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Regulating for Decent Work and the Effectiveness of Labour Law

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I

On 10 June 2008, the International Labour Conference adopted the Declaration on Social Justice for a Fair Globalisation. This was an important initiative, being only the third major declaration in the history of the ILO, building on the foundations established by the other two. The Declaration of Philadelphia of 1944 firmly embedded the principle that 'labour is not a commodity',[1] while the Declaration on Fundamental Principles and Rights at Work of 1998 reinforced the importance of four core principles relating to human rights at work (freedom of association and the effective recognition of the right to collective bargaining, the prohibition of forced and compulsory labour, the effective abolition of child labour, and the elimination of discrimination in employment).[2]

The Declaration on Social Justice was designed in part to institutionalise the ILO's decent work agenda that had been developed since 1999, thereby placing the latter agenda at the core of the ILO's policies. Key aspects of that agenda were job creation, the extension of social and labour protection, promoting social dialogue, and guaranteeing rights at work (with an emphasis on freedom of association and collective bargaining).[3] Although the Declaration was said to come "at a crucial political moment, reflecting the wide consensus on the need for a strong social dimension to globalization in achieving improved and fair outcomes for all",[4] having been adopted on the eve of the global financial crisis, it also came at a spectacularly bad time economically and politically.

The Declaration nevertheless provided that the Decent Work Agenda would be promoted through four strategic objectives, all said to be equally important.[5] Reflecting the outline of the Decent Work Agenda considered above, the first of these relates to job creation, and the second to 'developing measures of social protection – social security and labour protection – which are sustainable and adapted to national circumstances', including

> Policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living age to all employed and in need of such protection.[6]

The third objective is "the promotion of social dialogue and tripartism as the most appropriate methods" for a number of defined purposes. These include "adapting the implementation of the strategic objectives to the needs and circumstances of each country". But more importantly for present purposes they also include "making labour law and institutions effective, including in respect

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[1] ~~On which,~~ See P O'Higgins "Labour is not a Commodity": an Irish Contribution to International Labour Law" (1997) 26 ILJ 225, and A Supiot and others "Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot" (2010) 19 *Social Legal Studies* 217-252.
[2] ~~On which,~~ See P Alston, "Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15 EJIL 457.
[3] See <www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>.
[4] ILO Declaration on Social Justice for a Fair Globalisation (2008), Preface.
[5] At Part IA.
[6] At Part IA(ii).

of the recognition of the employment relationship, the promotion of good industrial relations and the building of effective labour inspection systems".[7] Note the need for labour law to be "effective". The promotion of social dialogue is, thus, not an end in itself, but an objective with a number of defined purposes of which the effectiveness of labour law is immensely important, but not the only one.

The fourth and final objective is respect, promotion and realisation of the fundamental principles and rights at work,[8] these to be found in the ILO Declaration on Fundamental Principles and Rights at Work referred to above. In emphasising the importance of these fundamental principles and rights at work, the Declaration on Social Justice maintains that these rights are valuable not only for their own sake, but also for "enabling conditions that are necessary for the full realization of all the strategic objectives'. According to the Declaration, however, "freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives".[9] Note the 'effective' recognition of the 'right' to collective bargaining.

II

From the partisan perspective of labour law, there are a number of points that stand out in the Declaration on Social Justice, not least the idea of an 'effective labour law'. This is a concept with which I am unfamiliar, and which does not appear to be well developed in the literature. But it is one which is very intriguing, not least because its meaning is unclear. In terms of the conference theme of Regulating for Decent Work, effective labour law would appear to be an essential starting point.

Despite the uncertainty as to meaning, there is a suggestion in the Declaration that an effective labour law is one that addresses both substantive and procedural matters, that is to say, both the content of the law and the manner of its enforcement. As to the former, at the very least, it must mean a labour law that is wholly **inclusive in terms of its coverage** (hence the reference in the Declaration to the "recognition of the employment relationship"). This, of course, is very important in view of the segmentation of labour law that is taking place in many jurisdictions throughout the world, as new forms of employment relationship are emerging in order to evade the protections which labour law seeks to provide, even though these protections increasingly are very limited.[10]

Beyond the question of scope, the idea of an effective labour law raises questions about **the substance of the law**. But if effectiveness relates to substance, how can we determine if labour law is effective if we do not know what it is seeking to achieve? This is a much more challenging issue about which consensus is likely to be difficult, though some sense of the minimum normative content of labour law for these purposes may be revealed by the Declaration itself.[11] Less challenging perhaps are the means by which that that minimum normative content is to be met, the Declaration highlighting procedural measures designed to secure the right to collective bargaining,

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[7] At Part IA(iii).
[8] At Part IA(iv).
[9] At Part IA.
[10] This is a point pursued in some detail below.
[11] A normative content in terms of labour standards is suggested by the reference to "wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living age to all employed and in need of such protection": ILO Declaration on Social Justice for a Fair Globalisation (2008), Part IA(ii). This is a matter that needs to be more fully considered.

alongside policies relating to pay, working time, health and safety and other undefined conditions of work.[12]

