Universality of Rights: The employment relationship under a progressive government

ENFORCING OUR RIGHTS
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The employment relationship under a progressive government

1. What’s the status quo and what’s wrong with it
2. A new ‘worker’ definition for accessing labour rights
3. A new ‘employer’ definition
4. A (rebuttable) legal presumption of work relations
5. Day one rights
6. Protecting ZHC
7. Conclusions – individual labour rights in a collective labour law context
1. The status quo and what’s wrong with it

- Employees, workers, and the self-employed
- Limb-b workers and labour law’s black hole theory
- Bogus self-employment and collective labour rights
- Who is the employer?
- Privatising profits and socialising costs: precarious work and the welfare state
- Need for reform
2. A new worker definition

- A single status for the purposes of accessing employment rights

‘worker’ or ‘employee’ means an individual who—

a) seeks to be engaged by another to provide labour,

b) is engaged by another to provide labour, or

c) where the employment has ceased, was engaged by another to provide labour, and is not operating a business on her or his own account'

- Broad and overarching
- Labour focused
- Non-contractual
- Applying across labour law and equality law statutes
3. A new ‘employer’ definition

Who is the employer?

- Working through intermediaries, working through platforms, subcontracting, franchising...

s.43K(1)(a) ERA 1996

- where T&C of work are ‘in practice substantially determined ... by the person for whom he works or worked, by the third person or by both of them’ then
- the worker may be considered as employed by whichever of the two entities played a greater role in setting those terms
- and potentially by both of them if both have ‘substantially determined’ the terms of engagement and employment

‘Joint employer status’ in UK labour law
4. Legal presumption of work relationship

- General presumption: it shall be presumed that an individual is a worker unless the other party to the arrangement establishes that the only possible construction of the engagement is that the individual was not providing labour as a worker or employee.

- Specific presumptions: Some particularly vulnerable categories of self-employed professionals may benefit from specific worker status presumptions (for all or for some rights).
5. Day one rights

- Abolishing qualifying periods for access to rights
- Probation periods (3 months max) only to test worker’s ability to do the job (not be used to terminate contracts for any other reason)
- (restricting use of fixed term contracts and temporary agency work to promote open ended work relations)
6. Protecting ZHC workers

- Contracts to specify a minimum number of regular hours of work in the contract itself (a ‘day one’) right
- ‘Premium rates’ for the extra hours agreed, from time to time, beyond the regular hours agreed in the contract (and such ‘extra hours’ being capped to 10-20% of the ‘regular hours’)
- The law should encourage employers (and workers) to take a realistic view about their future expectations in terms of
  - number of working hours to be agreed in the contract
  - how these hours are distributed in the working week, through shifts and rotas (whose variation would require a giving reasonable notice of at least 7 days)
  - while guaranteeing some ‘regulated flexibility’ to both workers and businesses (subject to premium rates and provisions contained in collective agreements)
7. Conclusions – Individual labour rights in a collective labour law context

- Universality of employment protection legislation
- Introducing clear regulatory principles in statute to assist judges performing a purposive interpretation of employment protection legislation (good faith; dignity at work; decommodification; interpreting ambiguous provisions in favour of workers; respect for international labour standards)
- The role of collective bargaining
  - Beyond minimum standards
  - Flexibility
  - Centrality of collective agreements in labour law’s edifice