law is bound up with the contract of employment. In the case of the former, the contract of employment (assuming one exists) will not be breached by simply providing the employee with no work; in the case of the latter, the amount of work the employee does can be reduced to the contractual minimum, causing the individual to suffer a reduction in their

wages. I have sought to solve this by first creating an entitlement to expect a certain amount of work and second by providing for circumstances under which an employee may consider themselves to have been dismissed. The individuals will then receive a redundancy pay. While this form of dismissal will widen the scope of individuals who benefit from the end-of-employment protections contained within the ERA, it will go no further than to bring the rights of many gig economy workers into line with those of individuals working under traditional contracts of employment. The rights not to be unfairly dismissed and to receive a redundancy payment are subject to a minimum service qualification, which should protect employers from pernicious or vexatious claims from employees who have only worked a number of shifts. In the example of the seasonal hotel worker, given above, she will need to have worked two full seasons before she is entitled to a redundancy payment; it will only be upon seeking work during the third that she will be receive any form of recompense. I have sought to create balance by including the requirement that the employee will have to cease working. This will prevent employees from seeking to obtain a windfall by claiming a redundancy payment while still working. This additional ground of dismissal, read in conjunction with the decontractualised test for employment status, should bring the rights of gig economy workers in line with those of individuals who work under traditional contracts of employment. As identified, the test contains a number of elements.

In the previous chapter, I argued *inter alia* that the current contract-dependent test for employment status led to many gig economy workers being deprived of employment rights enjoyed by individuals working under traditional contracts of employment. In this chapter, I have suggested a solution to this problem by creating a new test for status and an additional ground to the definition of dismissal. There are three consequent amendments to other provisions with the ERA which require consideration. This will be the focus of the following sections. These are amendments to the provisions relating to determining an employee's effective date of termination, the test for unfair dismissal and calculating an employee's period of continuous service. In addition, I will also consider the issue of implied terms and constructive dismissal, and an amendment to reg.4 of TUPE.

#### 4.4.3.2: EFFECTIVE DATE OF TERMINATION

The effective date of termination (“EDT”) is relevant for the purpose of determining the length of time for which certain statutory rights of action exist; a claim for unfair dismissal, for example, must be presented to the employment tribunal no less than 3 months from the EDT.<sup>200</sup> It is also relevant both for the enforcement of statutory rights that require a minimum qualifying service provision<sup>201</sup> and for the calculation of compensation for awards for which length of continuous service is a factor.<sup>202</sup> For any of the existing grounds of dismissal, the mathematics of the calculation will be relatively straightforward (although the factual reality of what was said to whom and when may not be). The distinction between these kinds of dismissals and the proposed additional ground of dismissal is that the additional ground requires a concurrence of two events; that is, that the employer stops giving the employee a reasonable amount of work and that the employee stops working altogether. This presents a difficulty. A purely respondent-focused test (that is, the date when the employer stops providing a reasonable amount of work) has the potential to disadvantage employees in cases where they may not be aware that the employer has stopped providing work. It may also lead to an unsatisfactory outcome, as the employee may continue to work for his employer for some period of time following the cessation of the provision of a reasonable amount of work, meaning the effective date of termination will occur some time before the dismissal has any legal effect. Consider the above example of the worker with a contract for five hours per week who in fact habitually works full-time hours. If the employer stops giving her a reasonable amount of work (that is, full-time hours) on week one, she may continue to work until week four before deciding to stop working and sue for a redundancy payment. Her dismissal will only have effect in terms of s.136(1)(cc) on week four however her effective date of termination will be week one.

An exclusively employee-focused test (that is, the date the employee last works) creates similar problems for the employee. Consider the above example of the hotel maintenance engineer. If she shows up for work at the start of the new hotel season in April to find that her employer will not provide her with any work that season, then her effective date of termination will have been in November. She will have lost her right to claim both unfair

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<sup>200</sup> s.111, ERA, subject to the

<sup>201</sup> For example, the right not to be unfairly dismissed

<sup>202</sup> For example, the value of a redundancy payment

dismissal and a redundancy payment. For these reasons, I have opted for the following approach:

*97(1) Subject to the following provisions of this section, in this part “the effective date of termination”-*

[...]