Apart from questions of scope and content, an effective labour law is one that addresses questions of **enforcement of standards**. At an abstract level, that is perhaps uncontroversial, and certainly less controversial than questions about the substance of the law. But not wholly uncontroversial, at least to the extent that there is an assumed need for a system of labour inspection, presumably to remove the burden of enforcement from the vulnerable. Effectiveness as enforcement also raises wider questions about the nature of national legal systems with which not all countries are able to comply. At its most basic, there are wider rule of law questions applicable here about access to justice, the independence of the judiciary, and the enforcement of judicial decisions.[13]

These seem to me to be modest claims for effectiveness. The first and third say little about the substance of the law: if we are to have labour law it should apply to everyone, and it should be properly administered and enforced. The second admittedly begs questions about substantive outcomes, though the demands of the Declaration are far from viewing labour law as a re-distributional tool.[14] Yet, it is clear that there are powerful forces at work to ensure that these modest principles are diminished in the face of a deliberate ineffectiveness of labour law in national systems. Three phenomena, in particular, present a clear and continuing challenge: the segmentation of labour law to which I have already referred, the growing commodification of labour, and the mutation of employer practice.

I propose to consider these latter phenomena through the lens of developments in English law, before returning to the effectiveness of labour law and the decent work agenda. If the effectiveness of labour law is the first step in regulating for decent work, we need to understand the problems the regulator must address. While I make no claims that the British experience is universal, I would be surprised if there are no parallels in other common law jurisdictions in particular.

III

Asda Stores Ltd is a British subsidiary of the US retail giant Walmart, though to claim that Walmart is a giant perhaps does not do full justice to its size. Walmart is the biggest private employer in the world, employing 2.1 million people globally, which places it just below the US Department of Defense, and the People's Liberation Army, respectively.

Step forward a group of Asda employees in the United Kingdom who claimed that their terms and conditions of employment had been unlawfully changed.[15] The company wanted to move all staff onto the same working conditions, leading to 8,700 workers being transferred 'involuntarily' to the new conditions, which led some of their number to bring proceedings for unauthorised deductions from wages, breach of contract and, in some cases, unfair dismissal.

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[12] At n 11 above. These latter questions on questions of substance presumably could be dealt with by collective bargaining or by protective legislation, or both.

[13] This is an issue that has arisen recently in relation to Cambodia. See ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III, Part 1A)* (2014) 74-75.

[14] See above n 11.

[15] *Bateman v ASDA Stores Ltd* [2010] IRLR 370. For comment, see J Hendy and F Reynolds, "Reserving the Right to Change Terms and Conditions" (2012) 41 *Industrial Law Journal* 79.

The issue before the employment tribunal hearing the case was a simple one, namely whether the employees' consent was necessary before these changes could be made. Asda Stores claimed that it had secured authority to make the change by virtue of a passage in its 'Colleague Handbook', which provides that "the Company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation".

It is not clear whether "colleagues" were always supplied with their personal copies of the handbook (which made clear that not all its terms were contractual). According to the handbook, however, a copy is "displayed on the colleague communication board in your store and on Pipeline, and replacement copies are available from your People Manager". It appears to have been the responsibility of 'colleagues' to keep themselves up to date about changes, "by attending meetings, huddles [informal team meetings] and by keeping an eye on the colleague communication board for any updates".[16]

In dismissing the employees' various claims, the employment tribunal, nevertheless, accepted that "the introduction of the new regime was a significant change affecting how much employees would be paid for their work at particular times of the day and night as well as removing certain benefits". It also concluded that "the pay of the claimants was fundamental to the employment relationship and that in the light of the significant changes to the claimants' contractual terms as to pay, Asda was required on ordinary principles to obtain the consent of the employees".[17]

So why did the tribunal decide for the employer? The answer lay in the provisions of the handbook, the tribunal accepting "the general principle that employers may reserve the contractual right to vary the terms or to change important aspects of their job irrespective of whether the employee consents or not", adding "such provisions will be scrutinised carefully to ensure that they cover the particular changes made unilaterally by the employer". But "if the change or variation falls within the contractual power to vary, it will be effective even if financial loss ensues".[18]

True, the tribunal suggested that there might be a number of safeguards that could operate to prevent the abuse of this power, in what would, of course, be standard form contracts, in which any notion of contract would be pure fiction. But these did not apply in this case, despite claims in an unsuccessful appeal that "most of the employees were not well-educated or even literate or numerate and subsisting on very low wages". Nor was it persuasive that to argue that:

> not one of the 150,000 employees who entered a contract on the basis of it, could conceivably have intended or expected its effect would be to leave to the unilateral discretion of the respondent the right to reduce the pay increase or change the hours of work and cut holidays without the need for consent and without the need for notice.[19]

We return below to consider what this case tells us about the contribution of labour law to the problems faced by workers in the modern economy. For the moment, perhaps the best that can be said is that *Bateman* was a harsh decision. But it is not the only example recently of employers taking the power to change the terms and conditions of employment unilaterally, or of the courts

[16] *Bateman* at [6].
[17] At [10].
[18] At [13] citing *Wandsworth LBC v D'Silva* [1998] IRLR 193, per Lord Woolf, at [31].
[19] *Bateman* at [22].

looking the other way. Nor is the use of this power confined to retail workers, with similar terms being identified in the contracts of dock-workers, airline cabin crew,[20] and bankers.

