GETTING MORE THAN YOU BARGAINED FOR? RETHINKING THE MEANING OF 'WORK' IN EMPLOYMENT LAW

A.C.L. Davies*

Abstract: There are many different situations in which the law requires a determination of whether an individual can be said to be 'working': to determine his or her status as an 'employee' or 'worker', to decide his or her entitlement to contractual pay, to assess his or her entitlement to the National Minimum Wage, and to distinguish working time from 'rest periods' for the purposes of working time legislation. Where the individual is engaged in core work tasks at the workplace, it is straightforward to say that he or she is 'working'. However, it will be argued in this article that there is a significant problem of 'availability': where workers are not actively engaged in core work tasks at the workplace, but are not fully at liberty either. This might be because they are waiting to be offered work or 'on call' in case of emergencies, for example. This 'available' time is often not recognised by the law as 'work', with the result that the workers in question may miss out on pay, employment rights and proper rest breaks. The article maps the problem of 'availability', arguing that it strikes at the heart of how labour lawyers think about employment relationships, and suggests an alternative analysis.

1. INTRODUCTION

The 'wage-work bargain' lies at the heart of the contract of employment, and of the law which regulates terms and conditions of employment more generally. The employee exchanges his or her labour for payment from the employer. But while much ink has been spilt on the question of how successive wage-work bargains can be linked together to form a long-term relationship characterised by a set of mutual obligations, the question of what constitutes 'work' within the wage-work bargain itself is less widely discussed.[1]

The need to determine whether time has been spent 'working' also arises in statutory contexts, for example, to decide whether a worker is entitled to the National Minimum Wage (NMW) and whether the worker is working or 'resting' for the purposes of the Working Time Directive (WTD) and implementing Regulations (WTR).[2] Although these statutes do not set out to define 'work', an understanding of that concept emerges from their provisions. Each piece of legislation approaches the problem in a different way. While this reflects the difference in their legal origins, it has the confusing consequence that a worker may be treated as working from a working time perspective but not entitled to the NMW during that time.

In this article, I argue that useful analytical and normative advances may be made by unpacking the meaning of 'work' within the context of the wage-work bargain as constructed by employment law. I will identify two threads of reasoning in the case-law, in both common law and statutory contexts. One takes a literal view of work, as time spent actively engaged in core work tasks on behalf of the employer. The other view is more nuanced, recognising as it does the complex

* Professor of Law and Public Policy, Faculty of Law, University of Oxford. I am grateful to Mark Freedland, and the editor and referees for their comments. This article considers developments up to 6 March 2017.

[1] Leading analyses include P Elias, 'The Structure of the Employment Contract' (1982) CLP 95; M Freedland, The Contract of Employment (Oxford: OUP 1976), chapters 2 and 4; *The Personal Employment Contract* (Oxford: OUP 2003), esp chs 3 and 4; M Freedland and S Deakin, 'The Exchange Principle and the Wage-Work Bargain', in M Freedland et al (eds), *The Contract of Employment* (Oxford: OUP 2016); BW Napier, 'Aspects of the Wage-Work Bargain' (1984) 43 CLJ 337.

[2] National Minimum Wage Act 1998; WTD, Directive 2003/88/EC, WTR, SI 1998/1833.

relationship between the worker's time spent at the employer's disposal, and the employer's use of managerial prerogative in order to obtain productive work during that time. Although the literal view is superficially appealing, it tends to create situations in which employers gain the benefit of people's 'work' without paying for it or giving them credit in other ways, for example, through compensating rest breaks. This is true even for well-meaning employers, but of course it is particularly open to exploitation by the unscrupulous. I will argue that the nuanced view fits better with the internal logic of the contract of employment, and – more importantly – is normatively attractive because it offers better protection against the exploitation of workers in the specific situations under consideration in this article.

For reasons of space, the article does not explore two related sets of concerns in the modern labour market: unpaid or 'voluntary' work, and unpaid 'overtime'. Many people engage in voluntary work for which they do not expect or seek payment. The law does not generally regard this as 'work' within the scope of employment law, because it is not based on a wage-work bargain.[3] This gives rise to two problems. One is that this form of 'work' may be a sham, disguising what should be regarded as a genuine employment relationship entitling the worker to the NMW and other employment rights.[4] Many so-called 'internships' are presented as an opportunity to gain valuable experience but in reality involve the performance of menial work tasks for the 'employer's' benefit for no reward. The second problem is that even if a person is genuinely a volunteer, for example, because he or she wants to work for free for a charity, he or she may still be vulnerable to problems at work – such as discrimination – but may be left without any obvious remedy in employment law.[5] These problems arise because of the close link between what we think of as 'work' and the receipt of payment in exchange. For reasons of space, the present article focuses on paid work.

Another related concern not addressed in the article is the issue of unpaid 'overtime'. This might include people who stay later than their contractual working hours to finish particular tasks, or people who do extra work in the evenings and weekends, for example, by catching up with work emails. The TUC estimates that 20% of UK workers work more than their contractual hours each week without receiving any pay for the extra hours worked.[6] This is coupled with an intractable problem of long-hours working among high discretion workers who determine their own working hours, making it very difficult to calculate whether their working time is excessive or unpaid. The problem of unpaid 'overtime' does not relate to the *definition* of work, because the individuals in question are clearly working. It is more likely to be a problem of compliance, either with the NMW or with contractual entitlements, or a problem of unfairness in the way that employers design jobs and draw up contracts for workers to sign. The focus of this article is on definitional questions.

The article proceeds as follows. Section 2 outlines some definitions of 'work' and 'rest' to be used throughout the article. Section 3 explores the contractual treatment of the problem, analysing the relationship between 'work' and 'pay' within the logic of the contract of employment, and then assessing whether that analysis is borne out by the common law's approach to the definition of the employee's obligations under the contract of employment. In Section 4, I turn to two sets of scenarios in which uncertainty about whether the individual is 'working' (for the purposes of statutory entitlements) can arise. These are: where the individual is at the workplace but not actively engaged in core work tasks (for example, because there is no work to do or he or she is on call), and where the individual is not at the workplace but is liable to be called upon to work. I will

[3] *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, [2013] ICR 249.
[4] Addressed, at least in relation to written contracts, by *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157.
[5] The claim in *X* (above n 4) itself.
[6] TUC press release, 'Workers contribute £32bn to UK economy from unpaid overtime' (27 February 2015), available at https://www.tuc.org.uk/economic-issues/labour-market/fair-pay-fortnight-2015/workplace-issues/workers-contribute-%C2%A332bn-uk.

examine how these scenarios are treated for minimum wage and working time purposes, and make proposals for reform. Section 5 explores the implications of my argument for the well-known problems surrounding casual work, employment status and access to employment rights.

2. DEFINITIONS

It is helpful to begin with some simple definitions of 'work' and 'rest' to guide the discussion. The Oxford English Dictionary defines 'work' as 'activity involving mental or physical effort done in order to achieve a result'. It would be hard to dispute that a person is 'working' when he or she is at the workplace and actively engaged in one or more of the main tasks of his or her employment. For example, a shop worker might be helping a customer, a factory worker might be operating a machine, or a lawyer might be researching a client's case. We can take this as our core meaning of 'work'. Importantly, that is not to say that other types of activity might not also fall within a sensible definition of work. It is simply to say that these activities definitely count as work.

