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## Inverting the Flexicurity Paradigm: The United Kingdom and Zero Hours Contracts

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JEFF KENNER

### I. Introduction

If the United Kingdom has, to quote one former Prime Minister, ‘the most lightly regulated labour market of any leading economy in the world’,<sup>1</sup> the phenomenon that has become known as the ‘zero hours contract’ (ZHC) is a meme that has entered into societal discourse as connotative of the ultimate form of the legalised commodification of labour. The ZHC, as a label, is colloquial and legally specious, in the absence of an accepted cognisable normative definition for the types of contract to which it is applied. As there is no single typology, it is best to understand ZHCs as encompassing a ‘wide spectrum’ of casual work contracts,<sup>2</sup> under which, in essence, ‘an employer agrees to pay for work done but makes no commitment to provide a set number of hours of work per day, week or month.’<sup>3</sup> Zero hours arrangements can simply be described as a mix between casual labour and part-time work.<sup>4</sup> Nevertheless, despite the absence of a ‘clear or overarching category or organising principle’,<sup>5</sup> the widespread use of these types of contract in the UK makes a study of ZHCs pertinent in the context of the core/contingent dichotomy as, firstly, in many cases, zero hours workers (ZHWs) perceive

<sup>1</sup> Tony Blair MP, Introduction, *Fairness at Work* (White Paper, Cm 3968, 1998): [webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file24436.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file24436.pdf).

<sup>2</sup> See A Adams, M Freedland and J Prassl, *The ‘Zero-Hours Contract’: Regulating casual work, or legitimating precarity?* (European Labour Law Network Working Paper No 5, March 2015) 5.

<sup>3</sup> Z Adams and S Deakin, *Re-regulating Zero Hours Contracts* (Institute of Employment Rights, 2014) 6.

<sup>4</sup> *Mailway (Southern) Ltd v Wilsher* [1978] ICR 511 (Kilner Brown J).

<sup>5</sup> A Adams, M Freedland and J Prassl (n 2) 7.

themselves as having no contract for continuing employment, and secondly, these workers often do not have access to the firm's 'internal labour market' of collective agreements, pensions and security.<sup>6</sup> It is necessary, however, when analysing the zero hours phenomenon, and proposing reforms of the law, to take heed of the warning that any attempt at regulation 'must ... be approached most cautiously, so as not to become merely an exercise in normalising a wide array of precarious arrangements'.<sup>7</sup>

The rise in ZHCs is a feature of globalisation and, throughout the EU, various forms of zero hours contracting are multiplying often in the form of 'on call' working but, in several EU Member States, subject to specific minimum standards' requirements to protect workers.<sup>8</sup> In the UK, however, where zero hours working is part of a long-term trend towards more flexibility and diversity in working arrangements,<sup>9</sup> these forms of contract have become synonymous with the 'most extreme form'<sup>10</sup> of precarious employment that the EU's most casualised labour market has spawned. Within the boundaries set by UK law for permissible employment contracts, ZHCs offer total flexibility to the employer to choose if and when to offer work,<sup>11</sup> so as to minimise cost and maximise profitability, and, conversely, total insecurity for the worker, who has no guarantee of a stable income or social security. ZHCs represent contingency max, an inversion of the European 'flexicurity' paradigm of an inclusive labour market that meets the need of workers for both flexibility and security throughout their working lives.<sup>12</sup>

In part two of this chapter, the emergence and rise of the culture of zero hours working in the UK's flexible labour market is explored in the light of increasing concerns about the use of ZHCs by some companies and organisations as part of their business model. Part three assesses the legal status and employment rights of workers on ZHCs. Part four discusses the lawfulness of ZHCs and proposals for reform of the law to end exploitation of ZHWs. Part five concludes with some suggestions for widening the scope of employment protection.

<sup>6</sup> See Ch 3 by Lo Faro in this volume.

<sup>7</sup> A Adams, M Freedland and J Prassl (n 2) 4.

<sup>8</sup> Z Adams and S Deakin (n 3) 28.

<sup>9</sup> Chartered Institute of Personnel and Development (CIPD), 'Zero Hours Contracts: Myths and Reality' (November 2013) 6, see [www.cipd.co.uk/binaries/zero-hours-contracts\\_2013-myth-reality.pdf](http://www.cipd.co.uk/binaries/zero-hours-contracts_2013-myth-reality.pdf).

<sup>10</sup> Z Adams and S Deakin (n 3) 3.

<sup>11</sup> See part III of this chapter below.

<sup>12</sup> See further, European Commission Communication, *Towards Common Principles of Flexicurity: more and better jobs through flexibility and security*, COM(2007) 359 final; and J Kenner, 'New Frontiers in EU Labour Law: From Flexicurity to Flex-Security' in M Dougan and S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing, 2009) 279–310.

## II. The Culture of Zero Hours Work in the UK

### A. Zero Hours Work: The Raw Facts

According to estimates from the UK Office for National Statistics (ONS), 801,000 people, 2.5 per cent of those in employment, had a ZHC as their main employment contract in the period from October to December 2015.<sup>13</sup> This was an increase of 15 per cent from the same period in 2014, when the total was 697,000 or 2.3 per cent of people in employment. However, because many people have more than one ZHC, or have a ZHC in addition to a standard full-time or part-time employment contract, and the numbers of ZHCs vary seasonally, the total number of ZHCs at the mid-point of the survey period stood at a much higher 1.7 million, or 6 per cent of all employment contracts.<sup>14</sup> The ONS also identified a further two million ZHCs where no work was carried out either because workers were not accepting work for personal reasons or, due to fluctuating demand, no work was available in the reference period.<sup>15</sup> 10 per cent of businesses as a whole make use of ZHCs with a much larger 40 per cent of businesses that employ 250 or more people.<sup>16</sup> For the purpose of these statistics, the ONS defines ZHCs broadly as contracts ‘that do not guarantee a minimum number of hours’, based on a survey of businesses.<sup>17</sup>

People on ZHCs are more likely to be young, part-time, women, and students in full-time education, when compared to the UK workforce as a whole.<sup>18</sup> This is hardly surprising as jobs on the periphery ‘tend to be taken by people who are already disadvantaged in the labour market for other reasons’.<sup>19</sup> The statistics reveal that 38 per cent are aged 16 to 24 compared with 12 per cent for all people not on a ZHC.<sup>20</sup> Such contracts are most prevalent in low paid sectors such as hotels, catering, retail and leisure.<sup>21</sup> 63 per cent of ZHWs work part-time with an

<sup>13</sup> Office for National Statistics (ONS), *Contracts that do not guarantee a minimum number of hours* (9 March 2016): [www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/march2016](http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/march2016).

<sup>14</sup> *ibid* Summary. The figures are for the fortnight beginning 9 November 2015. Indeed, in the fortnight beginning 11 May 2015, 2.1 million contracts were recorded.

<sup>15</sup> *ibid* part 3.

<sup>16</sup> *ibid*.

<sup>17</sup> *ibid* Summary.

<sup>18</sup> *ibid*.

<sup>19</sup> A Davies, *Employment Law* (Pearson, 2015) 95.

<sup>20</sup> ONS report 2016 (n 13) part 4. It is also notable that 23% of people on ZHCs are in full-time education compared to 3% of all people in employment. This suggests that many young people find ZHCs flexible for combining work with study.

<sup>21</sup> *ibid* part 3. In accommodation and food services, one in four companies, 26%, make use of ZHCs when compared with around one in twenty companies, 5%, in construction. Seasonal factors may accentuate these variations.

average of 26 weekly hours, with 17 per cent working no hours in the surveyed week.<sup>22</sup> More than one in three, 37 per cent, would like to work more hours with most wanting those additional hours in the same job.<sup>23</sup>

Research by the Resolution Foundation reveals that the growth in the number of workers employed on ZHCs is a factor in the general ‘squeeze’ on low wages as ZHWs receive lower gross weekly pay, an average of £236 per week, compared with £482 per week for those who are not on ZHCs.<sup>24</sup> Moreover, because workers on ZHCs work fewer hours than workers on standard contracts, the growing use of ZHCs is a contributory factor in rising rates of under-employment.<sup>25</sup> Many ZHWs have the experience of being ‘zeroed-down’ when the amount of work on offer reduces week by week and eventually dries up altogether.<sup>26</sup>

One side-effect of the fluctuations in working hours and pay, which go hand in hand with ZHCs, is a negative impact for the workers concerned when they are required to interact with the UK welfare system. As earnings fall, workers on ZHCs may revert to claiming Jobseeker’s Allowance (JSA) to supplement their income. Under the JSA system, a claimant can be disqualified from benefit, or sanctioned, for refusing a direction to take work and may face the loss of all social security benefits for a certain period.<sup>27</sup> Under the new system of Universal Credit, which is gradually replacing JSA and other benefits,<sup>28</sup> even more stringent conditionality will be applied, which ‘will increase the pressure on individuals to accept casualised forms of employment’.<sup>29</sup> In practice, this might mean that a worker in such a predicament, who refuses to accept an offer of zero hours work because they are seeking more regular hours, could be subjected to a sanction and loss of benefits.<sup>30</sup> The UK Government does not accept that ZHCs are, by default, unsuitable and is prepared to ‘mandate’ ZHCs for job-seekers on Universal Credit.<sup>31</sup> Overall, as Zoe Adams and Simon Deakin note, the cumulative effect of these and other social security changes has made the UK system of unemployment compensation ‘one of the least protective in the developed world’.<sup>32</sup> There is no doubt that the threat

<sup>22</sup> *ibid* part 4. The 17% not working in the surveyed week compares with 12% of the workforce as a whole who are not working.

<sup>23</sup> *ibid* Summary.

<sup>24</sup> M Pennycock, G Cory and V Alakeson, *A Matter of Time: The rise of zero-hours contracts* (Resolution Foundation, 2013) 3, see [www.resolutionfoundation.org/publications/matter-time-rise-zero-hours-contracts/](http://www.resolutionfoundation.org/publications/matter-time-rise-zero-hours-contracts/).

<sup>25</sup> *ibid*.

<sup>26</sup> *ibid* 4.

<sup>27</sup> Jobseeker’s Allowance Regulations 2013, SI 2013/378. See further, Z Adams and S Deakin (n 3) 19–27.

<sup>28</sup> Introduced by the Welfare Reform Act 2012 and due to become fully effective in 2017.

<sup>29</sup> Z Adams and S Deakin (n 3) 24.

<sup>30</sup> D Pyper and A Dar, *Zero-hours contracts* (House of Commons Briefing Paper Number 06553, 10 November 2015) 13.

<sup>31</sup> Letter from Esther McVey MP, then Minister for Employment, to Sheila Gilmore MP, dated 1 March 2014. Cited, *ibid* 13.

