

THE ‘ZERO-HOURS CONTRACT’:

REGULATING CASUAL WORK, OR LEGITIMATING PRECARITY?

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Abstract: Zero-Hours Contracts have become one of the most high-profile employment law issues of recent years. In this article, we analyse the legal and empirical evidence of work under Zero-Hours arrangements and suggest that whilst a legal engagement with Zero-Hours Contracts as an unresolved labour market problem is long overdue, the current discourse surrounding these work arrangements is fundamentally flawed: there is no such thing as *the* Zero-Hours Contract as a singular category; the label serves as no more than a convenient shorthand for masking the explosive growth of precarious work for a highly fragmented workforce. Ongoing attempts at regulating Zero-Hours Contracts thus constitute a significant shift towards the normalisation of all but the most extreme forms of abusive employment arrangements, leaving a rapidly increasing number of workers without recourse to employment protective norms. In concluding, we indicate ways towards a more coherent approach to the de-normalisation and progressive regulation of this large and growing set of casual work arrangements.

*‘Before considering the advantages and disadvantages of zero-hours contracts,
let me make a basic point [...]: it is intrinsically tricky.*

Dr Vince Cable MP¹

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¹ HC Deb 16 October 2013, vol 567, col 756.

INTRODUCTION

Since early 2013, Zero-Hours Contracts have become one of the highest-profile employment law issues in the United Kingdom,² with frequent media reports about the use and abuse of such work arrangements.³ Political debate is increasingly heated, from extensive debates in Parliament⁴ and a Private Member's Bill⁵ to an official Government consultation aimed at maximising 'the opportunities of zero hours contracts while minimising abuse and setting core standards that protect individuals'⁶ and a promise in the Queen's Speech 2014 to 'improve the fairness of contracts for low paid workers'⁷ by 'strengthen[ing] UK Employment Law by [...] cracking down on abuse in zero hours contracts'.⁸

In this article, we suggest that whilst a legal engagement with Zero-Hours Contracts ('ZHCs') as an unresolved labour market problem is long overdue, the current discourse surrounding these work arrangements is fundamentally flawed. It appears to be predicated on an unspoken assumption that there is clarity and coherence in the notion of 'the' Zero-Hours Contract as a specific phenomenon in employment law, and in the labour market more broadly, and that it could – and should – therefore be regulated as such. A detailed scrutiny of the empirical and legal evidence on such arrangements, on the other hand, suggests that the Zero-Hours Contract label serves as no more than a convenient shorthand for masking the explosive growth of precarious work for a highly fragmented workforce. Any attempt at regulating Zero-Hours Contracts must therefore be approached most cautiously, so as not to become merely an exercise in normalising a wide array of precarious work arrangements.

In order to substantiate these claims, the article is structured as follows. A first section scrutinises the recent surge of discussion surrounding 'the' Zero-Hours Contract, and challenges both the very terminology and the empirical evidence informing these debates as painting a misleading picture of clarity and homogeneity: Zero-Hours work arrangements are neither a new nor a unitary phenomenon, but can only be understood in the context of what has traditionally been analysed as the rise of 'atypical' or precarious work. These challenges are reflected in the evidence provided in official statistics, notably the Labour Force Survey ('LFS') administered by the Office for National Statistics ('ONS'),⁹ which has significantly underestimated the number of workers on Zero-Hours arrangements.

² See eg J Aglionby "One million" UK Workers on Zero Hours Contracts' *Financial Times* (London, 5 August 2013).

³ B Groom, 'Employers Face Greater Challenges, Says ACAS Chairman' *Financial Times* (London, 16 March 2014).

⁴ Including a whole day of Opposition-led debate: see HC Deb 16 Oct 2013, vol 567, 744ff.

⁵ Zero Hours Contracts HC Bill (2013-14) 79 ['ZHC Bill']. The Bill was presented as a Private Member's Bill on 24 June 2013, and nominated for second reading on 6 June 2014. As Parliament did sit on that day, the progress of the Bill is uncertain. See <http://services.parliament.uk/bills/2013-14/zerohourscontracts.html> accessed 6 June 2014.

⁶ BIS, *Consultation: Zero Hours Employment Contracts* (London, December 2013) ['Consultation'] 4.

⁷ HM Government, *Queen's Speech 2014* (London, June 2014).

⁸ Prime Minister's Office, *The Queen's Speech 2014 – Lobby Briefing* (London, June 2014) 18.

⁹ See further <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Labour+Market> last accessed 10 June 2014.

Section two then turns to the legal position of Zero-Hours Contracts in Employment law. The heterogeneity of such arrangements means that they cannot constitute a unitary category, let alone a specific employment status for purposes of most employment-protective regulation.¹⁰ Instead, it is suggested that they represent different points on a spectrum of casual work arrangements, from global or intermittent contracts of employment subject to varying degrees of employment protective norms to spot contracts for labour, which are much more difficult to classify under existing structures.

On the basis of these findings, section three analyses the regulatory and deeper normative challenges raised by Zero-Hours Contracts – including the question as to the actual motivation behind, and effect of, any ‘regulation’ of ZHCs. It is argued in particular that the proposals canvassed in the Consultation Document and in subsequent political and legislative discussion, presented in the guise of improved labour market regulation, actually constitute a significant shift towards the normalisation of all but the most extreme forms of abusive employment arrangements, leaving a rapidly increasing number of workers without recourse to employment protective norms. From that critical starting point, we indicate some initial pointers towards what we regard as a more coherent approach to the regulation of a large and growing set of casual work arrangements, some of which are currently being styled and understood as Zero-Hours Contracts.

1 THE MANY FORMS OF ZERO-HOURS WORK

The fundamental problem of recent public and legal discourse surrounding Zero-Hours Contracts is the seemingly unchallenged assumption that there is such a thing as a unitary notion of *the* Zero-Hours Contract – both in terms of a legal category of personal work relations, and as a clearly measurable statistical phenomenon. As the Secretary of State for Business, Innovation and Skills, Dr Vince Cable MP noted during a 2013 Opposition Day debate in Parliament, these definitional problems are at the heart of any discussion surrounding ZHCs:

There is an issue about what zero-hours contracts actually are; they are not clearly defined. [...] There are a whole lot of contractual arrangements [...] They are enormously varied.¹¹

The present section builds on this observation to question prevailing accounts of ‘the’ Zero-Hours Contract to demonstrate the wide variety of working arrangements which could potentially come under the Zero-Hours label, before turning to an assessment of the quantitative and qualitative empirical evidence on the prevalence of ZHCs.

(A) A RECENT, OVERARCHING PHENOMENON?

Zero-Hours work arrangement are not a new phenomenon – they are part of a much larger ‘tendency toward numerical flexibility [which has been] particularly marked

¹⁰ Employment Rights Act (‘ERA’) 1996, s 230.

¹¹ HC Deb (n 1).

