

# The Contract of Employment: Judicial vs Parliamentary Reform

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## **Abstract**

The narrow definition of contract of employment developed by the common law tests has given room for employers to avoid protective legislation for the people that work for them. In the current economic climate that we face today, the impact of globalisation and the UK government's response to the 2008 economic crash has made this problem far worse than it has been at other points in history. This deep, structural problem requires Parliamentary intervention as the courts have failed to reform the definition of the contract of employment effectively. This article will assess the role of Parliament and the judiciary and discuss which institution should take the primary role in reform of the contract of employment.

## Introduction

This article will assess the relationship between the judiciary and Parliament in relation to the definition of employment status and discuss whether Parliamentary intervention is needed. To look at this issue in enough detail, I will explain how the courts have developed the common law tests which define employment status before moving on to why the distinction between an employee and a worker is so fundamental for access to employment rights. Then I will contrast – and focus on – the current role of the judiciary and the role of Parliament and consider what their roles *should* be. This article will show that the judiciary are stuck in a strict interpretation of contract law and that Parliament, or more precisely, the government, seems to want to further weaken employment rights. Despite this, this article does conclude that Parliamentary intervention (however likely it may be) is the logical answer to the question of the definition of the contract of employment due to the societal importance of this area of law. Finally, I will look at the effects of the current economic climate on the definition of an ‘employee’ and how employers may use the current definition and the relationship between the judiciary and Parliament to exploit workers – both UK nationals and migrants – for self-profit.

## The Common Law Tests for Employee Status

The courts in this country have long had the task of defining who an employee is. This stems from the court’s interpretation and application of master and servant laws in which magistrates would have to distinguish between: contracts *for* service, and contracts *of* service. With contracts of service, there were various laws imposed on the servants and their masters, as such, “the common law attempted to draw a sharp

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distinction”<sup>1</sup> between the two. This distinction – although master and servant laws were repealed<sup>2</sup> - is still relevant today as the way that the courts distinguish between an employee and other worker statuses have taken ideas from the older tests that judges developed. Early legislation on the issue required courts to do this<sup>3</sup>. However, as Deakin explains, “the [unitary model of the] contract of employment, [...] was only clearly adopted when further reforms were enacted to social legislation, [such as the] National Insurance Act 1946.”<sup>4</sup> This led to “the fundamental division between employees and the self-employed”.<sup>5</sup> This way of defining employees was also adopted “under the employment-protection legislation that was introduced first in the early 1960s”<sup>6</sup> and still appears in today’s current legislation.

To help distinguish between who was and was not an employee, the courts developed the ‘control test’. This was illustrated in the case of *Lane v Shire Roofing Company (Oxford) Ltd*,<sup>7</sup> where Henry LJ defines the control test as, “who lays down what is to be done, the way in which it is to be done, the means by which it is to be done, and the time when it is done? Who provides [...] the material, plant and machinery and tools used?”.<sup>8</sup> Although these examples are still considered indicative of an employment contract, Deakin expresses that “the control test itself came to be regarded as excessively artificial and gave way to the tests of ‘integration’ and ‘business reality’”.<sup>9</sup> In conclusion, the control test now has less use in modern cases concerning the contract of employment. This is partly because the modern work force is seen to be less controlled by their employers with precarious and less

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<sup>1</sup> Hugh Collins, K.D. Ewing, Aileen McColgan, *Labour Law* (Cambridge University Press 2012) 190.

<sup>2</sup> Master and Servant Act 1889, s 2.

<sup>3</sup> Master and Servant Act 1867, s 2.

<sup>4</sup> Simon Deakin, ‘The Contract of Employment: A Study in Legal Evolution’ (2001) 11 *Historical Studies In Industrial Relations* 1, 32.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> [1995] PIQR 417 (CA).

<sup>8</sup> *Ibid.*, 422.

<sup>9</sup> See Deakin (n 4) 33.

structured work being more common and increasing. This form of work will be looked at later in the article as one example of why Parliamentary intervention is needed.