<sup>32</sup> Z Adams and S Deakin (n 3) 20.

of the removal of the safety net of social security is a key driver in the growth of ZHCs and other forms of precarious work in the UK labour market.<sup>33</sup>

Many of the most vulnerable ZHWs now form part of an increasing 'precarariat' in the UK, described by Guy Standing as 'a multitude of insecure people, living bits-and-pieces lives, in and out of short-term jobs, without a narrative of occupational development'.<sup>34</sup> Such workers, denied the certainty of work, are under constant pressure because they simply do not know, from week to week, whether they can pay the rent or household bills or clothe their children.<sup>35</sup>

Nevertheless, it is argued by some that ZHCs are 'unfairly demonised' because many ZHWs benefit from the flexibility that such arrangements offer.<sup>36</sup> These workers prefer adaptable working hours' contracts because they do not wish to work at fixed and regular times from week to week. Flexible hours contracts suit many students, single people, carers and older or retired workers, who wish to use zero hours work to 'blend paid work with other domestic commitments, education or other personal, family or community interests'.<sup>37</sup> According to a survey by the Charter Institute of Personnel and Development (CIPD), ZHWs are more likely to be satisfied with their work-life balance (65 per cent) when compared to all employees (58 per cent), and have similar overall job satisfaction levels with those working on more standard employment contracts.<sup>38</sup> This is somewhat at odds with the findings of research conducted by the Resolution Foundation that, for the majority of people employed on these types of contract, the freedom and choice they ostensibly offer is 'more apparent than real'.<sup>39</sup>

The immediate question, therefore, is whether such an uncertain but flexible form of working, desirable for some, should be permitted for those for whom it is convenient, when others, for whom ZHCs are not a matter of choice, seek, and indeed need, regular hours, secure employment and an end to a vicious cycle of personal and financial precariousness. Additionally, we must ask, when such uncertainty inexorably leads to exploitation, what steps should be taken to prevent the abuse of such contractual arrangements or indeed to outlaw them altogether if no other solution can be found. In seeking to find answers to these questions, we first need to understand the motivation and the method of those employers who have made ZHCs a central part of their business model.

<sup>33</sup> *ibid* 19.

<sup>34</sup> G Standing, *The precariat—the new dangerous class* (Policy Network 2011) 1, see [www.policy-network.net/uploads/media/154/7468.pdf](http://www.policy-network.net/uploads/media/154/7468.pdf).

<sup>35</sup> See P Fleming, 'There's nothing good about the rise in zero-hours contracts—ban them now', *The Guardian* (London, 7 September 2015), see [www.theguardian.com/commentisfree/2015/sep/07/nothing-good-about-zero-hours-contract-abolish-them](http://www.theguardian.com/commentisfree/2015/sep/07/nothing-good-about-zero-hours-contract-abolish-them).

<sup>36</sup> Chartered Institute of Personnel and Development (CIPD), *Consultation on zero-hours employment contracts: submission to the Department for Business, Innovation and Skills* (March 2014) para 7.

<sup>37</sup> CIPD (n 9) 6.

<sup>38</sup> *ibid* 14.

<sup>39</sup> Resolution Foundation (n 24) 4.

## B. Zero Hours Contracts—‘Demutualising’ the Employment Relationship

According to research by the Resolution Foundation, there are four main reasons why ZHCs are attractive for UK employers.<sup>40</sup> First, they allow employers to maximise the flexibility of their workforce to more easily adjust to variations in demand, which may help them cope with an economic downturn. As the authors put it bluntly: ‘zero-hours contracts allow an employer to transfer the burden of varying demand onto the workforce.’<sup>41</sup> This process of burden shifting is an example of what Freedland and Kountouris have aptly described as ‘demutualisation’, a term used to describe the many ways in which employers may seek to transfer economic risks that they would normally have to bear onto the workforce.<sup>42</sup> Of course, it is also sometimes the case that such workforce flexibility may be introduced to provide flexibility for individual staff.<sup>43</sup> Second, ZHCs allow employers to better manage costs, keeping wages down, and reduce risk. If a major contract falls through, ZHCs hours can be zeroed down ‘at a stroke’.<sup>44</sup> Third, recruitment and training costs are reduced because ZHCs are, in practice, a pool of trained workers ready to bring in as and when required and, therefore, save the employer the cost of hiring and training new workers or using an agency. Fourth, some employers may, anecdotal evidence suggests, use ZHCs to avoid employment obligations such as maternity leave and redundancy pay.<sup>45</sup> The extent to which ZHCs actually enable employers to evade employment protection laws will be considered further in part three below.

In the CIPD survey, 45 per cent of employers reported using ZHCs as part of a long-term strategy.<sup>46</sup> Many public sector organisations in the UK have made ZHCs a central part of their business model. In the public and non-profit sectors, the use of ZHCs is common in order to respond to fluctuations in demand to meet needs, such as education and health care, and to manage tight budgets. Many organisations, such as Moorfield Eye Hospital National Health Service (NHS) Foundation Trust and Outlook Care, have introduced ‘staff banks’ of ZHCs to be called in to meet unpredictable demand for care, reduce the need for agency staff, cut overtime and fill in for sickness absence and holidays.<sup>47</sup> Such practices are

<sup>40</sup> *ibid* 13.

<sup>41</sup> *ibid*.

<sup>42</sup> M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP, 2011) 433–446.

<sup>43</sup> CIPD (n 9) 12.

<sup>44</sup> Resolution Foundation (n 24) 13.

<sup>45</sup> *ibid*.

<sup>46</sup> CIPD (n 9) 13.

<sup>47</sup> *ibid* case studies at 22 and 26. In the case of Outlook Care, a non-profit organisation, 330 permanent staff are employed to meet basic needs with an extra 200 on casual contracts to meet variations in demand for services.

increasingly common in the care sector where 23 per cent of the adult social care workforce are on ZHCs.<sup>48</sup>

In the private sector, significant users of ZHCs include major retailers (Tesco, Sports Direct, Amazon), hotel chains (Holiday Inn), vehicle hirers (Hertz), food outlets (Subway, McDonalds), pub chains (Wetherspoons), and entertainment businesses (Cineworld).<sup>49</sup> For example, all 300 of Hertz UK's drivers are ZHWs. In a highly competitive market, the use of ZHWs meets fluctuating customer demand, varying from season to season. While this causes uncertainty for the workers, Hertz classifies its ZHWs as employees and provides them with contracts similar to those of its permanent staff.<sup>50</sup> In other cases, such as Holiday Inn, 15 per cent of ZHWs typically progress to permanent contracts.<sup>51</sup> Nevertheless, a study by the Work Foundation found that 44 per cent of ZHWs have had the same employer for two years and 25 per cent have been with the same employer for five years or more.<sup>52</sup>

The media, sometimes using undercover investigations, have revealed many examples of alleged abuses. For example, an exposé by Channel 4 News found heavy reliance on ZHWs at Amazon's massive packing warehouse at Rugeley in Staffordshire. According to former workers, staff were 'forced to make themselves available for work with no guarantee they will be offered a shift on a particular day'.<sup>53</sup> Claims were made of GPS tracking of staff to monitor their movements and airport-style security searches of staff for stolen goods during meal breaks.<sup>54</sup>

Much of the media coverage has focused on Sports Direct, one of the UK's largest sportswear retailers, which has developed a business model that is almost totally reliant on zero hours contracting and other 'demutualising' or burden shifting practices. More than eight in ten of the company's 27,000 workers are on ZHCs.<sup>55</sup> Following a lawsuit over its use of ZHCs in November 2014, Sports Direct, as part of a settlement, agreed to make clear in its job advertisements and employment contracts that there would be no guarantee of work and also to produce clear written policies on the entitlement of staff to sick pay and holiday pay.<sup>56</sup> Further legal action has been brought by unions against the company's policy of

<sup>48</sup> Skills for Care, *The State of the Adult Social Care Sector and Workforce in England* (March 2015) para 3.5, see [www.skillsforcare.org.uk/Document-library/NMDS-SC,-workforce-intelligence-and-innovation/NMDS-SC/State-of-2014-ENGLAND-WEB-FINAL.pdf](http://www.skillsforcare.org.uk/Document-library/NMDS-SC,-workforce-intelligence-and-innovation/NMDS-SC/State-of-2014-ENGLAND-WEB-FINAL.pdf).

<sup>49</sup> Examples given by Z Adams and S Deakin (n3) 10; CIPD (n 9) case studies.

<sup>50</sup> CIPD (n 9) 10.

<sup>51</sup> *ibid* 31.

<sup>52</sup> I Brinkley, *Flexibility or insecurity? Exploring the rise in zero-hours contracts* (The Work Foundation, 2013) [www.theworkfoundation.com/Research/Socio-Economic/Zero-hours-contracts](http://www.theworkfoundation.com/Research/Socio-Economic/Zero-hours-contracts).

<sup>53</sup> Channel 4 News, *Anger at Amazon working conditions*, see [www.channel4.com/news/anger-at-amazon-working-conditions](http://www.channel4.com/news/anger-at-amazon-working-conditions).

<sup>54</sup> *ibid*.

<sup>55</sup> See J Kellowe, 'Sports Direct chief defends zero-hours contracts', *The Guardian* (London, 29 October 2015) [www.theguardian.com/business/2015/oct/29/sports-direct-chief-defends-zero-hours-contracts](http://www.theguardian.com/business/2015/oct/29/sports-direct-chief-defends-zero-hours-contracts).

<sup>56</sup> Leigh Day Solicitors, *Sports Direct agree major changes for zero hours staff following legal battle* [www.leighday.co.uk/News/2014/October-2014/Sports-Direct-agree-major-changes-for-zero-hours-s](http://www.leighday.co.uk/News/2014/October-2014/Sports-Direct-agree-major-changes-for-zero-hours-s).

excluding ZHWs from its bonus schemes.<sup>57</sup> Sports Direct have hit back arguing that ZHCs ‘work well for the vast majority of our casual staff as well as it does for the company’.<sup>58</sup> Under mounting pressure from a UK Parliamentary enquiry over allegations of paying its warehouse staff less than the National Minimum Wage,<sup>59</sup> ‘zeroing out’ staff who fail to keep up with sales targets, and ‘naming and shaming’ workers using loudspeakers, the company has agreed to carry out a review of its processes.<sup>60</sup>

Evidence from the CIPD suggests that zero hours contracting is increasing as ‘employers seek more variable or contingent forms of work to manage business uncertainty in the face of fierce competition and tight budget constraints’. The CIPD advises that employers should only use them when the inherent flexibility of the arrangement ‘suits both the organisation and the individual’. This leads us to consider, in the next part, the employment status of this growing army of ZHWs and the contractual rights of these most contingent workers for whom ‘demutualisation’ has pushed them to the outermost boundaries of labour law.<sup>61</sup>

### III. Zero Hours Working—Legal Status and the Scope of Employment Protection

‘Contracts of service must not be turned into contracts of slavery’  
(*De Francesco v Barnum* [1890] 45 Ch D 430 (Fry LJ))

#### A. Introduction

As outlined in the introduction of this chapter, ZHCs are ‘enormously varied’<sup>62</sup> and, as such, there is no ‘unitary notion of the Zero Hours Contract’.<sup>63</sup> The term ZHC may include various types of ‘work arrangements ... for which there are no fixed or guaranteed hours of remunerated work’.<sup>64</sup> It is not just the heterogeneity of these contracts, but their intangibility, that poses challenges both for the common law tribunals and courts in the UK and also for the legislator. For the

<sup>57</sup> *The Guardian* (n 53).