[since] the 1980s'.¹² Litigation arising from the use of Zero-Hours Contracts to allow employers numerical flexibility and attempt to avoid the application of statutory protection can be traced back nearly forty years.¹³ In *Mailway*,¹⁴ for example, the claimant postal packer 'could and would only attend for work in accordance with the need expressed by the employers.'¹⁵ A study by Katherine Cave in the 1990s showed the already widespread use of 'something that could be classified as zero hours contracts';¹⁶ with a strong growth trend as an area where there has been abuse¹⁷ continuing in the subsequent decade.¹⁸

Zero-Hours Contracts were equally discussed in the academic literature,¹⁹ and even merited an explicit mention in New Labour's 1998 White Paper on 'Fairness at Work';²⁰ perhaps in response to one of the earliest examples of public controversy, when Burger King's practice to pay staff only for time spent actually serving customers was exposed in the mid-1990s.²¹ The (then) government there welcomed 'views on whether further action should be taken to address the potential abuse of zero hours contracts and, if so, how to take this forward without undermining labour market flexibility.'²²

Neither is the use of such arrangements specific to the United Kingdom (though it remains the most 'notorious'²³ user of such models), as observations from other Member States²⁴ and at the EU level show.²⁵ The Court of Justice's terminology, for example, is one of 'working according to need, [where the employee] works under a contract which stipulates neither the weekly hours of work nor the

¹² S Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 ILJ 337, 339. The effects were originally particularly marked in the case of female workers (339-340) and industries such as construction and dock-working (340), or trawler working. See also P Leighton and R Painter, "'Task" and "Global" Contracts of Employment' (1986) 15 ILJ 127; A McColgan, *Just Wages for Women* (OUP 1997) 391.

¹³ In the instance cited, the employer's minimum guarantee payment for employees within the meaning of s 22(1) of the Employment Protection Act 1975.

¹⁴ *Mailway (Southern) Ltd v Willsher* [1978] ICR 511 (EAT).

¹⁵ *ibid* 513G. See H Collins, K Ewing and A McColgan, *Labour Law* (CUP 2012) 163.

¹⁶ K Graven, *Zero Hours Contracts: a Report into the Incidence and Implications of Such Contracts* (University of Huddersfield, 1997); as discussed in L Dickens, 'Exploring the Atypical: Zero Hours Contracts' (1997) 26 ILJ 262, 263.

¹⁷ J Lourie, *Fairness at Work – Research Paper 98/99* (HC Library, London 1998) 26-27.

¹⁸ B Kersley et al, *Inside the Workplace: First Findings from the 2004 Workplace Employment Relations Survey* (DTI, London 2005).

¹⁹ The earliest mention of the label in the leading specialist journal appears to be in L Watson, 'Employees and the Unfair Contract Terms Act' (1995) 24 ILJ 323, 323.

²⁰ DTI, *Fairness at Work* (White Paper, Cm 3968, 1998) [3.14]ff. For a critical analysis on point, see B Simpson, 'Research and Reports' (1998) 27 ILJ 245, 251; D McCann, *Regulating Flexible Work* (OUP 2008) 167ff.

²¹ see eg B Clement, 'Burger King pays £ 106,000 to Staff Forced to "Clock Off"' *The Independent* (London, 19 December 1995). Today this practice would no longer be possible under the Minimum Wage Act 1998.

²² *Fairness at Work* (n 20) [3.16].

²³ R Munck, *Labour and Globalisation: Results and Prospects* (OUP 2003) 24.

²⁴ For example in Italy: A Lo Faro, 'Fairness at Work? The Italian White Paper on Labour Market Reform' (2002) 31 ILJ 190, 196. See also, in the context of a comparative discussion of a 'differential labelling effect', M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP, 2012) 334.

²⁵ See eg P Leighton and M Wynn, 'Classifying Employment Relationships—More Sliding Doors or a Better Regulatory Framework' (2011) 40 ILJ 5, 9; citing European Parliament, *Atypical Contracts, Secured Professional Paths, Flexicurity and New Forms of Social Dialogue* (Report A7-0193, Brussels 2010).

manner in which working time is to be organised, but it leaves her the choice of whether to accept or refuse the work offered by [the employer]’.²⁶

It is important to note, furthermore, that the Zero-Hours Contract label can not be seen as representing a clear or overarching category or organising principle of precarious work, or as somehow cleanly mapping onto received understandings of ‘atypical work’. There is a considerable degree of ‘heterogeneity of temporary work’,²⁷ reflected in ‘a growing nomenclature of ‘atypical’ and ‘non-standard’ work, apart from commonly used categories such as temporary, part-time and self employed work. Terms include ‘reservist’; ‘on-call’, and ‘as and when’ contracts; ‘regular casuals’; ‘key-time’ workers; ‘min-max’ and ‘zero-hours’ contracts.’²⁸ Indeed, the various categories of ‘atypical’ work can frequently overlap, for example where agency work incorporates a ‘zero-hours contract dimension’.²⁹ As Kilner Brown J in *Mailway* suggested, the claimant’s Zero-Hours arrangement there ‘in one sense [...] was casual labour; in another sense it was part-time work.’³⁰

Zero-Hours arrangements thus represent various degrees of fragmentation of work – from reasonably regular and consistent employment to a spot-market in labour.³¹ Rather than forming a single or unitary category, they represent some of the many possible variations of employment, ranging from ‘preferred choices, well-paid and secure’³² to ‘vulnerable’³³ or ‘poor work’.³⁴

(B) A DEFINED SET OF WORK ARRANGEMENTS?

Even more important than the realisation that ZHCs are not a recent phenomenon is the fact that they are not a single category of work arrangements. At first glance, there is a frequent assumption that clear-cut definitions could be found. One such example of an attempted definition of Zero-Hours Contracts can be found in a Private Member’s Bill introduced by Andy Sawford MP in the summer of 2013, with a view to making it ‘unlawful to issue a zero hours contract.’³⁵ That Bill seeks to define such arrangements in its clause 3(1), identifying them through a combination of factors as follows:

²⁶ Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG* ECR I-9522 [59]. See S Peers, ‘Equal Treatment of Atypical Workers: A New Frontier for EU Law’ (2013) 32 Yearbook of European Law 30, 41.

²⁷ McCann (n 20) 102.

²⁸ Dickens (n 16) 263.

²⁹ J O’Connor, ‘Precarious Employment and EU Employment Regulation’ in G Ramia, K Farnsworth and Z Irving, *Social Policy Review 25: Analysis and Debate in Social Policy* (OUP 2013) 238.

³⁰ *Mailway (Southern)* (n 14) 513F.

³¹ Not unlike online platforms such as Amazon’s ‘Mechanical Turks’. See J Horton, ‘Online Labor Markets’ in A Saberi (Ed) *WINE 2010* (Springer, Berlin 2010) 515.

³² O’Connor (n 29) 228.

³³ N Busyby and M McDermont, ‘Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings’ (2012) 41 *ILJ* 166; citing in fn 3 DTI, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers*. (London, 2006) [25].

³⁴ T Shildrick, R MacDonald and C Webster, *Poverty and Insecurity: Life in Low-Pay, No-Pay Britain* (OUP 2012) 24.

³⁵ ZHC Bill (n 5) cl 1(1).