As previously mentioned, the two newer tests<sup>10</sup> “stressed economic, as opposed to personal, subordination as the basis of the contract of employment”<sup>11</sup> and are summarised by Cooke J when he says that:

factors which may be of importance are [...] whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has.<sup>12</sup>

The replacement of the control test by the courts demonstrates the fluidity of how the labour workforce and circumstances changed and how the courts adapted to this change. Over time, more employers were relaxing their rules on control over their employees - a new way to assess whether someone was an employee was needed and was fulfilled by the business risk/reality test.

The second of these tests, the ‘integration test’ is “the test of a worker’s ‘integration’ into an organization”.<sup>13</sup> It “was used to explain how professionals such as doctors and journalists could be classified as employees notwithstanding the high degree of autonomy that they enjoyed in their work”.<sup>14</sup> This widening of the different tests adapted by the court, enabled judges to evolve the law with the changing nature of work routines and business organisation with the evolution of employment protection.

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> *Market Investigations v Minister of Social Security* [1969] 2 QB 173, 185.

<sup>13</sup> See Deakin (n 4) 33.

<sup>14</sup> Ibid.

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However, after these cases were ruled, it was easy for employers to insert clauses within their contracts to hint at aspects that suggest that the contract is a contract for service and not a contract of service. The courts must decide whether such a contract is a sham. The courts “will not be much influenced by an explicit statement that the contract is one of employment or a contract for services”<sup>15</sup> as illustrated by *McMeechan v Secretary of State for Employment*,<sup>16</sup> and in a recent case, the Supreme Court ruled that the courts must consider “the relative bargaining power of the parties [...] in deciding whether the terms of any written agreement in truth represent what was agreed”.<sup>17</sup> It is clear that the courts are trying to expand what aspects they will consider indicative of whether the contract at hand is one of employment rather than relying on a written agreement between the two parties.

These tests have been described by legal scholars as “a maze of casuistry”<sup>18</sup> and according to Hepple:

an attempt was bravely made in 1968 by MacKenna J. [...] to bring some order into the chaos by asking, first, whether there is a sufficient degree of control to make the worker an employee, and then asking whether the provisions of the contract are ‘consistent with its being a contract of service’.<sup>19</sup>

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<sup>15</sup> Hugh Collins, K.D. Ewing, Aileen McColgan, *Labour Law* (Cambridge University Press 2012) 195.

<sup>16</sup> [1997] ICR 549.

<sup>17</sup> *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] ICR 1157, para 35.

<sup>18</sup> Bob Hepple, ‘Restructuring Employment Rights’ (1986) 15 ILJ 69, 72.

<sup>19</sup> *Ibid.*

in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*.<sup>20</sup> This is where we are now – a mix of different tests which provide no sharp boundary between a contract of service and a contract for service.

### **The importance of distinguishing between the contract of service and the contract for service**

As observed, the courts have spent a long time developing the tests they can use to distinguish between the two types of contract. It is necessary to understand why this is the case. Many scholars have highlighted that “nearly all the statutory rights created since the 1960s are limited to the ‘employee’ under a ‘contract of employment’”.<sup>21</sup> It is therefore “the gateway to most employment-related protection at common law and under legislation”.<sup>22</sup> The statutes use terms such as: employee, workers and personal service contracts to set the scope of what types of people the legislation is intended to protect. The definition of an ‘employee’, found under the Employment Rights Act 1996 (ERA 1996) is “an individual who has entered into or works under [...] a contract of employment”.<sup>23</sup> This definition is clarified further by defining a contract of employment as “a contract of service or apprenticeship, whether express or implied, and [...] whether oral or in writing”.<sup>24</sup>

It is clear from the statutory definitions that the legislator has left it to the judiciary to define these terms more precisely. This is likely due to the courts long-established history of interpreting the distinction between the two (as demonstrated by the history of the case law in this area). It poses the question of whether

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<sup>20</sup> [1968] 2 QB 497.