<sup>58</sup> *ibid.*

<sup>59</sup> Now relabelled the National Living Wage with effect from 1 April 2016. See The National Minimum Wage (Amendment) Regulations 2016, SI 2016/68.

<sup>60</sup> ‘Sports Direct comes out fighting on zero hours contracts’ (*The Yorkshire Post*, 18 December 2015) [www.yorkshirepost.co.uk/business/retail/sports-direct-comes-out-fighting-on-zero-hours-contracts-1-7632334](http://www.yorkshirepost.co.uk/business/retail/sports-direct-comes-out-fighting-on-zero-hours-contracts-1-7632334).

<sup>61</sup> See A Davies (n 19) 94–95.

<sup>62</sup> Dr Vince Cable MP (HC Deb 16 Oct 2013, vol 567, col 756).

<sup>63</sup> A Adams, M Freedland and J Prassl (n 2) 5.

<sup>64</sup> M Freedland and N Kountouris (n 42) 318–319.



judiciary, the main challenge is to interpret each individual contractual arrangement in its specific employment law context, while for the legislator, the main task is to draft laws that provide, at least, for the outlawing of abuses of ZHCs and which may go further to provide ZHWs with the minimum standard of employment protection normally available to core workers. In order to frame this discussion, in this part, we must address the employment status of ZHWs and identify the scope and limitations of employment protection afforded to them.

## B. Employment Status of Zero Hours Workers

Employment status in the UK is determined by the operation of what Anne Davies has identified as the ‘main organising concepts’ of employment law,<sup>65</sup> specifically, in this context, the concepts of ‘employee’ and ‘worker’. We must first seek to determine whether the ZHW is an ‘employee’ with a ‘contract of employment’.<sup>66</sup> This prioritisation is important because the existence of a contract of employment, which is the foundation for ‘employee’ status, operates as a passport for the individual to be afforded the fullest protection that is available under employment law. Formally, as emphasised by the use of suffixes, an ‘employee’ is a counterpart to an ‘employer’, suggesting a certain kind of relational equilibrium between the contracting parties, but this notional sense of equality is illusory because the statutory ‘contract of employment’ is defined as a ‘contract of service’,<sup>67</sup> directly drawn from the common law hierarchical relation of master and servant. It is the common law tests evolving from this relation that have become the benchmark for UK Employment Tribunals<sup>68</sup> to establish, on a case by case basis, the existence of a contract of employment.

The common law tests are somewhat fluid but require evidence of elements of: ‘control’, indicating a measure of subordination of the employee to the employer; ‘risk’, or economic reality, identifying the employer as the person who takes the economic risk in the relationship; and ‘mutuality of obligation’, a variant of the control test, whereby the employee is obliged to accept work when it is offered to him or her by the employer.<sup>69</sup>

Among these tests, it is mutuality of obligation that is the most problematic for those working under ZHCs. The mutuality of obligation test is founded on the notion that the contract of employment is more than a mere wage/work bargain between the parties but rather, as Mark Freedland has explained, there is a second

<sup>65</sup> A Davies (n 19) 96–120.

<sup>66</sup> Employment Rights Act 1996 s 230(1).

<sup>67</sup> *ibid* s 230(2).

<sup>68</sup> Strictly speaking there is a separate system of tribunals in, respectively: England and Wales; Northern Ireland; and, Scotland.

<sup>69</sup> See A Davies (n 19) 101–108; S Deakin and G Morris, *Labour Law* (Hart Publishing, 6th edn, 2012) 159–169.

level of obligation of mutual promises of future performance.<sup>70</sup> These are ‘the mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment so called’.<sup>71</sup> The problem with this test for ZHWs arises from the weight it places on a promise made by the worker to be available to serve the employer when required, on an ongoing basis, even where there is uncertainty about whether, if at all, the employer will promise future work and for how long. It is even more difficult in cases where ZHWs are dependent on a series of short ‘spot contracts’, sometimes with more than one employer, in which there is no contract in force between engagements.<sup>72</sup> Is it possible for each of these separate wage/work bargains, if they are with the same employer, to be joined together into what is known as a ‘global contract’ if there is evidence of an ongoing mutuality of obligation during and between each hiring?<sup>73</sup>

Two late twentieth century court judgments illustrate how the mutuality of obligations test has been elaborated in cases involving casual or intermittent workers who might nowadays be described as ‘zero hours workers’. The first case, *O’Kelly*,<sup>74</sup> concerned a group of hotel wine waiters described as ‘regular casuals’ in the contractual documents. Under the arrangement, the wine waiters were available for hire periodically to cater at functions and were expected to offer their services. The waiters could turn down an offer of work but, under a preferential list system, those who refused work would be removed from the list. In practice, many worked long hours in the hotel most weeks and had not refused offers of work. Nevertheless, the Court of Appeal of England and Wales upheld the finding of an Employment Tribunal that, under the arrangement, there was no obligation for the hotel to provide work and no obligation on the waiters to offer their services. This meant that, according to the Court, each individual hiring of the waiters for a function was a singular wage/work bargain without the necessary mutuality of obligation and, further, there was no global contract of employment spanning these bargains. Without the necessary mutuality, the waiters were merely independent contractors choosing to work for the hotel as a client. To the extent that there was an exchange of promises between the parties, these promises were not strong enough to amount to mutual obligations to maintain the relationship on an ongoing basis.<sup>75</sup> There was also interplay between the absence of mutuality of obligation and the ‘risk’ test because, by being able to exercise a choice to work, rather than having an obligation, the waiters ‘bore the risk of the absence of work’.<sup>76</sup>

<sup>70</sup> M Freedland, *The Contract of Employment* (Clarendon Press, 1976) 21–22.

<sup>71</sup> *ibid.*

<sup>72</sup> See Z Adams and S Deakin (n 3) 12.

<sup>73</sup> See A Davies (n 19) 104.

<sup>74</sup> *O’Kelly v Trusthouse Forte Plc* [1984] QB 90 (CA).

<sup>75</sup> A Davies (n 19) 105.

<sup>76</sup> H Collins, *Employment Law* (OUP, 2nd edn, 2010) 40.

In the second case, *Carmichael*,<sup>77</sup> two tour guides at a power station were hired on a 'casual as required' basis. Like the waiters in *O'Kelly*, these women had no minimum hours of work and were simply offered work and performed it whenever the employer decided that they were needed. Each party bore a risk of the unavailability of labour.<sup>78</sup> When the case reached the House of Lords,<sup>79</sup> Lord Irvine, in the leading judgment, observed that the documentation signed by the parties pointed to an absence of the 'irreducible minimum' of mutual obligation necessary to create a contract of service. He noted that, in practice, both tour guides had not been available for work on several occasions when it had been offered indicating an absence of mutuality. Lord Irvine approved of what we would understand today as zero hours contracting, commenting, with gendered undertones, that '[t]his flexibility of approach was well suited to their family needs. Just as the need for tours was unpredictable so also were their domestic commitments. Flexibility suited both sides.'<sup>80</sup> The price that these women paid for this 'domestic' convenience and 'flexibility' for their 'family needs' was to be denied the right to seek some of the most basic protection afforded by UK employment law, including the right to claim unfair dismissal, the right to a redundancy payment and the right to take maternity leave and parental leave, all of which are reserved exclusively for those granted the status of 'employee'.<sup>81</sup> If the same conclusion were reached today in a similar case, such workers would even be denied the right to request flexible working, which is also confined to 'employees'.<sup>82</sup>

In more recent cases, however, the courts have made 'much less aggressive use'<sup>83</sup> of the strict mutuality of obligation approach laid down in *O'Kelly* and *Carmichael*. In *Wilson*,<sup>84</sup> it was held that absence of mutuality means there is no obligation on either party to perform work. Therefore, if, as in many zero hours arrangements, an employer is not obliged to offer work but, when it is offered, it must be accepted by the worker, that worker would have the necessary obligation required for a contract of employment. In such a case, there might not be a positive mutual obligation but there would not be an absence of mutuality. Further, in *Williams*, it was found that a refusal to accept work was not fatal to being awarded 'employee' status 'if there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it'.<sup>85</sup>

The mutuality of obligation test will be applied on the basis of the facts, which gives considerable latitude to an Employment Tribunal (ET) hearing a particular

<sup>77</sup> *Carmichael v National Power Plc* [1999] 1 WLR 2042 (HL).

<sup>78</sup> See H Collins, 'Employment Rights of Casual Workers' (2000) 29 ILJ 73, 73.

<sup>79</sup> Now replaced by the UK Supreme Court.

<sup>80</sup> *Carmichael v National Power Plc* [1999] 1 WLR 2042 (HL).

<sup>81</sup> In each case, statute limits the protection to 'employees'; see for example the Employment Rights Act 1996 s 94(1) concerning unfair dismissal.

<sup>82</sup> Employment Rights Act 1996 s 80F.

<sup>83</sup> A Adams, M Freedland and J Prassl (n 2) 15.

<sup>84</sup> *Wilson v Circular Distributors Ltd* [2006] IRLR 38 (EAT).

<sup>85</sup> *Cotswold Developments Ltd v Williams* [2006] IRLR 181 (EAT) [55].

case. For example, in *Haggerty*,<sup>86</sup> a worker who was on a list of casuals was found to be under a contract of employment for each shift she worked and, although there was no guarantee of minimum hours of work, on the facts, it was shown that the claimant had an expectation of a reasonable amount of work. As in *O'Kelly*, it was understood that refusal to accept offers of work would lead to her removal from the employer's list of casuals. On appeal, the Employment Appeal Tribunal (EAT) approved the emphasis given by the ET on the need to deduce the intention of the parties from their conduct over a long period of time. This evidence was 'just sufficient' to point to an ongoing mutuality of obligations between shifts.<sup>87</sup> *Haggerty* suggests that, in the case of a ZHW who is 'on call', and thus required to be available to work, the obligation on the employer to offer work can be inferred as a reciprocal obligation.<sup>88</sup>

After *O'Kelly*, it was common for employers to put 'no mutuality of obligations' clauses into contracts with casual or intermittent workers. How strictly should such clauses be interpreted and how much scope is there for a broader contextual interpretation of the parties' statements? The traditional 'contract' approach to interpretation is very strict indeed as typified by the majority of the Court of Appeal in *Kalwak*, which held that an express 'no obligations clause' could only be shown to be a 'sham' if 'at the time of the contract, both parties [must have intended the term] to misrepresent their true actual relationship'.<sup>89</sup>

More recently, however, the higher courts have preferred an alternative 'employment' approach to interpretation that looks beyond the content of any promises.<sup>90</sup> Smith LJ in *Szilagyi* stressed that the task of the ET was to put such clauses in a wider employment context, to look at 'the substance not the label' and recognise that 'in the field of work ... the reality may be that that the principal/employer dictates what the written agreement will say and the contractor/employee must take it or leave it'.<sup>91</sup> The Supreme Court in *Autoclenz*<sup>92</sup> went further, expressly rejecting the notion in *Kalwak* of 'common intent' to misrepresent because it implied a degree of equality between the parties that did not normally exist in an employment contract. Lord Clarke observed that:

[T]he relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represents what was agreed and the *true agreement* will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.<sup>93</sup>

<sup>86</sup> *St Ives Plymouth Ltd v Mrs D Haggerty* [2008] UKEAT 0107/08/MAA.