*(cc) In relation to an employee whose employment is terminated by operation of s.95(1)(cc) or s.136(1)(cc), means the first date on which:*

- (i) the employee is aware, or reasonably ought to have been aware, that his employer had stopped providing him with a reasonable amount of work; and*
- (ii) the employee does not work.*

This definition seeks to combine both elements of the additional ground of dismissal. The potential time bar issue caused by the employee-focused test has been alleviated by making the cessation of a provision of work employee subjective; that is, it will focus on when the employee first gained the knowledge that her employer would no longer provide her with a minimum amount of work. This is qualified by the condition of there being a day when she “reasonably ought” to have been aware. The second limb prevents the effective date of termination falling some time after the employee has gained this knowledge.

In the example of the hotel maintenance engineer, her EDT will depend on when she first discovered that there was going to be no work for her in the new season: if the employer had told her at the conclusion of the previous season that it would not be requiring her services the following season (or if she ought reasonably to have been aware of this at the close of the season; for example, if the hotel was being demolished), then her EDT would be the day following her final shift. If she was not told at the conclusion of one season that she would not be required back for the next (or if there were no facts or circumstances from which she could reasonably have worked it out herself), then her EDT would be the day she discovered that she was not required that season.

In drafting this provision, I have sought to reconcile the difficulties caused by the imprecise nature of employees being employed without any contractual guarantee of a minimum amount of work. Often changes in statute can be used to drive social change; while some employers are using the current contractual rigidities of employment law to deprive individuals of employment rights, it is hoped that by reversing this burden and allowing a more flexible approach not only to who qualifies for employment rights but also when and how they can be enforced, employers will seek a degree of financial certainty by employing individuals on full and obvious contracts of employment.

#### 4.4.3.3: UNFAIR DIMISSAL

The test for unfair dismissal is contained in s.98, ERA. Broadly speaking, the test requires a tribunal to adopt a two-stage approach. The first stage places the burden of proof upon the employer to show that the reason for dismissal was either one falling into the potentially fair reasons listed in s.98(2), ERA, or was for some other substantial reason of a kind which would justify dismissal.<sup>203</sup> The second stage has a neutral burden which requires the tribunal to determine whether or not the employer acted reasonably in all the circumstances, including having regard to various prescribed factors such as the size and administrative resources of the employer's undertaking.<sup>204</sup> Each potentially fair reason has its own common law idiosyncrasies which have developed through the case law.<sup>205</sup> The operation of the two-stage test should remain largely unaffected by the change to the definition of dismissal proposed in the above section, however it is suggested that for the sake of clarity the following subsection is added into s.98:

*“(6A) Where an employee is dismissed by operation of s.95(1)(cc) or s.136(1)(cc), the reason for dismissal for the purposes of this section will be the reason the employer stopped providing the employee with the amount of work the employee reasonably expected to be given.”*

This section simply seeks to guide the tribunal as to where the burden of proof contained in s.94(1) lies and how it will be discharged. Under the current law, where, say, an Uber

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<sup>203</sup> s.98(1), ERA

<sup>204</sup> s.98(4), ERA

<sup>205</sup> See, for example, *British Home Stores v Burchell* [1973] ICR 303 relating to the test to be applied where the reason for dismissal relates to the conduct of the employee in terms of s.98(2)(a), ERA

driver has been the subject of an allegation by a customer, it is open to the company to deactivate her account without any investigation, regardless of how long the individual has driven for the company. This places her at a substantial disadvantage when compared to individuals employed under contracts of employment. In the case of an individual employed under a contract of employment, the employer will be required to carry out a reasonable investigation and follow a procedure in line with the relevant codes of practice.<sup>206</sup> Under the proposed change, where the Uber driver's account has been deactivated, her employer will have stopped providing her with the amount of work she reasonably expected to have been given. She will not work for the company. She therefore may claim that her right not to be unfairly dismissed has been breached. In order to dismiss fairly, the employer, by operation of s.94(6A) is required to demonstrate both that it had a potentially fair reason for reducing the amount of work it was giving her and that it carried out a fair and reasonable procedure before making that reduction. In this example, the reason the employer stopped providing the employee with the amount of work she had reasonably expected related to her conduct (insofar as it had received an allegation). Had it carried out an investigation, perhaps by taking a statement from the customer and allowing the employee to put forward her case, whether in defence or mitigation of the charge; and then by convening a disciplinary hearing in order to consider the outcome of the investigation, the employee may have been fairly dismissed.

