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Zero-hours contracts and english employment law: Developments and possibilities

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journals.sagepub.com/home/ell**Joe Atkinson**

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Abstract

The UK has seen a dramatic growth in precarious work over recent decades, including the amorphous category of ‘zero-hours contracts’ which are often regarded as a paradigm example of an exploitative and insecure form of work. Although somewhat overshadowed by litigation and debates surrounding the gig-economy, the regulation of zero hours work continues to be a pressing issue in the UK, and important questions as to the rights that are, and should be, available to individuals with these contracts remain unanswered. This article sets out the detrimental effects that zero hours working arrangements have in the absence of adequate regulatory safeguards and argues that the orthodox treatment of zero hours contracts under English law, and the standard tools of employment law, fail to protect against these economic and social harms. The article then assesses the extent to which recent legislative and common law developments improve the position of zero hours workers, and whether existing legislation might be creatively applied to better protect these individuals. While current statutory frameworks, including reforms and legislation aimed at regulating atypical work, fall short of adequately protecting zero hours workers, the ‘purposive approach’ to employment status developed by the Supreme Court in *Uber* makes it considerably easier for zero hours contracts to be brought within the protective scope of employment law. It is argued that under this approach many individuals with supposedly ‘zero hours’ working arrangements should in fact now be regarded as employees with overarching contracts of employment. Despite the significance of this, however, it is ultimately concluded that further statutory intervention is necessary to effectively regulate zero hours work in the UK.

Keywords

Employment law, zero-hours contracts, purposive approach, employment contract, atypical work

I. Introduction

In the UK the term ‘Zero-Hours Contract’ (ZHC) is used to refer to a wide variety of working arrangements, and ‘there is no such thing as *the* Zero-Hours Contract’ in English

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law.¹ Although not amenable to precise definition, the common core characteristic of ZHCs is that they are working arrangements where an employer ‘refuses to commit itself in advance to make any given quantum of work available.’² This understanding of ZHCs encompasses a range of more specific forms of precarious work,³ and the category frequently overlaps with other atypical working arrangements such as agency work provided on a zero-hours basis, and ‘gig-work’ performed via apps and online platforms. The term ‘ZHC’ might therefore be regarded as ‘suspect’, for giving this array of casual and precarious working arrangements an undeserved appearance of homogeneity and legitimacy.⁴ In response to this, it is suggested that the label can be helpful provided we are clear about the sense in which it is being used. Here, the focus is on the regulation of zero-hours work in the context of continuous bilateral relationships between a worker and their employer where a ZHC is used in place of a traditional employment contract. Thus conceived, ZHCs are a form of on call work where ‘the employer does not continuously provide work for the employee’ and ‘has the option of calling the employee in as and when needed’.⁵

Although casual and zero-hours working arrangements have long been a part of the UK’s labour market,⁶ the issue of zero-hours work has attracted significant attention in recent public policy debates. The extreme precarity created by ZHCs, whereby workers lack any certainty or stability over the amount of work they will be offered and the amount they will be able to earn, is emblematic of broader trends in the UK regarding the decline of standard employment relationships in favour of ‘atypical’ work.⁷ As such, ZHCs have provided a focal point and accessible shorthand for assessments and critiques of the changing nature and organisation of work. The position of ZHCs under English law has also been the subject of scholarly analyses, which have highlighted the exclusion of ZHCs from the domain of employment law.⁸

More recently, however, the issue of zero-hours work has been overshadowed by litigation and debates relating to work in the ‘gig economy’. This is understandable as gig work seemingly represents the next step in the evolution of casualised and on-demand labour. But it is also unfortunate, given that the use of ZHCs continues to be a widespread problem in the United Kingdom, and important questions remain to be answered regarding the regulation of these arrangements.

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1. M. Freedland, J. Prassl, and A. Adams, ‘Zero-Hours Contracts in the United Kingdom: Regulating Casual Work, or Legitimizing Precarity?’ (2015) No. 00/2015 *University of Oxford Legal Research Paper Series* 16.
 2. S. Deakin and G. Morris, *Labour Law* (Hart 2012) 167.
 3. Such as ‘on call’ work, ‘reservists’, ‘casual’ work and ‘intermittent employment’, see M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 318–19; A. Adams, Z. Adams, and J. Prassl, ‘Legitimizing Precarity: Zero Hours Contracts in the United Kingdom’ in M. O’Sullivan and others (eds), *Zero Hours and On-call Work in Anglo-Saxon Countries* (Springer 2019) 43.
 4. M. Freedland, J. Prassl, and A. Adams (n 1) 18.
 5. Eurofund, ‘New Forms of Employment’ (Publications Office of the European Union, Luxembourg 2015) 46.
 6. S. Fredman, ‘Labour Law in Flux: The Changing Composition of the Workforce’ (1997) 26 *ILJ*; M. Freedland, J. Prassl, and A. Adams (n 1) 3–5; L. Dickens, ‘Exploring the Atypical: Zero Hours Contracts’ (1997) 26 *ILJ* 262.
 7. See H. Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ [1990] *OJLS* 353; J. Fudge, ‘Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation’ (2006) 44 *Osgoode Hall Law Journal* 609; J. Prassl and E. Albin, ‘Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion’ in M. Freedland and others (eds), *The Contract of Employment* (OUP 2016).
 8. M. Freedland, J. Prassl, and A. Adams (n 1); J. Kenner, ‘Inverting the Flexicurity Paradigm: The United Kingdom and Zero Hours Contracts’ in E. Ales, O. Deinert, and J. Kenner (eds), *Core and Contingent Work in the European Union: A Comparative Analysis* (Hart 2017); P. Leighton, ‘Problems Continue for Zero-Hours Workers’ (2002) 31 *Indus. LJ* 71; A. Adams, Z. Adams, and J. Prassl (n 3); A. Adams and S. Deakin, ‘Re-Regulating Zero Hours Contracts’ [2014] *Institute of Employment Rights*.

While the existing literature sets out the difficulties faced by ZHC workers in establishing employment status and accessing statutory employment protections, there is yet to be a full assessment of the available statutory and common law frameworks by which these hurdles might be overcome. Nor has there been sufficient evaluation, including through comparative methods and analysis, of potential new regulatory mechanisms that might be introduced to prevent the harms arising from zero-hours work. This article focusses on the first of these gaps and makes a novel contribution by considering in greater depth the potential for existing legislative frameworks and recent common law developments to protect workers with ZHCs.

Section two provides some context on ZHCs in the UK, and highlights the detrimental effects of these arrangements in the absence of adequate regulatory safeguards. Section three sets out the treatment of ZHCs under orthodox principles of English contract and employment law, whereby each individual engagement for work forms a distinct contract rather than being part of any overarching relationship. Under this approach individuals with ZHCs may, although significantly not always, be entitled to some basic protections while at work, but will struggle to access key rights. Moreover, the standard tools of UK employment law provide them with no protections against the specific vulnerabilities created by the unstable and insecure nature of ZHCs.

Section four examines recent legislative and common law developments of relevance to ZHCs and assesses their impact in extending employment rights to this group of precarious workers. It is argued that recent statutory reforms provide no meaningful new protections, but that the purposive approach to employment status recently developed by the Supreme Court should make it considerably easier for ZHCs to be brought within the protective scope of labour law. Following the decision in *Uber v Aslam*⁹ many, if not most, individuals with ZHCs should now be classed as having overarching employment contracts as a matter of law. Despite the significance of this development, however, ZHC workers will continue to face difficulties in enforcing their rights. Section five therefore considers the future of ZHCs in the UK and some potential further avenues for protecting ZHC workers through the creative application and interpretation of existing statutes, but concludes that these will have only marginal benefits and legislative reform is needed to effectively regulate ZHCs.

2. ZHCs in the UK

Although it is hard to establish precise numbers, the use of ZHCs is widespread in the UK. Data from the Office for National Statistics (ONS) in 2020 indicated that just under 1.1 million people were working under these arrangements.¹⁰ This figure is undoubtedly significant but represents only 3.3% of the total workforce. However, it is likely that official estimates understate the number of ZHCs due to under-reporting and a lack of worker awareness regarding their contractual position. The prevalence of ZHCs in the UK labour market may be more accurately reflected in the ONS Business Survey which indicated that in 2018 there were 1.8 million contracts in the UK that did not guarantee any hours to workers, representing 6% of all contracts for the performance of work.¹¹

9. *Uber v Aslam* [2021] UKSC 5.

10. ONS, 'People in Employment on Zero Hours Contracts' (2020). Available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/emp17peopleinemploymentonzerohourscontracts> (accessed 20 September 2021).

11. ONS, 'Contracts That Do Not Guarantee a Minimum Number of Hours' (2018). Available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018> (accessed 20 September 2021).

The reliance on worker awareness and self-reporting for statistical estimates of ZHCs also makes it difficult to accurately track their numbers over time. ONS data appears to show that the number of ZHCs has risen dramatically from 150,00 in 2006, or just 0.5% of the workforce, to over a million. It is thought, however, that between 20% and 60% of this increase can be put down to greater understanding and self-reporting of zero-hours work arrangements by workers.¹² But even accounting for this, ZHCs do seem to have become considerably more common over the past few decades. These working arrangements are found in public as well as private sector employment,¹³ and are now firmly established as a small but not insignificant portion of the UK's labour market.

The use of ZHCs is concentrated in certain industries, and among particular demographics of the labour market. For example, hospitality, retail, and the health and social care sector together account for 54% of all such contracts.¹⁴ In addition, zero-hours working arrangements are most concentrated among younger workers. Individuals between the ages of 16 and 24 account for a third of all zero-hours working arrangements, with one in ten workers in this age group having a ZHC.¹⁵ There is also a gendered dimension to the distribution of ZHCs, with a higher proportion of the female workforce having these arrangements (3.7%) compared to men (2.9%).¹⁶

The growth of ZHCs is one aspect of a broader trend in the UK towards the 'vertical disintegration' of workplaces and an increase in atypical and precarious forms of work.¹⁷ Businesses engage workers through these contracts as it provides them with additional flexibility that allows them to precisely match labour power with variations in demand.¹⁸ Some employers may also adopt ZHCs in an attempt to avoid the tax and regulatory costs associated with standard employment contracts, as successfully framing these relationships as self-employment will result in their having no obligations to pay national insurance contributions or provide benefits such as holiday pay and pension contributions. A demonstration of the flexibility provided by ZHCs can be seen in the dramatic drop in average weekly working hours, of almost a half, for individuals with these arrangements at the start of the Covid-19 pandemic compared to a smaller drop in the proportion of hours worked for standard employees (a similar effect can be observed in the Netherlands; see the contribution of Anja Eleveld in this special issue).¹⁹

The use of ZHCs, and other atypical and precarious forms of work, has largely been viewed uncritically and even positively by successive UK Governments as a means of securing a flexible labour market and economic competitiveness.²⁰ As discussed below, this permissive attitude is reflected in the absence of regulatory frameworks limiting the use of ZHCs or protecting

12. E. Farina, C. Green, and D. McVicar, 'Zero Hours Contracts and Their Growth' (2020) 58 *British Journal of Industrial Relations* 507.