<sup>87</sup> *ibid* [9].

<sup>88</sup> See S Deakin and G Morris (n 69) 167.

<sup>89</sup> *Consistent Group Ltd v Kalwak and Others* [2008] EWCA Civ 30 (Rimer LJ) [51].

<sup>90</sup> A Davies (n 19) 105.

<sup>91</sup> *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365 (CA) [52] and [61].

<sup>92</sup> *Autoclenz Ltd v Belcher* [2011] UKSC 41. For comment, see A Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *ILJ* 328.

<sup>93</sup> *ibid* [35]. Emphasis added.

*Autoclenz* matters because, for the most precariously situated workers, such as those on various forms of ZHCs, it is vital for tribunals to recognise that, whatever the formal terms, the contract of employment is to a large extent, as Kahn-Freund put it, ‘a figment of the legal mind’ that conceals a ‘condition of subordination.’<sup>94</sup> The more the worker needs work, any work, however infrequently it is offered, the more likely it is that he or she will have ‘take it or leave it’ and accept the employer’s contractual terms.<sup>95</sup>

The importance of *Autoclenz* is illustrated by *Pulse Healthcare*.<sup>96</sup> The case concerned the transfer of a contract for 24-hour care provision for a woman with severe physical disabilities in the context of the Transfer of Undertakings (Protection of Employment) Regulations 2006, known as TUPE. Under TUPE, any employees performing the relevant contract are normally transferred to the new contractor and their acquired employment rights are protected. Pulse, the transferee company, refused to agree to the transfer of the care workers responsible for the care package from the transferor, Carewatch, on the basis that there was no mutuality of obligation. The workers had signed a document provided by Carewatch entitled ‘Zero Hours Contract Agreement’. Apart from the title, many of the other provisions in the document referred to typical requirements of a contract of employment such as annual leave and sickness leave entitlements. The document even set out ‘particulars of employment’ as required for employees.<sup>97</sup> It did not exclude the workers from working for another employer but this was only possible when ‘unassigned’ to Carewatch. Against the heading, ‘Hours of Employment’, the document stated ‘Zero hours’. In practice, however, it was shown that each of the carers worked an agreed number of hours per week varying from 24 to 36. Not surprisingly, the Employment Judge found that the document ‘did not reflect the true position.’<sup>98</sup> Once the work rota was fixed the workers were required to work and the employer was required to provide that work. This was sufficient to show mutuality of obligations. On appeal, the EAT found that the judgment was wholly in accord with *Autoclenz*.<sup>99</sup>

What is interesting about *Pulse Healthcare* is not so much the application of *Autoclenz*, but the approach of the EAT to the wage-work bargain. Each of the care workers were rostered for individual shifts. Such individual wage/work bargains can be regarded as ‘miniature contracts of employment’ so long as, firstly, there are the necessary requirements of control and risk,<sup>100</sup> and, secondly, if the employer is obliged to pay the worker for the whole of the agreed shift.<sup>101</sup> This is important

<sup>94</sup> P Davies and M Freedland, *Kahn-Freund’s Labour and the Law* (Stevens, 3rd edn, 1983) 18.

<sup>95</sup> See further, H Collins, *Employment Law* (OUP, 2nd edn, 2010) 7.

<sup>96</sup> *Pulse Healthcare Ltd v Carewatch Care Services Ltd and 6 Others* [2012] UKEAT/0123/12/BA.

<sup>97</sup> Employment Rights Act 1996 s 1(1)-(2).

<sup>98</sup> *Pulse Healthcare Ltd v Carewatch Care Services Ltd and 6 Others* [2012] UKEAT/0123/12/BA [21].

<sup>99</sup> *ibid* [35].

<sup>100</sup> A Davies (n 19) 106. For example, see *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA).

<sup>101</sup> A Davies *ibid*. See *Little v BMI Chiltern Hospital* [2009] UKEAT/0021/09/DA.

because duration is not a decisive factor in establishing a contract of employment. If there is an absence of mutuality between each contract that will mean that the contract is legally unenforceable at common law, as in *O'Kelly and Carmichael*, but it does not mean that the worker has not acquired any statutory rights.<sup>102</sup> For example, certain employment rights, such as the right to a statement of employment particulars, or the right not to be dismissed for trade union membership, do not require a long period of continuity of employment.<sup>103</sup>

In *Pulse Healthcare*, these conditions were met and, moreover, in the interpretation of the EAT, the care workers were employed under a global contract which required mutual obligations to subsist for the entire period leading up to the transfer and no problem of lack of continuity of employment arose.<sup>104</sup> The EAT reached this conclusion because, although each worker was rostered for specific shifts, there were mutual obligations for the delivery of the whole care package on an ongoing basis including to cover for holidays and sickness. It followed that the care workers had global contracts of employment to work a certain number of hours each week in relation to the care package.

On the one hand, the outcome of *Pulse Healthcare* can be seen as a positive for the employment protection of ZHWs. Workers designated by their employer as ZHWs may be found, on the particular facts, to be 'employees' not just for specific engagements but on an ongoing basis, satisfying the mutuality of obligations. If it is possible to 'join up' each shift, or miniature contract, a global contract can be established. This is important because, in order to access many employment rights in the UK, it is necessary to fulfil a lengthy qualifying period of continuous employment. Continuity requirements are thus 'an important filter for employment protection'.<sup>105</sup> For example, two years of continuous employment is required to bring a claim for unfair dismissal.<sup>106</sup>

On the other hand, *Pulse Healthcare* was a relatively straightforward case where the designation of the workers as 'zero hours' was shown to be a rather obvious sham. Indeed, it is not the case, even after *Autoclenz*, that the written agreement, if there is one, can simply be disregarded. In other cases, even if the worker can

<sup>102</sup> H Collins (n 76) 77.

<sup>103</sup> See S Deakin and G Morris (n 69) 167. The right to a written statement of particulars of employment requires one month's continuous employment, Employment Rights Act 1996 s 1(2). No qualifying period is required for an employee to bring a claim for the right not to be dismissed for reasons related to trade union membership or activities under the Trade Union and Labour Relations (Consolidation) Act 1992 s 152.

<sup>104</sup> *Pulse Healthcare Ltd v Carewatch Care Services Ltd and 6 Others* [2012] UKEAT/0123/12/BA [40].

<sup>105</sup> S Deakin and G Morris (n 69) 199.

<sup>106</sup> Employment Rights Act 1996 s 108. See, for example, *Borrer v Cardinal Security Ltd* [2013] UKEAT/0416/12/GE, a case involving a supermarket security guard with a contract stipulating that his working hours 'will be specified' by his line manager. He received a text message each week informing him of his working hours. In practice, he regularly worked 48 hours a week for two years. He resigned when his hours were drastically reduced. It was held, applying *Autoclenz*, that the true agreement was a contract of employment for 48 hours a week. As an employee with two years' continuous employment, he was entitled to bring a claim for unfair dismissal.

establish a series of contracts of employment, unless it is possible to convert those separate contracts into a global contract, casual or intermittent ZHWs will be filtered out of important areas of employment protection because they will not have the necessary continuity to bring claims. This is precisely what happened in the subsequent case of *Saha v Viewpoint Field Services Ltd*,<sup>107</sup> in which a telephone interviewer who worked on an ad hoc basis for between seven and 43 hours almost every week for a year was found not to have mutuality of obligations because she was not obliged to work each week when work was offered and the employer was not obliged to offer her work. Even though she had been referred to by the employer as an ‘employee’ and, during her shifts she had spot contracts of employment, she did not have mutuality of obligation and, therefore, was filtered out of protection against unfair dismissal because she had no global contract of employment.<sup>108</sup>

UK legislation provides limited protection against filtering in cases that, on the facts, satisfy the requirements of ‘statutory continuity’ under s. 212 of the Employment Rights Act 1996. Under this provision, any week ‘during the whole or part of which an employee’s relations with his employer are governed by a contract of employment counts in computing the employee’s contract of employment’.<sup>109</sup> If, however, there is a gap in employment on account of, inter alia, ‘a temporary cessation of work’, that gap does not break the period of continuous employment.<sup>110</sup> In this way, as Anne Davies explains, statutory continuity provides the ‘glue’ to stick a series of short contracts of employment together to create one whole period of what is deemed to be continuous employment.<sup>111</sup>

For example, in *Prater*,<sup>112</sup> a teacher who taught pupils at their homes was given a different assignment lasting a varying period of time for each pupil she taught. There were gaps between teaching assignments including for holidays. The Court of Appeal held that there was a mutual obligation for each assignment in the sense that Ms Prater was obliged to teach the pupil and the Council was obliged to pay her.<sup>113</sup> Mummery LJ noted that the question as to whether each engagement was an individual work contract in which there were mutual obligations was not addressed in *O’Kelly* and *Carmichael*.<sup>114</sup> In *Prater*, there were a succession of individual work contracts in each of which there was mutuality of obligation. Once this was established, s 212 ‘took care of the gaps between the individual contracts and secured continuity of employment’ for the purposes of employment protection.<sup>115</sup> The significance of the judgment is that, for the purpose of establishing

<sup>107</sup> [2014] UKEAT/0116/13/DM.

<sup>108</sup> Miss Saha was therefore denied the opportunity to bring a claim for unfair dismissal. At the time of her claim, in 2012, the period of continuous employment for bringing such a claim under the Employment Rights Act 1996 s 108 was one year.

<sup>109</sup> Employment Rights Act 1996 s 212(1).

<sup>110</sup> *ibid* s 212(2)(c).

<sup>111</sup> See A Davies (n 19) 107.

<sup>112</sup> *Cornwall County Council v Prater* [2006] EWCA Civ 102.

<sup>113</sup> *ibid* [33] (Mummery LJ).

<sup>114</sup> *ibid* [34] and [36].

<sup>115</sup> *ibid* [40].



statutory continuity, if there is a temporary cessation, there is no need to consider the contractual position between each contract or whether there is ongoing mutuality of obligation.<sup>116</sup>

There is no doubt that statutory continuity does solve some problems for certain casual or intermittent ZHWs, who will have a series of capsuled contracts of employment that can be linked together, but may not be able to establish ongoing mutuality or a global contract. However, statutory continuity is not a golden bullet to solve all problems for ZHWs. Many cases will be unlike *Prater*. For example, where no work is available from week to week because the work has already been allocated to other casual workers, the week will not count as a ‘temporary cessation’ and continuity will be broken.<sup>117</sup> In other cases, as in *Saha*,<sup>118</sup> individual shifts, which may be erratic and unpredictable, will be found to lack mutuality of obligation and be distinguishable from *Prater*. Such ZHWs will either have the status of ‘worker’, in which case they will have access to a more limited menu of employment rights, or, if they take on the risk of profit and loss in the relationship,<sup>119</sup> they will be deemed to be autonomous and self-employed.