At the opposite end of the spectrum from active engagement in core work tasks, we find a worker who is 'resting' or enjoying time off. This can be defined as time during which the individual is not in any sense at the employer's disposal. For example, the individual is free to spend the time wherever he or she chooses, need not be contactable by the employer and need not be available for work on demand. A rough-and-ready test for genuine time off is whether it is open to the individual to get drunk (and thus be unfit for work) during the time in question.[7]

Importantly, 'time off' in this sense is not necessarily the *opposite* of 'work': time that the individual would otherwise have spent working. Of course, some 'time off' has this character: when a worker takes annual leave at a time of his or her choosing, this will generally be time that would otherwise have been spent at work.[8] The worker is exercising a right not to work for a particular period of time. However, most 'time off' is time that would not have been spent at work anyway. For example, an office worker with a '9 to 5' job gets 16 hours of 'time off' during every 24 hours simply by virtue of the fact that the office is closed and there is no expectation of work during that time.

It is also important to note that the worker may not be able to forget work completely during his or her 'time off'. There is a long-standing concern that the law allows employers to control workers' spare time activities where they are able to show that those activities might have a harmful impact on the employer's reputation. As the *Pay* case illustrates, the threshold for this reputational harm can be very low indeed.[9] There, the mere fact that victims of crime might find out about the employee probation officer's spare time interest in bondage and might be concerned by it was regarded as sufficient to justify his dismissal. Nowadays, workers' use of social media is a particularly pertinent issue. Controversial or disparaging remarks on social media may lead to disciplinary action at work unless the remarks are clearly made in a 'non-work' capacity.[10] But this issue is not the focus of this article.

In between the concepts of 'work' and 'rest' as just defined, there is a large grey area in which the individual is not entirely free and therefore not 'resting', but is not engaged in core work tasks either. This might be because his or her work involves peripheral tasks before or after the core ones, such as clearing up or travelling between appointments. Or it might be because his or her

---

[7] Of course this is subject to allowing enough time to sober up before work begins again.
[8] Though not necessarily: *Russell v Transocean International Resources Ltd* [2011] UKSC 57, [2012] ICR 185.
[9] *Pay v Lancashire Probation Service* [2004] ICR 187 (EAT), and see *Pay v United Kingdom* (Admissibility) (32792/05) (2009) 48 EHRR SE2.
[10] See, for example, *Game Retail Ltd v Laws* (EAT, 3 November 2014).

work is inherently discontinuous so that a particular period of work may involve core tasks with waiting time in between. For example, a security guard or receptionist may be required to sit at a reception desk all day but is only actively engaged in work when a visitor arrives (assuming that the employer does not give him or her other tasks to perform while waiting). A third option is that the individual is 'on call', in the sense of liable to be called upon to work at short notice. 'On call' time may involve a variety of different restrictions on the worker's liberty. There is a spectrum from being required to be at the workplace, awake and ready to work, on the one hand, to contactable by phone on the other. The correct classification of workers' activities in this grey area is my concern in what follows.

3. THE WAGE-WORK BARGAIN AT COMMON LAW

This section will consider the common law's approach to the definition of work. I will proceed in two stages. First, I will examine the internal logic of the contract of employment. This offers a strong justification for a nuanced approach to the definition of work that covers time spent at the employer's disposal as well as time spent engaged in core work tasks. Second, I will consider the extent to which this reasoning is supported by the case-law.

Although 'work' is a convenient shorthand in the phrase 'wage-work bargain', it is never quite true in practice to say that what the employer pays for is the worker's 'work'. One reason for this, of a purely practical nature, is that 'work', in the dictionary sense of the worker's purposive 'activity involving mental or physical effort' on the employer's behalf, tends to be difficult to quantify. As a result, employers usually draft contracts so that they pay according to a proxy measure: either the outputs of the worker's activity, or the time spent engaging in that activity.

The most obvious example of payment by output is a piece-rate system. This technique is used to incentivise workers by placing upon them the risks of slow or insufficient performance. If a manufacturing worker paid by the piece is slow, he or she will earn less money, and if his or her work is of poor quality, the employer may reject the products and refuse to pay for them. The employer does not pay the worker for the fact of having done work. This payment method is popular with employers who perceive a high risk of shirking, for example, because the work is monotonous. It has equivalents in other settings, for example, the payment of bonuses or commission to workers in sales roles, in order to motivate them to be as persuasive as possible with customers. However, it is important to remember that payment by output is only available to the employer in occupations where the output is readily measurable. It can also have disadvantages where the process leading up to the output is important but not easy to observe, as the many mis-selling scandals in the financial services industry have demonstrated.[11]

In most jobs, payment is by time rather than output. In the simplest case, the worker is paid by the hour. The employer has two opportunities to specify what the worker does during the time. One is the oral or written contract between the parties, which may set out a detailed or general specification of the worker's role, depending on how easy it is to state in advance what the worker will be expected to do. In most cases, it is not possible or efficient to attempt to set out the employer's expectations in full in advance, leaving contracts necessarily 'incomplete' to some degree.[12] The law addresses this problem of incompleteness through the legal device of 'managerial prerogative', supported by implied contractual terms such as the duty of obedience.[13] This allows the employer to direct the worker's activities during the time he or she spends at the workplace in

[11] For example, Competition Commission, *Market Investigation into Payment Protection Insurance* (January 2009).
[12] A central insight of the work of Oliver Williamson: see OE Williamson, *Markets and Hierarchies* (New York: Free Press 1975).
[13] *Turner v Mason* 153 ER 411. For discussion, see ACL Davies, *Employment Law* (Harlow: Pearson 2015), 158-160.

order to obtain productive work in exchange for pay. Thus, although it may seem that the employer is paying for an hour of 'work', and that is of course what the employer hopes to obtain through the arrangement, what the employer pays for in practice is the worker's availability for a period of time coupled with the worker's willingness to obey the employer's reasonable instructions as to how that time should be spent. As Marx famously said, 'What the working man sells is not directly his *Labour*, but his *Labouring Power*, the temporary disposal of which he makes over to the capitalist'.[14]

Matters are even more complicated in relation to salaried workers. Some salaried workers have hours of work fixed by the employer. In their case, it is possible to do an analysis similar to that for hourly paid workers, but just over a longer period of time. Someone who is paid a monthly salary for four 40-hour weeks is paid to be available for that period of time and to act under the employer's direction during that time. Other salaried workers have discretion over their own hours of work.[15] This makes it more difficult to attach their availability to particular periods of time, but it does not change the underlying analysis. They make themselves available to their employer, at times of their choosing (though usually there are some parameters to this) and they act under the employer's direction during those times. Of course, the employer's instructions may be more or less precise, depending on factors such as the relative expertise of the employer and the worker, and the employer's readiness to trust the worker to make his or her own judgements about work tasks, but for present purposes nothing turns on this.[16] The key point is that the employer pays not for activity or work in itself but for the worker's availability over a period of time and willingness to act under the employer's direction during that time, even though both the time and the employer's instructions may be quite vague.