<sup>21</sup> See Hepple (n 18) 69.

<sup>22</sup> J. Fudge, E. Tucker, L. Vosko, ‘The Legal Concept of Employment: Marginalizing Workers’ (Report for the Law Commission of Canada, York University 2002) 8. Even though this is a Canadian report, it is relevant to the United Kingdom’s legislative structure of labour law.

<sup>23</sup> ERA 1996, s 230(1).

<sup>24</sup> *Ibid*, s 230(2).

Parliament have left it to the judiciary or, whether they allowed the judiciary to continue in this area of the law as they have done in the past? The fact that such a crucial area of labour law – the qualifying boundary to access rights – is in a grey area is worrying. The common law tests that have been described are not very consistent and have been constantly changing and evolving over their existence which has implications for both employers and employees.

It is clear then, that there needs to be a clearer and simpler system of defining an employee under a contract of employment from workers under personal service contracts. The key question of this article is therefore, who should do this – Parliament or the judiciary?

### **Who should define the employment contract?**

#### *Parliament?*

Labour law at first glance seems to be focused on contract law – a common law creature. As previously discussed, one of the “objects of labour law [is] the contract of employment between employer and worker”.<sup>25</sup> However, this should not distract us from the political and social impact of that definition. The “employment relation lies at the centre of a fundamental conflict of interest [...] [of] capitalist societies”<sup>26</sup> and therefore we must consider the contract of employment distinction as being wider than a merely contract law problem because “it is important to study the legal rules in their economic, social and political context”.<sup>27</sup> From this angle, it is questionable whether our judiciary – who should be politically neutral – should be forced to define a term which has far reaching political and social consequences.

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<sup>25</sup> Hugh Collins, K.D. Ewing, Aileen McColgan, *Labour Law* (Cambridge University Press 2012) 4.

<sup>26</sup> *Ibid.*, 5.

<sup>27</sup> *Ibid.*

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Legal academics have observed that “the common law plays a diminishing role”<sup>28</sup> in shaping the contract of employment.

From the common law tests, it can be said that the courts have been struggling to keep pace with the fast-paced environment of the workplace. Hepple heavily criticises the common law method by saying that:

any attempts to rationalise the coverage of legislation or to simplify the law so that it can be understood by employers, workers and tribunals, [...] or to make workers' rights more effective, are bound to collapse if they are built on the corner-stone of the common law.<sup>29</sup>

This is a heavy criticism of our employment rights legislation and makes it clear why Parliament needs to change its stance on the contract of employment. Hepple compares our method of structuring employment rights around contract law, with other European countries, noting that the “development of labour law in several European countries has been based on the realisation that the employment relationship had to be freed from the law of contracts and of property”.<sup>30</sup> It seems a logical step forward to break free from the shackles of English contract law which is both archaic and unsuited to governing the politically charged and socially impactful area of labour law.

It is therefore clear that Parliament should intervene. However, this leads us on to a fundamental question which needs to be discussed – *how* should Parliament intervene? What should Parliament do to change the problems highlighted?

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<sup>28</sup> Ibid, 9.

<sup>29</sup> See Hepple (n 18) 83.

<sup>30</sup> Ibid.

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There has been a significant amount of academic focus on this point and I will consider what multiple academics have to say in this area about how Parliament should intervene in labour law. The overall aim of these various articles is to try to solve the:

widespread agreement that the traditional legal categories – ‘employee’, ‘independent contractors’, ‘contract of service’, and ‘contract for services’ – no longer fit with the economic and social reality of work relations.<sup>31</sup>