The statutory term ‘worker’ is defined in s 230(3)(b) of the Employment Rights Act 1996 as including contracts where ‘the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or undertaking carried on by the individual’.<sup>120</sup> ‘Worker’ is an intermediate category lying between an ‘employee’ who is dependent on the employer and an independent contractor who is self-employed. The statutory concept of the ‘worker’ is designed to protect those who do not have sufficient mutuality of obligation to be ‘employees’ but are, unlike the self-employed, ‘semi-dependent’<sup>121</sup> on an employer and are normally in a subordinate position in the employment relation, although a relation of subordination is not necessarily essential.<sup>122</sup>

Simon Deakin and Gillian Morris have explained the rationale for the ‘worker’ concept in the following terms:

‘... the legislature has in essence taken the view that casual workers who would not necessarily fall within “employee” status should not, for that reason, be denied basic protections which do not depend, for their effective functioning, upon the employment relationship in question being regular or long-term.’<sup>123</sup>

<sup>116</sup> See A Davies (n 19) 108.

<sup>117</sup> *ibid.* See *Byrne v Birmingham City Council* [1987] ICR 519 (CA).

<sup>118</sup> *Saha v Viewpoint Field Services Ltd* [2014] UKEAT/0116/13/DM.

<sup>119</sup> See *Quashie v Stringfellows Restaurants Ltd* [2012] EWCA Civ 1735.

<sup>120</sup> Employees are also included in the definition of a ‘worker’ in s 230(3)(a) of the Employment Rights Act 1996. This ensures that statutory references to rights for every ‘worker’ cover all those in both the ‘employee’ and ‘worker’ categories.

<sup>121</sup> See M Freedland, *The Personal Employment Contract* (OUP, 2003) 30–33.

<sup>122</sup> *Clyde & Co v Bates van Winkelhof* [2014] UKSC 32 [39] (Baroness Hale).

<sup>123</sup> S Deakin and G Morris (n 69) 175.



These ‘basic protections’ include, inter alia, the right to be paid the National Living Wage,<sup>124</sup> paid holidays and limits on working hours,<sup>125</sup> and protection against unauthorised pay deductions.<sup>126</sup> Those in ‘employment’, who have ‘a contract personally to do work’,<sup>127</sup> are also protected under the Equality Act 2010 against discrimination on the grounds, inter alia, of age, sex, racial or ethnic origin, religion or belief, disability or sexual orientation. The Equality Act definition, although it does not use the term ‘worker’, is increasingly regarded as similar in meaning to the definition of ‘worker’ in the Employment Rights Act.<sup>128</sup>

To establish ‘worker’ status it must be shown that the individual has a contract to perform work or services personally. Also, to more clearly distinguish workers from the wholly self-employed, an individual must not be a ‘client or customer’, which means that it is possible that an individual can run a business and be a worker ‘provided that the recipient of the business’s services cannot be described as a customer’.<sup>129</sup>

As with the concept of ‘employee’, following *Autoclenz*, the ET must look at the ‘true agreement’ taking into account the conduct of the parties. In *Buckborough*,<sup>130</sup> for example, a bricklayer who had signed a document stating that he was self-employed was found to be a ‘worker’ on the facts.

Early case law on the ‘worker’ concept tended to blur the tests for ‘employee’ and ‘worker’ by suggesting that some, more limited, degree of mutuality of obligation between the parties was required for ‘worker’ status.<sup>131</sup> More recently, the courts have developed a distinctive interpretation of ‘worker’, emphasising the need for an obligation on the part of the ‘worker’ to perform work or services personally.<sup>132</sup> This will cover most situations where there is a personal work relationship with an employer except where the true agreement includes an unqualified clause under which, when a worker is not required to provide a personal service, he or she can nominate a substitute.<sup>133</sup> As Anne Davies has succinctly put it: “‘Worker’ is not a ‘low-fat’ version of employee: it is a different concept altogether”.<sup>134</sup> It follows that, a broad approach to the ‘worker’ concept, untied to the common law tests for ‘employee’, will encompass many zero hours arrangements, including intermittent working, so long as there is an obligation on the part of the ZHW to perform work or services for another person on each occasion when they accept an offer of work.

<sup>124</sup> Formerly the National Minimum Wage. See The National Minimum Wage (Amendment) Regulations 2016, SI 2016/68.

<sup>125</sup> Working Time Regulations 1998, SI 1999/584.

<sup>126</sup> Employment Rights Act 1996 ss 13–14 and 17–22.

<sup>127</sup> Equality Act 2010 s 83(2)(a).

<sup>128</sup> *Clyde & Co v Bates van Winkelhof* [2014] UKSC 32 [31] (Baroness Hale); see also *Jivraj v Hashwani* [2011] UKSC 40.

<sup>129</sup> A Davies (n 19) 113. See *Hospital Medical Group v Westwood* [2012] IRLR 834 (CA).

<sup>130</sup> *Redrow Homes v Buckborough* [2009] IRLR 34.

<sup>131</sup> *Byrne Bothers (Formwork) Ltd v Baird* [2002] ICR 667 (EAT).

<sup>132</sup> *Community Dental Centres Ltd v Sultan-Darmon* [2010] UKEAT/0532/09/DA.

<sup>133</sup> See *Express & Echo Publications v Tanton* [1999] IRLR 367 (CA).

<sup>134</sup> A Davies (n 19) 114.

### C. Employment Protection of Zero Hours Workers—Examples of Entitlements and Limitations

Even where the law does provide formal protection for workers on ZHCs, whether they have the status of ‘employee’ or ‘worker’, in practice it may be difficult for them to exercise their rights. For example, if the ZHW has a contract of employment, with at least one month’s continuous employment, which would include many shorter wage/work bargains with mutual obligations, he or she is entitled to a statement of written particulars of employment.<sup>135</sup> The written statement must include ‘terms and conditions relating to hours of work’ including ‘normal hours of work.’<sup>136</sup> On one reading, this might suggest that, where there is an opaque ZHC, the employer would be forced to reveal regular working hours to the employee in the statement. However, the statement is no more than a reflection of the employer’s interpretation of the terms and conditions contractually agreed between the parties.<sup>137</sup> The contract itself does not have to be in writing.<sup>138</sup> The statement does not replace the contract, nor does it create an obligation on the employer to fix a set number of contractual hours per week or month, or to provide work on particular days or at certain times of the day. In a best case scenario, it could be argued, that if the employer has in practice offered fixed hours on a regular basis this ‘crystallises’ over time into a legal obligation that must be faithfully reflected in the statement.<sup>139</sup>

Bringing a claim for unfair dismissal will also be difficult for a ZHW. It may be possible to establish a global contract by linking together a series of contracts of employment and relying on the rule on temporary cessations to stick them together so as to establish the necessary qualifying period of two years’ continuous employment.<sup>140</sup> However, there may be uncertainty over whether a temporary cessation, with no further work being offered, amounts to a ‘dismissal’ in law.<sup>141</sup> It is possible for the termination of a fixed-term contract to be deemed a ‘dismissal’,<sup>142</sup> but it would be relatively straightforward for the employer to show that such a dismissal is ‘fair’<sup>143</sup> in the absence of compelling evidence that he or she has acted unreasonably when compared to the standard of the ‘reasonable employer’.<sup>144</sup>

ZHWs, including those with ‘worker’ status, even if they are only offered work intermittently, will be entitled, when they are working, to the National Living Wage

<sup>135</sup> Employment Rights Act 1996 s 1(1)-(2).

<sup>136</sup> *ibid* s 1(4)(c).

<sup>137</sup> See *Southern Cross Healthcare Co Ltd v Perkins* [2010] EWCA Civ 1442.

<sup>138</sup> Employment Rights Act 1996 s 230(2).

<sup>139</sup> See *Z Adams and S Deakin* (n 3) 13.

<sup>140</sup> Employment Rights Act 1996 s 108.

<sup>141</sup> *ibid* s 95(1). See further, *Z Adams and S Deakin* (n 3) 13.

<sup>142</sup> *ibid* s 95(1)(b).

<sup>143</sup> *ibid* s 98.

<sup>144</sup> *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT).

(NLW) at an hourly rate,<sup>145</sup> a limit on their maximum weekly working hours, rest periods and paid holidays calculated on a pro-rata basis.<sup>146</sup> The right to be paid the NLW is important, not only as a statutory wage floor, but also because the legislation can be used to clamp down on abuses, such as clocking on and clocking off during times of inactivity or only paying staff when they are serving customers.<sup>147</sup> It also covers many ‘on-call’ workers, such as care workers, who are required to be at, or close to, the workplace, and those who may have to sleep during part of their shift.<sup>148</sup> Under the legislation, hourly paid workers are entitled to the NLW not only for the time that they are actually working but also for time when they are ‘available at or near a place of work’.<sup>149</sup> Travelling time while on business, such as between appointments, is also included.<sup>150</sup> While the NLW provides important protection, it is not payable in situations when casual workers turn up for work in the hope of being hired but are turned away without work.<sup>151</sup>

## IV. Outlawing Abuses of Zero Hours Contracts and Proposals for Reform

### A. Are Zero Hours Contracts Legal?

In this part, measures to outlaw abuses of ZHCs and proposals to reform the law will be discussed. As Shanks J observed in a recent case before the EAT, ‘there can be no doubt that this is an area which is crying out for some legislative intervention’.<sup>152</sup> An immediate question, however, is whether ZHCs are legal.<sup>153</sup> According to the UK Government, in its December 2013 consultation on ‘Zero Hours Employment Contracts’, a ZHC ‘is a legitimate form of employment contract drawn up between employer and individual, providing both parties freely agree to it’.<sup>154</sup> This is a fairly obvious reference to the well-rooted common law notion of ‘freedom of contract’, but this assumes that the contract is a ‘freely negotiated agreement of two equal

<sup>145</sup> National Minimum Wage (Amendment) Regulations 2016. With effect from 1 April 2016, the National Living Wage, formerly the National Minimum Wage is £7.20 per hour for workers aged 25 and over with lower rates for those under 25 and apprentices.

<sup>146</sup> Working Time Regulations 1998, SI 1998/1833.

<sup>147</sup> See A Adams, M Freedland and J Prassl (n 2) 6–7.

<sup>148</sup> *Esparon v Slavikovska* [2014] UKEAT/0217/12/DA.

<sup>149</sup> National Minimum Wage Regulations 1999, SI 1999/584, reg 15(1).

<sup>150</sup> *ibid* reg 15(2).

<sup>151</sup> See A Adams, M Freedland and J Prassl (n 2) 19.