This logic is not, however, strongly reflected in the judicial decisions on the nature of 'work' within the wage-work bargain.[17] The courts' default position is summed up in the well-known and oft-repeated statement, 'The consideration for work is wages, and the consideration for wages is work.'[18] As Napier rightly explains, 'consideration' in this context is not being used in its technical sense to refer to one of the required elements of formation of a contract, but is instead being used as a synonym for performance.[19] On this view, it is necessary for the employee to have worked – not just to have been ready and willing to work – to have fulfilled his or her side of the bargain and earned his or her pay.[20]

The operation of this approach in practice is particularly evident in the context of a repudiatory breach of contract by the employer. The traditional contractual analysis of a repudiatory breach of contract is that it is of no legal effect in itself. The innocent party has a choice between accepting the repudiatory breach and suing for damages, or keeping the contract alive and expecting the other party to perform. For many years, there was a controversy within employment law as to whether this contractual analysis was applicable, with some judges proposing an 'automatic' theory in which the employer's repudiatory breach brought the contract to an end unilaterally.[21] The Supreme Court's decision in *Geys* put an end to this controversy by confirming that contracts of

---

[14] K Marx and F Engels, *Selected Works II* (Moscow: Progress 1969), 55 (emphasis in original).
[15] 'Unmeasured' work within the working time regime: Working Time Regulations 1998 (SI 1998/1833) (WTR), reg 20.
[16] Provided there is sufficient 'control' for the individual to be an employee: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.
[17] For detailed discussion, on which I draw in this section, see M Freedland, *The Personal Employment Contract* (Oxford: OUP 2003), esp chs 3 and 4.
[18] *Browning v Crumlin Valley Collieries* [1926] 1 KB 522, 527 (Greer J).
[19] Above n 1, 339.
[20] Of course, it is always open to the parties to contract in express terms for a different definition of 'performance'.
[21] For example, *Sanders v Ernest A Neale Ltd* [1974] ICR 565.

employment were subject to the usual elective theory of termination.[22] However, there are important differences between contracts of employment and other contracts in respect of remedies. The most obvious is that specific performance is not available, given the personal nature of the contract. Less obvious, but of particular importance for present purposes, is the long-established principle that the employee who has affirmed the contract after a repudiatory breach may not bring a claim in debt for wages based on his or her willingness to go back to work.[23] As Lord Wilson explained in *Geys*:

> … the law has been clear that, save when, unusually, a contract of employment specifies otherwise, the mere readiness of an employee to resume work, following a wrongful dismissal which he has declined to accept, does not entitle him to sue for his salary or wages… The law takes the view that it is better for the employee (as well, of course, as for the employer) that his claim for loss of wages or salary should be confined to a claim for damages and therefore be subject to his duty to mitigate them by taking all reasonable steps to find other work.[24]

Although the expression 'duty' to mitigate is not strictly accurate, the employee is given a strong incentive to seek alternative employment because of the risk that the court will make a deduction from his or her damages on the basis that he or she could have found a new job. Judges have often expressed the worry that, if a claim in debt were available, the employee would be able to 'sit in the sun' doing nothing at the previous employer's expense instead of engaging in productive work for a new employer.[25]

The desire to protect the employer in this situation is, arguably, misplaced. The employer always has the option of terminating the contract lawfully (for example, by giving the proper notice), and the rules on mitigation may give the employer a windfall (in the sense of a reduction in the damages payable) even though it is the party in breach. It seems likely in practice that the courts were motivated either by basic economic thinking – that the factors of production should be deployed to their most valued uses – or by a moral judgment about idleness, described by Lord Wilson in *Geys* as the 'Victorian work ethic'.[26] Thus, although these decisions appear to reject the 'ready and willing' analysis, they are probably more about policy than contractual analysis.

But there are contexts in which the courts have taken a different view of the nature of the employee's obligations. One example is the situation in which the employer is willing to pay the employee, but the employee wants to work. There is a well-established assumption that if the employer fulfils its duty to pay, it is not normally obliged to provide any work for the employee to do, save in the exceptional case where he or she has some special skill to maintain.[27] As Elias points out, if the correct analysis of the employee's obligation is to work, he or she would not have earned any pay in this situation, and there would be no need for the employer to be so 'generous'.[28]

Other examples arise where the courts have been more obviously influenced by a concern for the fair treatment of employees. One such example is where the employer 'lays off' some workers because there is insufficient work for them to do. The strict 'pay for work performed' approach is, arguably, reflected in *Browning*, in which the employer closed the workplace, a mine, in order to conduct repairs on safety grounds.[29] It was held that the employer was not obliged to pay wages (or damages) to the employees during the period of closure. But this can be contrasted with the

---

[22] *Geys v Societe Generale* [2012] UKSC 63, [2013] 1 AC 523.
[23] *Goodman v Pocock* (1850) 15 QB 576, 583–584 (Erle J).
[24] Above n 22, [79].
[25] *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, 726 (Salmon LJ).
[26] Above n 22, [78].
[27] As Asquith J put it in *Collier v Sunday Referee Publishing* [1940] 2 KB 647, 650: 'provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out'.
[28] Above n 1, 102.
[29] *Browning*, above n 18.

Devonald case, which concerned piece-rate workers who were entitled to a month's notice of termination.[30] The court held that, in a lay-off situation, they were entitled to be provided with a 'reasonable' amount of work to enable them to earn a living until the employer could terminate their contracts in a lawful manner. The court was clearly concerned that the employees remained under contract to the employer and were thus unable to take another job, and had no means of earning any money from the employer unless it provided them with work to do. In policy terms, the court thought that the employer should bear the risk. This led them to construe the contract as entitling the employees to payment for being 'ready and willing' to work.[31] Of course, this case-law has been overtaken by a statutory regime for dealing with lay-offs and by a much more elaborate framework of statutory notice periods and other requirements relating to dismissal, but for present purposes, it is the basic analysis of what triggers the employee's entitlement to pay that is of interest.[32]

Another example of the emergence of 'ready and willing to work' as a sufficient summary of the employee's obligation for reasons of fairness developed in relation to payment during sickness absence. In ordinary usage, it is admittedly difficult to argue that an employee is 'ready and willing' to work when he or she is unable to work because of illness.[33] However, some judges clearly thought that a right to sick pay was desirable as a matter of policy and stretched their interpretation of 'ready and willing' to work in order to include those who would have been 'ready and willing' to work had they not been prevented by illness from doing so.[34] Initially, this approach applied only to salaried workers. This may have reflected a concern that salaried workers' right to payment often only accrued after completion of a relatively lengthy period of service, with the risk that an employer might refuse to make any payment at all in respect of a period of service that was partially completed, though in practice the courts developed a variety of other ways of addressing that problem.[35] In relation to hourly- or weekly-paid workers, some judges maintained the view that their right to pay depended on the performance of work,[36] though some later cases began to extend the analysis to these workers, presumably in recognition of the clear injustice involved in failing to do so.[37] Again, the case-law has been superseded by statutory rights for employees during sickness absence.[38] This is perhaps fortunate, given that the cases were hard to explain other than as policy choices.

From this necessarily brief overview, it can be seen that, although the courts' starting-point is the assumption that the employee's obligation is to perform work, the alternative view that the employee's obligation is to be 'ready and willing' to work is also an important strand of reasoning in some of the cases. Nor does this depend particularly on the parties' drafting of their contract. Sometimes, it reflects a different analytical view of the contract of employment, as in the case where the employer pays but provides no work. More commonly, it reflects a normative judgment that it would be unfair to the employee to demand more than readiness and willingness to work, because the employee is not to blame either for the lack of work or for his or her ill health. In other words, the employer is best placed to shoulder the relevant risk.

---

[30] *Devonald v Rosser & Sons* [1906] 2 KB 728.

[31] Arguably, this interpretation was not possible in *Browning* (n 18, 529 (Greer J)) because the employees had refused to work until the mine was made safe.

[32] Employment Rights Act 1996, s. 28(1).

[33] See Freedland and Deakin, above n 1, 59.

[34] *Cuckson v Stones* 120 ER 902.

[35] For example, *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, but cf *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216, 255.

[36] For example, *O'Grady v M Saper Ltd* [1940] 2 KB 469 (CA).