A zero hours contract is a contract or arrangement for the provision of labour which fails to specify guaranteed working hours and has one or more of the following features—

- (a) it requires the worker to be available for work when there is no guarantee the worker will be needed;
- (b) it requires the worker to work exclusively for one employer;
- (c) a contract setting out the worker’s regular working hours has not been offered after the worker has been employed for 12 consecutive weeks.³⁶

Whilst an official consultation document on the use and regulation of Zero-Hours arrangements, published by the government in December 2013, noted that ‘[t]here is no legal definition of a zero hours contract in domestic law’, it then similarly went on to try and define the concept as ‘an employment contract in which the employer does not guarantee the individual any work, and the individual is not obliged to accept any work offered.’ The technical implementation of such arrangements was illustrated by means of a specific ‘example of a clause in a zero hours contract which does not guarantee a fixed number of hours work per week’:

“The Company is under no obligation to provide work to you at any time and you are under no obligation to accept any work offered by the Company at any time.”³⁷

The main problem with such accounts is their underlying assumption that *the Zero-Hours Contract* is a unitary category – an assumption difficult to sustain in the face of widespread factual complexity.³⁸ Definitions provided by academic commentators, on the other hand, try to take account of this much broader spectrum. Hugh Collins, Keith Ewing and Aileen McColgan, for example, draw a distinction between ZHCs, where ‘the employee promises to be ready and available for work, but the employer merely promises to pay for time actually worked according to the requirements of the employer’ and ‘arrangements for casual work’ where ‘again the employer does not promise to offer any work, but equally in this case the employee does not promise to be available when required.’³⁹

Simon Deakin and Gillian Morris suggest that ZHCs encompass all cases ‘where the employer unequivocally refuses to commit itself in advance to make any given quantum of work available.’⁴⁰ Mark Freedland and Nicola Kountouris bring out this diversity even more clearly, when they refer to ‘work arrangements in which the worker is in a personal work relation with an employing entity [...] for which there are no fixed or guaranteed hours of remunerated work. These arrangements are variously described as ‘on-call’, ‘intermittent’, or ‘on-demand’ work, or sometimes referred to as ‘zero-hours contracts’.⁴¹

³⁶ *ibid* cl 1(3).

³⁷ Consultation (n 6) [11] – [12].

³⁸ A fact realized by the ONS’ most recent definitional attempts, introducing the notion of ‘Contracts that do not guarantee a minimum number of hours’ (‘NGHCs’): ONS, *Analysis of Employee Contracts that do not Guarantee a Minimum Number of Hours* (London 2014) 4-5.

³⁹ Collins, Ewing and McColgan (n 15) 243.

⁴⁰ S Deakin and G Morris, *Labour Law* (6th edn Hart 2012) 167.

⁴¹ Freedland and Kountouris (n 24) 318-319.

Even a brief survey of fact patterns has thus suggested that there can be no clear divisions or watertight categories,⁴² as will be confirmed when turning to a legal analysis of Zero-Hours arrangements in section two. This is entirely understandable; especially once the phenomenon is seen against the context of the ‘richness of non-legal accounts and analyses’,⁴³ found for example in a recent report on Zero-Hour Contracts by the Resolution Foundation.⁴⁴

(C) MEASURING THE PREVALANCE OF ZERO-HOURS WORK

The lack of clarity and uniformity thus identified has a particularly stark impact on the quality of the empirical evidence on work under Zero-Hours Contracts, despite the suggestion that ‘[t]he statistics provide the only way of finding out what is going on [with regards to such arrangements] in our economy.’⁴⁵

Taken at face value, the statistics on the use of Zero-Hours contracts did not suggest significant cause for concern until very recently. In the final quarter of 2012, for example, responses to the official Labour Force Survey (‘LFS’) suggested that only a negligible percentage of the workforce, a mere 0.8%, held a Zero-Hours contract.⁴⁶ Furthermore, the majority of those on such contracts indicated that they did not want to work additional hours and that they were not actively seeking alternative employment.⁴⁷ The most recent figures for the reference period of October to December 2013 show more than twice this amount, with an increase from 250,000 to 583,000 workers.⁴⁸ As the following paragraphs suggest, however, those numbers still represent a significant underestimation of the prevalence of Zero-Hours Contracts, as the heterogeneity observed in previous sub-sections makes it very difficult to gauge the actual prevalence of Zero-Hours work.

The main set of official statistics on Zero-Hours Contracts is drawn from the Labour Force Survey, a series administered by the Office for National Statistics (ONS).⁴⁹ The LFS is the largest regular social survey of private households in the UK, with a quarterly sample currently consisting of approximately 41,000 households in

⁴² Indeed, ZHC can also be seen as a feature in other characterisations, such as Albin’s notion of ‘personal service work’: E Albin, ‘The Case of *Qashie*: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work’ (2013) 42 ILJ 180, 186.

⁴³ L Barmes, ‘Learning from Case Law Accounts of Marginalised Working’ in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oñati International Series in Law and Society Hart 2012) 305.

⁴⁴ M Pennycook, G Cory, and V Alakeson, *A Matter of Time: The rise of zero-hours contracts* (Resolution Foundation, London 2013). See also several profile-based case studies found throughout the Full Report of the Commission on Vulnerable Employment M Aziz and others, *Hard Work, Hidden Lives: The Full Report* (TUC Commission on Vulnerable Employment, London 2008).

⁴⁵ HC Deb 16 October 2013, vol 567, col 754.

⁴⁶ ONS, ‘Zero Hours Contract Levels and Percent 2000 to 2012’ available at <http://www.ons.gov.uk/ons/about-ons/business-transparency/freedom-of-information/what-can-i-request/published-ad-hoc-data/labour/july-2013/index.html> accessed 10 June 2014.

⁴⁷ See eg I Brinkley, *Flexibility or insecurity? Exploring the Rise in Zero Hours Contracts* (The Work Foundation, London 2013) 21.

⁴⁸ ONS (n 38) 6.

⁴⁹ The Workplace Employment Relations Survey is an additional official data source on Zero-Hours Contracts. However, there is only one mention of this survey in the Consultation (n 6) and it is not widely quoted in the further literature.

Great Britain and approximately 1,600 households in Northern Ireland.⁵⁰ As part of the survey, respondents deemed to be ‘in employment’ are asked a wide range of questions concerning the characteristics of their working arrangements, with the majority of the questionnaire requesting information about activities in a seven day period referred to as the ‘reference week’.⁵¹ A question on Zero-Hours Contracts is currently put to respondents ‘in employment’ during the reference week in the second and fourth calendar quarters, i.e. during April to June and October to December.⁵²

Perhaps reflecting the absence of a clear definition as discussed, the term Zero-Hours Contract appears in the LFS without an explicit definition unless a survey respondent requests further clarification.⁵³ The problem of a precise definition is thus largely side-stepped by invoking the judgement of the individual; the LFS’s working definition depends upon survey respondents’ individual understanding of the term Zero-Hours Contract. From an empirical perspective, this is deeply problematic: the concept is not necessarily defined in a consistent manner over time, nor between the LFS and the survey respondent.

In circumstances when clarification of the concept is requested to aid classification of an individual’s working arrangement, respondents are provided with the following definition:

‘[A Zero-Hours Contract] is where a person is not contracted to work a set number of hours, and is only paid for the number of hours that they actually work’⁵⁴

However, in asking for definitional clarification, a respondent is likely to exclude herself from being recorded as working under a Zero-Hours Contract and will be recorded instead as employed under ‘none of these’ working arrangements. The LFS User Guidance suggests that in ‘most cases a respondent who works any of these particular type of shift patterns will recognise the term and will require no further explanation. Where a respondent asks what is meant by the term it is unlikely they work such shift patterns and are generally coded as (8) [on call working] or (9) [none of these]’.⁵⁵

More recently, it has been acknowledged that the ONS’ lack of clarity is likely to have hindered individuals from correctly identifying their working arrangements. The LFS is based upon the responses of individuals, who will frequently not have the necessary information about, or understanding of, their contractual situation to provide reliable evidence in this regard. For example, in an interview given to the Resolution Foundation, a further education lecturer in Bradford suggested that he:

⁵⁰ ONS, *User Guide: Volume 1 – LFS Background and Methodology 2011* (Version 1.0, London 2011) 9.