<sup>152</sup> *Saha v Viewpoint Field Services Ltd* [2014] UKEAT/0116/13/DM, 23.

<sup>153</sup> See further, E McGaughey, ‘Are Zero Hours Contracts Lawful?’ (20 November 2014) SSRN [ssrn.com/abstract=2531913](https://ssrn.com/abstract=2531913).

<sup>154</sup> Department for Business, Innovation and Skills, *Zero Hours employment contracts* (December 2013) [www.gov.uk/government/consultations/zero-hours-employment-contracts](http://www.gov.uk/government/consultations/zero-hours-employment-contracts).

parties in the market.<sup>155</sup> In the absence of statutory protection, the conventional rule is that the parties' bargain is enforceable regardless of whether it is fair.<sup>156</sup> However, the courts have come to recognise that the employment contract is a special type of relational contract to be interpreted and applied in the context of the inequality of bargaining power between the parties.

One might ask, how can an employment contract be lawful if it does not guarantee that a worker will be provided with any work (or any further work) or, indeed, any specified hours of work? This is problematic because it is a basic tenet of the common law that the employee only has a right to be paid if he or she performs an obligation under the contract. It is the performance of this obligation that triggers the employer's corresponding obligation to pay.<sup>157</sup> As Greer LJ succinctly put it in *Browning v Crumlin Valley Collieries Ltd*: 'the consideration for work is wages, and the consideration for wages is work'.<sup>158</sup> The absence of a guarantee of work has the effect, therefore, of undermining the purpose of the minimum wage—to provide a basic income—but there is no statutory or common law guarantee of minimum working hours.<sup>159</sup> It is only possible to secure a right to work, or to be paid for work not provided, if a term can be implied based on the agreement of the parties. In *Devonald v Rosser and Sons Ltd*,<sup>160</sup> workers were laid off without pay but had no contractual provision specifying their hours of work. The contract did, however, specify a notice period to be applied before the employees could be dismissed. The Court of Appeal held that, during this contractual notice period, a term could be implied that the employer had a duty to offer a reasonable amount of work based on the hours normally worked. The employees were entitled to damages for the employer's failure to provide that work.

An alternative approach at common law would be for the courts to imply that, at least some regular work should be offered to provide employees with a subsistence income, even if the contract is formally described as 'zero hours', on the basis that this would represent the reasonable expectations of the parties.<sup>161</sup> McGaughey, relying on the 'true agreement' test in *Autoclenz*, suggests that express contract terms referring to 'zero hours' are one-sided and may 'lie in a shadowy recess of borderline legality'.<sup>162</sup> This is an argument that is compelling, particularly in cases where it can be shown that 'zero hours' clauses are a sham, as in *Pulse Healthcare*, but it would not apply in situations where a ZHC accurately reflects the agreement of the parties even if the ZHW would like to have more regular work.<sup>163</sup> This takes

<sup>155</sup> A Davies (n 19) 138.

<sup>156</sup> *ibid.*

<sup>157</sup> See S Deakin and G Morris (n 69) 318.

<sup>158</sup> [1926] 1 KB 522 [528] (CA).

<sup>159</sup> E McGaughey (n 153) 2.

<sup>160</sup> [1906] 2 KB 728 (CA).

<sup>161</sup> E McGaughey (n 153) 3.

<sup>162</sup> *ibid.* 5.

<sup>163</sup> As in *Saha v Viewpoint Field Services Ltd* [2014] UKEAT/0116/13/DM, discussed in Part III.B above.

us back to the point that there is no single type of ZHC but, on a case by case basis, a contract dressed up as 'zero hours' may be shown, if regular hours of work are offered and accepted over an extended period, to be, in truth, a contract for a fixed number of hours per week.<sup>164</sup>

## B. Proposals for Reform

Much of the discourse on ZHCs has been concerned with identifying ways to end the exploitation of these types of contracts or even to abolish them altogether. One possible solution to the problems of lawfulness of ZHCs, identified above, would be to create a statutory presumption of illegality of ZHCs that could only be rebutted by objective justification.<sup>165</sup> For example, if evidence shows that the contractual arrangement is flexible in a way that genuinely suits both parties taking into account their unequal power relations. The difficulty with proposals for reforming the law, by giving official blessing to 'fair' ZHCs, is that ZHCs have to be defined and to an extent legitimised whilst simultaneously minimising abuse and setting core standards of protection for ZHWs.<sup>166</sup>

This very specific focus on ZHC-specific legislative proposals is an understandable, and to an extent inevitable, short-term response to media reporting of abuses and the public demand for action. The danger is that a targeted approach leads to piecemeal measures that 'legitimate precarity'<sup>167</sup> but do not address the wider challenge of meeting needs of contingent workers in the UK for security in working life.

### i. Exclusivity Clauses

The UK Government consulted in 2013 on abuses of ZHCs and problems with how they were operating.<sup>168</sup> In the consultation, the underlying assumption of Government was that ZHWs were a positive phenomenon because they 'support business flexibility, making it easier to hire new staff and providing pathways to employment for young people'.<sup>169</sup> From this standpoint any action would be

<sup>164</sup> *Borner v Cardinal Security Ltd* [2013] UKEAT/0416/12/GE. See n 106 for fuller details.

<sup>165</sup> See E McGaughey (n 153) 7, who suggests that such a presumption 'leaves room for development of the law by the courts'. See also, House of Commons Scottish Affairs Committee, *Zero-Hours contracts in Scotland: interim report, Tenth Report of session 2013–14*, HC 654 (9 April 2014) [www.publications.parliament.uk/pa/cm201314/cmselect/cm��otaf/654/654.pdf](http://www.publications.parliament.uk/pa/cm201314/cmselect/cm��otaf/654/654.pdf).

<sup>166</sup> Department for Business Innovation and Skills (BIS), *Zero-Hours Employment Contracts* (December 2013), Foreword by the Secretary of State, 4; see [www.gov.uk/government/consultations/zero-hours-employment-contracts](http://www.gov.uk/government/consultations/zero-hours-employment-contracts).

<sup>167</sup> A Adams, M Freedland and J Prassl (n 2).

<sup>168</sup> BIS (n 166).

<sup>169</sup> *ibid* Foreword by the Secretary of State, 4.

targeted as a ‘crack down on any abuse and exploitation’ by a small number of employers who were not behaving responsibly.<sup>170</sup>

One of the main areas of concern identified by the Government was ‘exclusivity clauses’, which prevented a ZHW from working for another employer, even if their current employer was not guaranteeing any hours of work. Even without legislation, such clauses, known as restrictive covenants, would be of doubtful legality at common law because of their coercive nature.<sup>171</sup> In the absence of a global contract maintaining mutuality of obligation, exclusivity clauses are unenforceable in periods in between individual ‘spot contracts’ as they amount to a restraint on the individual’s freedom to work.<sup>172</sup> Such clauses are deemed antithetical to the concepts of ‘choice and flexibility’ that provide the rationale for zero hours contracting.<sup>173</sup>

CIPD evidence presented in 2013 found that 9 per cent of ZHWs reported that they had an exclusivity clause or believed that they were restricted from exercising their choice to take up work with additional employers.<sup>174</sup> After further consultation, which revealed that 83 per cent of 36,000 respondents supported an outright ban on exclusivity clauses in ZHCs,<sup>175</sup> the Government, wishing to be seen to be doing something in the wake of considerable public outrage over the exploitation of ZHWs, concluded that ‘exclusivity clauses were used to the detriment of individuals’<sup>176</sup> and introduced legislation banning them. The Small Business, Enterprise and Employment Act 2015 inserted a new section 27A into the Employment Rights Act 1996. The provision is the first explicit statutory reference to the ZHC. It defines a ZHC as:

- ‘(1) ... a contract of employment or other worker’s contract under which
- (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and
  - (b) there is no certainty that any such work or services will be made available to the worker.
- (2) For this purpose, an employer makes work or services available to a worker if the employer requests or requires the worker to do the work or perform the services’.

On the one hand, this provision is sufficiently broad to include both ‘employees’ and ‘workers’. It recognises that all forms of employment, other than genuine

<sup>170</sup> *ibid.*

<sup>171</sup> See *De Francesco v Barnum* [1890] 45 Ch D 430.

<sup>172</sup> *Z Adams and S Deakin* (n 3) 16; *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69.

<sup>173</sup> BIS, *Zero-Hours Employment Contracts. Banning Exclusivity Clauses: Tackling Avoidance* (August 2014) 8 [www.gov.uk/government/consultations/zero-hours-employment-contracts](http://www.gov.uk/government/consultations/zero-hours-employment-contracts).

<sup>174</sup> CIPD (n 9) 23.

<sup>175</sup> BIS (n 173) 12; and, see also, BIS, *Zero Hours Employment Contracts. Government Response to the ‘Banning Exclusivity Clauses: Tackling Avoidance’* (March 2015).

<sup>176</sup> BIS (n 173) 12.

self-employment, involve a degree of dependency. On the other hand, it endorses exploitation of that dependency by permitting contracts rooted in uncertainty over working hours or even the very availability of work. The benign language of s 27A(2) implies a genuine choice on the part of the worker to accept or refuse work whenever it is made available by an employer. As has been shown in Part II.A above, the new system of Universal Credit creates a pressure on the ZHW to accept offers of work, however uncertain the hours and however low the pay, so as to avoid punitive welfare sanctions.

Exclusivity clauses are defined in s 27A as follows:

- (3) Any provision of a zero hours contract which—
- (a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or
  - (b) prohibits the worker from doing so without the employer's consent,
- is unenforceable against the worker'.

An exclusivity clause is thus deemed to be an automatically unfair contract term without reference to whether the individual who is subject to it is an employee or a worker.<sup>177</sup> The law is stronger, in certain respects, than parallel legislation concerning unfair terms in consumer contracts which outlaw some 'unfair' terms whilst allowing others based on satisfying a test of 'reasonableness'.<sup>178</sup> The legislation also provides scope, in a new s 27B, inserted into the Employment Rights Act 1996, for the Secretary of State to make further regulatory provisions to penalise employers for using exclusivity clauses or to tighten the law if there is evidence of workers who ignore an exclusivity requirement being refused further work.<sup>179</sup> Under this provision, new Regulations have been issued to provide for individual redress in cases when an 'employee' is dismissed or a 'worker' is subjected to a detriment for breaching an exclusivity clause as defined in s 27A(3) above.<sup>180</sup> The introduction of a redress mechanism provides protection to all ZHWs who are adversely affected by being refused work by an employer relying on an exclusivity clause. In the case of 'employees', dismissals for this reason will be regarded as automatically unfair.<sup>181</sup> Moreover, claims can be brought without the need to satisfy a qualifying period of employment.<sup>182</sup> Individuals seeking redress can bring a complaint before an ET and, if the complaint is well founded, they will be entitled to compensation for the infringement and any loss attributable to it.<sup>183</sup>

<sup>177</sup> Employment Rights Act 1996 s 27A(4).