[37] For example, *Orman v Saville Sportswear* [1960] 1 WLR 1055, concerning an employee on a weekly wage.

[38] Social Security Contributions and Benefits Act 1992, ss. 151-163.

As Freedland and Deakin rightly argue, one would not wish to rely on this body of case-law to capture a notion of 'fair exchange' in the contract of employment.[39] However, it does provide a useful starting-point for discussion. The narrow view, that the employee's obligation is to perform work, reflects an understanding of the contract of employment that prioritises its economic dimension over its social one, focusing on what the employer wants from the transaction. The more nuanced view recognises the social dimension: that the work is provided by a human being. At the core of the 'transaction' is a social relationship in which the worker makes him- or herself available to obey the employer's reasonable instructions, and the employer uses its managerial prerogative to obtain productive work from the worker.[40] On this view, to require the worker not only to be available but to perform work is to impose on him or her a double burden and to ignore the employer's power to get what it wants by exercising its prerogative. If the employer chooses not to exercise that prerogative – perhaps because there is no work available at a particular time, or perhaps because there is a benefit simply in having the worker on stand-by – that should not be treated as a failure on the worker's part to perform his or her contractual duties because it is outside his or her control. The view that the worker is entitled to be paid for being 'ready and willing' to work is consistent with the internal logic of the contract of employment and it is normatively attractive from a worker-protective perspective. Of course, it might sometimes be defeated by express contractual terms or competing policy considerations, but it is a better starting-point than the narrow view. It is unfortunate that, although the courts have adopted the nuanced view in some circumstances, it has never quite succeeded in becoming the dominant analysis in the common law jurisprudence.[41]

4. THE BLURRED BOUNDARIES OF 'WORK'

In modern times, the need to determine when someone should be regarded as 'working' arises primarily in statutory contexts, either in relation to the NMW – where it affects the individual's entitlement to be paid – or in relation to the WTR, where it affects the calculation of the individual's working hours for the purposes of entitlement to rest periods.[42] In most cases, this is straightforward but, as we saw above, there is a twilight zone between 'work' and 'rest' in their most obvious senses in which difficulties can arise. I will consider two sets of scenarios in turn. The first is where the worker is at the workplace but not engaged in core work tasks. This may be because the work is inherently intermittent in nature, or because the worker is engaged in peripheral work tasks such as travelling or clearing up, or because (in non-technical language) the worker is 'on call' in case of emergencies, either awake or asleep. The second set of scenarios concerns workers who are not at the workplace but remain at the employer's disposal, for example, because they are formally 'on call' or liable to be called in to work at short notice.

The cases in the twilight zone are not primarily concerned with developing a definition of 'work'. Rather, they are concerned with applying statutory provisions to the facts of cases. Nevertheless, the reasoning follows a similar pattern to that discussed in the previous section in the common law context. Some decisions have given effect to the literal view of work – focusing on whether the worker is actively engaged in core work tasks – whereas others have accepted that being 'ready and willing' to work should be regarded as sufficient. Policy factors play a significant role alongside questions of interpretation. In general terms, judges adopting the literal view have tended to give

---

[39] Above n 1, 59.

[40] Neatly summarised by Elias, above n 1, 102.

[41] Cf Elias, n 1, for a strong argument to the contrary.

[42] Of course, in practice, a significant proportion of UK workers have signed an opt-out which removes their entitlement to most of the rights in the WTR: R Hobbs, C Barnard and S Deakin, 'Opting out of the 48-hour Week: Employer Necessity or Individual Choice? an Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK' (2003) 32 ILJ 223.

weight to economic factors, such as the affordability for employers of paying workers for long periods of time during which they might not be engaged in much productive activity, whereas judges adopting the more nuanced view have focused on worker-protective concerns, such as the need to ensure that workers are able to earn a decent wage or to get proper rest time. Thus, the uncertainty surrounding the 'work' element of the wage-work bargain is pervasive here too.

At work, but not engaged in core work tasks

We will begin by considering individuals who are at work but not engaged in core work tasks, examining the NMW and the WTR in turn.

NMW

The starting-point for determining an individual's entitlement to the NMW is to identify the basis on which he or she is paid. We will focus on time work (where the individual is paid in respect of the time he or she has worked) for ease of explanation. NMWR 2015, regulation 32(1), provides that:

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

This definition performs a worker-protective function in that it does not require the worker to be engaged in core work tasks in order to be found to be working and thus entitled to the NMW. For example, it would not be lawful for an employer of a call-centre worker to pay him or her the NMW only for the time spent on the phone to customers, because time spent at the call-centre waiting for the phone to ring would clearly count as being 'available… for the purposes of working' within regulation 32(1).

The NMW contains a further safeguard in regulation 34 for workers who are obliged to travel between different locations for the purposes of working. This might include, for example, carers who provide personal services in clients' homes, or maintenance workers carrying out repairs on customers' premises. These workers are entitled to the NMW for time spent travelling between the places in which they carry out their work, though not for time spent 'commuting': travelling between home and work. Although there is evidence of non-compliance with this provision, in the care sector in particular, the legal position is reasonably clear.

Difficulties arise where the worker works intermittently during a shift and is permitted to spend some of the non-work time asleep. Workers in these roles are often described in common parlance as being 'on call', though this is not a term of art. Examples include workers in care homes or security guards who are required to sleep at the workplace overnight in case of medical emergencies, fire alarms or other problems. Under regulation 32(1):

> … hours when a worker is "available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.

Thus, time spent asleep is excluded from the definition of time during which the worker is 'available' to the employer for the purposes of working, even though he or she is at the workplace.

An example of this provision being invoked in practice is *South Manchester Abbeyfield Society*.[43] The claimant was a housekeeper in a nursing home. She worked during the day and was required to be 'on call' on the premises overnight for four nights per week. She was provided with sleeping accommodation and was permitted to sleep during the nights unless there was an emergency. The EAT held that in this situation, she was only entitled to be paid the NMW for any hours spent actively working during the 'on call' periods. A similar result was reached in *Lauder*, concerning a warden in sheltered accommodation with a working arrangement very like the one just described,[44] and in *Wray*, concerning a pub manager who was required to sleep on the premises overnight for security reasons,[45] and more recently in *Shannon v Rampersad*, also concerning a worker in a care home.[46]

The difficulty with regulation 32 is that it does not compensate the worker for the restriction on his or her liberty inherent in being at the employer's premises overnight. Even if the worker regards the accommodation as his or her main place of residence, so that he or she can relax, engage in leisure pursuits or sleep, he or she is still constrained in the sense that he or she is unable to go out and must remain ready to work if called upon to do so. If the sleeping accommodation is of a temporary kind, the restrictions are potentially even greater. The accommodation itself may be of poor quality and may not allow the worker to get a proper rest. And there may be serious limits on what the individual can do during the time when he or she is present, not required to work and not asleep, depending on the facilities the employer chooses to provide. Most importantly, if there is no emergency during the 'on call' period the worker may have no opportunity to earn any money at all for potentially long periods of time spent at the employer's premises.