⁵¹ *ibid* 26.

⁵² ONS, *Estimating Zero Hours Contracts From the Labour Force Survey* (London 2013) 2.

⁵³ Zero-Hours Contracts appear as part of LFS question FLEX10. See ONS, *User Guide: Volume 2 - Questionnaire, Labour Force Survey* (London 2013) 69.

⁵⁴ ONS, *User Guide: Volume 3 – Details of LFS Variables, Labour Force Survey* (London 2014) 143.

⁵⁵ *ibid* 142.

had no idea [that he] had signed a zero-hours contract. When I applied for the job it was advertised as being for between three and twenty-one hours work a week.⁵⁶

In 2013 the Chair of the UK Statistics Authority, Sir Andrew Dilnot, expressed concern that individuals who do not recognise the term Zero-Hours Contract were unlikely to correctly classify themselves in the survey.⁵⁷ Furthermore, by leaving the concept largely undefined, changes in individual awareness may directly affect estimates, even though this cannot be shown in current data.⁵⁸

In response to these difficulties, the ONS have begun to carry out a survey of businesses, who may be better placed to respond to questions about the contractual arrangements of their workers.⁵⁹ The first results of this new methodology, released in the late spring of 2014, show a significant increase in the numbers of ‘Employee Contracts that do not Guarantee a Minimum Number of Hours’, as the broad category of Zero-Hours arrangements is now referred to.⁶⁰ ‘[I]nitial estimates from the employer survey indicate that there were 1.4 million [such contracts], which also provided work in the survey reference period’, with an additional number of ‘around 1.3 million’ similar arrangements where no work was undertaken during the two-week reference period.⁶¹ As repeated communication from the ONS makes clear, however, the problem is far from solved, with significant ‘further analysis of the data collected’ required to present a clearer picture.⁶²

The first section has thus challenged a series of unstated assumptions surrounding the Zero-Hours Contract label: it does not represent a recent phenomenon, or a specific, determinable group of arrangements. Despite public and regulatory perceptions to the contrary, it can therefore not be used as a term of art or an overarching or consistent category of casual work, is difficult adequately to measure in empirical surveys, and cannot easily be mapped onto the legal spectrum of contractual employment relationships. It is to the latter challenge that discussion now turns.

2 ZERO-HOURS CONTRACTS AS A LEGAL SPECTRUM OF CONTRACTUAL RELATIONSHIPS

As Freedland and Kountouris have noted, ‘There are major and continuing controversies in many European legal systems as to how [precarious work] arrangements fit into existing legal relational categories which are the outcomes of processes of legal normative characterization of personal work relations.’⁶³ The preceding section has shown how the Zero-Hours Contract label has come to

⁵⁶ M Pennycook et al (n 44) 12.

⁵⁷ Letter from Sir Andrew Dilnot to Chuka Umunna MP (22 August 2013).

⁵⁸ ONS (n 46).

⁵⁹ ONS, *ONS Announces Additional Estimate of Zero-Hours Contracts* (Press Release, 22 August 2013).

⁶⁰ ONS (n 38) 4-5.

⁶¹ *ibid* 8, 9.

⁶² *ibid* 18-19.

⁶³ Freedland and Kountouris (n 24) 319.

represent a wide spectrum of different forms of casual work. The question thus arises as to the employment law protection which such arrangements might attract.

In 2013, the government asserted that Zero-Hours Contracts ‘are legal under domestic law. If they are freely entered into, a zero hours contract is a legitimate form of contract between individual and employer.’⁶⁴ The heterogeneity just demonstrated presents a significant challenge to this statement. In a strict technical sense, the arrangements will of course be legal, in so far as they do not contravene the (rather extreme) limitations of freedom of contract found in doctrines such as illegality: the arrangements do not involve contracts involving the commission of a legal wrong,⁶⁵ or contracts contrary to public policy.⁶⁶ On the other hand, it is deeply problematic to suggest that they represent *a* singular form of contract: instead, a rather a wide variety along a broad spectrum of contracts can be observed.

(A) MUTUALITY AND THE GLOBAL CONTRACT OF EMPLOYMENT

The legal institution of the contract is central to English employment law.⁶⁷ Through the dramatic increase of legislative activity in the labour market from the second half of the twentieth century onwards,⁶⁸ contract has become the key legal relationship which confers an externally defined employment status on its parties. This latter function as a gateway to statutory rights and duties is illustrated in the interpretative provisions of the Employment Rights Act 1996, which simply provide that “‘employee” means an individual who has entered into or works under [...] a contract of employment.”⁶⁹ Large parts of the British system of labour market regulation are thus designed to hinge on this status, the definition of which is left to the common law.⁷⁰

Over more than a century, a considerable amount of case law and scholarship has built up to develop, adapt and refine a series of common law tests to determine on which side of the ‘binary divide’ or the more recent tri-partite scheme of employees, workers and the self-employment any given individual should fall.⁷¹ Under the prevailing common law tests, Zero-Hours arrangements could lead to a series of different classifications – and thus degrees of statutory protection – including certain scenarios which fall completely outside the scope of employment protective norms.

⁶⁴ Consultation (n 6) [13].

⁶⁵ E Peel, *Treitel's Law of Contract* (13th ed, Sweet & Maxwell 2011) [11-011] ff.

⁶⁶ *ibid* [11-032]ff. See also Deakin and Morris (n 40) 156-159.

⁶⁷ M Freedland, *The Contract of Employment* (OUP 1976); J Prassl, ‘The Notion of the Employer’ (2013) 129 LQR 380, 381-382.

⁶⁸ S Deakin, ‘The Evolution of the Contract of Employment, 1900 to 1950 - the Influence of the Welfare State’ in N Whiteside and R Salais (eds), *Governance, Industry and Labour Markets in Britain and France - The Modernising State in the Mid-Twentieth Century* (Routledge 1998) 225.

⁶⁹ ERA 1996, s 230(1).

⁷⁰ The same is true for the more recent notion of the worker: *ibid*, s 230(3).

⁷¹ For a full overview, see Deakin and Morris (n 40) 145ff.

The primary reason behind this is the role played by the requirement of mutuality of obligation.⁷² In *Nethermere v Gardiner*, Dillon LJ summarised earlier case law and suggested

that there is one *sine qua non* which can firmly be identified as an essential of the existence of a contract of service and that is that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service.⁷³

It is often assumed that the requirement of mutuality of obligation has thus become a significant hurdle in establishing such a relationship, either by denying a ‘global’ or ‘umbrella’ contract necessary to clear statutory temporal qualification thresholds, or by attacking the very classification of the work undertaken as employment due to the absence of future commitments.⁷⁴ This is usually illustrated by reference to two leading cases, *O’Kelly* and *Carmichael*.