The first scholar I will look at is Freedland, who is one of many to consider the reshaping of our labour law legislation. The core idea he says, is “about moving from the Contract of Employment to the Personal Work Contract as a central organising category for the discussion of the law of the individual relationship”.<sup>32</sup> He first suggested this in his book, *The Personal Employment Contract* when he says that we need to extend “the scope of the work to include other personal work or employment contracts”.<sup>33</sup> Freedland realises that the fact that “employment lawyers, [...] approach this diverse world entirely from the contract of employment outwards”<sup>34</sup> means that there “is a problem which is not just an academic or theoretical one [...] [but that the] problem may have consisted in the lack of a well-defined contractual basis or pattern for such arrangements”.<sup>35</sup> Furthermore, such problems are widespread in the world of sporting fixtures and sportspersons, [...] people working

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<sup>31</sup> See J. Fudge, E. Tucker, L. Vosko (n 22) 93.

<sup>32</sup> Mark Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 ILJ 1, 2.

<sup>33</sup> Mark Freedland, *The Personal Employment Contract* (OUP 2003) 1.

<sup>34</sup> See Freedland (n 32) 6.

<sup>35</sup> Ibid.

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in entertainment and in the media and also to a growing army of people providing consultancy services and stand-in services of every kind.<sup>36</sup>

This should bring the attention of Parliament to redefine who is protected by employment legislation as the labour laws are leaving a lot of people without protection. Freedland neatly summarises a list of workers that are on the edge of being under a contract of employment but ultimately fall short: “examples of such types or descriptions are those of ‘free-lancers’, ‘consultants’, ‘casuals’ (‘regular’ or otherwise), ‘on-call workers’, ‘outworkers’ or ‘homeworkers’, ‘gang workers’, ‘contract workers’ and ‘agency temps’”.<sup>37</sup> Freedland suggests that this is the reason why legislative intervention is needed.

That article notes that the widening of the scope of employment legislation has already happened in some areas, for example the “National Minimum Wage Act, like the Working Time Regulations, applies not just to employees with contracts of employment but to other workers as statutorily defined”.<sup>38</sup> Although the definition of ‘worker’ is defined as:

an individual who has entered into or works under, (a) a contract of employment; or (b) any other contract [...] to do or 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<sup>39</sup>

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid, 9.

<sup>38</sup> Ibid, 21.

<sup>39</sup> ERA 1996, s 230(3)(a), (b).

it is still not as wide as the scope that Freedland is suggesting. Critics would argue that widening the scope beyond that of 'worker' would be problematic, however, Freedland argues that the fact legislation has already been widened, suggests that this "helps to show why this might be non-problematical, by challenging our fixation with the contract of employment"<sup>40</sup> even further by using the personal work contract as the scope of employment legislation.

Freedland is not the only legal scholar to consider this. Deakin has "take[n] up Freedland's challenge to reconceptualise the employment relationship as a 'personal employment contract'".<sup>41</sup> He also notices that the contract of service "has certainly undermined its relevance from the late-1970s onwards"<sup>42</sup> due to "the development of the debate about labour market flexibility, coupled with the emergence of 'post-industrial' forms of employment".<sup>43</sup> Just for clarification, Deakin highlights the fact that "Freedland's proposal does not equate to saying that all 'independent' workers should be subsumed into the protective coverage of labour laws, simply the dependent self-employed"<sup>44</sup> and that this should be the aim of legislative reform. Again, following the legislation which focuses on the term 'worker',<sup>45</sup> Deakin observes that the "purposive approach to interpreting the 'worker' term which the EAT had adopted [...] has been disapproved in a dictum of the Court of Appeal".<sup>46</sup> Not only is this a reason for the need for legislative intervention but the fact that "the introduction of the 'worker' concept has arguably exacerbated, and certainly not improved, this situation"<sup>47</sup> and that therefore the UK's labour law "need[s] [...] the

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<sup>40</sup> See Freedland (n 32) 21.

<sup>41</sup> Simon Deakin, 'Does the *'Personal Employment Contract'* Provide a Basis for the Reunification of *Employment Law?* (2007) 36 ILJ 68.

<sup>42</sup> *Ibid.*, 69.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 75.

<sup>45</sup> See n 37.