In some cases, tribunals or courts have addressed this by treating 'on call' workers as being engaged in time work for the whole of their shift. For example, in the *Burrow Down* case, the worker was described as a 'night sleeper' and he was required to be present in a care home overnight.[47] He had duties to perform for a small proportion of the time and was permitted to sleep for the remainder unless there was an emergency requiring his attention. He was paid for the time spent awake and working, and received a token payment for his presence on the premises, but the EAT held that he was entitled to be paid the NMW for the whole of the shift. The EAT took the view that he was engaged in time work throughout: 'even during the time when he was permitted to be asleep, he was still required to deal with anything untoward that might arise in the course of his shift'.[48] Elias J for the EAT noted that there was 'some artificiality in saying that someone is working when he is sleeping', but suggested that the employer might address this by giving the worker more tasks to perform during the quieter periods of the shift.[49] A similar result was reached in *Esparon*, in which it was held that the fact that the employer was required by law to have someone on the premises in case of emergencies pointed towards the individual being engaged in 'time work' throughout,[50] and in *Scottbridge*, in which it was held that a security guard was at the employer's disposal to deal with phone calls and emergencies (and therefore working) while sleeping.[51] These decisions reflect the idea that a worker might be 'working by being present' at the workplace, even if not engaged in core work tasks, and even if asleep.

---

[43] *South Manchester Abbeyfield Society Ltd v Hopkins* [2011] ICR 254.
[44] *Edinburgh City Council v Lauder* (EAT (Scotland), 20 March 2012).
[45] *Wray v JW Lees & Co (Brewers) Ltd* [2012] ICR 43.
[46] *Shannon v Rampersad* [2015] IRLR 982 (EAT).
[47] *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172. See also *Whittlestone v BJP Home Support Ltd* [2014] ICR 275.
[48] ibid [24] (Elias J).
[49] ibid [25], citing the EAT decision in *Scottbridge Construction Ltd v Wright* [2001] IRLR 589.
[50] *Esparon v Slavikovska* [2014] ICR 1037.
[51] *Scottbridge Construction Ltd v Wright* 2003 SC 520 (Court of Session (Inner House, First Division)).

The legal reasoning underpinning the ruling in *Burrow Down* is that the starting-point for analysis must be the definition of 'time work' in regulation 30. If the worker's presence at the workplace is sufficient to constitute 'time worked' within regulation 30, the provisions about availability (with the associated exception for time spent asleep) in regulation 32 are irrelevant and need not be applied by the tribunal or court. In other words, the provisions about availability are 'deeming' provisions and do not constitute a qualification or exception to regulation 30.[52] This approach is attractive in principle because it avoids the injustice of a worker spending long periods of time at the workplace without getting paid the NMW. It also closes off an obvious avenue of abuse: the deliberate provision of sleeping accommodation by an unscrupulous employer as a means of avoiding paying the NMW for the worker's full shift.

However, the ruling in *Burrow Down* is difficult to reconcile with the apparent intention of the legislation to provide some kind of exception to the NMW for time spent asleep. It also generates some highly problematic and fact-sensitive distinctions in the case-law between workers who are treated as working by being present (as in *Burrow Down* itself) and workers to whom the regulation 32 exception for sleeping is applied, like *South Manchester Abbeyfield Society*.[53]

WTD/WTR

The definition of 'work' for working time purposes is much more generous than that in the NMW regime. The Court of Justice treats all time spent *at the workplace* as 'work'.

Both the WTR and the WTD define working time using the same phrase: 'any period during which [the worker] is working, at his employer's disposal and carrying out his activity or duties'.[54] At first sight, it might seem as if this adopts an 'active' definition of working in which the worker must not only be available but also engaged in core work tasks. However, the Court of Justice has used a more generous interpretation which is, of course, binding on the English courts. According to the ruling in *SIMAP*, the worker is regarded as 'working' for WTD purposes if he or she is required to be available for work at the employer's premises, even if he or she is not actively engaged in core work tasks for some or all of that time.[55]

The Court's reasoning is instructive. The Court's starting-point is that time must either be treated as working time or as a rest period. There is no middle ground: '… in the scheme of the directive, [working time] is placed in opposition to rest periods, the two being mutually exclusive'.[56] The nature of the employee's activities during working time does not matter: 'the intensity of the work done by the employee and his (*sic*) output are not among the characteristic elements of the concept of "working time" within the meaning of that directive'.[57] The use of presence at the employer's premises as an indicator of working time is justified on two grounds. First, the Directive's objective of protecting workers' health and safety by providing adequate rest periods away from work would be undermined if 'on call' time was not counted as working time.[58] Second, the Court recognised the constraints imposed on the worker's freedom if he or she is obliged to be at the employer's premises, and held that this was a feature distinguishing 'on call' time at work (which counts as

[52] A further complication is that the wording of the relevant provisions has changed since *Burrow Down*, though the 2015 Regulations are intended simply to consolidate the 1999 Regulations and subsequent amendments and thus should not be assumed to have brought about a substantive change in the law.
[53] Above n 43.
[54] WTD, Art 2; WTR 1998, r. 2.
[55] Case C-303/98 *Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963. See also Case C-14/04 *Dellas v Premier Ministre* [2005] ECR I-10253.
[56] *SIMAP*, above n 55, para 47.
[57] *Dellas*, above n 55, para 43.
[58] *SIMAP*, above n 55, para 49.

working time) from 'on call' time away from work (which counts as working time only when work is in fact performed). In the latter situation:

> Even if they are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests.[59]

The ruling in *SIMAP* did not explicitly address the question whether time spent 'on call' at the workplace counted as working time if the employer provided the worker with a place to sleep. This issue was raised in the subsequent case of *Jaeger*.[60] The Court held that such time did count as working time, following the reasoning in *SIMAP*: workers' use of their time was constrained by the obligation to be at the workplace, and workers' health and safety would not be adequately protected by a different interpretation.[61] Importantly, the Court also rejected an argument put forward by some national governments that treating 'on call' time as working time would be unaffordable, noting that workers' health and safety could not be subordinated to economic considerations.

The Court's binary approach to the definition of working time also has implications for the treatment of time spent travelling. It was noted above that in the NMW context, time spent travelling between work sites counts for NMW purposes, but not time spent commuting from home to work. The recent *Tyco* decision adopts a more generous approach in the working time context.[62] In that case, the workers were maintenance engineers who were sent details of their daily maintenance visits via a mobile phone application and travelled from home directly to their first appointment. The Court held that the workers should be treated as working not only when travelling between clients but also when travelling from home to the first appointment and from the last appointment back home. It noted that they were not free to do as they pleased during that time but were at the employer's disposal and acting for its purposes. Thus, the time had to be regarded as 'work' rather than 'rest'.

However, it is important to set the discussion of the WTD against some of its most significant limitations. First, the 48-hour maximum limit on the working week does not apply to workers whose work is 'unmeasured', for example, because they are managers who determine their own working hours.[63] Second, the limit does not apply to workers who have signed the so-called 'opt-out'.[64] The UK government was the driving force behind the inclusion of the opt-out in the Directive and the available empirical evidence suggests that the use of the opt-out is widespread in the UK.[65] More worryingly, the rulings in *SIMAP* and *Jaeger* have prompted other Member States to invoke the opt-out in the health care sector in particular, where there is widespread use of 'on call' time.[66] Thus, although the WTD has been interpreted in worker-protective ways, it is questionable how widely applicable it is both to the UK workforce and across the wider EU.

Conclusion

---

[59] *SIMAP*, above n 55, para 50. See also *Truslove v Scottish Ambulance Service* [2014] ICR 1232 (EAT).
[60] Case C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] ECR I-8389.
[61] ibid, paras 65 and 70.
[62] Case C-266/14 *Federacion de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL* EU:C:2015:578; [2016] 1 CMLR 22.
[63] WTR, reg 20.
[64] WTR, reg 4(1).
[65] Above n 42.
[66] Commission, *Report on Implementation by Member States of Directive 2003/88/EC ('The Working Time Directive')* (COM(2010) 802 final, 2010) para 3.7.