In *O’Kelly*,⁷⁵ function waiters at the Grosvenor House Hotel employed under a rostering system as ‘regular casuals’ claimed for unfair dismissal due to their trade union membership and activities. Despite evidence that they had worked ‘virtually every week [...] for] up to as much as 57’ hours, the Court of Appeal found that there was ‘no overall or umbrella contract’ of employment,⁷⁶ and suggested furthermore that even each individual wage/work bargain could not be a contract of service. In *Carmichael*, ‘casual as required’ tour guides in a power station attempted to assert their right to particulars of employment.⁷⁷ Whilst the Court of Appeal had found them to be employees, the House of Lords upheld the industrial tribunal’s finding that the claimants’ ‘case “founder[ed] on the rock of absence of mutuality”’.⁷⁸

Mutuality of obligation thus appears to be fatal to the classification of Zero-Hours Contract arrangements as statutorily protected contracts of employment or service. Upon closer inspection, however, that concept, whilst continuing to be problematic, is frequently in much less aggressive use than may be presumed from an initial reading of these leading cases. Lord Hoffmann in *Carmichael*, for example, warned that ‘in a case in which the terms of the contract are based upon conduct and conversations as well as letters’ the Courts should not ignore evidence of the reality of what happened between the parties.⁷⁹ Indeed, even *O’Kelly* itself could be

⁷² *ibid* 164-8. Though cf now N Countouris ‘Uses and Misuses of “Mutuality of Obligations” and the Autonomy of Labour Law’ in A Bogg, C Costello, A Davies and J Prassl, *The Autonomy of Labour Law* (forthcoming Hart 2014).

⁷³ *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA) 632F-G.

⁷⁴ Deakin and Morris (n 40) 165.

⁷⁵ *O’Kelly v Trusthouse Forte Plc* [1984] QB 90 (CA).

⁷⁶ *ibid* 101B; 124H.

⁷⁷ *Carmichael v National Power Plc* [1999] UKHL 47, [1999] 1 WLR 2042. The right to particulars of employment at that time was set out in s 1(1) of the Employment Protection (Consolidation) Act 1978.

⁷⁸ *ibid* 2045 (L Irvine LC; who, as Alexander Irvine QC, had appeared for the employer in *O’Kelly*).

⁷⁹ *ibid* 2050G.

characterised as a misinterpretation of the earlier decision in *Nethermere*,⁸⁰ driven primarily by jurisdictional questions about the reviewability of the industrial tribunal's findings.⁸¹

It is unsurprising therefore that in the more recent decision in *Cotswold Developments v Williams*, Langstaff J (as he then was) expressed his concern that Tribunals may

have misunderstood something further which characterises the application of “mutuality of obligation” in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it.⁸²

This sensitivity of the mutuality of obligation criterion to a wide range of factual variation can be seen in operation in the EAT's decision in *St Ives*, which found that whilst the work had been characterised contractually as a Zero-Hours arrangement, there ‘were mutual obligations subsisting between the employer and the employee during periods when the employee, a casual worker, was not actually engaged on any particular shift’.⁸³ This was primarily due to the tribunal's findings of a long and well-established regular work pattern, with the employer on one occasion even taking disciplinary action against the casual worker's violation of that pattern.⁸⁴ As Elias J (as he then was) noted, ‘a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided.’⁸⁵

Even through an application of the mutuality of obligation test for employment status, it is therefore entirely possible that an individual working under a Zero-Hours Contract could be classified as an employee under section 230 ERA. Such an outcome, however, would be heavily dependent on the precise facts of each individual case. It would, furthermore, and somewhat counter-intuitively, be dependent on level of precarity in any one work setting: the less stable or secure the arrangement, the higher the chance that it would fail to be classified as a contract of employment.

(B) WORKERS' CONTRACTS AND SHAM ARRANGEMENTS

Where a Zero-Hours Contract worker is found not to be working under a contract of employment, there remains a secondary gateway into (a smaller set of) basic

⁸⁰ Where ‘evidence of the absence of any strict legal obligation to offer or carry out homeworking was countered by an evaluation of the practice of the parties which had evolved over a period of time’: P Leighton, ‘Employment Status and the “Casual Worker”’ (1984) 13 ILJ 62, 65.

⁸¹ See further H Collins, ‘Employment Rights of Casual Workers’ (2000) 29 ILJ 73, 75.

⁸² *Cotswolds Developments Construction Ltd v Williams* [2006] IRLR 181 (EAT) [55].

⁸³ *St Ives Plymouth Ltd v Mrs D Haggerty* [2008] WL 2148113 [1], [33].

⁸⁴ *ibid* [9].

⁸⁵ *ibid* [26].

employment rights. Statutory employment law has reacted to the increasing heterogeneity of work through a proliferation of additional categories,⁸⁶ including notably the worker concept in the sense of section 230(3) ERA, introduced in order to broaden the scope of basic labour standards.⁸⁷

The leading *dicta* on the interpretation of this status can be found in *Byrne Bros v Baird*,⁸⁸ a decision in the context of the Working Time Regulations 1998.⁸⁹ Recorder Underhill QC suggested that the difference between the statuses of employee and worker was to be understood as one of degree, not kind:

Drawing the distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker’s favour. [...] Cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.⁹⁰

Within the wide spectrum of possible factual scenarios, mutuality of obligation will therefore clearly not prove fatal for all claimants working under Zero-Hours Contracts seeking to rely on their statutory rights. Even those not found to be working under a contract of employment will frequently be able to have recourse to at least the set of rights protected under a worker’s contract.⁹¹

The discussion thus far, however, has omitted one particular factual scenario, *viz* where employers have begun to react to the changing legal landscape of worker protection,⁹² and inserted explicit ‘no mutual obligations’ clauses into standard form contracts with Zero-Hours workers. This appeared for a while to be able successfully to deny any employment status, because ‘[s]o long as a document is clearly detailed, drafted and the worker signs freely [...] it seem[ed] unlikely that employee status can be successfully asserted by the worker.’⁹³

Today, however, this technique may no longer be successful, especially in the case of Zero-Hours clauses. In *Autoclenz*, the Supreme Court famously addressed the issue of such explicit clauses (including ‘no-mutuality’ terms), and suggested that in

⁸⁶ For an extended discussion of employment status in English law, see J Prassl, ‘Employee Shareholder “Status”: Dismantling the Contract of Employment’ (2013) 42 ILJ 307, 326ff, on which parts of the present discussion draw.

⁸⁷ Workers are there defined as those working (a) under a contract of employment or (b) any other contract [...] whereby the individual undertakes to do or perform personally any or work or services for another party to the contract [...].

⁸⁸ *Byrne Bros (Formwork) Ltd v Bard and others* [2002] ICR 667 (EAT). This case was approved in its basic approach by the Court of Appeal in *Redrow Homes (Yorkshire) Ltd v Wright* [2004] EWCA Civ 469, [2004] ICR 1126 (though with some reservations as regards the overall purposiveness of the approach to be taken: [21]).

⁸⁹ Working Time Regulations 1998, SI 1998/1833. The worker definition can be found in reg 2(1).

⁹⁰ *Byrne* (n 88) [17].

⁹¹ Including notably the Working Time Regulations 1998 (n 89) and the National Minimum Wage Act 1998.

⁹² *Stevedoring and Haulage Services v Fuller* [2001] IRLR 627 (CA).

⁹³ P Leighton, ‘Problems Continue for Zero-Hours Workers’ [2002] 31 ILJ 71, 74.

case of any deviation in practice from a written Zero-Hours clause, effect could be given to the parties' 'actual legal obligations'.⁹⁴ This was in large part due to the realisation of the relational inequality inherent in 'the relative bargaining power of the parties',⁹⁵ which will be particularly stark in the sort of precarious work arrangements identified in the previous section.