#### 4.4.3.4: CONTINUITY OF EMPLOYMENT

In consequence of the de-contractualisation of the test for employee status, adjustment is required to the statutory definition of continuous employment,<sup>207</sup> which provides that an individual will be taken to be in continuous employment for “any week during the whole or part of which an employee's relations are governed by a contract of employment.”<sup>208</sup> As it is anticipated that many individuals will continue to be employed under contracts of employment (and that, for the most part, the written records of those contracts will be a fair and honest reflection of the intention and understanding of the parties at the point of contracting), this portion of the test ought to remain. This test however will not be appropriate for assessing the continuity of service of individuals who are in employment

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<sup>206</sup> See the ACAS Code of Practice on Disciplinary and Grievance Procedures

<sup>207</sup> Found at Chapter I, Part XIV, ERA

<sup>208</sup> s.212(1), ERA

but do not work under a contract of employment. As this essay has argued that the definition of employment should be expanded so as not to exclude workers in atypical relationships (including seasonal workers), should the definition be changed to “any week where the employee is in employment”, would have the possibility to exclude certain kinds of workers who do not work every week.

The period of continuous employment is superficially defined at s.211(1), ERA as lasting from “*the day on which the employee starts work, and [...] ends with the day the employee’s period of continuous employment is to be ascertained*”. The first limb of this test (with remarkable prescience for the purposes of this essay) ignores the contractual dimension altogether and ordains the day the employee actually starts working as the beginning of her period of continuous service. For obvious reasons, I do not propose interfering with this limb of the definition.

The second limb of the definition can only be understood when read in conjunction with s.212(1), ERA, which provides that “*any week during [...] which the employee’s relations with his employer are governed by a contract of employment counts in computing the employee’s period of employment*”. The difficulty provided by this limb for the proposed status test, of course, stems from the reference to the contract of employment. The proposed solution is to use the concept of the “employment relationship” from the status test in place of the contract of employment. The proposed version of s.212(1) will therefore substitute the words “*the employee’s relations are governed by a contract of employment*” with “*the employee is in an employment relationship with the employer*”.

On the face of it, this definition may prove problematic for employees working in atypical patterns: for example, the hotel maintenance engineer will not work during the off season. During the off-season, she might not satisfy the definition of an “employee” for the purposes of the proposed statutory test. The answer however is contained (again, with remarkable prescience) within both s.212(3)(b) and (c), ERA, which excludes from the definition of continuous service “*any week during [...] which an employee is [...] absent from work on account of a temporary cessation of work*” and “*absent from work in circumstances that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose*”. These two paragraphs should provide statutory mechanisms by which the gap in continuous employment for atypical workers could be bridged. In the example of the hotel maintenance engineer, both provisions are

applicable: the off-season can be properly regarded both as a temporary cessation of work and an arrangement where no work was expected of the employee.

#### 4.4.3.5: IMPLIED TERMS AND CONSTRUCTIVE DISMISSAL

The proposed test for employee status removes the existence of a contract of employment as an absolute prerequisite of status. Contracts of employment, as discussed in the previous chapter, are given special treatment not only by statute but also at common law, insofar as the common law implies certain terms onto contracts of employment which are not (as a rule) implied into other contracts. The significance of these implied terms largely relates to the manner in which they are founded upon by individuals claiming they have been unfairly constructively dismissed.

Despite having a statutory right of action,<sup>209</sup> constructive dismissal is largely a contractual matter. In order to claim constructive dismissal, an employee is required to demonstrate that they had terminated their contract of employment in circumstances where they were entitled to do so by reason of their employer's conduct. The employee is required to satisfy a four-step test in order to successfully demonstrate that she has been dismissed. The first is that the employer breached a term of her contract; the second is that the breach was sufficiently serious so as to repudiate the contract; the third is that she resigned in response to the breach and not for some other, unconnected reason; and the fourth is that she delayed unduly before taking the decision to terminate her contract.