To sum up the discussion so far, we have seen that being 'available' for work at the employer's premises entitles the worker to the NMW and is treated as time spent 'working' for the purposes of the WTR. Where the two diverge is if the worker is provided with sleeping accommodation and permitted to sleep during the 'available' time. Under the WTR regime, this still counts as working time, whereas under the NMW, the position is uncertain. Some cases have applied regulation 32 to exclude time spent sleeping from entitlement to the NMW, whereas others have treated a worker as 'working' simply by being present at the workplace and thus entitled to the NMW for the whole shift, even if some or all of the time is spent asleep. It is not easy to predict on which side of this line a case will fall. Another divergence relates to the treatment of travelling time: both treat travelling time between clients as 'work', but the WTD may also cover time spent travelling from home to a client following the decision in *Tyco*.

Since the NMW and the WTR are derived from different legal sources, it is not necessarily problematic or surprising that they should diverge. More troubling is the very real possibility that workers may be required to spend quite long periods of time at the employer's disposal without being entitled to the NMW for all of that time, either because of the 'unmeasured' work rules or because of the exception for time spent asleep. Although, as some judges have noted, it is odd to describe someone as working when he or she is asleep, the requirement to be present at the employer's premises and available for work is a benefit to the employer and a restriction on the worker. It is unfair not to reflect this in the NMW regime.

Not at work, but at the employer's disposal

The second type of blurred boundary between 'work' and 'time off' is where the worker is not at the workplace but is at the employer's disposal in the sense of being liable to be called upon to work at short notice, for example, where the worker is 'on call' on a rota for dealing with emergencies.[67] The exact arrangements obviously vary from case to case but many workers in this situation are contractually obliged to be contactable during the 'on call' time, to remain within a reasonable travelling distance of the workplace, and to go to work if called upon to do so. In general terms, a worker who is 'on call' at home under his or her contract is not likely to be regarded as working for NMW or working time purposes.

In this scenario, it is important to remember that workers may have markedly different preferences both in general terms and at different points in time. For example, a worker with a busy day job who is also on the emergency night-time call-out rota may be hoping not to be called out so that he or she can enjoy a period of uninterrupted rest, whereas a worker who is short of money will be hoping to get a call because it represents an opportunity for earnings. Nonetheless, the problems are much the same. The worker is available to the employer, in the sense of being 'ready and willing' to work, for potentially quite long periods of time, without getting paid for it, unless the employer voluntarily pays some kind of retainer. Although it is arguable that the worker's use of his or her time is less restricted, in the sense that he or she is at home rather than at the workplace and can engage in a greater range of leisure activities, the need to remain 'ready and willing' to work is still a significant constraint.

Under NMWR 2015, regulation 32(1), time work 'includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working *unless the worker is at home*'. Thus, if the worker is at home, his or her activity does not count as time work, even if he or she is 'available… for the purposes of working'. Moreover, it is arguable that a worker who is 'available… for the purposes of working' but is not required to be 'near a place of work' is not

[67] For an example, see the facts of *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714.

covered either, even though technology now permits many workers to be on call remotely, in all senses of the word.

Difficulties have arisen in distinguishing the 'on call' situation from cases in which the worker is working *from home*, particularly if that work is intermittent in nature, as the *British Nursing* case illustrates.[68] In that case, the employer ran an agency supplying nursing staff. During the day, its call handlers worked from a call centre, but at night, the calls were diverted to the workers' homes. The employer argued that the night workers were entitled to the NMW only for time spent awake and answering calls. However, the Court of Appeal rejected this argument. It held that the workers were working when waiting to answer calls as well as when answering them. The fact that they were at home was irrelevant. It is analogous to the *Burrow Down* decision in which the worker was found to be working by being present at the workplace.[69] The decision in *British Nursing* offers an important safeguard against exploitation by employers.

Of course, an 'on call' worker who is called upon to work would be entitled to be paid the NMW for hours spent actually working, whether he or she did this from home, or at the workplace.[70]

For working time purposes, the position is relatively straightforward. The WTD and the WTR both define working time using the same phrase: 'any period during which [the worker] is working, at his employer's disposal and carrying out his activity or duties'.[71] Although the Court of Justice has adopted a generous interpretation of being 'at [the] employer's disposal', this only applies to workers who are at the employer's premises. In *SIMAP*, the Court indicated that being on call not at the employer's premises would not count as working time because it was less restrictive:

> … the situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. Even if they are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests.[72]

Thus, a worker who is on call but not required to be at work would count as 'working' for WTR purposes if he or she was called in to work, but not during the on call period itself. This offers no protection to workers against long periods of time spent on call away from the workplace. Although, as the Court notes, there are 'fewer' constraints on the worker's use of his or her time, we noted above that it cannot be regarded as proper rest time either because of the number of constraints that remain.

If the worker is called into work during an 'on call' period, it seems likely that in many cases this would impinge upon one of his or her other entitlements under the WTR. The permutations here are many and varied, so we will consider just one example for reasons of space. Let us assume that the worker works an eight-hour day shift and is then on call for the remaining 16 hours of the day. If he or she is called into work in the middle of the on call period, he or she will not have enjoyed the regulation 10 right to eleven consecutive hours off during the 24-hour period. However, this right is far from absolute. It is not applicable to workers in certain sectors where 'on call' working is common, and is subject to an exception for 'emergencies' under regulation 21. This triggers a right to an equivalent period of compensatory rest under regulation 24. Thus, the right to a rest break is unlikely to prove a major impediment to the practice of requiring workers to spend long periods of time 'on call'.

---

[68] *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494, [2003] ICR 19.
[69] Above n 47.
[70] NMWR 2015, reg 30.
[71] WTD, Art 2; WTR 1998, r. 2.
[72] Above n 55, para 50.

This section has shown that the law's treatment of working people who are on call away from the workplace is highly problematic. These individuals are at their 'employer's' disposal, 'ready and willing' to work, but they are unlikely to be entitled to the NMW, and they are usually treated as resting for WTR purposes. The legal position can, of course, be justified on the basis that the individuals in question are not engaged in core work tasks and are not required to be at the workplace. Nevertheless, their liberty is restricted in a way that benefits their employer, and they gain little in return. Indeed, workers' willingness to accept these restrictions simply to secure the employer's 'goodwill' is indicative of the inequality of bargaining power inherent in the relationship.

Reform

We have seen that the legislation on the minimum wage and working time requires courts and tribunals to be able to determine when someone is 'working'. This has brought to the fore the tension between a literal understanding of 'work' – active engagement in core work tasks – and a more nuanced approach, in which the worker is working when he or she is at the employer's disposal, available for work. It will be argued here that a greater emphasis on the latter understanding, which is both logical and normatively attractive from a worker-protective perspective, would be desirable.

We saw that the treatment of workers who are available to the employer at the workplace is problematic in terms of the NMW. Under the WTR, time spent at the workplace is treated as working time even if the worker is provided with sleeping accommodation. The NMW legislation attempts to exclude workers who are provided with sleeping accommodation, though in some cases the courts have avoided this conclusion by finding that some workers 'work' simply by being present at the workplace and are therefore engaged in time work throughout their shifts even if they are permitted to sleep. The approach to work proposed in section 3 supports this latter interpretation. The worker who is required to be at the workplace and available for work is placing him- or herself at the employer's disposal in a way that is generally sufficient to fulfil his or her side of the wage-work bargain. It is up to the employer to decide how that time is used. The employer has the option of using managerial prerogative to direct the worker to engage in active work tasks throughout the shift. If the employer chooses not to do this, we can infer it must still derive some benefit from the worker's presence. Of course, it might be argued that there is a countervailing policy consideration against requiring the employer to pay an unproductive worker, but the NMW situation can be distinguished from (for example) the repudiatory breach situation in that the employer is not seeking to terminate the employment relationship and can solve the productivity problem using managerial prerogative.