13. See for E. Burrowes, 'Research into the Use of Zero Hours Contracts in Devolved Welsh Public Services' [2015] Government Social Research; GMB Union, 'Revealed: Scandal of 30,000 NHS Workers on Zero Hours Contracts' (2019), available at www.gmb.org.uk/news/revealed-scandal-30000-nhs-workers-zero-hours-contracts (accessed 12 January 2022).

14. ONS, 'People in Employment on Zero Hours Contracts' (n 10).

15. *Ibid.*

16. *Ibid.*

17. H. Collins (n 7); David Weil, *The Fissured Workplace* (Harvard University Press 2014).

18. Chartered Institute of Personnel and Development, 'Zero Hours Contracts: Myths and Reality' (2013).

19. ONS (n 9), comparing the periods October-December 2019 and April-June 2020.

20. As evident, for example, in Department for Business Innovation and Skills (BIS), *Zero-Hours Employment Contracts* (2013) 4. More generally see P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Clarendon 1993); P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (OUP 2007).

against the economic precarity and temporal instability inherent in these arrangements. Indeed, rather than seeking to restrict or minimise their use, the recently introduced Universal Credit system for administering social security may require individuals to work under ZHCs to be eligible for payments (on this practice, see the contribution of Virginia Mantouvalou in this special issue). While the application of any cuts to benefits is at the discretion of local 'job coaches', Government guidance makes it clear that 'claimants [of Universal Credit] can be required to apply for and take-up employment that is based on a zero hours contract provided that the contract allows the claimant to take-up further work with different employers'.²¹ The Government's *laissez-faire* attitude towards zero-hours working arrangements is also reflected in the fact that they are commonly used by public sector employers, including the National Health Service.²²

This hands-off approach to regulating ZHCs is troubling as, if left unchecked, they can have significant adverse effects for both individual workers and society more widely. The lack of security or stability in respect of working hours and remuneration creates distinct vulnerabilities and risks of harm for ZHC workers over and above those in standard employment relationships. The uncertainty over working hours and pay inherent in ZHCs can put severe strain on workers' social relationships and work-life balance, create financial hardship, and negatively impact their physical and mental health.²³ Zero-hours work is frequently low paid, with few opportunities for training or career development, meaning these arrangements can act as a poverty trap for workers; one in seven people living in destitution in the UK have a ZHC or are in other insecure work.²⁴ More broadly, ZHCs threaten workers' ability to live fully autonomous lives, and to fully exercise their capabilities, by making it difficult to form and pursue long-term goals. How can workers make commitments and stick to plans without knowing, on a day-to-day basis, when they will be working and how much they can expect to earn?

As well as negatively impacting workers' lives outside of work, ZHCs heighten the level of subordination experienced in the workplace. Employers' freedom to vary an individual's working hours, and therefore remuneration, provides an additional means of exercising control and achieving compliance that does not exist in standard employment relationships,²⁵ creating a working environment Wood aptly describes as 'flexible despotism'.²⁶ Whereas in standard employment relationships the assumption is that work (and pay) will be provided on an ongoing basis, under ZHCs the position is that work need not be provided in future. Workers are therefore placed in an acutely vulnerable position, needing to act subserviently and ingratiate themselves with employers to ensure they continue to be offered work.

This heightened level of subordination leaves ZHC workers more vulnerable to exploitation and threatens values that are central to labour law. ZHCs make it harder to achieve the goal of ensuring non-domination in the workplace, in the neo-republican sense of freedom from the

21. Department of Work and Pensions, 'Advice for Decision Makers', (2013) chapter K3271-K3280. Available at <https://www.gov.uk/government/publications/advice-for-decision-making-staff-guide> (accessed 12 January 2022).

22. GMB Union (n 13).

23. M. Pennycook, G. Cory, and V Alekeson, 'A Matter of Time. The Rise of Zero-Hours Contracts.' (Resolution Foundation 2013); K.A. Bender and I. Theodossiou, 'The Unintended Consequences of Flexicurity: The Health Consequences of Flexible Employment' (2018) 64 *Review of Income and Wealth* 777.

24. S. Fitzpatrick and others, 'Destitution in the UK 2020' (Joseph Rowntree Foundation 2020).

25. A. Wood, 'Powerful Times: Flexible Discipline and Schedule Gifts at Work' (2018) 32 *Work, Employment and Society* 1061.

26. A. Wood, *Despotism on Demand: How Power Operates in the Flexible Workplace* (ILR Press 2020), showing how this temporal flexibility can be used to heighten and exercise control over workers.

arbitrary will of another,²⁷ which has been proposed by scholars as a normative underpinning for employment law.²⁸ This is because ZHCs provide employers with greater arbitrary power over workers' lives and income than standard employment relationships, meaning workers will struggle to pass the 'eyeball test' which provides a heuristic for freedom from domination, of looking their employer in the eye 'without the fear or deference that a power of [arbitrary] interference might inspire'.²⁹ Additionally, Kenner points out that ZHCs run contrary to another of labour law's foundational ideas, that labour should not be treated as a mere commodity, because they reduce workers' labour power to just another factor of production,³⁰ or as Supiot describes it, to 'a resource which can be mobilised at any moment'.³¹ Finally, by shifting the risk of demand fluctuations and shortages from employers to individual workers ZHCs also represent a troubling 'demutualisation' of employment relationships, upsetting the equitable distribution of risks that labour law aims to embody,³² and threatening the values of stability and dignity in employment relationships that Freedland and Kountouris argue employment law seeks to establish.³³

ZHCs may also be bad for businesses and have wider societal harms. Overreliance on ZHCs by employers may leave them without a sufficiently experienced or skilled workforce because there are limited incentives to provide or undertake training in these roles, and therefore be detrimental for productivity.³⁴ Furthermore, the detrimental effects of ZHCs set out above disproportionately fall on already disadvantaged groups of workers, who are overrepresented among ZHC workers. The widespread use of ZHCs in place of standard employment relationships therefore contributes to increasing social exclusion and inequality, the breakdown of community ties, and the creation of a precariat class of workers.³⁵ While employers might argue that ZHCs benefit society and the economy by promoting job creation, the evidence is that they are in fact often used to replace more stable forms of work.³⁶

Despite these various harms, the benefits of flexibility that ZHCs provide suggests that their use can be legitimate and justified in some circumstances, namely where a lack of any ongoing commitment genuinely suits both parties, and that a blanket ban on their use may be disproportionate. Indeed, job satisfaction surveys frequently contain little difference between those on standard employment contracts and atypical workers, and workers often state that they are happy with their existing flexible arrangements.³⁷ Nevertheless, the risks associated with these extremely

27. On non-domination see P. Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997).

28. V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912; D. Cabrelli and R. Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 339; K. Breen, 'Non-Domination, Workplace Republicanism, and the Justification of Worker Voice and Control' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 419.

29. A. Bogg and C. Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 152.

30. J. Kenner (n 8).

31. A. Supiot, *Governance by Numbers The Making of a Legal Model of Alliance* (Hart 2017) 250.

32. M. Freedland, J. Prassl, and A. Adams (n 1) 19.

33. See M. Freedland and N. Kountouris (n 3) ch 9.

34. For critique of the economic and job-creating impacts of ZHCs see A. Adams, Z. Adams, and J. Prassl (n 3) 57–9.

35. G. Standing, *The Precariat: The New Dangerous Class* (Bloomsbury 2016).

36. E. Farina, C. Green, and D. McVicar (n 12).

37. D.E. Guest and others, 'Free or Precarious? A Comparison of the Attitudes of Workers in Flexible and Traditional Employment Contracts' (2006) 16 *Human Resource Management Review* 107; D. Pyper and F. McGuiness, 'Zero-Hours Contracts' (2018) House of Commons Library Briefing, available at <https://commonslibrary.parliament.uk/research-briefings/sn06553> (accessed 20 October 2021).

precarious working arrangements generate a strong imperative to regulate and control their use. Against this background, the following sections consider the legal position of ZHCs in the UK, and the mechanisms that exist in English law to protect this group of precarious workers.

3. The orthodox treatment of ZHCs in English employment Law

3.1 The absence of regulatory frameworks aimed at ZHCs

Zero-hours working arrangements do not correspond to a distinct category of employment status in English law and, aside from the recent ban on ‘exclusivity clauses’ discussed below, there are no legal restrictions on their use, either in respect of the reason for their adoption or the length of time that they can be used for. Neither are employers required to seek approval or permission to contract for labour via ZHCs. In contrast to some other jurisdictions there is no requirement that an individual with a contract of employment must be guaranteed any minimum number of hours over the year (see, for example, the position in Belgium discussed by Elise Dermine and Amaury Mechelynck in this special issue). There have been attempts by some Members of Parliament to introduce Private Members’ Bills containing new rights and protections specifically aimed at ZHC workers, but these have all failed to become law.³⁸

This lack of regulatory frameworks limiting or restricting the use of ZHCs means that, should they choose, employers are free to engage their entire workforce on a zero-hours basis. They would face no legal barriers to this, nor be required to provide their workers with any guaranteed hours or pay. Furthermore, the employer would be able to ask ZHCs workers to come into work at short (or no) notice, and then simply send them away without any pay if it turns out there is insufficient work available for them after all. The UK is therefore a paradigm example of a legal system that adopts a highly deregulatory approach towards ZHCs.

Historically, casual and zero-hours labour would have been regulated to some extent in the UK through collective agreements, and there are also examples of legislation tackling casualisation in specific industries.³⁹ Both these sources of regulation are now largely defunct, however. Industry-specific legislation has been repealed, and although trade unions continue to campaign on the issue of ZHCs and seek to limit their use through collective agreements,⁴⁰ this is to relatively little effect due to the lack of collective bargaining coverage in the UK, particularly in those sectors where ZHCs are most concentrated.

Concern over the problems created by irregular and highly insecure work helped motivate the development of the early welfare state in the UK and the policy goals of full employment and ‘decasualisation’ have sometimes underpinned regulatory interventions in the labour market.⁴¹ In the

38. For a recent example see the ‘Workers (Rights and Definition) Bill’ introduced by Chris Stephens MP, available at <https://publications.parliament.uk/pa/bills/cbill/58-02/0110/210110.pdf> (accessed 19 Oct 2021).