<sup>46</sup> See Deakin (n 41) 79.

<sup>47</sup> *Ibid.*

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kind of fundamental conceptual reorientation within the law which Freedland argues for”,<sup>48</sup> also requires attention. Deakin is therefore calling for a widening of labour law and this simply cannot be done by the judiciary as they are limited to the current definitions within the relevant employment statutes that have been mentioned. Ultimately, he calls for the Law Commission to conduct a

re-examination of concepts in governing the employment form, in the context of employment, social security and fiscal law, with comparative insights where necessary [...] and a Beveridge report for our own times, one which would set out the values which should inform legislative change in this area<sup>49</sup>

which would lead to “a ministerial or parliamentary review”<sup>50</sup> of the scope of labour law.

From these two highly respected labour law scholars alone, it is clear that in recent years the criticism of the courts – to come up with a solution for the lack of keeping pace with the changing world of work – has resulted in calls for Parliamentary intervention and a reshaping of the scope of relevant employment laws around a different fixation. From this, it can be concluded that the courts have had their chance to develop this law without the need for Parliament, but they have failed to do this. Thus, Parliament must act on this to keep the UK’s labour laws effective and protective to all who should be protected – the dependant self-employed.

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid, 83.

<sup>50</sup> Ibid.

### *The Judiciary?*

In this section I will demonstrate how the courts have failed to change the definition of the contract of employment and its central position for access to labour law protection despite being given a number of opportunities to do so, thus leaving the issue for parliament to resolve.

The court's interpretation of certain key cases, which were highlighted by Langstaff<sup>51</sup> shows just how narrow the judiciary has been. The first of his examples was *Halawi v WDFG UK Ltd t/a World Duty Free*.<sup>52</sup> This case was to do with World Duty Free ceasing their sponsorship with the claimant on ground of racial discrimination. The Court of Appeal ruled that World Duty Free could do this as the claimant was not a 'worker' using the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*<sup>53</sup> which Langstaff summarises the decision that, "to be a contract of employment the contract must provide for personal service in return for payment, subject to the control (in the sense of direction) of the employer, at least insofar as there is room for it, provided other features of the contract do not negate it as being one of employment".<sup>54</sup> The claimant was also not "a worker, for section 83(2) of the Equality Act requires [which] personal service".<sup>55</sup> In effect, the meaning of this ruling allowed World Duty Free to discriminate a dependant self-employed person on the ground of religious belief – something which the courts should be ashamed of. Langstaff writes that "It is worth reflecting that all

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<sup>51</sup> Sir Brian Langstaff, 'Changing Times, Changing Relationships At Work . . . Changing Law?' (2016) 45 ILJ 131.

<sup>52</sup> [2015] IRLR 50 (CA).

<sup>53</sup> [1968] 2 QB 497.

<sup>54</sup> See Langstaff (n 51) 137.

<sup>55</sup> Ibid.

the judges who heard the case on appeal [...] expressed unease that a discriminatory wrong might have been done which the law could do nothing to remedy.”<sup>56</sup> However, this assessment is hard to justify. After all, it was the courts that developed the narrow definition of a contract of service and ‘worker’ – it could be argued that it should be the courts job to rectify this narrow definition.

The lack of judicial creativity in this case is concerning. The circumstances of the claimant made it so that there was no contract between herself and World Duty Free, but only between the claimant and a third party. However, to overcome this problem, the Court of Appeal could have simply evaluated the circumstances of the case and realised that the claimant was not – apart from on paper – an independent self-employed person but was in fact, in all the circumstances, subject to a contractual relationship akin to that of a contract of employment. This approach to legal problems has been shown elsewhere in law. For example, in land law, when deciding on whether a lease or a licence exists, the courts look at what is happening ‘on the ground’ and not what is written on paper.<sup>57</sup> It would not be revolutionary for judges to adopt a similar approach to this area of contract law as this has already been achieved in the lease-licence distinction which is also rooted in contract law.

