

Universality of Rights: The employment relationship under a progressive government

THE
INSTITUTE OF
EMPLOYMENT
RIGHTS

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; decommmodification; 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