I proposed above that the test for employee-initiated dismissal be changed in order to require an employee to terminate their employment, rather than their contract of employment. The four-stage test for s.95(1)(c) dismissals has been taken from the common law and has no statutory basis. It is submitted that the principles and spirit of this test can still apply to s.95(1)(c) dismissals even in the absence of a contract of employment. However, in order to do so, the rights which the employer is alleged to have breached may have to be created, as employees in certain circumstances will not be able to rely on a contract of employment as the source of those rights. The solution is simply to insert a new section into the ERA which replicates the implied terms. So, for example, where an employer in the gig economy acts towards an employee in a way that destroys or seriously

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<sup>209</sup> s.94 and s.111, ERA

damages the relationship of trust and confidence, it will breach its duty owed to that employee under statute. Provided the breach is sufficiently serious, the employee will be entitled to resign in response to the breach and claim that she has been constructively dismissed.

There are therefore two proposed amendments to the ERA required in order to bring the rights of gig workers in line with those employed under contracts of employment. The first is the above-mentioned new section codifying the rights implied at common law onto the contract of employment. The second is to add the following subsection onto s.95 giving statutory effect to the test for constructive dismissal at s.95(2A).

*95(2A) For the purposes of s.95(1)(c), an employee will be entitled to terminate his contract by reason of his employers conduct where:*

- (a) the employer has breached any employment right of the employee contained within this Act;*
- (b) that breach was sufficiently serious so as to repudiate the employment relationship;*
- (c) the employee terminated his employment in response to that breach and not for some other, unconnected reason; and*
- (d) the employee has not unduly delayed before terminating his employment.*

#### 4.4.4: REGULATION 4(4) TUPE VOIDING MECHANISM

As discussed in the previous chapter, TUPE will have limited or no application for gig economy workers. While the main focus of this essay has been in relation to rights contained within the ERA, TUPE itself contains limited rights of action and most claims brought pursuant to transgressions of the regulations are contained within the ERA. The expanded definition of employment given above should give effect to the prohibition of dismissals because of a transfer found at reg.7, TUPE. This does however still leave the issue of reg.4 and, in particular, the voiding mechanism which prevents a transferee from varying the terms and conditions of transferring employees. The current regulations only provide for the protection of terms contained within contracts of employment. It is proposed that the wording of reg.4 is amended to remove references to “contracts of employment” or “contract” and simply replace them with “employment”. So for example,

in reg.4(1), the words “*a relevant transfer shall not operate so as to terminate the contract of employment of any person*” will now read “*a relevant transfer shall not operate so as to terminate the employment of any person*”. Similarly, in reg.4(2), “*all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract*” will read “*all the transferor’s rights, powers, duties and liabilities under or in connection with any such employment*”.

The concept of employment as defined by the new proposed test is sufficiently broad so as to cover terms derived from contracts of employment. The amendment will therefore leave individuals currently employed under contracts of employment unaffected. The wording of reg.4(2) is already sufficiently broad so as to include the transfer of matters which are not strictly contractual; it provides that a number of matters “under or in connection with any such contract” will transfer. Therefore the amendment of this clause will not affect the substance or spirit of the application of TUPE. Where a worker in the gig economy is assigned to an organised grouping of resources which transfers, these proposed changes should operate to protect his ongoing terms and conditions of employment. So, for example, where an individual is employed by an app based employer to deliver food in a certain area, and that employer transfers that part of its business to another employer, any change the incoming employer makes to the rates at which the employee is paid for deliveries will be voided by operation of reg.4.