A similar point of law was determined in *O’Kelly v Trusthouse Forte*<sup>58</sup> where the claimant was classified as being an independent contractor (outside the scope of most protective labour laws) rather than a dependant self-employed person. The EAT originally held that they were employees because of this economic dependence. In the previous case and in *O’Kelly v Trusthouse Forte*, the Court of Appeal refused to expand the definition to allow protection for the dependant self-employed. Therefore, it seems that the EAT and the Court of Appeal are conflicting

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<sup>56</sup> Ibid.

<sup>57</sup> *Street v Mountford* [1985] AC 809.

<sup>58</sup> [1984] QB 90 (CA).

with each other which needs to be solved – the most practical way is by changing the law from above (Parliamentary intervention) so there is no need for judicial conflict.

The last case I will consider is that of *Quashie v Stingfellows Restaurants Ltd.*<sup>59</sup> The set up between the claimant and her employer was that of a lapdancer and the club which allowed her to dance at their premises for a fee. The club required customers to pay the dancers with ‘heavenly money’ which the club then converted into money to give to the dancers. The claimant was dismissed and she brought an unfair dismissal procedure forward – which requires the person claiming to be under a contract of employment. The Court of Appeal disagreed with the EAT ruling that “there was a contract, [...] but the critical question was whether the nature of the contractual obligations made it a *contract of employment*”.<sup>60</sup> They held that “there was no obligation to pay her anything at all; she negotiated her own fees with clients, and took the risk that she might be out of pocket on any night”.<sup>61</sup> The Court of Appeal disagreed with the EAT yet again with the same issue – not allowing dependant self-employed persons access to rights for which many legal scholars in labour are currently arguing for.<sup>62</sup>

In conclusion, the three cases shown demonstrate the difficulty the highest courts in the country have with progressing the law in this area forward. Langstaff echoes the calls from Freedland and Deakin when he says, “primacy could be given to ‘the employment relationship’ rather than the need for contract”.<sup>63</sup> However, Langstaff makes a powerful point in the last line of this article when he realistically

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<sup>59</sup> [2012] EWCA Civ 1735.

<sup>60</sup> See Langstaff (n 51) 139.

<sup>61</sup> Ibid.

<sup>62</sup> See Freedland (n 32) and, Deakin (n 41).

<sup>63</sup> See Langstaff (n 51) 142.

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comments on whether the courts should even be developing this part of the law as it is not within their remit to do so by saying:

Though all of us, by virtue of our discipline and practice have an interest in the development of employment rights, we have to remember we may not always share these with every politician, some of whom may see our approach as imposing an albatross around the neck of enterprise upon which a decent and worthwhile life depends, even if a decent and worthwhile job does not.<sup>64</sup>

I would argue that the judiciary could take small steps to achieve a wider and fairer definition of the employment contract and possibly even to expand the definition to the 'employment relationship'. However, as it will be later examined, it is not the judiciary that have been 'eroding' employment rights and access to justice amongst other aspects, it is the 2010-2015 Coalition Government that is responsible for this. It therefore seems that although many legal scholars and perhaps judges would like to expand and give security to more people, the government does not. This is further highlighted by the rise in 'zero-hour contracts'. Until Parliament wishes to give stronger employment protections, it should arguably not be changed by an unelected and unaccountable judiciary. This gives a clear view that Parliament should be the institution to change the contract of employment, not the judiciary.

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<sup>64</sup> Ibid, 143.