39. The Dock Workers (Regulation of Employment) Act 1946, creating a system of licensing and attendance money for dock workers with zero-hours arrangements.

40. For example, Trade Union Congress, ‘We Need to Put an End to Zero-Hours Contracts’, (2020) available at <https://www.tuc.org.uk/blogs/we-need-put-end-zero-hours-contracts> (accessed 20 October 2021); University and College Union, ‘Stamp out Casual Contracts’, (2020) <https://www.ucu.org.uk/stampout> (accessed 20 October 2021).

41. W. Beveridge, *Unemployment: A Problem of Industry* (Longmans 1917); J. Harris, *Unemployment and Politics: A Study of English Social Policy, 1886-1914* (Oxford University Press 1972); N. Whiteside, ‘Casual Employment and Its Consequences: A Historical Appraisal of Recent Labour Market Trends’ [2019] *Historical studies in industrial relations* 1. See also the goal of full employment as the basis for labour market regulation in, P. Davies and M. Freedland (n 20) 60–77.

main, however, the development of modern labour law has focussed on regulating ‘standard’ employment relationships, with successive Governments adopting a permissive, and even positive, attitude towards ZHCs. The 1998 New Labour *Fairness at Work* White Paper, for example, acknowledged that ZHCs ‘have the potential to be abused’ by employers but nevertheless asserted the ‘Government wishes to retain the flexibility these contracts offer business’.⁴² Subsequent Governments have adopted a similarly light-touch regulatory approach and *laissez-faire* attitude towards ZHCs, notwithstanding the ban on exclusivity clauses; reflecting a belief that zero-hours work offers ‘valuable flexible working opportunities’,⁴³ and is ‘legitimate ... providing both parties freely agree to it’.⁴⁴

In the absence of any tailored statutory framework designed or intended to regulate ZHCs in English law, these arrangements fall to be governed by the generally applicable rules of contract and employment law. The following sub-sections set out the orthodox treatment of ZHCs in English law and the position of these workers in respect of statutory employment rights, demonstrating how the default legal analysis of ZHCs makes it difficult or even impossible for these workers to access employment protections, and leaves them without adequate safeguards against the harms arising from their position of precarity. The focus here is on employment law, so the interaction of ZHCs with the UK’s social security system is not discussed.⁴⁵

3.2 ZHCs, employment status, and the lack of an overarching contract

As there is no specific category of employment status corresponding to ZHCs the entitlement of zero-hours workers to employment rights and protections under English law turns on whether they can be classed as either an employee or worker. Employees are defined as individuals with a contract of employment,⁴⁶ and benefit from the full range of employment rights that exist in English law. The conventional approach to identifying employment contracts is that they must involve a wage-work bargain between the parties, confer rights on the employer to control performance, and contain no terms inconsistent with employee status.⁴⁷ Other relevant factors used to identify employees include their degree of integration into the employing entity,⁴⁸ and the extent to which they are in business on their own account or assume risks of making a profit or loss.⁴⁹ Crucially for present purposes, contracts of employment also require an ‘irreducible minimum’ of continuing obligations to offer and perform work, commonly known as mutuality of obligations.⁵⁰

42. Board of Trade, *Fairness at Work* (1998) Cm 3968, paras 3.14-15.

43. Department for Business, Innovation and Skills, ‘Government Crackdown on Zero Hours Contract Abusers’ (2014). Available at www.gov.uk/government/news/government-crackdown-on-zero-hours-contract-abusers (accessed 20 October 2021).

44. Department for Business, Innovation and Skills, *Zero Hours Employment Contracts* (2013).

45. On the interaction of social security and ZHCs see V. Mantouvalou in this edition; A. Adams and S. Deakin (n 8); A. Adams, Z. Adams, and J. Prassl (n 3) 49–51.

46. ERA 1996, s.230(1)-(2).

47. *Ready Mixed Concrete Ltd v Minister of Pensions* [1968] 2 QB 497; A.C.L. Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) ch 5.

48. *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101.

49. *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173; *Stringfellow v Quashie* [2012] EWCA Civ 1735 (CA).

50. *O’Kelly v Trusthouse Forte* [1984] QB 90 (CA); *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA); *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (CA); N. Countouris, ‘Mutuality of Obligation’ in A. Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015).

Worker status includes those with an employment contract, but also individuals contracting to ‘perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’.⁵¹ The core elements when identifying who is a worker are therefore: (1) a contract to perform work or services, (2) an undertaking of personal performance, and (3) that the other party to the contract is not a client or customer of the individual.⁵² In addition to this, however, courts have also drawn on the principles and factors used to identify employee status, such as control and integration, albeit ‘with the boundary pushed further in the putative worker’s favour’.⁵³ An additional status exists for the purposes of discrimination law, drafted more broadly as covering individuals employed under ‘a contract personally to do work’,⁵⁴ but the courts have equated this with worker status.⁵⁵

The personal scope of many core employment rights now extends to the larger class of worker status. This includes the minimum wage,⁵⁶ written statements of terms and conditions,⁵⁷ working time and holiday pay regulations,⁵⁸ anti-discrimination protections,⁵⁹ health and safety law,⁶⁰ and trade union and collective rights.⁶¹ But some are still afforded only to those classed as ‘employees’, such as redundancy payments and unfair dismissal protection,⁶² minimum notice periods,⁶³ the right to request flexible working,⁶⁴ and maternity and parental rights.⁶⁵ Individuals who fall outside the definitions of both employee and worker are self-employed independent contractors, left to fend for themselves in the labour market without the benefit of any statutory employment rights.

The place of zero-hours working arrangements within this tripartite scheme, and the statutory protections individuals with ZHCs are entitled to, depend on the terms of the contract. Some ZHC workers will be entitled to basic rights while at work, but this is far from guaranteed. The orthodox common law position, however, is that ZHCs will not amount to overarching contracts of employment, also known as ‘global’ or ‘umbrella’ employment contracts.

It is certainly possible for someone to have a contract of employment with variable working hours, where the amount of work provided/performed depends on what is available.⁶⁶ An employment contract may exist where ‘the putative employee agrees to *some reasonable minimum amount* of work and the putative employer’s obligation may be discharged by merely *providing* the work to

51. ERA s.230(3)(b). Similar, although not identical, definitions are contained in other statutes, see Trade Union and Labour Relations (Consolidation) Act (‘TULRCA’), s.296.

52. *Clyde & Co LLP v Bates van Winklehof* [2014] UKSC 32; *Uber v Aslam* (n 9), [41].

53. *Byrne Bros (Formwork) v Baird* [2002] ICR 667 (EAT), [17].

54. Equality Act 2010, s.83(2).

55. *Clyde & Co LLP v Bates van Winklehof* [2014] UKSC 32, [31]-[32]; *Secretary of State for Justice v Windle* [2016] EWCA Civ 459; *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [13]-15].

56. National Minimum Wage Act 1998, s.54.

57. ERA 1996, s.1.

58. Working Time Regulations 1998, reg.2.

59. Equality Act 2010, s.83.

60. The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021; Health and Safety at Work Act 1974, s.3(1).

61. TULRCA, s.296.

62. ERA 1996, Part X.

63. ERA 1996, s.86.

64. ERA 1996, s.80F.

65. ERA 1996, Part VIII, Ch.1-4; The Statutory Maternity Pay (General) Regulations 1986.

66. As in *The Harpur Trust v Brazel* [2019] EWCA Civ 1402.

be done'.⁶⁷ Some flexible working arrangements that might colloquially be described as 'zero-hours' could therefore fall into this category. But a core feature of ZHCs, as understood here, is the total absence of *any* commitment by the employer to provide work in future, irrespective of whether it is available (see the general introduction of this special issue). However, this feature of ZHCs is incompatible with the requirement of mutuality of obligations, and means they lack the ongoing reciprocal promises to provide and perform work necessary for an overarching employment contract.⁶⁸ This conclusion is further reinforced where a ZHC allows workers to turn down all work they are offered; while a right to refuse some work is not necessarily incompatible with employment, there must be at least '*some* obligation upon an individual to work'.⁶⁹

If ZHCs are not employment contracts on conventional principles, might they nevertheless be classed as an overarching 'worker' contract?⁷⁰ It is somewhat unclear whether mutuality of obligations, in the sense of an ongoing commitment to provide/perform work, is also necessary for an umbrella 'worker' contract. Several cases on worker status refer to the requirement of mutuality of obligations,⁷¹ and the statutory language requiring a 'worker' contract be a contract to perform work could be interpreted as demanding a commitment to provide some minimum amount of work. If the principle does apply in the same way as to employment contracts it would similarly prevent ZHCs from being overarching worker contracts. The better interpretation of these cases, however, may be to take the references of mutuality of obligations as meaning a requirement of mutuality in a more general sense, of reciprocal promises and the consideration needed for a legally valid contract.⁷² In which case ZHCs might amount to overarching worker contracts if the necessary consideration is present for them to be legally valid contracts, despite the absence of any ongoing commitment to offer and accept work.

Even under this broader understanding of 'mutuality of obligation', however, ZHCs may struggle to be classed as overarching worker contracts. This is because it will often be difficult to identify any legally binding reciprocal promises in the agreement; meaning the application of classic contract law principles to ZHCs would 'result in the denial of any contractual obligations at all' due to a lack of consideration.⁷³ On this analysis, there have been no enforceable promises exchanged between the parties and ZHCs are mere framework agreements with no legal effect or validity (for discussion of similar doubts about the status of ZHCs as valid contracts in the Belgian context, see the contribution of Elise Dermine and Amaury Mechelynck to this special issue).⁷⁴

Orthodox principles of English law therefore regard ZHC arrangements as a series of distinct and ad hoc contractual engagements, in much the same way as work performed via online platforms in

67. *Varnish v British Cycling Federation* [2020] IRLR 822, [38].

68. On mutuality of obligation see N. Countouris (n 50).

69. *Cotswold Developments Construction v Williams* [2006] IRLR 181, [55].

70. This question of whether ZHCs are overarching worker contracts is less significant in practice, because the rights linked to worker status do not have qualification periods of continuous service and, as discussed below, individuals may be a 'worker' for each engagement. The absence of an overarching worker contract will therefore have little impact on the rights held by those with 'worker' status.

71. Most notably *Byrne Brothers (Formwork) Ltd v Baird* (2002) IRLR 96, [25]. See also *Firthglove Ltd (t/a Protectacoat) v Descombes* [2002] All ER 415; *Cotswold Developments Construction v Williams* (n 69).