As Bogg has noted, '[w]here there is other relevant evidence that the 'real agreement' differed from the signed contract, for example the subsequent conduct of the parties, the court will evaluate that evidence and determine what was agreed.'⁹⁶ This approach can be illustrated in the recent decision of the EAT in *Pulse Healthcare*, where a preliminary question as to Zero-Hours Contract workers' employment status arose in the context of the transfer of an undertaking. The claimant care workers had provided intensive medical support under a 'Zero-Hours Contract Agreement' which 'the Employment Judge was [...] entirely justified in saying [...] did not reflect the true agreement between the parties.'⁹⁷ The work arrangement in question was from the outset or had over time become one in which the parties are subject to some degree of continuing mutual obligation with regard to the provision of work and the doing of work as offered. 'The mere fact that an employee can object to rostered hours [...] did] not mean there is no mutuality of employment.'⁹⁸

This line of cases is of course to be welcomed, as it ensures that a further cluster of Zero-Hours work arrangements is brought within the scope of statutory employment protection. At the same time, however, it is important not to overstate its potential, and to note its high degree of fact-specificity, and thus diversity of potential solutions: the finding of an *Autoclenz*-style sham will again be directly dependent on the level of precarity in any one work setting: the 'no mutuality' clause will only be disregarded if the relationship on the ground did in fact have a stable and permanent character.

(C) INTERMITTENT CONTRACTS OF EMPLOYMENT

The final potential set or cluster of cases to be evaluated, then, are those situations where a Zero-Hours clause and corresponding working arrangement have in fact denied the existence of a global or umbrella contract. It is clear today that even in such scenarios, the courts will at least find the presence of a contract of employment in place during each period of work.⁹⁹ This assertion might at first sight contradict the already-discussed decision in *O'Kelly*.¹⁰⁰ Subsequently, however, Lord Hoffmann in *Carmichael* saw no problem with each individual wage-work bargain to constitute a contract, which could be classified as one of service: 'it may well be that, when performing [...] work, [the casual tour guides] were being employed.'¹⁰¹

⁹⁴ *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 [32].

⁹⁵ *ibid* [35].

⁹⁶ A Bogg, 'Sham Self-Employment in the Supreme Court' [2012] 41 ILJ 328, 333.

⁹⁷ *Pulse Healthcare Ltd v Carewatch Care Services Ltd* [2012] UKEAT 0123/12/BA [35].

⁹⁸ *ibid* [38].

⁹⁹ cf the notion of formation by conduct, Freedland (n 67) 10ff.

¹⁰⁰ Though cf Ackner LJ's dissent: *O'Kelly* (n 75) 118H; 127B.

¹⁰¹ *Carmichael* (n 77) 2051C.

A short-term contract is frequently in place between the parties, and there is nothing in principle to stop it from being characterised as a contract of employment; indeed, the Court of Appeal so found in *McMeechan*.¹⁰² Mutuality of Obligation similarly does not stand in the way of such a finding: as Elias J (as he then was) suggested in *Delphi Diesel*, ‘The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. [...] This is so, even if the contract is terminable on either side at will. [...] The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not’¹⁰³

Each incidence of actual work might thus be regarded as taking place under the legal form of a miniscule contract of employment or miniscule ‘worker’s contract’. In the absence of an over-arching contract to join up those dots, however, the worker-protective consequence of such a series of contracts has been said to be ‘illusionary’.¹⁰⁴ One example of this possibility are the provisions of the National Minimum Wage Act of 1998, Regulation 3(1) of which stipulates that onsite availability should be counted as working hours. This was seen as a solution to ‘one of the issues raised by an alleged abuse of the labour market, the “zero hour contract” under which the worker is required to be on site available for work, but only paid when actually working’:¹⁰⁵ in the Burger King scenario set out in the previous section, for example, payment could not be limited to moments actually worked whilst a worker is behind the counter.¹⁰⁶ The provisions nonetheless only address one part of the larger problem: if Zero-Hours Contract workers are asked to turn up, but then not offered any work for that day, their time will not be counted under the National Minimum Wage Act provisions, even though the worker may have already expended effort and incurred significant cost, from transportation to arranging child care. Standards rooted in EU law are similarly porous: in *Wippel*,¹⁰⁷ the CJEU held that the non-discrimination principle in the Framework Agreement Directive on Part Time Work¹⁰⁸ could not be used to defeat Zero-Hours Contract arrangements.

The one counter-point which must be mentioned in concluding is the possibility of a ‘statutory adding up’ of individual short-term contracts employment, as first recognised by the courts in *Prater v Cornwall County Council*.¹⁰⁹ There, a teacher who had been on individual engagements, with mutuality of obligation found on the facts of each such teaching assignment, could rely on section 212(1) of the Employment Rights Act of 1996 to assert the period of continuous employment required for her statutory claim. Whilst this solution is not all encompassing,¹¹⁰ it is nonetheless important further evidence for this section’s suggestion that Zero-Hours Contract

¹⁰² *McMeechan v Secretary of State for Employment* [1996] EWCA Civ 1166, [1997] IRLR 353.

¹⁰³ *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 (EAT) [13]-[14].

¹⁰⁴ Such as for example the annual leave rights in the Working Time Directive: C Barnard, ‘The Working Time Regulations 1998’ (1999) 28 ILJ 61, 62. Though cf now Case C-173/99 *R v Department of Trade and Industry (ex parte BECTU)* [2001] 3 CML Rev 7.

¹⁰⁵ B Simpson, ‘The National Minimum Wage Act 1998’ (1999) 28 ILJ 1, 17

¹⁰⁶ Clement (n 21).

¹⁰⁷ Case C-313/02 *Wippel* (n 26).

¹⁰⁸ Directive (EC) 97/81 Concerning the Framework Agreement on Part-Time Work concluded by ETUC, UNICE and CEEP [1998] OJ L14/9, Art 4.

¹⁰⁹ *Cornwall County Council v Prater* [2006] IRLR 362 (CA).

¹¹⁰ See A Davies, ‘Casual Workers and Continuity of Employment’ (2006) 35 ILJ 196, 199.

arrangements can be located on a wide spectrum of contracts of employment and beyond. At the same time, however, that picture falls far short of the full recognition of explicit categories such as the ‘Contract for Intermittent Employment’ proposed by Freedland,¹¹¹ thus leaving many an individual working under a Zero-Hours arrangement outside the scope of even the most basic employment protective legislation.

The suggestion put forward by Wynn and Leighton that the courts’ ‘commercial reasoning if applied to contracts of zero-hours and intermittent workers would result in the denial of any contractual obligations at all’,¹¹² is thus perhaps too stark an analysis. As courts at all levels are increasingly becoming aware of the fact that mutuality of obligation may be a ‘red herring [which] hinders the tribunals from asking the relevant legal questions’,¹¹³ various clusters of Zero-Hours Contracts can be analysed under traditional models, representing different points on a spectrum of casual work arrangements, from global or intermittent contracts of employment subject to varying degrees of employment protective norms to spot contracts for labour, which are much more difficult to classify under existing structures. At the same time, however, courts are still ‘often caught between a rock and a hard place’,¹¹⁴ as the considerable opportunities for bringing a number of workers within the scope of employment protective regulation are but some of the points on a vast and complex fact-dependent spectrum. In law, as in fact, then, there is no such thing as *the* Zero-Hours Contract.