## Is the Current Economic Climate Exacerbating the Problem?

### *Globalisation and migrant labour*

Globalisation has impacted many areas of our lives; labour law and the workplace have been no exception. As Kaufmann explains, “globalisation has several effects in the world of work: it entails new markets, new products, new mindsets, new competencies and new ways of thinking about business”.<sup>65</sup> Globalisation could be defined as the weakening of physical borders between countries, yet remaining politically and possibly legally distinct.<sup>66</sup> This requires businesses to compete and operate on many different levels, both national and international. For example, a company’s main market may be in the UK, but their production line may be in China or Bangladesh. This means they must abide by both UK laws and the laws in other countries where they operate. This puts pressures on businesses as they “have to [accommodate] different cultures and religions”<sup>67</sup> and be “aware of local differences and particularities”<sup>68</sup> from all over the world. This may seem irrelevant to many UK workers, but their employers are often on the lookout to exploit cheaper labour elsewhere. This is because the “business community is pushing hard [...] for rapid changes in business strategy to be made without the hamper of legal rules”.<sup>69</sup> The exploitation of workers by businesses can be seen by the modern trend to outsource labour to countries with lower labour standards such as China or India and therefore will break or ignore labour regulations to achieve this. It may not seem relevant to UK labour law and the contract of employment, but the government could use this as a reason to weaken employment rights in the UK to attract business from abroad.

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<sup>65</sup> Christine Kaufmann, *Globalisation and Labour Rights* (Hart Publishing, 2007) 7.

<sup>66</sup> Jost Delbruck, ‘*Structural Changes in the International System and its Legal Order: International Law in the Era of Globalisation*’ (2001) 11 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (Swiss Journal for International and European Law) 1, 16.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

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However, it could alternatively use this as a platform to work towards global improvement of labour standards.

Not only has globalisation caused businesses to exploit cheap labour elsewhere, but migrant labour is also a way for businesses to ignore labour laws in the UK. Shelley has a fascinating book which explores this subject. It looks at the recent phenomena of a large amount of migrant labour being available to UK businesses and the possible causes behind this. At the time of writing, Romania and Bulgaria were joining the European Union and this had the effect of cheap labour migrating to higher-wage economies such as the United Kingdom, Germany and France. The same principles of this book could also be applied to the more recent influx of migrant labour resulting from the refugee crisis in Syria. Shelley recognises that “agricultural produce and major construction projects, by their very nature [...] has militated towards informality in workplace arrangements”<sup>70</sup>, this of course being the avoidance of labour regulations. This has been exacerbated in the current, post-2008-crash economy, as businesses are trying to cut costs by defining these people as personal contractors so they have little responsibility over them. It is easier for businesses to exploit migrant labour as they also tend to have little understanding of UK labour law and some of the time, the English language. Globalisation further exacerbates this effect as “poverty in rural China, unemployment in Poland, orphanhood in Nigeria are transformed into the use and abuse of people we sit next to on the bus”.<sup>71</sup> The exploitation of migrant labour is certainly aided by the lack of protections offered to those who are not by definition ‘employees’. However, the problem is far deeper and more integral to society than just the definition of the employment contract itself.

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<sup>70</sup> Toby Shelley, *Exploited Migrant Labour in the New Global Economy* (Zed Books London 2007) 41.

<sup>71</sup> *Ibid*, 43.

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Firstly, the diminishing funds of access to justice make taking an employer to a tribunal hard for those with limited funds as introduced under the 2010-2015 Coalition government.<sup>72</sup> As well as this, reliable free-to-access sources such as Citizens Advice and ACAS, are only available to read online in English or Welsh. Both obstacles prevent many people, especially exploited migrant labourers, from accessing both the legal system and information to aid themselves. These problems go far beyond the definition of the contract of employment, and thus, the scope of this article, but I hope that they highlight the extent of the problem and how the contract of employment is certainly a fundamental concept in providing protections, but is also surrounded by larger problems in society. It is this reason for why the judicial system is not capable of solving the exploitation of the definition of the contract for employment. Even if it took a step forward, larger problems would still prevent any real improvement for those exploited.

It only takes a quick look at tragedies such as 'Morecambe Bay' to realise how awful worker exploitation can be and why Parliamentary involvement is necessary. At 'Morecombe Bay', twenty-three Chinese migrant labourers drowned to death as they were picking cockles as the Bay trapped them when the tide came in. They were being overworked and underpaid by their employers. They would be classed as workers or self-employed and thus, they would have little protection under the current system if they took their case to court before the tragedy. Although the narrow definition of the contract of employment is not the cause of this terrible event, the fact that migrant labourers were being exploited under the current law speaks for itself and is why we must change it with Parliamentary authority immediately.