72. J. Prassl, 'Who Is a Worker?' (2017) 133 LQR 366. This approach was recently adopted in *Somerville v Nursing and Midwifery Council* (UKEAT/0258_20_0505).

73. M. Wynn and P. Leighton, 'Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract' (2009) 72 MLR 91, 98.

74. H. Collins, 'Employment Rights of Casual Workers' (2000) 29 ILJ 73.

the gig economy, rather than as constituting an umbrella employment or worker contract. But it does not necessarily follow that ZHCs are entirely excluded from the protective domain of employment law, because the individual engagements performed under ZHCs can themselves amount to mini employment or worker contracts.⁷⁵ Mutuality of obligation presents no barrier to employment status during periods when the individual is actually performing work: 'For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will.'⁷⁶ The employment status of individuals with ZHCs while actually working is therefore to be determined by applying the remaining tests for employee or worker status to these individual engagements. While '[t]here may be no overarching or umbrella contract ... that does not preclude such a status during the period of work'.⁷⁷

Some ZHC workers will not be employees or workers even while performing work, and will therefore fall entirely outside the scope of employment law.⁷⁸ This can happen where, for instance, the contract contains an unfettered substitution clause entitling them to send another person in their place,⁷⁹ or the worker is regarded as being in business for themselves.⁸⁰ Worryingly, in *Secretary of State for Justice v Windle* it was suggested that in some circumstances the intermittent nature of work and the ability for individuals to turn work down may 'tend to indicate a degree of independence, or lack of subordination' incompatible with employment status, even during the periods they are at work.⁸¹ This principle has been subject to persuasive critique,⁸² but was recently affirmed in *Uber*.⁸³ While that case involved platform work, the Supreme Court endorsed the principle in respect of casual work more generally. The circumstances where courts will apply this reasoning to deny the existence of employment status even while an individual is working remains unclear. But if adopted more widely it clearly has the potential to deny ZHC workers both employee or worker status during individual engagements, leaving them without the most basic employment protections.

In most cases, however, periods of work conducted under ZHCs should amount to employment, with individuals having either employee or worker status.⁸⁴ It may be difficult to determine whether individuals are properly classed as employees or workers during these engagements, as the line between the two categories is far from clear. But if someone working under a ZHC does not take on risks of profit and loss during shifts, and the employer controls the manner/performance of work, it is suggested that this should be sufficient to find a contract of employment exists for the period of each engagement. Irrespective of which side of the employee/worker boundary they fall, zero-hours workers who have an employment or worker contract during individual engagements are entitled to core rights such as the national minimum wage and working time

75. *McMeechan v Secretary of State for Employment* [1997] ICR 549.

76. *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471, [23].

77. *James v Redcats (Brands) Ltd* [2007] ICR 1006, [84].

78. As in *O'Kelly v Trusthouse Forte plc* [1983] IRLR 369.

79. *Pimlico Plumbers Ltd v Smith* (n 55); *R (on the application of the IWGB) v CAC and Rooffoods Ltd t/a Deliveroo* [2021] EWCA Civ 952.

80. *Jivraj v Hashwani* [2011] UKSC 40; *Stringfellows v Quashie* (n 49).

81. *Secretary of State for Justice v Windle* (n 55), [23].

82. H. Dhorajiwala, 'Secretary of State for Justice v Windle: The Expanding Frontiers of Mutuality of Obligation?' (2017) 46 *ILJ* 268; J. Prassl (n 72).

83. *Uber v Aslam* (n 9), [91]. Although this case involved platform work, the Supreme Court endorsed the principle in the context of [text missing?]. On the contrasting position adopted by the Court of Cassation in Belgium, see Elise Dermine and Amaury Mechelynck in this special issue.

84. *Carmichael v National Power* [1998] ICR 1167, 2051C; *McMeechan v Secretary of State for Employment* (n 75).

regulations, protection of trade union membership and activities, as well as for whistleblowing and against discrimination. The question of whether they are an employee rather than a worker becomes important only if they seek to claim rights restricted to employee status, and in these situations continuity of employment will often be the more significant barrier than employment status.

3.3 *The problem of continuity of employment*

ZHCs are therefore not wholly mutually exclusive with the application of employment law protections even under the orthodox approach to these working arrangements. But significant gaps and shortcomings do remain in the protection offered to ZHCs. First, individuals who count as employed while performing work under a ZHC will lack status in the gaps between engagements, and therefore have more limited protection against discrimination and victimisation at these times.⁸⁵ Second, even if they are entitled to workplace protections as employees or workers there may be complications when it comes to claiming these rights, for example, due to difficulties about what counts as working time for the purposes of employment legislation.⁸⁶ Finally, some key employment rights have qualification requirements of minimum periods of continuous service, notably, the two-year qualification period for protections against unfair dismissal and redundancy,⁸⁷ and these pose a particular problem for ZHC workers, who lack of an umbrella contract of employment.

A legislative mechanism does exist that enables periods worked under successive employment contracts to be counted together for the purpose of continuity requirements,⁸⁸ and ZHC workers can attempt to use this to meet qualification periods. Under s.212 of the Employment Rights Act 1996 ('ERA'), any week where an individual has worked under a contract of employment at any point will count towards their continuity of employment. Weeks where they have not worked as an employee will break continuity unless this was because of illness, a temporary cessation of work, or where continuity is maintained by agreement or custom.⁸⁹ ZHC workers who are employees during individual engagements will therefore accrue continuity of employment provided they work on a weekly basis, with any gaps falling under these permitted exceptions.

In practice, however, it will be very difficult for most ZHC workers to link sufficient weeks together via s.212 to meet statutory qualification periods, not least because weeks where the employer chooses not to offer them work when it is available will not count as a temporary cessation and can therefore break continuity.⁹⁰ In *Booth v United States of America*, for example, individuals employed for several years under successive contracts with regular two-week gaps between them were unable to use the bridging provisions to demonstrate continuity of employment, despite the employer creating these gaps with the express purpose of breaking their continuity of employment.⁹¹

85. A.C.L. Davies, 'Casual Workers and Continuity of Employment' (2006) 35 *Industrial Law Journal* 196, 199. But note the post-employment protections against discrimination contained in Equality Act 2010, s.108.

86. On the difficulties of protecting ZHC workers through the legislation on the minimum wage and working time, see A. Adams, Z. Adams, and J. Prassl (n 3) 54–55.

87. ERA 1996, ss.108 and 155. This qualification period does not generally apply to dismissals for 'automatically unfair' reasons.

88. ERA 1996, s.212.

89. ERA 1996, s.212(3).

90. *Byrne v Birmingham City Council* [1987] ICR 519 (CA), 525.

91. [1999] IRLR 16.

Furthermore, any ZHC worker able to meet the qualifying period for unfair dismissal protection or redundancy payments by linking individual engagements together will struggle to bring claims against employers who stop providing them with work or reduce their hours. The primary difficulty lies in identifying a 'dismissal' in these circumstances. This might be possible in the rare instances where ZHC workers are sent home or told during a shift that their services will not be required in future. But in the more common situation of an employer simply ceasing to offer work under the ZHC there appears to have been no act of dismissal on which to base a claim.⁹² Similarly, under most standard employment contracts a unilateral reduction in working hours by the employer would amount to a fundamental breach of contract, entitling the employee to resign and claim constructive dismissal. However, this is not the case under a ZHC, as the employers' ability to vary working hours is inherent in the parties' relationship.

One novel way of attempting to ground a dismissal claim for a zero-hours worker would be to argue that each engagement under a ZHC is very short fixed-term contract of employment, and that non-renewal of the contract by the employer therefore falls within the definition of 'dismissal' found in the ERA. This appears sound in principle, because the statutory definition of 'circumstances in which an employee is dismissed' for the purposes of unfair dismissal claims includes situations where workers are 'employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed'.⁹³ But even if this argument were accepted, any claim for unfair dismissal based on non-renewal of a zero-hours contract would be unlikely to succeed. For a dismissal to be found unfair, the employers' conduct must fall outside the 'range of reasonable responses' that were open to them.⁹⁴ This standard is notoriously generous towards employers,⁹⁵ and employers who use zero-hours arrangements to provide flexibility, or pursue other business objectives, will easily be able to persuade a tribunal that the non-renewal of a zero-hours contract (i.e. the act of dismissal) comes within the range of reasonable behaviour open to them, and is therefore not unfair.

Stepping back, the inability of unfair dismissal law to provide security and stability for zero-hours workers illustrates a broader problem with the regulation of ZHCs in English law, namely, that even if the barriers of employment status and continuity can be overcome, the rights ZHC workers are subsequently entitled to are not capable of addressing the precarity in time and pay that they face. The law of dismissal aims to provide a degree of job security and protection from unemployment; but a more pressing problem for ZHC workers may be their lack of stable working pattern, or safeguards against underemployment and reductions in hours.⁹⁶ Similarly, ZHC workers will frequently be entitled to working time protections and the minimum wage but nevertheless have no security over their working hours or income, because these regulations are aimed at addressing the problems of low pay and overwork in standard employment relationships rather than that of insecure and fluctuating work under zero-hour arrangements. These problems arise due to English employment law taking the standard employment relationship, with its underlying assumption of stability and continuity, as the primary target for regulation.

In sum, orthodox principles of English law treat ZHCs as a series of distinct *ad hoc* contracts rather than an overarching employment relationship. In many cases, but not all, each individual engagement will be classed as a brief employment or 'worker' contract, meaning individuals

92. As in *Saha v Viewpoint Field Services Ltd* [2014] UKEAT/0116/13/DM.

93. ERA 1996, s.95(1)(b).

94. *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT).

95. See A. Baker, 'The "Range of Reasonable Responses" Test: A Poor Substitution for the Statutory Language' (2021) 50 *ILJ* 226; A. Freer, 'The Range of Reasonable Responses Test - From Guidelines to Statute' (1998) 27 *ILJ* 335.

96. M. Freedland, J. Prassl, and A. Adams (n 1) 21.

with ZHCs will often benefit from basic employment rights while at work. But even where ZHCs are regarded as a series of separate employment contracts, workers continue to be excluded from important employment protections that require status during non-working time, or that have minimum periods of continuous service. More fundamentally, the traditional tools of English employment law are ill-equipped to address the specific economic and social harms created by ZHCs, so will inevitably struggle to provide secure and decent work for these workers.

4. Recent legislation regulating ZHCs

As Kenner notes, zero hours contracts ‘represent contingency max, an inversion of the European “flexicurity” paradigm’.⁹⁷ The permissive approach to ZHCs under orthodox principles of English employment law facilitates and actively enables this inversion of the flexicurity paradigm. Rather than seeking to combine labour market flexibility with security for workers it instead creates a position that can be described as ‘flexicarity’; one that ensures flexibility for employers and precarity for ZHC workers. Given this, the following sections consider what legislative and common law developments, if any, there have been which move away from this position of legally entrenched flexicurity and improve the level of protection provided to these workers.