<sup>178</sup> Unfair Contract Terms Act 1977.

<sup>179</sup> D Pyper and N Dar (n 30) 18.

<sup>180</sup> The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015, SI 2015/2021. Effective from January 2016.

<sup>181</sup> *ibid* reg 2(1).

<sup>182</sup> *ibid* reg 2(5).

<sup>183</sup> *ibid* regs 3 and 4.

Compensable losses may include expenses incurred and loss of benefits that the complainants might be reasonably expected to receive.<sup>184</sup>

Banning exclusivity clauses is welcome, from a protective labour law standpoint, because the new law provides clarity in striking out a particular form of exploitation affecting an estimated 125,000 ZHC workers and also remedies for violations. This group of ZHWs are now free to seek additional work to boost their income.<sup>185</sup> However, bearing in mind the protection against trade restrictive clauses at common law, and the relative paucity of these types of exclusivity clauses, this measure provides, at best, a statutory gloss on the law without addressing the fundamental problems for the worker arising from the inherent ambiguity and unpredictability of no minimum hours contracting. Moreover, there is a danger that providing a statutory definition offers yet further scope for ‘rogue employers’ to find a way of evading the exclusivity ban by, for example, shaping contract terms that may fall outside of the definition.<sup>186</sup>

Further measures are anticipated in s 27B, which allows the Secretary of State to take additional regulatory steps to modify ZHCs and confer rights on ZHWs.<sup>187</sup> Several suggestions, made independently of Government, are discussed below.

## ii. *Increasing Transparency in ZHCs*

Lack of transparency in ZHCs was highlighted as an issue in the UK Government’s consultation exercise in 2013.<sup>188</sup> The provisions banning exclusivity clauses included a definition of ZHCs but it does not necessarily cover all arrangements where there is a lack of certainty about the number of hours of work arising from a dearth of information, or conflicting information, about the contract terms. In turn, an information vacuum leads to uncertainty for the worker about present and future earnings and entitlement to welfare benefits.<sup>189</sup>

Under the law as it stands, statutory provisions concerning the right to a written statement of particulars of employment, including information about hours and pay, are only applicable to employees with two months’ continuity of employment.<sup>190</sup> Eligible employees can demand a written statement from their employer and seek to rely on it, if it precisely reflects the essential elements of their contract of employment, or challenge any inaccuracies, by bringing a claim before an ET.<sup>191</sup>

<sup>184</sup> *ibid* reg 4(3).

<sup>185</sup> BIS press statement, *Government crackdown on zero hours contract abusers* (25 June 2014) [www.gov.uk/government/news/government-crackdown-on-zero-hours-contract-abusers](http://www.gov.uk/government/news/government-crackdown-on-zero-hours-contract-abusers).

<sup>186</sup> *ibid*.

<sup>187</sup> Employment Rights Act 1996 s 27B(5)(a) and (e).

<sup>188</sup> BIS press statement, *Cable announces plans to boost fairness for workers* (16 Sept 2013) [www.gov.uk/government/news/cable-announces-plans-to-boost-fairness-for-workers](http://www.gov.uk/government/news/cable-announces-plans-to-boost-fairness-for-workers).

<sup>189</sup> *ibid*.

<sup>190</sup> Employment Rights Act 1996 s 1(1)-(2).

<sup>191</sup> See J Kenner, ‘Statement or Contract?—Some Reflections on EC Employee Information (Contract or Employment Relationship) Directive after *Kampelmann*’ [1999] 28 ILJ 205.



The right to a written statement is a modest measure first introduced in 1963.<sup>192</sup> It does not fundamentally affect the balance of power between the employer and the employee but it does help to demystify the terms of their relationship. Sir John Hare MP, the Minister of Labour when the original legislation was introduced, explained that its purpose was to enforce the principle that ‘workers’ obligations and rights should be clear and in writing’.<sup>193</sup> At the time, the concept of a ZHC, as we understand it today, was unknown. More than 50 years later, those ZHWs and other casual workers categorised as ‘workers’ without employee status, or whose contracts of employment are too short and lack mutuality of obligation, are denied this basic right of information. It would, therefore, be straightforward and relatively unburdensome for employers to be obliged by law to issue an accurate written statement of contract particulars, including hours of work and rates of pay, to all ‘workers’ employed by them, regardless of the type of contract, at the commencement of their employment.<sup>194</sup> It has also been suggested that employers should confirm employment status in the statement and be required to state their policy on when the worker should be notified that work is available.<sup>195</sup> Such an extension of legal scope would necessarily cover all ZHCs, except in cases of genuine self-employment, and would give some measure of certainty about the terms of employment. It would not, however, guarantee minimum hours of work or any guarantee of future work.

### *iii. Sharing the Risk of Insecurity and Income*

One of the main drivers of ZHCs, identified in Part II.B above, is the ‘demutualisation’ of the employment relationship whereby the risks of insecurity and income are placed on the worker who can be ‘zeroed out’ and ‘zeroed in’ to maximise flexibility.<sup>196</sup> This kind of one-sided flexibility puts huge pressure on ZHWs and other casual workers who will face uncertainty over paying bills and entitlement to welfare benefits. In an independent report for the opposition Labour Party, Norman Pickavance, recommended a sharing of this risk of insecurity between the employer and the ZHW.<sup>197</sup> Pickavance proposed, inter alia, that employers should only be able to require availability in direct proportion to the amount of work they offer. For example, employers would only be able to require additional availability for a maximum of 50 per cent of contracted hours.<sup>198</sup> This would ensure that workers would normally not be required to be available when there is no

<sup>192</sup> Contracts of Employment Act 1963.

<sup>193</sup> HC Deb, vol 671, col 1511 (1962). See further, J Kenner (n 191) 207–208.

<sup>194</sup> See Z Adams and S Deakin (n 3) 34.

<sup>195</sup> *Zeroed Out: The place of zero-hours contracts in a fair and productive economy: An independent report by Norman Pickavance* (The Labour Party 2014) 18 [www.yourbritain.org.uk/uploads/editor/files/ZHCs\\_report\\_final\\_FINAL\\_240414.pdf](http://www.yourbritain.org.uk/uploads/editor/files/ZHCs_report_final_FINAL_240414.pdf).

<sup>196</sup> See further, A Adams, M Freedland and J Prassl (n 2) 23.

<sup>197</sup> Pickavance Report (n 195) 16. Pickavance is a former human resources director at the super-market chain, Morrisons.

<sup>198</sup> *ibid.*

guarantee of work. Legislation could be introduced to make clauses to that effect unenforceable. In order to maintain some flexibility, additional availability might be possible for on-call staff if they are paid a retention fee by employers.

Another example of sharing the risk of insecurity would be to implement the proposal of the UK House of Commons Scottish Affairs Committee for employers to compensate workers for the inconvenience of arriving for work but finding that none is available.<sup>199</sup> Such a compensation scheme would discourage, but not eradicate, a particularly inimical exploitative practice. The Committee also proposed a rule requiring an employer to give a minimum notice period of work.<sup>200</sup> Along similar lines, legislation has been adopted in New Zealand, requiring notice to be given to the worker when a shift is cancelled.<sup>201</sup> The introduction of such requirements would shift the burden of risk in the employment relation back onto the employer, albeit that neither measure would be as strong as the former National Dock Labour Scheme which guaranteed work for dockers and effectively ended *On The Waterfront*<sup>202</sup> style casual working at ports before its abolition in 1989 during the first phase of labour market deregulation in the UK.<sup>203</sup>

#### *iv. Guaranteeing Regular Working Hours*

Whilst each of the proposals discussed above would mitigate some of the worst abuses of ZHCs none of them adequately addresses the precariousness of working under a contract with no guaranteed working hours. The Pickavance Report suggested a highly convoluted measure to convert a ZHC into a more standard employment contract.<sup>204</sup> It proposed that, after six months on a ZHC, workers who are in practice working 'regular hours' should have the right to request a contract other than a ZHC which would provide a minimum amount of work.<sup>205</sup> Employers would only be able to refuse such a request 'if they can demonstrate that their business needs cannot be met by any other form of flexible contract'.<sup>206</sup> The concept of a 'right to request' a change of contract is modelled on the 'right to request flexible working' for employees with six months' continuous employment.<sup>207</sup> The proposal would appear to offer considerable scope for an employer to refuse such a request on business grounds.<sup>208</sup>

<sup>199</sup> HC Scottish Affairs Committee (n 165). A similar scheme was proposed by Pickavance, *ibid* 17.

<sup>200</sup> *ibid*.

<sup>201</sup> Employment Relations Amendment Bill (No 3) 2016 s 67G, [www.legislation.govt.nz/bill/government/2015/0053B/latest/DLM6774103.html](http://www.legislation.govt.nz/bill/government/2015/0053B/latest/DLM6774103.html).

<sup>202</sup> Columbia Pictures, 1954.

<sup>203</sup> *Dockers' Job for Life Scrapped* (BBC, 6 April 1989). [news.bbc.co.uk/onthisday/hi/dates/stories/april/6/newsid\\_2522000/2522787.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/april/6/newsid_2522000/2522787.stm).

<sup>204</sup> Pickavance Report (n 195) 17.

<sup>205</sup> *ibid*. For example, a contract for seasonal work.

<sup>206</sup> *ibid*.

<sup>207</sup> Employment Rights Act 1996 s 80F-I, as amended by the Flexible Work Regulations 2014, SI 2014/1938.

<sup>208</sup> See Z Adams and S Deakin (n 3) 33.

As a fall back, Pickavance proposed that, after 12 months of continuous employment, workers on regular hours (suggested as a minimum of eight hours per week over the reference period) would have the right to be offered a contract other than zero hours which would provide a minimum amount of work. The law would ensure that this happened automatically and reflect the actual hours being regularly worked. The proposal allows for an individual opt-out from conversion to a regular hours contract subject to independent advice and freely given consent by the worker.<sup>209</sup> This proposal is quite similar to the law in the Netherlands under which a contract of employment guaranteeing minimum hours is implied after three months working on-call.<sup>210</sup>

Pickavance anticipated that such rules would be liable to abuse by ‘unscrupulous employers’ who might lay people off to break continuity of employment or ‘game’ the hours during the reference period by using fixed one or two hour contracts. Bridging provisions, similar to the rules on ‘temporary cessation’, discussed in Part III.B above, would be introduced to overcome this problem.<sup>211</sup>

Pickavance’s fall back proposal represents the most serious attempt to devise a solution to the maximum flexibility/minimum security conundrum that is a typical feature of ZHCs in the UK even in cases where the worker is working regular hours. However, despite the proposed safeguards, there would be a twofold problem if it were implemented. Firstly, the right to end the ZHC after 12 months would be dependent on satisfying mutuality of obligations at least during each individual engagement, as in *Prater*.<sup>212</sup> This may be difficult to prove over a 12-month period unless, as in *Pulse Healthcare*,<sup>213</sup> there is strong evidence that a zero hours clause in the contract is a sham. Secondly, the proposal would not assist the many ZHCs who work irregular hours, as in *Saha*,<sup>214</sup> and who are, in practice, the most vulnerable ZHWs in the greatest need of a standard employment contract to provide them with more certainty as to working hours, pay and benefit entitlement.