#### 4.5: CONCLUSION

The true villain of this piece is the contractual gateway into statutory employment rights. Employers – in both the gig economy and elsewhere – simply act unthinkingly according to market forces. Corporate responsibility towards employees should never be presumed; on the contrary, corporate irresponsibility is precisely the reason employment laws exist in the first place. Where a loophole opens which allows employers to take advantage of regulatory arbitrage, Adam Smith’s invisible hand will invariably push businesses through it. This is no more than a structural function of capitalism. The role of policymakers is to be alert to the existence of such loopholes and to close them off as soon as this existence becomes known. In this endeavour, Taylor was a failure: the unwillingness to propose any alternative to the two-tier status will mean that a constituency of workers will inevitably remain outwith the security of the end-of-employment protections. Similarly, the principle

of Parliamentary sovereignty has restricted the Supreme Court's role to that of mitigating rather than the resolving the problem. It has done so with an admirable degree of imagination, through cases such as *Autoclenz* and *Pimlico*, however it can never remove the contractual basis on its own.

Despite precarious work being nothing new, the emergence of the gig economy and the dynamism of the gig business models have drawn the issue into the political mainstream. As gig employers find workable formulae across different industries, the number of workers gigging without guarantee of work or wage will increase further. Reform of the status tests is required to mitigate the social and personal impact of this increase.

The solution argued for in this thesis is one which removes the contractual nexus from the statutory test. In so doing, it has suggested a codification of the common law principles used to identify a contract of employment into statute, updated to account for the realities of modern working practices (for example, by replacing “control” with “degree of entrepreneurial freedom”; and “mutuality of obligations” with a “reasonable expectation of work”). By putting these tests on a statutory basis, courts and tribunals will be able to determine status entirely without constraint by principles of contract law. It is not however offered as a panacea to all problems caused by the gig economy. Some problems may be countered by other areas of law, such as taxation or competition; others may be here to stay. In the previous chapter we considered how the physical and geographical realities of the digital allocation of work made it more difficult for workers to organise for purpose if collective action. While part of this will be offset by the ability of social media to create a virtual space for interaction, such organisation is not apt for statutory encouragement. It will likely have to occur organically across the virtual workplace. Bolstering legal protections should however embolden workers seeking to organise in these ways.

Further consequential amendments may also be required to the proposed status test. For example, the proposal has the potential to establish an employment relationship between agency workers and the principals who have solicited their work from the agency. This may or may not be desirable, according to political taste. A simple express carve out could however remove liability for principals using agency staff: an inversion of the express inclusion of principals in s.41(5), EqA, for example, would achieve this.

Aspects of an individual's working relationship are and will likely remain matters to be agreed voluntarily between employer and employee: wages, hours and place of work are free of statutory interference beyond the safety net provisions contained within the NMW and the WTR. Other aspects (such as the duty to pay wages in cash and the reason for termination) have been identified by parliament as matters which should be regulated. These are the involuntary obligations. The aim of this final chapter was to provide a mechanism for ensuring involuntary obligations upon employers remain truly involuntary, with a view to lifting everyone bar the genuinely and wilfully self-employed into the scope of employment protections. In this sense therefore, in spite of the leaps in technology required to create the smartphone economy, the fundamental policy goals have not deviated since the days of Beveridge in 1942.

**s.230 Definition of Employee**

- (1) A person, A, is an employee of another, B, where B has offered to provide, and A has agreed to carry out and has carried out, work in an employment relationship;
- (2) In determining the question of whether or not a relationship is an employment relationship for the purposes of subsection (1), regard shall be had to-
  - (a) The terms of any document relating to the relationship between A and B, including:-
    - (i) The terms of any written agreement between A and B;
    - (ii) The terms of any collective agreement between B and a Trade Union representing a bargaining unit of which A is a member;
    - (iii) Any policies produced by B in order to govern its relationship with A; and
    - (iv) Any other relevant document;
  - (b) Whether or not there is a clear expectation that A will carry out the work personally;
  - (c) The degree of entrepreneurial freedom A has as to the manner in which he carries out the work;
  - (d) The nature of B's business;
  - (e) Any other relevant circumstances consistent with an employment relationship.
- (3) In considering any term contained within any document for the purposes of s.230(2)(a)(i), regard should be had to the relative bargaining power between A and B at the time the terms of those documents were either agreed, amended or came into force.
- (4) An employee is not an individual who is:-
  - (a) employed by another person; and
  - (b) supplied by that other person in furtherance of a contract to which the principal is a party

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