3 THE REGULATORY CHALLENGES OF ‘ZERO-HOURS CONTRACTS’

In the two previous sections we have thus argued, and hope to have demonstrated, that the supposed category of Zero-Hours Contracts is a deeply uncertain and therefore unsatisfactory one. As a matter of legal analysis, it is conceptually uncertain what kinds of personal work arrangement should or even can be regarded as ZHCs. In those circumstances it is unsurprising that statistical assessment of the numbers of workers who are employed under Zero-Hours Contracts has been found to be unreliable, and that estimates of these numbers vary wildly within a short space of time. At the same time, the rapid spread of these casual work arrangements has become a matter of general public note and concern, and a vigorous public policy debate is taking place about them.¹¹⁵

In this concluding section we identify the regulatory challenges posed by the burgeoning phenomenon of Zero-Hours contracting and we advance some preliminary suggestions as to how as a matter of public policy and legislative

¹¹¹ PEC 109ff; *idem*, ‘The Contract for Intermittent Employment’ [2007] 36 ILJ 102.

¹¹² M Wynn and P Leighton, ‘Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract’ (2009) 72 MLR 91, 98, make an excellent comparison with *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 (commercial dealings could be stopped without notice, as there was no ‘framework’ or ‘umbrella’ contract in place).

¹¹³ Collins (n 81) 74.

¹¹⁴ H Collins, ‘Book Review: D McCann *Regulating Flexible Work* (Oxford, OUP 2008)’ 2009 (72) MLR 141, 143.

¹¹⁵ See eg S Read, ‘Queen’s Speech: Two Steps Forward, One Step Back for Pensions’ *The Independent* 4 June 2014.

development those challenges might be met. We argue, first, that current governmental policy analysis has, somewhat by design, failed to identify the real regulatory problems with Zero-Hours Contracts before presenting a view of what we regard as the real regulatory problems in that regard; and finally we articulate a notion of de-normalising and controlling the practice of Zero-Hours contracting.

(A) THE SUPPOSED REGULATORY PROBLEMS

As we have indicated earlier, we take the view that current governmental policy with regard to Zero-Hours Contracts is largely placed on display in the Consultation Document of December 2013,¹¹⁶ and given further prominence in the Queen's Speech of May 2014,¹¹⁷ though we think that this policy position is very significantly complemented by the developing governmental stance with regard to the role of ZHCs in determining eligibility for social security benefits, as explained in the following sub-section. The tenor of these documents was resolutely positive with regard to Zero-Hours Contracts, while acknowledging the need to 'crack down on any abuse or exploitation of individuals in the workplace'. The positive tone was firmly set in the Secretary of State's Foreword:

Zero hours contracts have been used responsibly in some sectors for many years. They can support business flexibility, making it easier to hire new staff and providing pathways to employment for young people. These contracts and other flexible arrangements give individuals more choice and the ability to combine their work with their other commitments.¹¹⁸

The Consultation Document does identify some problems with Zero-Hours arrangements, singling out exclusivity and lack of transparency. There is a distinct sense, however, that this is done with the purpose of making good the legitimacy of a labour market institution which has already been marked out as a benign one, as the problems thus highlighted are either insignificant in comparison to the main issues or are falsely identified.

The exclusivity problem, first, consists of provisions in Zero-Hours Contracts or arrangements whereby the worker undertakes to work exclusively for the employer in question. The Consultation Document points to exclusivity as an occasional problem for Zero-Hours contracting, where a 'small number of individuals on zero hours contracts are prevented from working for another employer', whilst being quick to assert that it 'is clear that, in some circumstances, exclusivity clauses are useful and justifiable'.¹¹⁹ The acknowledgment of exclusivity as problematical is thus a decidedly cautious and rather tactical one; but we suggest that this is, in any case, by no means the greatest problem with Zero-Hours arrangements, and could in fact be protective of workers, insofar as a valid exclusivity clause presupposes and confirms the existence of a contract of some sort.¹²⁰

¹¹⁶ Consultation (n 6) 4.

¹¹⁷ Queen's Speech (n 7).

¹¹⁸ Consultation (n 6) 4.

¹¹⁹ *ibid* 13.

¹²⁰ Peel (n 65) 8ff, 70ff.

The other main set of issues identified as a matter for discussion is the concern with a lack of transparency; a question which is articulated primarily in terms of the incompleteness of information given to workers about the Zero-Hours work arrangement, as ‘individuals were not always aware they are employed on a zero hours contract, or that there was a possibility they could be offered no hours or “zero hours”.’ The Consultation does however go on to include concerns that ‘some employers may not fulfil, or understand, their responsibilities towards individuals they employ on a zero hours contract in terms of their employment rights’ and that ‘[t]here may be employers who deliberately evade these obligations’.¹²¹ We accept that the lack of transparency is a very real problem with Zero-Hours work arrangements, but we argue that current policy debates crucially understate the depth of that problem. Our point here is that the problem is represented as if employers were merely being insufficiently informative to their workers, or themselves insufficiently informed about, or possibly evasive with regard to, the norms and parameters of an inherently well-understood legal and labour market institution which is of a basically benign character vis-à-vis the workers concerned and the labour economy as a whole.

We contend that the Consultation Document displays a serious over-confidence in these assumptions. As previous sections have shown, Zero-Hours contracting is far from being a well-understood legal or labour market institution, the beneficial character of whose impact upon the workers concerned and the labour economy as a whole is (to say the least) highly debatable. We suggest that the Consultation to that extent falsely identifies the problem, and indeed actually adds to the lack of transparency of Zero-Hours work arrangements by treating them as generically constituting continuing employment contracts when, as we hope to have demonstrated, the majority fall along many different points of the regulatory spectrum, up to and including the absence of any meaningful contractual relation. We turn accordingly from the Consultation’s more than slightly false formulations of the problems with Zero-Hours contracting towards the articulation of a more real statement of those problems.

(B) THE REAL PROBLEMS

The real problems with Zero-Hours Contracts go well beyond the issues which were recognised in the policy discourse to date. Perhaps the best way to make out this claim is to free ourselves of dependency upon the particular terminology of Zero-Hours Contracts, by-passing it in order better to identify the practice to which this rather tendentious name has been given. The terminology of ZHCs is suspect in more than one way: it describes a certain large set of work arrangements as if they were universally contractual in character,¹²² and moreover, the descriptor of Zero-Hours, which was until recently an unknown terminology in UK English,¹²³ has seemed by its very unfamiliarity to endow the practice in question with a certain positive standing, such as is often secured by means of a high-sounding technical term

¹²¹ Consultation (n 6) 14.

¹²² Even though their contractual nature is often very debatable, as discussed in section 2.

¹²³ A Google trends analysis of ‘Zero-Hours contracts’ (and variants thereof) suggests that the label has only been searched for in the UK since late 2012: see <http://goo.gl/zXCxTk> accessed 21 March 2014.

of whose origin and meaning people may be reluctant to confess their ignorance. Without going as far as advocating zero tolerance for the terminology of Zero-Hours Contracts, we nevertheless suggest that it might work better to think of the dispositions in question as ‘no-minimum-hours work arrangements’ in order to open up discussion to a clearer understanding of what is at stake.