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<sup>72</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

This part of my article has highlighted the negative effects of globalisation on labour law rights in the UK. Shelley repeats this by saying that:

the ‘hunger’ for work, the ‘reliability’ and ‘flexibility’ of migrant labour are employers’ terms for long hours, lack of overtime bonuses, unpaid duties, zero hour contracts, Working Time Directive opt-outs and disposability of migrant labour.<sup>73</sup>

In conclusion, it is clear that from this aspect of the current economic climate and the ever-increasing impact of globalisation calls for the need of Parliamentary regulation in labour law – particularly the definition of the employment contract which would encompass most of the described workers listed above.

### *Post-2008-crash economy*

The economic crash has influenced the way our governments have regulated many laws – including labour law. Hepple observes that “the response to the financial crisis, which started in the USA and Britain in 2008 [...] has seen drastic cuts in public expenditure and austerity programmes aimed at reducing the deficit”.<sup>74</sup> Hepple says that “Conservative–Liberal Democrat [...] Coalition Government accepts the verdict of the [OCED], that Britain [...] has ‘one of the most lightly-regulated labour markets in the world’”.<sup>75</sup> This according to Hepple, is furthered due to “employment rights [...] being debilitated by the protracted and painful method of

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<sup>73</sup> Ibid, 127.

<sup>74</sup> Bob Hepple, ‘*Back to the Future: Employment Law under the Coalition Government*’ (2013) 42 ILJ 203, 204.

<sup>75</sup> Ibid.

‘death by a thousand cuts’<sup>76</sup>. This cutback of regulation is due to the government’s response to the current economic situation which is rooted in neo-liberalism and that legal doctrines should aid the free market.<sup>77</sup> It is clear that the effects of the current economic climate has had a negative impact on labour law rights, however, it is hard to conclude by saying that Parliament should intervene as it is Parliament that is the institution which is deregulating the employment rights legislation.

### Conclusion

This article has argued that the judicial process of defining the contract of employment has ultimately failed to keep pace with the current world of work due to the lack of judicial creativity and judges being deeply rooted in the strict interpretation of the law of contract. This is a valid criticism because judges have previously moved away from strict interpretation with regards to lease-licence distinctions which involves a similar problem. I have very briefly compared our system of legislation to that of some European countries<sup>78</sup> and stated that an overhaul of this area is needed – a refocus from the common law fixation on contract principles and instead on the ‘personal work contract’ suggested by Freedland, Deakin and Langstaff. As well as this, the article aimed to shed light on the impact of cheaply available migrant labour and the exploitation that occurs in that area of society due to the gaps in protection provided by the current employment definition. This issue itself is worthy of Parliamentary action. Parliament should also intervene with regards to the definition of the contract of employment more broadly. This is because we should in the 21<sup>st</sup> century, see labour and employment law as more than a contract between two

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid, 213.

<sup>78</sup> See n 30.

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'equal' parties and, instead see how it affects many other areas of society and impacts almost every single one of us.

However, this article has casted doubt on whether Parliament or the government would be willing to intervene given cuts to legal aid and the promotion of the legally awkward 'zero-hour contracts', both of which hamper the protection of employees under the narrow definition of the contract of employment. In conclusion, it is easy enough to say whether Parliament should or should not intervene. The issue is large enough and has a big enough social impact for it to have Parliament's attention, but to conclude knowing that Parliament is currently unlikely to change anything seems disappointing. Therefore, more work is needed from the judiciary to change what it can in the process of the courts as it has done little to offer more protection to people. As well as this, perhaps the Law Commission should review this area and set proposals for Parliament to consider, which would build pressure for the much-needed Parliamentary intervention.