On the legislative side, the increasing (ab)use of ZHCs in the UK labour market has not triggered a Polanyian countermovement towards the re-regulation of these working arrangements.⁹⁸ The sole legislative intervention expressly aimed at ZHCs is a ban of ‘exclusivity clauses’ in these contracts, meaning clauses attempting to prevent individuals from working for another employer.⁹⁹ This ban was introduced by The Small Business, Enterprise and Employment Act 2015, amending the ERA 1996, which provides that any clause in a ‘zero hours contract’ that ‘prohibits the worker from doing work or performing services under another contract or under any other arrangement’, or that requires the employer’s consent for doing so, is unenforceable.¹⁰⁰ Where workers breach an exclusivity clause in a ZHC they are protected against dismissal (for employees) or suffering detriments (for workers) as a result.¹⁰¹

For the purposes of this ban, a zero-hours contract is defined as:

‘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’.¹⁰²

The use of exclusivity clauses in ZHCs is clearly exploitative, as they represent attempts to create a captive pool of on-demand labour, usually made up of those with few other options for employment and who may be forced into accepting these contracts as a condition of receiving Universal Credit payments. The ban is therefore a welcome signal that this practice is unacceptable.

97. J. Kenner (n 8) 154.

98. Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd ed reprint, Beacon Press 2001).

99. The Small Business, Enterprise and Employment Act 2015, s.153. Inserting ss.27A-27B into the ERA 1996.

100. ERA 1996, s.27A(3).

101. The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015.

102. ERA 1996, s.27A(1).

However, it is of limited practical or legal significance, and falls drastically short as an adequate regulatory response to the issue of ZHCs.

Practically, only a small minority of ZHCs ever contained exclusivity clauses (estimated at 9%),¹⁰³ so the legislation is not relevant for most ZHC workers. Legally, these terms were likely already unenforceable at common law both because they would be an unreasonable restraint of trade,¹⁰⁴ and because on the orthodox analysis the ZHC may not be a valid contract in the periods between engagements. As Kenner concludes, the legislation therefore ‘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’.¹⁰⁵

The ban on exclusivity clauses was introduced following sustained political pressure by the Labour Party and a rise in public awareness of the problem of zero-hours and casual work. It appears to have been motivated by the Government’s desire to be seen to be acting on the issue, and to be able to say it had legislated to prevent ‘abuses’ of ZHCs.¹⁰⁶ But even in symbolic terms the value of the legislation is limited and, as argued by Freedland et al,¹⁰⁷ it may in fact be harmful. By picking out exclusivity clauses as the only problematic abuse of ZHCs that necessitates legislation, the ban serves to legitimise the majority of ZHCs that do not contain these terms. The UK’s approach to regulating ZHCs therefore implicitly endorses their continued widespread use outside this narrow category of ‘abusive’ zero-hours arrangements.

Two further employment law reforms have been introduced in recent years that, while not explicitly targeted at ZHCs, nevertheless benefit these workers. First, from April 2020 the right to a written statement of ‘employment particulars’ has been extended from employees to those with ‘worker’ status and the qualification requirement of one-month continuous service removed.¹⁰⁸ ZHC workers who are not classed as self-employed are therefore now entitled to a written statement of employment particulars as soon as they begin working.¹⁰⁹ These statements must contain information relating to pay, annual leave and other benefits, notice and probationary periods, relevant collective agreements, and any disciplinary processes.¹¹⁰ As part of this recent reform, statements must now also include details of normal working hours and required days of work, as well as ‘whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined’.¹¹¹ As a result, ZHC workers with overarching employment or worker contracts must now be informed how their employer will determine and allocate their working hours. ZHC workers who lack an overarching employment or worker contract must also be provided with a written statement when they begin work, but this need only contain the terms that apply during that individual engagement.

103. Chartered Institute of Personnel and Development (n 18).

104. *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69.

105. J. Kenner (n 8) 176.

106. Department for Business, Innovation and Skills (n 43).

107. M. Freedland, J. Prassl, and A. Adams (n 1).

108. Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018, Part two. Amending the ERA 1996, s.1.

109. There are some exceptions for certain classes of information that can be provided in the first two months of employment, ERA 1996, s.2(4).

110. See ERA 1996 s.1(3)-(4).

111. ERA 1996, s.1(4)(c)(iii).

These extensions to the scope and content of the right to a written statement will promote transparency and help ZHC workers understand the terms on which they are engaged. However, the legislation only requires that employers state the terms of employment and does not confer any substantive rights regarding the content of these terms. Employers using ZHCs are therefore free to issue a written statement asserting that the worker is employed on a zero-hours basis with no guaranteed or normal working hours, and that their hours will be determined entirely at the employers' discretion. Alternately, they can issue a separate statement for each individual engagement, asserting that the working hours are only for the duration of that shift. Moreover, the right has weak enforcement mechanisms, as failure to provide the required information will not in itself give rise to a claim for damages and the only remedy is for workers to seek a declaration from the employment tribunal confirming the information they should have been given.¹¹²

The final recent reform that will benefit ZHCs is the change in reference period for calculating holiday pay, from 12 to 52 weeks of pay data.¹¹³ The previous 12-week reference period meant that if a ZHC worker took annual leave after a period when they had been working shorter hours than usual they would receive holiday pay at a lower rate than their normal pay.¹¹⁴ Extending the reference period to 52 weeks means that the holiday pay of ZHC workers who are treated as akin to standard employees by their employer, and do not receive their holiday pay 'rolled up' with their wages, will more accurately reflect their usual earnings.¹¹⁵

These legislative developments all leave the orthodox position of ZHC workers set out above largely unchanged. Even regarded charitably they represent a tinkering at the margins of the law governing ZHCs rather than a meaningful attempt to address the vulnerability and insecurity faced by this group of workers.

5. Developing the common law to protect ZHCs

More significant movement has occurred at common law. In some circumstances the courts have departed from the orthodox treatment of ZHCs, which views them as a series of individual contractual engagements, and instead classed ZHCs as overarching or 'umbrella' contracts of employment, thus bringing ZHC workers more fully within the scope of labour law and providing them with some additional protections. These developments are part of a broader shift whereby courts have begun to recognise the 'social reality' of the importance of employment to people's lives,¹¹⁶ and that a degree of autonomy is warranted for the law governing employment contracts from the general rules of contract due to the distinct context within which employment contracts operate.¹¹⁷

112. ERA 1996, s.11. But a worker will receive additional compensation of at least two weeks' wages if they succeed in a separate employment law claim and the employer is found to be in breach of their obligation to provide a written statement at the relevant time, Employment Act 2002, s.38.

113. Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018, reg 10.

114. Conversely, employees who worked long hours during the reference period would receive holiday pay at a higher rate than their average income.

115. This practice remains common, despite being found to breach the Working Time Directive in *Robinson-Steele v PD Retail Services* [2006] IRLR 386.

116. *Johnson v Unysis Ltd* [2001] UKHL 13, [35].

117. *Spring v Guardian Assurance* [1994] UKHL 7, [33]; *Malik and Mahmud v Bank of Credit and Commerce International SA* [1997] UKHL 23; D. Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' in M. Freedland and others (eds), *The Contract of Employment* (OUP 2016).

5.1 Crystallisation of ZHCs into employment contracts

The first means by which ZHCs have been classed as employment contracts is through the courts finding that there is sufficient mutuality of obligations for an overarching contract based on an established pattern of work, despite employer denials of any ongoing commitment to provide work.¹¹⁸ This may be relatively easy where there is no written contract and the employer is arguing the working arrangement is zero-hours, because the court can simply find that the parties' conduct provides evidence that their agreement is a standard contract of employment, albeit one that may have varying hours.¹¹⁹ The position is more difficult in cases where there is a written ZHC expressly denying any obligation for the employer to provide work in future. But even in these circumstances, courts have sometimes found that a prolonged period of work being offered and accepted on a stable basis has 'crystallised' into a contractual obligation to continue doing so, despite this being contrary to the written agreement.¹²⁰

The precise legal mechanism at play in these instances is not always made explicit, but the best interpretation is that the parties' conduct is taken by the courts as indicating that the terms of the original ZHC have been varied. Viewed this way, it is possible to reconcile these cases with the orthodox treatment of ZHCs discussed above, because the validity of the original agreement is not being questioned and the courts are instead finding it has been (impliedly) varied, and so no longer reflects the parties' agreement. Variation of this kind is consistent with conventional contract law principles provided there is no clause in the ZHC preventing variation by non-written means,¹²¹ and consideration for the variation can be identified.¹²² Cases where ZHCs are found to have been varied based on the parties' conduct remain rare, however, as the parties' conduct must meet the high threshold of demonstrating a clear intention to adopt new terms.¹²³

5.2 A purposive approach to employment status

The second, and more radical, common-law innovation by which ZHCs can be classed as employment relationships is via the 'purposive approach' to employment status that has been developed recently by the courts. This departs from the orthodox position set out above, replacing strict adherence to the written agreement with a more 'relational' analysis that focusses on the reality of the parties working arrangements.¹²⁴ Although the courts are yet to directly address or work through the ramifications of this purposive approach for ZHCs, it is suggested that under it many, if not most, ZHCs can now be regarded as umbrella contracts of employment.

A significant step in this direction this was taken in *Autoclenz Ltd v Belcher*.¹²⁵ In that case the Supreme Court found the inequality of bargaining power present in the employment context required them to depart from standard contractual principles on 'sham' terms, under which there

118. *St Ives Plymouth Ltd v Haggerty* [2008] UKEAT 0107_08_2205; *Airfix Footwear Ltd v Cope* [1978] IRLR 396, EAT.

119. As in *Newnham Farms Ltd v Powell* (2003) All ER (D) 91, EAT.

120. *St Ives Plymouth Ltd v Mrs D Haggerty* [2008] WL 2148113.

121. Such terms being capable of preventing subsequent variation, *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

122. *Foakes v Beer* (1884) 9 App Cas 605; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

123. *Accountax Marketing Ltd v Halstead* [2003] UKEAT 0313_03_0611.

124. J. Atkinson and H. Dhorajiwala, 'The Future of Employment: Purposive Interpretation and the Role of Contract after Uber' [2021] MLR (forthcoming); M. Freedland and N. Kountouris (n 3) 320.