In New Zealand, a more radical proposal has been introduced, effective from 1 April 2016,<sup>215</sup> stipulating that employers must specify the number of guaranteed hours of work when the worker is required to be available.<sup>216</sup> Workers can refuse extra hours without being subjected to any detriment. What it does not do, contrary to some reporting, is set a default minimum number of hours per week.<sup>217</sup> It does not ban zero hours working in contracts where there is no mutuality of

<sup>209</sup> Pickavance Report (n 195) 17.

<sup>210</sup> See Z Adams and S Deakin (n 3) 29–30 and 33.

<sup>211</sup> *ibid.*

<sup>212</sup> *Cornwall County Council v Prater* [2006] EWCA Civ 102, see Part III.B above.

<sup>213</sup> *Pulse Healthcare Ltd v Carewatch Care Services Ltd and 6 Others* [2012] UKEAT/0123/12/BA, see Part III.B above.

<sup>214</sup> *Saha v Viewpoint Field Services Ltd* [2014] UKEAT/0116/13/DM, see Part III.B above.

<sup>215</sup> Employment Relations Amendment Bill (No 3) 2016 (n 201) ss 67E–H.

<sup>216</sup> Eleanor Ainge Roy, ‘Zero-hour contracts banned in New Zealand’, *The Guardian* (London, 11 March 2016) [www.theguardian.com/world/2016/mar/11/zero-hour-contracts-banned-in-new-zealand](http://www.theguardian.com/world/2016/mar/11/zero-hour-contracts-banned-in-new-zealand).

<sup>217</sup> As suggested by E McGaughey (n 153) 7.

obligation, to offer and accept work, but it does prohibit ZHCs that require availability without a guarantee of work. Protection is reinforced by a provision that prevents an employer from requiring the worker to perform additional hours without showing reasonable grounds and, where such grounds are shown, compensates the employee for being available.<sup>218</sup> If imported into the UK, it would provide a simpler, more effective mechanism to provide some certainty about working hours requiring the availability of the worker but it would not end no minimum hours contracting.

## V. Conclusion—Towards ‘Horizontal Equity’ for all Workers

Each of the proposals for labour law reform discussed in the previous part has merit in addressing and, to an extent, rectifying some of the worst abuses of ZHCs. Fundamentally, however, what this study has revealed is that, even if some ‘light-touch’ measures are introduced to regulate the practice of zero hours contracting,<sup>219</sup> the dynamic of casualisation in the UK labour market is set to continue with the ZHW situated at the extreme end of the arc of precariousness. Other factors, such as social security reform, following the introduction of Universal Credit, further privatisation, and outsourcing of services, will tend to increase reliance on the ZHC model.<sup>220</sup> Low paid sectors more dependent on ZHWs, such as hotels and catering, retail and social care, can be expected to continue to segment from the rest of the labour market.

As was shown in part III of this chapter, many ZHWs are situated in a twilight zone of employment status hovering somewhere between ‘employee’ and ‘worker’ with cases falling either side of the distinction based on the weight given to particular facts gleaned from the contractual documentation, the labels used by the employer to describe the relationship, and the conduct of the parties. Even if a ZHW passes the common law tests for recognition as an ‘employee’, his or her fortunes may founder on the ‘archaic rules’<sup>221</sup> of continuity of employment. Indeed, it is somewhat ironic that several of the published proposals for reform of ZHCs require the worker to cross the threshold of a continuity period. The use of continuity provisions only serves to highlight the divide between core and contingent workers in the UK’s two-tier labour market.

<sup>218</sup> See D Newman, ‘New Zealand bans zero hours contracts? Not exactly ...’ (A Range of Reasonable Responses, 13 March 2016), see [darrennewman.wordpress.com/2016/03/13/new-zealand-bans-zero-hours-contracts-not-exactly/](http://darrennewman.wordpress.com/2016/03/13/new-zealand-bans-zero-hours-contracts-not-exactly/).

<sup>219</sup> A Adams, M Freedland and J Prassl (n 2) 25.

<sup>220</sup> See Z Adams and S Deakin (n 3) 35.

<sup>221</sup> *ibid* 33.

Against this backdrop, workers on ZHCs will remain contingent in the absence of more stringent measures placing a duty on the part of the employer to provide a default minimum hours' requirement and a guaranteed regular income for workers who have made themselves available for work. Targeted measures aimed at regularising ZHCs will not be sufficient, however, to bring about a less segmented and more inclusive labour market in which the dignity of the worker is respected. We must understand the issue of ZHCs to be totemic for social actors seeking to respond to the challenges arising from the surge in many different types of flexible working which have transformed the expectations of employers and workers about flexibility and security.<sup>222</sup> For this reason, it is necessary to extend the personal scope of employment protection legislation to include all those in diverse non-standard but dependent relationships of which ZHCs are one small part.<sup>223</sup> This does not mean that divergences in protection between core and contingent workers can be easily eradicated but certain changes can be made to achieve more of an equilibrium.

Two reforms would serve as starting blocks for the development of a more inclusive system of labour law in the UK.

First, the application of continuity rules impacts most harshly on intermittent workers, such as ZHCs, who often work for the same employer for long periods. These workers will usually have contracts of employment when working, but continuity of employment will be broken when they are 'zeroed-out' or laid off between engagements. In order to overcome this problem, the law could be modernised straightforwardly, as Zoe Adams and Simon Deakin suggest, to add together all periods of employment with the same employer while disregarding 'breaks' in continuity.<sup>224</sup> This would minimise abuses designed to take advantage of the continuity rules and widen access to rights, such as maternity pay, which require a qualifying period of continuous employment.<sup>225</sup>

Second, a statutory presumption of employment could be introduced.<sup>226</sup> It would allow for essential employment protection laws to be applicable more widely. The present system in the UK no longer fits the reality of the employment relationship. As has been shown in part III.B above, much of the litigation on the status of casual workers has concerned sham labels and bogus terms in employment contracts. What is required is more transparency, and therefore certainty, about both the scope and the content of the employment relationship. Guidance can be found in ILO Recommendation No 198, which is designed to ensure that workers whose contractual position is uncertain are not deprived of the legal

<sup>222</sup> See J Kenner (n 12) 279.

<sup>223</sup> For a wider exploration of the modalities of how this might be achieved see J Kenner, *ibid.*

<sup>224</sup> See Z Adams and S Deakin (n 3) 33.

<sup>225</sup> The qualifying period is 26 weeks under the Social Security Contributions and Benefits Act 1992 s 164(2)(a).

<sup>226</sup> See further, J Kenner (n 12).

protection to which they are entitled.<sup>227</sup> It seeks to encourage transparency and effectiveness of laws concerning the existence of an employment relationship.<sup>228</sup> The Recommendation suggests a range of indicators as a basis for a legal presumption of an employment relationship. The indicators include ‘control’ and ‘integration of the worker in the organisation of the enterprise’ which are drawn from the common law tests for ‘employee’.<sup>229</sup> Other indicators fit the broader ‘worker’ definition in UK law,<sup>230</sup> specifically where ‘work ... is performed solely or mainly for the benefit of another person’ and ‘carried out personally by the worker’.<sup>231</sup> The Recommendation also identifies socio-economic indicators such as ‘the fact that [payment of] remuneration constitutes the worker’s sole or principal source of income’. It does not include factors that negate proof of employment such as the absence of mutuality of obligation.

If the UK was serious about updating its employment law to be more inclusive, consistent with the ‘flexicurity’ paradigm, it would consult about the content of the most appropriate indicators to form the point of reference for a new proof of employment law or, if a normative measure is not the preferred route, a Code of Practice on establishing an employment relationship might be a first step. Consultation might extend to suggestions about the material scope of employment protection to be afforded to all those with proof of employment based on the indicators. For example, this could include core rights to, *inter alia*, a minimum wage, safe working conditions, paid holidays, maximum working hours, maternity leave and pay and other family leave rights, non-discrimination, joining a union, taking collective action and protection against arbitrary dismissal. The logic of reaching an agreement on these matters might lead to a decision to have a single category of ‘employee’ for all those in a position of economic subordination or dependency by reference to the indicators. Alternatively, the separate categories of ‘employee’ and ‘worker’ could be retained but the indicators would help to clarify the essential elements of ‘employee’ or ‘worker’ status and form a basis for deciding on the detailed content of the employment protection afforded to every ‘worker’.

To conclude, the zero hours culture has flourished in the UK’s increasingly flexible and ‘demutualised’ labour market.<sup>232</sup> For some employers, zero hours contracting has become an art form for exploitation by means of transferring the burden of insecurity and risk to the worker. ZHWs are further disadvantaged by benefit rules that increase pressure on them to be available to accept offers of work even when there is no guarantee of minimum hours. In the absence of a uniform

<sup>227</sup> Para 3 of the preamble. The Recommendation was adopted at the 95th session of the International Labour Conference in June 2006 [www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::N0::P12100\\_ILO\\_CODE:R198](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::N0::P12100_ILO_CODE:R198).

<sup>228</sup> *ibid* point 4(a)-(g).

<sup>229</sup> *ibid* point 13(a).

<sup>230</sup> Employment Rights Act 1996 s 230(3)(b).

<sup>231</sup> ILO Recommendation No 198 [1996] point 13(b).

<sup>232</sup> See M Freedland and N Kountouris (n 42).

definition of ZHCs, workers who are working, often irregularly, over a period of time for the same employer are faced with uncertainty about their legal status and the scope of employment protection afforded to them. It is, therefore, essential for coercive ZHCs to be challenged to test their lawfulness on a case by case basis. Some of the most egregious abuses of ZHCs could be stamped out, or at least minimised, by adopting proposals that have been put forward or using the New Zealand legislation as a blueprint for further regulation. More stringent measures are needed to guarantee minimum hours and income security. Ultimately, however, the divide between core and contingent work in the UK will only be bridged if measures are initiated to widen access to employment rights for intermittent workers like ZHWs and create a statutory presumption of employment to which a minimum standard of employment protection can be attached.

In the UK, the majority of employers do not use ZHCs as part of their business model or, to the extent that they do offer them, there is evidence that flexibility often suits both parties. An alternative vision of a competitive, more productive, social market economy is possible in which workers' dignity is respected, more legal certainty is provided in the employment relation, and there is greater opportunity for full engagement of all workers in the enterprise. As Judy Fudge has observed, the most important shift in the discipline of labour law has been towards individualisation.<sup>233</sup> The task of labour law in the twenty-first century is to regulate for flexibility by providing 'horizontal equity' between workers in ever more diverse working relationships.<sup>234</sup>

<sup>233</sup> J Fudge, 'Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP, 2011) 120-136, 124.

<sup>234</sup> *ibid.* See also, M Link, 'Labour Law and the New Inequality' (2009) 59 UNBLJ 14-47.