The 'available at home' scenario is problematic from all perspectives. For workers who make themselves available in case of emergencies, but are allowed to remain at home unless called upon, the time is treated as rest time for WTR purposes and there is unlikely to be any entitlement to the NMW for that time. Again, however, a proper analysis of the worker's side of the wage-work bargain would suggest that the worker in this situation is placing him- or herself at the employer's disposal and restricting his or her own activities in order to be available for work during that time. This should trigger an entitlement to be paid the NMW and to be treated as working for WTR purposes (with a consequent entitlement to rest breaks at other times).

However, it may be difficult to make the case for NMW entitlement (and working time recognition) for individuals who are accepting relatively light restrictions on their freedom and may not be called upon to work at all. The countervailing policy concern about not forcing the employer to pay an unproductive worker may have more traction here. It is harder to make the

argument that the employer can direct the worker's time to productive uses when he or she is not at the workplace, since there may not be any work activities he or she can be called upon to do at home. A compromise might be to require the employer to pay some kind of retainer in respect of time spent on call at home, and to restrict the amount of time the worker can be required to spend on this type of shift.[73] This would give workers some financial recompense for the restrictions they have accepted and would balance out their on call time with some proper rest time, though it could only be achieved by statutory reform.

5. CASUAL WORK AND EMPLOYMENT STATUS

So far, I have focused on cases which might loosely be classed as being about the content, rather than the validity, of the legal relationship between the parties. The common law cases considered in section 3 concerned the proper construction of the parties' obligations under the contract of employment, not whether such a contract existed at all. The NMW and WTR cases discussed in section 4 were about whether an individual who was clearly a worker or an employee, and therefore entitled to the NMW or to rest periods, should be regarded as 'working' for the purposes of the relevant statute at the relevant time.

There is, of course, a much bigger problem of worker 'availability' than the difficulties generated under the NMW and WTR regimes. It is that working people may be 'available' to prospective employers for long periods of time whilst not counting, in law, as employees or workers at all. The 'on call' at home scenario is not dissimilar, in purely factual terms, to the scenario in which an individual is engaged in so-called casual or 'zero hours' work and is waiting at home to be offered an assignment. In these situations, the 'available' time tends to be regarded in law as nothing more than a gap between employment relationships. On this view, the individual is not an employee or worker during that time, so the alleged employer cannot owe him or her any obligations, and of course the many gaps in the individual's employment history may serve to deny him or her access to employment rights requiring a period of continuity of employment. Without engaging in a comprehensive discussion of casual working, a topic which is already the subject of a large body of case-law and critical literature,[74] I will seek to demonstrate that a focus on 'availability' or being 'ready and willing' to work is of some assistance even in this area of the law.

It is important to begin by noting that some supposedly casual work is, in practice, quite regular and reliable in nature, and the employer seeks to present it as casual work (for example, through contract drafting devices) in order to avoid its obligations in employment law. This is the type of situation tackled – to some extent at least – by the ruling in *Autoclenz*, in which the Supreme Court placed less emphasis on contract documents in determining the true nature of the parties' contractual relationship.[75] Other casual work is more genuinely casual in nature: the worker does not know from week to week or from day to day whether he or she will get work, and remains available just in case. For example, the waiters in the well-known *O'Kelly* case were given a rota each Thursday evening for the week's work beginning on Friday morning,[76] and the nightclub dancer in *Quashie* did not know from minute to minute whether she would get work from the customers in the club.[77] These situations will be the focus of this discussion.

---

[73] In the local government context, for example, it would be common for the employee to be paid a 'stand-by payment' for being on call, plus an hourly wage (at overtime rates) for any work in fact performed. See *Atchoe*, above n 67.

[74] See, for example, B Hepple, 'Restructuring Employment Rights' (1986) 15 ILJ 69; H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 OJLS 353; S Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 ILJ 337; M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP 2011).

[75] *Autoclenz*, above n 4.

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

[77] *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99.

The courts, and some commentators, have sometimes overlooked the important point that when an individual is in fact working for the employer, the best view is that he or she is an employee under a contract of employment, because there is a straightforward wage-work bargain between the parties.[78] On this view, the individual would be entitled to, for example, the NMW for each hour worked, and to any applicable rights under the WTR, such as the right to a 20-minute rest break after six hours of work. The performance of work is, of course, easiest to establish when the individual is engaged in core work tasks, but as the recent *Uber* litigation (which was concerned with the worker definition) indicates, it may also be possible to find, on the facts, that an individual is working whilst engaged in peripheral tasks.[79] In that case, the drivers had to log on to Uber's software in order to indicate their availability for work, and the tribunal found that they were working when logged on even if they were not called upon to drive any passengers, noting that it was inherent in Uber's business model of responding promptly to customer demand that there should be an over-supply of available drivers at any given time.

However, establishing employee status during the wage-work bargain is not automatic. As Elias LJ confirmed in *Quashie*, it is necessary to satisfy all the usual tests to find that an individual is an employee even at this time.[80] Thus, if the individual is liable to be sent home early within the agreed shift because there is not enough work to be done, for example, a tribunal or court may find that he or she is not an employee because the risk lies with him or her.[81] Of course, to claim rights under the NMW or WTR, 'worker' status is sufficient, so this may serve to protect some individuals who fall outside the employee group but are not genuinely self-employed.[82] This might be the case where, for example, the individual is at risk of being sent home due to lack of work but cannot be regarded as accepting risk at the level involved in running his or her own business.

It remains to be seen how much damage the recent decision of the Court of Appeal in the *Windle* case will do to the view that the wage-work bargain is, itself, a contract of employment or a worker's contract.[83] It was there suggested that the parties' relationship between bouts of work should be regarded as a relevant factor in a determination of the nature of their relationship when work is taking place.[84] This is highly problematic, as *Windle* itself demonstrates, because it may tempt courts to conclude that because the parties do not have a long-term employment relationship, they cannot have a series of short ones. But the Court of Appeal did not regard this as conclusive, so some hope remains.

The main difficulty lies in showing that the individual has the necessary employee or worker status to be able to bring a claim for the NMW or for rights under the WTR, or any other rights, during the periods of time not occupied by a wage-work bargain. The classic route to achieving employee status is to demonstrate 'mutuality of obligation': a promise on the part of the employer to offer more work in future, and a promise on the part of the employee to accept that work in future. It should be noted that the employee obligation here is entirely consistent with the concept of availability developed in this article, in the sense that what the employee is expected to promise is to make him- or herself available for work, though in the mutuality context it is a future-regarding promise rather than a promise for the present. However, while the 'employee' may be keen to accept future work, the courts have sometimes treated this as arising out of economic necessity

[78] *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA), though cf *O'Kelly*, above n 76.
[79] *Aslam v Uber*, ET case no 2202550/2015, judgment 28 October 2016, [86] and [100].
[80] Above n 77, [13]-[14].
[81] For example, *Little v BMI Chiltern Hospital*, EAT, 24 April 2009.
[82] National Minimum Wage Act 1998, s. 1; WTR, r. 2(1).
[83] *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721.
[84] ibid [23] (Underhill LJ).

rather than as a matter of contractual obligation.[85] In other words, the 'employee' is making him- or herself available for work because it is in his or her economic self-interest to do so, rather than because he or she is under a legal duty to the 'employer' to do so. This is not a problem that the present analysis can solve. More profoundly, in casual work relationships the 'employer' may be quite explicit about the fact that it is not promising future work, so that the 'employee' faces substantial hurdles on that side of the equation too.