This terminology covers a multiplicity of work arrangements, thus reinforcing the points that there is no such thing as *the* Zero-Hours Contract, and that many such arrangements may not amount to continuing contracts in the first place. Even more importantly, this terminology places it unmistakably on display that these work arrangements are defined and characterised by their extreme precariousness, that is to say by the complete or almost complete precarity of the situation of the workers who labour under these forms of engagement. That is the real problem: as compared with the forms of contract for stable and secure employment which had in a still quite recent epoch been regarded as the standard ones against which ‘atypicality’ could be measured, these ‘no-minimum-hours work arrangements’ paradigmatically shift towards and locate upon the worker the whole set of risks of insecurity of work and income which, we argue, it has been one of the principal functions of labour law to distribute equitably and manageably between workers and employers.¹²⁴

There are two further and associated points to be made by way of identification of the real problems associated with no-minimum-hours work arrangements. The first is that, as we saw in detail in the second section of this paper, such arrangements are in their nature apt to fall outside the worker-protective scope of those statutory employment rights – and they are numerous and important – which are restricted to those working under continuing contracts of employment or continuing ‘worker’s contracts’. The Government may be correct in asserting that such arrangements may possibly fall within such protective provisions, but is in our submission quite wrong to imply that all Zero-Hours Contracts generally or typically will do so. If as we hope our argument in this respect is accepted, it seems to us to follow that this factor combines with the general precarity of ‘no-minimum-hours work arrangements’ to produce a negative or ratcheting down effect upon the situation of workers engaged under such arrangements: the absence of contractual security brings about an absence of statutory security which confirms and reinforces the absence of contractual security in a vicious circle of interactions.

Our second associated point is that a further turn in that vicious circle presents itself in the fact that Zero-Hours Contracts now seem to be assuming a significant role in the law and politics of entitlement to social security benefits in respect of periods of unemployment or of under-employment sufficiently serious so as to deprive the claimant of the means of basic subsistence. It would appear that as a matter of law and policy, the refusal of an unemployed individual claiming Jobseekers’ Allowance, the principal modern form of social security unemployment benefit,¹²⁵ to accept a Zero-Hours Contract has not been treated as a basis for withholding the allowance or penalising the claimant, no doubt because it has been accepted that it would be unreasonable to do so in view of the inherently precarious character of such arrangements and their failure by definition to guarantee any minimum level of income from work for the claimant. However, a recent policy pronouncement from

¹²⁴ For an earlier articulation of this idea, see Freedland and Kountouris (n 24) 439-445.

¹²⁵ cf A Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (OUP, Oxford 2008) 94ff.

the relevant Government minister seems to suggest that refusal to accept a ZHC may attract such sanctions upon claimants for the Universal Credit which is in the gradual course of replacing Jobseekers' Allowance.¹²⁶ In this we see the perfect instantiation of the self-intensifying normalisation and legitimisation of Zero-Hours contracting,¹²⁷ which is at the heart of the normative concerns which we have put forward. This places us in a position to consider possible ways of meeting the regulatory challenges which thus present themselves.

(C) DE-NORMALISING AND CONTROLLING NO-MINIMUM-HOURS WORK ARRANGEMENTS

Our concluding points succinctly summarise the arguments we have sought to make out. We have essentially expressed concerns about what we regard as a danger of normalisation and legitimisation of Zero-Hours contracting. Emerging governmental policies, expressed in the Consultation Document, the legislative programme set out in the Queen's speech, and recent pronouncements concerning the role of Zero-Hours Contracts in the determination of entitlement to Universal Credit seem to us to tend quite strongly in the direction of such normalisation and legitimisation, on the footing of what seems likely to be markedly 'light-touch' regulation of this kind of labour market practice. Proposals to address the regulatory challenges posed by the growth of what we prefer to style as 'no-minimum-hours work arrangements' seem apt to become polarised between those kinds of suggestion for normalisation on the footing of very light regulation and, on the other hand, advocacy in favour of the banning of Zero-Hours Contracts.

This paper has expressed concerns about the former kind of proposals. On the other hand, notions of 'banning zero-hours contracts' are for their part in our view similarly problematical on technical grounds even to the extent that they might command the requisite political consensus in any realistically foreseeable future. As Roger Rideout has noted, '[t]he contractual simplicity of the zero hours arrangement has defied even the skill of statutory draftsmen to devise some form of restriction.'¹²⁸ Aware of the need to steer between Scylla and Charybdis in that sense, we have tried in this paper to lay down some analytical and normative foundations, or at least starting points, for a discussion which we think is crucially needed, of how to devise intermediate methodologies for a socially responsible approach to this new genre and culture of casual work arrangements.

As Zoe Adams and Simon Deakin have argued, '[t]he casualisation of working life is a huge problem in Britain today and Zero Hours Contracts (ZHCs) are just its most extreme form. It is caused by a dysfunctional employment law and the

¹²⁶ This policy pronouncement emerges an exchange of letters and Freedom of Information requests between Sheila Gilmore MP and the Minister for Employment at the Department of Work and Pensions, Esther McVey MP, as set out at <http://www.sheilagilmore.co.uk/sanctions-and-zero-hours-contracts/> accessed 10 June 2014.

¹²⁷ Thus it appears from Esther McVey's letter (n 126) that the non-exclusivity requirement for Zero-Hours Contracts, which the Consultation (n 6) is clearly contemplating, is or will be an important element in the justification for sanctions upon claimants for refusing to accept such contracts.

¹²⁸ R Rideout, 'The Lack of Principles in Labour Law' (2000) 53 *Current Legal Problems* 409, 424.

disappearance of the safety net formerly provided by social security law.¹²⁹ The essence of any moves to restored coherence and properly considered risk-distribution seems to us to consist in the *de-normalisation* and the *control by minimum labour standards* of what might come to be better understood both by lawyers and statisticians as ‘no-minimum-hours’ work arrangements. The designing of such moves is a matter of great difficulty, not only because of the technicalities of legal engineering to which we have referred, but also because of the strength of the perceived inherent freedoms to offer and to accept occasional very short-term work engagements. Nevertheless, it seems to us that there is real scope for the development of public policy in such a way as to *de-normalise* such engagements in the sense of proclaiming and insisting that the practice of offering such engagements should not become *the norm* and above all should not become an acceptable and legitimate substitute for the making of arrangements for stable employment. One promising way of pursuing that development might be to widen and deepen the concern about Zero-Hours Contracts beyond a narrow pre-occupation with the ‘*abuse of*’ ZHCs towards a more fundamental recognition that they represent *in general* a socially and economically regressive practice of work relations.

Bringing about such a transformation in the public discourse about Zero-Hours Contracts would also in our view need to be accompanied by concrete *control by minimum labour standards*. Here again, as we have said, the design problems are formidable. However, a start can perhaps be made by recognising that the concern which we have for minimum labour standards which protect the *security* of employment (against the unfair or abusive *termination* of employment) always need to be complemented by a wider regulation of the *stability* of employment. It is a connection which can be made simply by pointing out that under an unregulated Zero-Hours Contract or arrangement, the employer does not even need to ‘dismiss’ its workers in order to deprive them of their employment; it suffices simply to discontinue any actual offering of paid work while keeping the contract or arrangement nominally in force. It is that potential for unemployment in the ironical guise of employment which we suggest especially needs to be circumscribed. It is our hope that future work on this topic will be able to develop convincing models in this regard, aimed at the progressive regulation of the manifold problems facing casual workers and facing our society at large as the labour economy seems to take a significant turn towards the casualisation of personal work relations.

¹²⁹ Z Adams and S Deakin, ‘Work Is Intermittent But Capital is Not: What To Do About Zero Hours Contracts’ (IER Blog, 1 May 2014) <http://www.ier.org.uk/blog/work-intermittent-capital-not-what-do-about-zero-hours-contracts> accessed 10 June 2014.