125. *Autoclenz Ltd v Belcher* [2011] UKSC 41.

must be a common intention to mislead,¹²⁶ and instead seek to identify the ‘true agreement’ and legal obligations of the parties from the wider circumstances of the case.¹²⁷ This was aptly described as a ‘purposive approach’ by Lord Clark,¹²⁸ as it furthers the protective goals of the employment legislation. As a result of *Autoclenz*, working arrangements labelled as ZHCs by employers may nevertheless be classed as overarching contracts of employment where the reality of the agreement is that work will be offered and accepted on an ongoing basis.¹²⁹ The extent of *Autoclenz*’s impact on ZHCs has remained uncertain, however, with Adams et al arguing that it ‘should not be overstated’¹³⁰ because workers must convince the court that their written contract does not reflect reality, and this is likely to be a rare occurrence.¹³¹

The recent Supreme Court decision in *Uber* extends and further elaborates the purposive approach to employment status, and in doing so makes clearer its dramatic implications for ZHCs. Following the decision, written contracts are no longer even the prima facie starting point when determining whether an individual is a worker or employee, and therefore entitled to statutory rights.¹³² Instead, the ‘ultimate question’ is ‘whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction’.¹³³ The Supreme Court identified the general purpose of employment legislation as being to protect ‘vulnerable workers’ who are in ‘subordinate and dependent’ conditions.¹³⁴ Following this, employment legislation must be interpreted and applied by courts so as to protect workers in these conditions.

The basis on which the Court identified the purpose of employment legislation is not entirely clear, as the judgment dealt with the question briefly and only engaged with the goals of employment law at a high level of generality. There was no discussion of the process by which this purpose should be determined, nor whether it was the (actual or assumed) intentions of Parliament that mattered or the courts own interpretation of the legislation’s objective purpose. Instead, it was simply stated, with reference to the work of Guy Davidov, that the general purpose of employment law as being to protect subordinate and dependent workers is ‘not in doubt’.¹³⁵

Despite some uncertainties regarding the Supreme Court’s reasoning,¹³⁶ *Uber* makes it clear that courts and tribunals must now look to the reality of the working arrangements and construe the scope of employment legislation in a manner that protects individuals working in conditions of subordination and dependency. In doing this a lack of control over one’s working conditions and remuneration will be taken as a key ‘touchstone’ for identifying subordinate and dependent workers, although not the only relevant consideration.¹³⁷ The *Uber* case involved worker status in the context of the gig economy, but the principles set out by the Supreme Court are applicable wherever

126. *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

127. *Autoclenz Ltd* (n 125), [32]-[35].

128. *ibid*, [35].

129. As in *Pulse Healthcare v Carewatch Care Services Ltd* [2012] UKEAT 0123_12_0608.

130. A. Adams, Z. Adams, and J. Prassl (n 3) 53.

131. As demonstrated in *Saha v Viewpoint Field Services Ltd* (n 92).

132. *Uber v Aslam* (n 9), [76].

133. *ibid*, [70]. Citing *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454.

134. *Uber v Aslam* (n 9), [71].

135. *ibid*. Citing G. Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

136. For discussion, see J. Atkinson and H. Dhorajiwala (n 124).

137. Other relevant factors include an individual’s integration into the business and their inability to market services to others, *Uber v Aslam* (n 9), [74], [83].

courts are determining who has the necessary employment status to benefit from statutory rights. This includes when interpreting ‘employee’ as well as worker status, and in the context of other forms of atypical work such as ZHCs.¹³⁸ Given this, what implications does the purposive approach have for the legal analysis of ZHCs?

5.3 ZHCs and the purposive approach

The purposive approach developed in *Uber* ‘represents a dramatic shift away from the narrow contract-based analysis of the parties’ relationship towards a broad enquiry into the reality of the relationship’¹³⁹ that has more in common with the ‘relational’ understanding of employment advocated by Freedland and Kountouris.¹⁴⁰ As a result it is no longer the case that, as previously stated by Leighton, a carefully written zero-hours contract will make it ‘unlikely that employee status can be successfully asserted’.¹⁴¹ On the contrary, the written contract is no longer the starting point when determining the parties’ relationship and courts should instead class ZHC workers as having an overarching employment or worker contract where this is the reality of the working arrangement. The concrete implications of the purposive approach will depend on the circumstances of each individual ZHC worker, but it should make it considerably easier for ZHC workers to be access statutory rights, including those that have continuity requirements, and may provide them with a contractual entitlement to work their regular shifts or number of hours.

Following *Uber*, courts should class supposedly zero-hours workers as having an umbrella employment or worker contract if they are working for an employer in a position of subordination and dependency on an ongoing basis, because in these situations the reality of the relationship is that there is ongoing mutuality of obligations rather than a series of independent and discrete contractual engagements. This means that the 380,000 people the ONS records as having ZHCs but working for their employer full-time should therefore now be classed as having umbrella contracts of employment.¹⁴² The ZHC label does not accurately reflect the reality of these working arrangements. This is significant, as it represents 35% of all ZHCs. Similarly, ZHC workers that are not full-time but nevertheless work for an employer on a consistent and ongoing basis should also now be regarded having an umbrella contract; for example where they are automatically included on weekly shift rotas, or work is regularly offered and accepted when it is available. Again, this reflects the reality of their arrangement more accurately than viewing them as contracting separately for each shift. The adoption of the purposive approach therefore means that many, perhaps even most, ZHCs can now be regarded as contracts of employment rather than a series of distinct contractual engagements.

The implications of the purposive approach for ZHCs are less straightforward where the individual does *not* work for the employer on a regular or sustained basis. In such cases the reality of the arrangement appears to be one of genuinely *ad hoc* and intermittent work, with individual contracts applying for each shift rather than a continuing overarching relationship. There therefore appears to be an absence of the mutuality of obligations needed for an umbrella

138. A. Bogg and M. Ford, ‘The Death of Contract in Determining Employment Status’ 137 *LQR* 392; J. Atkinson and H. Dhorajiwala (n 124).

139. J. Atkinson and H. Dhorajiwala (n 124) 3.

140. M. Freedland and N. Kountouris (n 3) 309–320.

141. P. Leighton (n 8) 74.

142. ONS (n 5).

contract of employment. It is possible, however, that the purposive approach might lead to umbrella contracts of employment being found even for these workers. Following *Uber*, courts must interpret and define the scope of employment legislation in a manner that protects workers in conditions of subordination and dependency. Most individuals with ZHCs will be vulnerable workers in these conditions, meaning the courts should seek to construe employment statutes in a manner which brings these workers within its protective scope. One way this could be achieved is by lowering the threshold of mutuality of obligations needed for a contract of employment, so that rather than requiring an ongoing commitment to provide work, a global employment contract may exist where the reality of the arrangement is that the worker is included on a list of casuals who may be offered work by the employer.¹⁴³

While consistent with (and arguably mandated by) the purposive approach,¹⁴⁴ this change in the doctrine of mutuality of obligations would significantly extend the definition of employment contracts to encompass intermittent employment relationships. It may well therefore be a step the courts are not prepared to take. In which case, the position of ZHC workers who do not work on a relatively stable or consistent basis will be largely unchanged by purposive approach from the orthodox analysis outlined above, and they will continue to struggle to access key employment protections.

The full impact of the purposive approach on ZHCs remains to be seen, but it has been argued that many ZHCs must now be regarded as overarching employment contracts as a matter of legal principle. What, then, is the significance of this in terms of the protections available to ZHC workers? First, as they will have employee status in the periods between engagements, they will enjoy greater protection from discrimination and victimisation outside of working time. Second, they will more easily be able to meet the continuity requirements for statutory employment rights, and so more easily be entitled to minimum notice periods and redundancy payments, maternity and paternity rights, and protection from unfair dismissal.

Finally, and perhaps most significantly, having an umbrella contract of employment should result in workers having some additional protections of their working hours. Where an individual with a ZHC is found to have an umbrella contract of employment because this reflects the reality of their relationship, it is suggested that the contract must logically also be found to contain a contractual right to work the hours that reflect the reality of their working arrangement. So, those with stable working patterns will have a contractual entitlement to their normal working hours, and those with variable working hours will have a right to be offered an amount of work that is in line with the reality of the parties' relationship. Given this, an employer who unilaterally reduces the hours of a ZHC worker to less than their normal working pattern, or fails to offer them any work at all when it is available, will be in repudiatory breach of the employment contract.¹⁴⁵ In addition to breaching the term of the contract specifying the employees' working hours, the act of reducing working hours will likely also breach the employers' implied duty of trust and confidence.¹⁴⁶

Following this, supposedly ZHC workers who in fact have overarching employment contracts under the purposive approach will be able to respond to reductions in their hours by resigning and bringing a claim for constructive dismissal. Employees that do not meet the qualifying period for unfair dismissal

143. For discussion, see A.C.L. Davies, 'The Contract for Intermittent Employment' (2007) 36 *ILJ* 102.

144. For the argument that this is required by the purposive approach, see J. Atkinson and H. Dhorajiwala (n 124) 7; G. Davidov (n 135) 126–7.

145 The exception being that there will be no breach of contract if the tribunal finds the umbrella contract of employment is for variable hours and that the employer has not breached their obligation to offer a reasonable amount of work.

146 As in *Mostyn v S and P Casuals Ltd* UKEAT/0158/17.

will be limited to a common law action for wrongful dismissal, and so be awarded the amount they would have earned for their normal working hours during their notice period. The amount of compensation will therefore depend on their minimum notice period, as contained in the contract or calculated under the ERA,¹⁴⁷ and the courts' assessment of the hours they were entitled to work, as determined by looking at the reality of the arrangement and their normal working hours. Individuals employed for two years or more can bring a claim for unfair dismissal, and will be awarded compensation if the employer's conduct falls outside the band of reasonable responses open to them.¹⁴⁸

Alternately, a ZHC worker who has an overarching employment contract entitling them to work their normal hours could choose to respond to unilateral reductions in their working pattern by bringing a claim for unauthorised deduction of wages.¹⁴⁹ This would allow them to continue working rather than having to resign and claim constructive dismissal. Such claims should succeed provided the contract is not found to contain a right to suspend them without pay.¹⁵⁰

The purposive approach therefore represents a significant advance in the regulation of zero-hours work in the UK; removing many working arrangements from this category and providing new rights to these reclassified workers. Despite its potential benefits, however, two notes of caution must be sounded. First, although the principles in *Uber* will apply straightforwardly to classify many supposed ZHCs as global employment contracts, the impact of the purposive approach on ZHCs is less certain where the reality is that the arrangement is for intermittent work. If the courts are reluctant to fully embrace the purposive approach and adopt a more nuanced understanding of mutuality of obligations this group may continue to be treated as having a series of spot contracts for work.