In relation to worker status outside the wage-work bargain, the law is less clear. The biggest obstacle is to show that there is a contract of any description between the parties outside specific engagements. On one view, this is the role of mutuality of obligation in the contract of employment, so the same requirement would be applicable here, a position apparently adopted by the EAT in *Byrne Brothers*.[86] A preferable view is that mutuality of obligation is about demonstrating that a contract is one of employment, since it is more demanding than the requirement to show consideration in the ordinary law of contract.[87] On this view, it would be possible to show the presence of a contract with any pair of promises between the parties, regardless of their content. Thus, for example, a promise on the part of the 'employer' to give an individual priority when work became available, coupled with a promise on the part of the 'worker' to accept work (within reason) when offered, would be sufficient for a finding that the parties had a contract. The tribunal or court could then consider whether the other elements of the worker definition were satisfied in the case.

A variant on this scenario is the so-called 'zero hours' contract that has been the subject of much recent topical debate.[88] In this relationship, the individual is hired under a contract that does not specify or guarantee any particular level of work. The government has legislated to prohibit 'exclusivity clauses' in these contracts which bar the individual from accepting a job with another employer.[89] In theory at least, this would allow the individual to spread his or her risk of not having any work by accepting other casual jobs. However, even without an exclusivity clause, a worker may feel unable to risk taking on work elsewhere (unless it is better paid or more reliable) if this might mean that he or she is unavailable when required by the first employer. In any event, as commentators have been quick to point out, the underlying legal analysis of the so-called 'zero hours' contract is rather more complex than this might suggest.[90] One possibility is that the individual may have regular working hours in practice but a written contract that specifies 'zero hours'. On a straightforward application of *Autoclenz*, a court could construe the parties' 'true agreement' as a contract of employment with regular working hours.[91] But if the parties' agreement is genuinely for zero hours, the question arises whether the agreement itself (as opposed to any particular wage-work bargains entered under it) constitutes a contract of employment or even a legally-binding contract of any description. Presumably, the argument on the worker's side must be that he or she promises to make him- or herself available for work when called upon by the employer – again, consistently with the idea developed in this article that the working person can discharge his or her obligation to the employer not just by performing core work tasks but by putting him- or herself at the employer's disposal. The status of this as a legally-binding obligation – as opposed to a matter of economic necessity – is, again, an issue, though it would clearly be much easier to demonstrate this in the event that the employer requires the worker to accept an exclusivity clause. However, it is of the essence of a zero-hours contract that the employer does

---

[85] *O'Kelly*, above n 76.
[86] *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667 (EAT).
[87] For further discussion, see ACL Davies, 'The Contract for Intermittent Employment' (2007) 36 ILJ 102.
[88] See A Adams, MR Freedland and J Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimating Precarity?' Oxford Legal Studies Research Paper No 11/2015.
[89] Small Business, Enterprise and Employment Act 2015, s. 153.
[90] Adams et al, above n 88.
[91] *Autoclenz*, above n 4; *Pulse Healthcare Ltd v Carewatch Care Services Ltd*, EAT, 6 August 2012.

not promise to provide future work, which is a requirement for demonstrating that there is a contract of employment. Nor is it immediately apparent what promise the employer does make in order to give contractual effect to the arrangement, with the result that a 'zero-hours *contract*' may be a contradiction in terms.

Of course, even if an individual who works on a casual basis is able to demonstrate worker status outside particular wage-work bargains, he or she might still not benefit from that status in any meaningful sense, for the reasons given in the previous section. We saw above that an individual who is at home waiting to work is unlikely to be found to be entitled to the NMW. Nor is it likely that his or her time would be treated as working time for WTR purposes. He or she would be entitled to the rest periods set out in the WTR, but any interruption to these because of a call to work could simply be addressed by providing a compensating rest period. For most casual workers, the working time 'problem' is not excessive hours but either insufficient hours (and insufficient pay) or unpredictable hours, making it difficult to achieve an effective work/life balance. There is a real risk that casual workers who believe that they will be penalised for turning down work will accept too many hours when the employer is busy, leading to significant risks to health. The WTR regime, which is designed around a traditional employment paradigm, is not effective at addressing any of these deeper problems.[92]

To sum up, in the context of determining someone's employment status, there is nothing particularly controversial in the idea that the obligation of the putative worker or employee is to make him- or herself available for work at the employer's request. Since the law's focus here is on what the worker or employee is promising to do in the future, perhaps this is more easily framed in terms of being at the employer's disposal rather than performing core work tasks. However, as this brief discussion has demonstrated, the problems associated with mutuality of obligation relate primarily to the legal status of the worker's undertaking to be available, and to the promises – if any – made by the employer. No amount of discussion of the content of the employee's or worker's obligations can solve these problems.

Nevertheless, there is one sense in which the argument of this article is potentially problematic from the perspective of worker or employee status. If the law were to tighten up on the circumstances in which an individual should be regarded as 'working' for the purposes of NMW or WTR entitlements, for example, this might encourage some less scrupulous employers to devote more effort to setting up their employment arrangements in ways that deny worker or employee status. This is but one aspect of the more general problem that any increase in regulation applicable to employees or workers increases the temptation for employers to use avoidance strategies, something which the law (despite the *Autoclenz* decision) still does far too little to address.

6. CONCLUSION

This article has advocated an account of the worker's side of the wage-work bargain that is rooted in the logic of the contract of employment, supported by at least some cases at common law and – most importantly – is normatively attractive from a worker-protective perspective. In most cases, the worker's obligation is to be at the employer's disposal, ready and willing to work as the employer directs. Although what the employer is seeking to obtain through the relationship is the work performed by the worker, this is not normally what it pays for. Rather, the employer usually pays for the time the worker devotes to being available for work. It is the employer's responsibility

[92] For further discussion, see A Bogg, 'The Regulation of Working Time in Europe', in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Cheltenham: Elgar 2017).

to use its managerial prerogative to gain the maximum benefit – in the form of work performed – from that time. If the employer chooses not to exercise that prerogative, for example, because it benefits in some way from having the worker available or does not have any work for him or her to do, that choice should not operate to the disadvantage of the worker. To require the worker to prove that he or she has performed work, rather than just that he or she has been 'ready and willing' to work, is to impose an unfair additional burden, one that the worker may be unable to discharge through no fault of his or her own.

This analysis is not just of theoretical or historical interest. As I have sought to demonstrate, it has practical implications for statutory contexts in which courts need to be able to determine whether an individual should be regarded as 'working' for the purposes of entitlement to statutory employment rights, such as the NMW and rest breaks under the WTR. As part of a more general and well-recognised trend of transferring risk from employers to workers, there has been a tendency for employers to argue that they should only be required to treat individuals as working when they are actively engaged in core work tasks. Although the courts must work within the statutory language, it is clear that policy considerations play a role in their decisions. By going back to first principles, and reminding ourselves of the social dimension of the employment relationship and the centrality of managerial prerogative, it has been possible to explain why the apparent unfairness to the employer in being expected to treat individuals as working when they are not actively engaged in core work tasks is, in reality, no unfairness at all.