Second, supposedly zero-hours workers who in fact have umbrella contracts of employment following *Uber* may struggle to benefit from this in practice. One reason being that these workers will continue to bear the burden of bringing tribunal claims to enforce their rights in the face of employer denials that they are employees, and many will lack the time, resources, or ability to take the necessary steps to enforce their rights. Another is that the common law is a weak source of guidance for employers and human resource managers when compared to legislation. As a result, even good employers may be unaware that individuals with written ZHCs that work for them on a regular basis are likely to be entitled to the full range of statutory employment protections and have a contractual right work their normal hours.

6. Further possibilities for ZHCs in the UK

Given the shortcomings in the UK's treatment of ZHC workers, what hope is there for improving the regulation of ZHCs in the future? This section identifies and examines some further possible avenues for protecting ZHC workers via existing statutory frameworks, and considers the regulatory horizon for ZHCs in the UK, including the impact of the EU Directive on Fair and Transparent Working Conditions.

6.1 Leveraging existing legislation

The shortcomings of the legislative and common law developments set out above make it important to consider what further avenues exist for protecting ZHC workers through the

147 ERA, s.86.

148 *Iceland Frozen Foods v Jones* [1983] ICR 17 (EAT).

149 ERA, s.13.

150 *Obi v Rice Shack Ltd* [2018] UKEAT/0240/17.

creative application and interpretation of existing legislation. There are several frameworks which have so far been largely overlooked that might potentially be leveraged to better regulate ZHCs, most notably those implementing EU law protecting other groups of atypical workers. But while they may sometimes provide additional rights for ZHC workers, the benefits of these statutes are marginal at best.

First, if ZHC workers cannot be brought within the scope of statutory employment protections under the purposive approach established in *Uber*, the Human Rights Act 1998 (HRA) and European Convention of Human Rights (ECHR) might be used to challenge their exclusion from statutory frameworks, at least where Convention rights are at stake. The ECHR imposes positive obligations on Member States to introduce effective legal protections of Convention rights,¹⁵¹ including securing workers' rights against infringements by employers.¹⁵² The exclusion of ZHC workers from any statutory framework securing Convention rights will breach these positive obligations unless it can be justified as striking a fair balance between the competing rights and interests at stake.¹⁵³ The HRA was introduced to give domestic effect to Convention rights and section 3 requires that legislation be applied in a manner consistent with Convention rights so far as possible. This includes the interpretation of employment statutes.¹⁵⁴ As a result, where employment legislation safeguards workers' Convention rights HRA section 3 requires that courts interpret the protective scope of these frameworks as extending to ZHCs, unless the failure to protect the ZHC workers' Convention rights can be justified. The HRA has already been used in this way to extend the personal scope of employment law to some previously excluded workers,¹⁵⁵ albeit with mixed success,¹⁵⁶ and it might similarly allow ZHCs to be brought within the protective scope of employment law, at least where Convention rights are at stake.

Second, and somewhat counterintuitively, ZHC workers can use the statutory 'right to request flexible working' to attempt to formalise their working hours or pattern.¹⁵⁷ Under the ERA, employees have a right to request changes in their working hours or the time or place they are required to work, provided they have 26 weeks' continuous employment.¹⁵⁸ Employers must treat these requests in a reasonable manner, and only refuse where they consider one of eight business-related grounds applies.¹⁵⁹ Permitted grounds for refusal include the burden of additional costs, a detrimental effect on ability to meet customer demand, and an inability to recruit new workers or reorganise work among existing staff.¹⁶⁰ Despite being intended to promote and enable more flexible working

151 See, generally, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (Intersentia 2016).

152 *Siliadin v France* [2005] ECHR 545; *Vogt v Germany* (1996) 21 EHRR 20; *Barbulescu v Romania* [2017] IRLR 1032; *Demir and Baykara v Turkey* [2008] ECHR 1345.

153 *Redfearn v UK* [2012] ECHR 1878; H. Collins and V. Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76 *MLR* 909; *Pharmacists' Defence Association Union (PDAU) v Boots Management Services Ltd* [2017] IRLR 355; *Gilham v Ministry of Justice* [2019] UKSC 44; *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092.

154 *X v Y* [2004] EWCA Civ 662.

155 *Gilham v Ministry of Justice* (n 154); *Vining v London Borough of Wandsworth* (n 154).

156 *R (on the application of the IWGB) v CAC and Rooffoods Ltd t/a Deliveroo* (n 79). For critique, see J. Atkinson and H. Dhorajiwala, 'IWGB v RoofFoods: Status, Rights and Substitution' (2019) 48 *ILJ* 278.

157 ERA, Part 8A.

158 Flexible Working Regulations 2014, reg.3.

159 ERA, s.80G.

160 ERA, s.80G(1)(b).

patterns, the legislation covers requests relating to *any changes in working hours* or the required times or location work, so the mechanism might be utilised by ZHC workers seeking formal recognition of stable or regular hours.

While novel, there are two factors limiting the benefits of this framework for ZHC workers. The first hurdle is that they will struggle to meet the required period of continuous employment. The more fundamental problem, however, is that the statutory framework only provides a right to have the request *considered*, not for it to be granted. The duty to treat requests reasonably is procedural rather substantive in nature and is satisfied providing the employer acts in good faith and processes the request reasonably.¹⁶¹ The employer's decision itself need not be reasonable, meaning they retain an almost unfettered ability to deny requests by reference to the listed business grounds. Employees can bring tribunal claims and be awarded up to eight weeks' pay in compensation where the application has not been dealt with reasonably or has been refused based on incorrect facts.¹⁶² But employment tribunals cannot question or overturn an employer's commercial judgment regarding their reason for refusal. Should they choose to do so, therefore, employers will find it easy to deny requests for more stable working patterns submitted by ZHC workers.

The final source of additional protection for ZHCs is domestic legislation giving effect to EU law provisions designed to regulate other forms of atypical work.¹⁶³ The operation of these legal frameworks is largely unaffected by Britain's departure from the EU, because they have been transposed into domestic law and the CJEU's case law on the relevant Directives continues to apply in the UK as part of 'retained EU law' under the European Union (Withdrawal) Act 2018. For instance, ZHC workers may be protected under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.¹⁶⁴ The Regulations provide a right not to be treated 'less favourably than the employer treats a comparable full-time worker' on the grounds that a worker is part-time.¹⁶⁵ This right extends to workers' pay and contractual terms, as well as other detriments. Comparable workers are those engaged under the same 'type of contract' to perform 'broadly similar' work on a full-time basis.¹⁶⁶ The courts have found that the an individual with a ZHC who is an employee during each engagement has the same 'type' of contract as standard employment contracts for the purpose of the Regulations.¹⁶⁷ ZHC workers therefore have the right to the same pay rates and other contractual entitlements (on a pro rata basis) as full-time employees doing comparable work, and may be able to bring a claim for equal pay where they are receiving less than standard employees performing similar work.¹⁶⁸ These claims will not succeed, however, if the less favourable treatment is for reasons other than the

161 *Whiteman v CPS Interiors Ltd* ET/2601103/2015.

162 ERA, s.80H-I; The Flexible Working Regulations 2014, reg.6.

163 Another example not considered here is that individuals with ZHCs working through employment agencies may have some additional protections under the Agency Workers Regulations 2010, implementing Directive 2008/104/EC on temporary agency work.

164 Implementing EU Directive 97/81/EC.

165 Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg.5(1).

166 Part Time Workers Regulations, reg.2(4).

167 See, for example, *Roddis v Sheffield Hallam University* (UKEAT/0299/17); *Matthews v Kent and Medway Towns Fire Authority* [2006] IRLR 367. Adopting a more generous interpretation than the CJEU in *Wippel v Peek & Cloppenburg GmbH* (Case C-313/02) [2005] IRLR 211.

168 Part Time Workers Regulations, reg.5.

individual's part-time status,¹⁶⁹ or can be objectively justified by the employer as necessary and appropriate to achieve a legitimate business aim.¹⁷⁰

Similar protection may also be available under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.¹⁷¹ Fixed-term contracts are defined as employment contracts that terminate following the expiry of a specific term, the completion of a particular task, or the occurrence of a specific event other than the employee reaching retirement age.¹⁷² We have seen that in the absence of an umbrella contract, the orthodox analysis of ZHCs will regard each engagement as a distinct contract of employment that terminates at the end of the shift. In legal terms, these individual engagements are very short fixed-term contracts. A ZHC worker who has a miniature employment contract for each shift or engagement should therefore be covered by the 2002 Regulations, and thus entitled to equal contract terms and treatment as permanent workers performing the same or 'broadly similar' work, unless the differences can be objectively justified.¹⁷³ ZHC workers may therefore be able to claim for equal pay and contractual benefits, such as holiday or pension contributions, if they are receiving less than comparable permanent employees. These regulations on part-time and fixed-term work may enable ZHC workers to claim equal conditions with other employees, and so help close the pay gap that exists between ZHCs and other working arrangements.¹⁷⁴ Whether ZHC workers can benefit from these frameworks in practice will largely depend on whether they can identify a relevant comparator, and whether the employer is able to identify a legitimate business goal that they can only achieve through the differential treatment.¹⁷⁵

More radically, it might be argued that in some circumstances the regulations on fixed-term employees have the effect of converting a ZHC arrangement into a standard and permanent contract of employment. Under the Regulations an individual employed on a fixed-term contract becomes a permanent employee if they have been employed under successive fixed-term contracts for a continuous period of four years unless the employer can objectively justify their continued use of fixed-term contracts.¹⁷⁶ ZHC workers who have employment contracts for each individual engagement should be regarded as working under a series of short fixed-term contracts which are repeatedly renewed, and might therefore be able to use the mechanism in s.212 ERA 1996 to meet the requirement of four years' continuous employment.¹⁷⁷ Following this, where an individual has worked under a ZHC as an employee for some part of each week for four years, with any gaps being merely temporary cessations, they should be regarded as permanent employees unless the continued use of fixed-term contracts is objectively justified.

While at least theoretically possible, this mechanism for converting fixed-term contracts to permanent employment will be of little benefit to the vast majority of ZHC workers. According to the

169 Part Time Workers Regulations, reg.5(2)(a). There are conflicting authorities on whether a worker's part-time status need be the sole reason for less favourable treatment, *Carl v University of Sheffield* (2009) ICR 1286, EAT; *Engel v Ministry of Justice* (2017) ICR 277, EAT.

170 *ibid*, reg.5(2)(b). See, for example, *Hoey v Commissioners for HM Revenue and Customs* ET/2421248/17.

171 Implementing Directive 1999/70/EC.

172 Fixed Term Employees Regulations 2002, reg.1.

173 Fixed Term Employees Regulations, reg.2(1).

174 Estimated to be 6.6% for individuals performing the same work and controlling for other factors such as education and experience, A. Adams, Z. Adams, and J. Prassl (n 3) 47.

175 On justification, see *Ministry of Justice v O'Brien* (2013) ICR 499.

176 Fixed Term Employees Regulations, reg.8.

177 *ibid*, reg.8(4).

ONS only around 24% of those with ZHCs have worked for the same employer for more than the required period,¹⁷⁸ and even these individuals will find it extremely difficult to link together four years of continuous service under ERA s.212. In addition, successive fixed-term employment contracts will only become permanent if their continued use cannot be objectively justified. This is a considerable barrier because the courts view it as sufficient justification for employers to continue using fixed-term contracts if they are being used to cover temporary business needs rather than to fulfil the need for permanent staff.¹⁷⁹ This framework may also be of little relevance following the Supreme Court's decision in *Uber*; because any zero-hours arrangement capable of being converted into a permanent contract under the Regulations should arguably now already be classed as an overarching employment contract under the purposive approach to employment status.

The above analysis demonstrates that while it may be possible to achieve some additional protections for ZHC workers through the creative application of existing statutory frameworks the benefits of these are limited, and new legislation is needed to address the 'flexicarity' inherent in zero-hours arrangements, which provide flexibility for employers at the cost of precarity for workers.

6.2 The regulatory horizon

At present, there is little prospect of any meaningful legislative reforms affecting ZHCs on the regulatory horizon. Some upcoming changes to domestic employment law will impact ZHCs, and the EU Directive on transparent working conditions may also have some influence. But the Government has rejected proposals for more substantial reforms, and any hope of significant new rights or protections for zero-hours workers rests on a change in political leadership.

Several changes to UK employment law that relevant to the regulation of ZHCs have been announced but not yet implemented.¹⁸⁰ For instance, the Government's Good Work Plan commits to extending the gap between periods of work that are capable of breaking continuity of employment from one to four weeks.¹⁸¹ If introduced this will make it considerably easier for ZHC workers who lack an overarching employment contract to satisfy qualification periods for statutory rights, including statutory notice periods, maternity and parental rights, and protections against unfair dismissal and redundancy, because they will only need to have worked under a contract of employment every four weeks rather than every week.¹⁸²

Another change announced in the Good Work Plan is the right for casual workers to right to request a 'more stable contract' after 26 weeks of service.¹⁸³ The details of this new right are yet to emerge, but it appears that it will operate in a similar manner to the existing right to request flexible working, discussed above, with the primary difference being that will apply to those with 'worker' as well as 'employee' status. The right would therefore be available to those working under ZHCs who are workers rather than employees during their individual engagements. The

178 The most recent data shows that 23.8% had worked under a ZHC for the same employer form more than five years, ONS (n 9).

179 *Pérez López v Servicio Madrileño de Salud* (2016) ICR 1168, ECJ.

180 The long-awaited Employment Bill expected to contain these reforms, among others, was not included as part of the Government's current legislative agenda, BBC News, 'Queen's Speech: Government accused of 'rowing back' on workers' rights' (11 May 2021).

181 Department for Business, Energy & Industrial Strategy, 'Good Work Plan' (2018) 14.

182 ERA, s.212.

183 Department for Business, Energy & Industrial Strategy, 'Good Work Plan' (n 182) 13.

benefits of this for ZHC workers will be limited, however, due to the 26-week qualification period and employer's ability to easily refuse requests by reference to business reasons.

Relatedly, and perhaps more significantly, the Government has announced its intention to remove the current qualifying period for the right to request flexible working conditions, due to the impact that Covid-19 has had on the labour market.¹⁸⁴ If introduced, this would have the effect of making the right more accessible for ZHC workers. While not providing a substantive right to guaranteed hours, the statutory framework would provide a potential route for individuals with ZHCs that are classed as employees for the duration of each shift to gain formal recognition of a stable working pattern by their employer. The fundamental weakness in this mechanism would remain, however, namely, that reluctant employers will be able to easily refuse requests on business related grounds.

These changes aside, the Government has rejected more substantial reform proposals. This includes the suggestion of the Taylor Review of Modern Working Practices that the burden of proof when determining employment status should be reversed.¹⁸⁵ If implemented, this proposal would have meant workers with ZHCs were assumed to have an overarching employment contract unless proven otherwise, thus making it considerably easier for them to assert and enforce employment rights. In its response to the Taylor Review, the Government also agreed to ask the Low Pay Commission to consider the impact of introducing pay premiums for non-guaranteed working hours, in the form of a higher minimum wage,¹⁸⁶ but subsequently rejected this proposal in the Good Work Plan.¹⁸⁷ It has similarly failed to take forward the recommendations of the Low Pay Commission to introduce a right to reasonable notice of working patterns and compensation for cancelled shifts,¹⁸⁸ both of which are now central elements of the EU Directive on Transparent and Predictable working conditions.¹⁸⁹

The lack of ambition to introduce any significant new mechanisms or frameworks to regulate ZHCs reflects the Government's continuing support for these working arrangements based on their benefits to businesses. Given this, what impact, if any, will the EU Directive on Transparent and Predictable Working Conditions have on the future of ZHCs in the UK? The Directive did not create directly effective rights before 'exit day', so does not form part of 'retained EU law' under the European Union (Withdrawal) Act 2018.¹⁹⁰ However, some elements of the Directive have already been implemented, namely the right to a written statement of conditions and ban on exclusivity clauses, and the Government has also announced its intention to introduce other aspects of the Directive in future such as a right for workers to request a more predictable working pattern. But there is no indication that the remaining provisions of Directive will be implemented. Most significantly this includes the right to reasonable notice periods before the start of

184 Department for Business, Energy & Industrial Strategy, 'Millions to Be Empowered by Government Plans to Strengthen Day One Employment Rights and Increase Productivity of Businesses' (2021).

185 M. Taylor, 'Good Work; The Taylor Review of Modern Working Practices' (2017) 62.

186 Department for Business, Energy & Industrial Strategy, 'Good Work: A Response to the Taylor Review of Modern Working Practices' (2018) 76.

187 Department for Business, Energy & Industrial Strategy, 'Good Work Plan' (n 182) 16.

188 Low Pay Commission, 'Response to Government on "One Sided Flexibility"' (2018). Available at <https://www.gov.uk/government/publications/low-pay-commission-response-to-the-government-on-one-sided-flexibility> (accessed 12 Jan 2022).

189 2019/1152/EU.

190 European Union (Withdrawal) Act 2018, ss.3-4.

work assignments,¹⁹¹ compensation for late notice shift cancellation,¹⁹² and measures to prevent the ‘abuse’ of ZHCs such as ‘limitations to the use and duration of such contracts’.¹⁹³

It therefore appears that the UK will diverge from EU law in respect of the regulation of casual work and ZHCs. How this plays out will provide some valuable early insight into the operation of the EU-UK Trade and Cooperation Agreement (‘TCA’), as well as the direction of travel for UK employment law post-Brexit. The key question here is whether the UK’s failure to implement the Directive on Transparent and Predictable Working Conditions amounts to a ‘significant divergence’ that will have ‘material impacts on trade or investment’.¹⁹⁴ If not, it is permitted under the TCA. But if the divergence is regarded as creating material trade barriers the EU can trigger consultation and arbitration processes under the Agreement, and potentially introduce rebalancing measures.¹⁹⁵ It remains to be seen whether the potential threat of rebalancing is sufficient to spur the UK into strengthening its regulation of ZHCs, but it seems unlikely in the currently fractious post-Brexit political environment.

Looking to the longer term, more meaningful reform to address the problem of ZHCs may still be possible given that the Labour Party remains committed to legislating on this issue should it ever manage to win power.¹⁹⁶ Options for statutory intervention include softer forms of regulation that aim to reduce the use of ZHCs by imposing additional costs on employers, such as pay premiums for zero-hours work or tax incentives for companies that refrain from using ZHCs. More radical would be to create new rights for workers or impose substantive limits on employers use of these working arrangements. For example, limiting the proportion of a company’s workforce that can be on ZHCs, introducing a right to regular hours or converting ZHCs to standard employment contracts after a certain period of time, or banning zero-hours arrangements entirely and requiring workers have at least some minimum number of guaranteed hours. Much work remains to be done in scrutinising the respective strengths and weaknesses of these policies,¹⁹⁷ and in designing a coherent and effective regulatory response to ZHCs. As part of this it will be crucial to draw on, and learn from, the comparative experience of other jurisdictions in regulating zero-hours work.

7. Conclusion

The UK’s *laissez-faire* approach to regulating ZHCs fails to adequately protect precarious workers and leaves them vulnerable to a range of economic and social harms. There has been no real attempt by Parliament to address the detrimental effects of zero-hours work or to limit the use or growth of these arrangements, and the application of orthodox rules of contract and employment law frequently exclude ZHC workers from employment protections. It has been argued, however, that the recent adoption of a purposive approach to employment status by the Supreme Court should have the effect of bringing many ZHC workers more fully within the protective domain of employment law by classing them as having an overarching employment or worker contracts.

191 Directive on Transparent and Predictable Working Conditions, Article 10(1).

192 *ibid*, Article 10(3).

193 *ibid*, Article 11.

194 TCA, Article 411(2).

195 See TCA, Article 411.

196 Labour Party, ‘It’s Time for Real Change: Labour Party Manifesto 2019’ (2019) 61; J. Pickard, ‘Starmer to Pledge New Deal for UK Workers under a Labour Government’ *Financial Times* (13 September 2021).

197 Some of these options are discussed in A. Adams and S. Deakin (n 8) 33–4; J. Kenner (n 8) 173–180.

The application of the purposive approach to ZHCs remains to be seen, however, and the courts may decline to extend employment protections to those individuals working on an intermittent basis. In addition, workers with written ZHCs who should have overarching employment contracts under the principles set out in *Uber* will nevertheless find it difficult to enforce their legal entitlements, and so continue to be precarious and vulnerable to mistreatment at the hands of employers. Finally, English employment law continues to lack any frameworks safeguarding against the specific forms of vulnerability created by genuinely casual and zero-hours work.

As a result of these shortcomings, carefully calibrated legislative reform is needed to effectively regulate zero-hours work and protect against the scheduling insecurity and economic precarity faced by this group of workers. Further work is needed to identify the form that any new mechanisms should take, but a key consideration should be to learn from the experience of other jurisdictions that have adopted a more interventionist regulatory approach to ZHCs.

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