IV

Labour economists have referred to the segmentation of labour for many years, as employers 'slice and dice' the workforce to minimise the risks of employment, by transferring these risks where possible to the worker.[21] Thus, the worker is used when needed and wages are paid only when required, divesting the employer of responsibility for the worker as a person rather than as a labourer. Labour law has permitted, tolerated and encouraged this development by what might be referred to as the parallel segmentation of labour law.

This segmentation is best seen in the form of a simple pyramid divided into three parts. At the top of the pyramid is a small group of highly paid workers illustrated by the applicants in *Dresdner Kleinwort Ltd v Attrill*,[22] in which 104 employees of the bank claimed that "they had been wrongfully denied their contractual entitlement to certain discretionary bonuses for the calendar year 2008 promised by their employers".[23] According to the judgment of the appeal court which upheld the lower court decision in favour of the claimants, at stake were "sums totaling more than €50 million".[24] The applicants' claimed that the employer had undertaken to make these payments and was contractually bound to do so, having been caught out by contracts of employment providing that "the Company reserves the right to vary the terms and conditions described in this handbook and the terms and conditions of your employment generally".[25]

This top segment of the workforce is a small and elite group: wealthy individuals in very highly paid jobs with generous contractual terms and the personal financial muscle to enforce them. The distinguishing feature of this case (and cases like it in recent years) is that it was heard in the ordinary courts, where justice is very expensive to administer and where the costs of failure are crippling. *Attrill* was a case where both sides were represented by city solicitors and at least two barristers each. The proceedings, at first instance, lasted for 16 days, and the appeal for another three; and this was only after the applicants had survived earlier attempts by the employer to have their action struck out as showing no cause of action,[26] in a case involving another expensive team of solicitors and barristers of the highest professional calibre. Indeed, one of the barristers for the bank was subsequently appointed directly from legal practice to the Supreme Court in a unique move, albeit a move reportedly delayed as the individual in question completed his highly publicised and allegedly highly remunerated representation of Roman Abramovitch.[27]

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[20] *Malone v British Airways plc* [2010] EWHC 302 (QB), [2010] IRLR 32. See K D Ewing, *Fighting Back – Resisting 'Union – Busting' and 'Strike – Breaking' During the BA Dispute* (Institute of Employment Rights, 2011).

[21] See the discussion in N Beerepoot, 'Globalization and the Reworking of Labour Market Segmentation', in A C Bergene, S B Endresen and H M Knutsen (eds) *Missing Links in Human Geograp*hy (Ashgate, Farnham, 2010) 220-3.

[22] *Dresdner Kleinwort Ltd v Attrill* [2013] EWCA Civ 394.

[23] At [1] (Elias LJ).

[24] At [1]

[25] The passage continued: "Such changes can only be made by a member of the Human Resource Department and must be communicated to you in writing. When the change affects a group of employees, notification may be by display on notice boards or Company Intranet".

[26] [2010] EWHC 1249 (QB); [2011] EWCA Civ 229, [2011] IRLR 613.

[27] This fight to the death with rival oligarch Boris Berezovsky over the entrails of the USSR was fought out in the English courts: *Daily Telegraph*, 31 August 2012: 'Roman Abramovich has won his $6.5bn legal battle with his former mentor and business partner, in the biggest private court case in British legal history'. Sumption's fee in the latter case was reported to be £3m: *The Lawyer*, 6 April 2011.

The *Attrill* case is, thus, important partly because the bankers had access to the most senior judges in the High Court to enforce a massive contract claim with the help of very expensive legal teams. This is not an option available to most workers[28] and, indeed, the dangers of losing such a case would have been enough to terrify all but the most reckless or the most financially secure, in view of the costs' order that might be awarded to the successful party.[29] The case is also important, however, for illustrating how wealthy litigants are able to enforce their contracts and, in the process, indulge in esoteric and technical aspects of contract law in the enforcement of their claims.[30] As indicated, *Attrill* is not alone, and it is an important feature of these recent cases that the courts have indicated a willingness to develop principles to control the wide discretionary powers employers often reserve for themselves in contracts, the courts in these cases beginning to apply to the private law of contract principles that seem to derive from public law and the legal control of State power.[31]

The latter is a welcome development but one with limited application lower down the pyramid. Perhaps, the idea is that there will be a 'trickle down' effect to the second or middle segment of the pyramid, though it was not much evidence of 'trickle down' in *Bateman*. The second segment applies to what is probably still the majority of workers, though it is a category that is shrinking fast for a number of reasons. This is the category of workers who enjoy various employment rights by virtue of their legal status as 'employees'. These are workers whose contracts provide benefits, nothing like the benefits and bonuses available to bankers (who might as well inhabit a different planet), and indeed whose contracts are likely to be subject to detrimental variations in circumstances where the worker in question may have little option for practical (and perhaps also legal) reasons to accept. That aside, these are workers to whom minimum wage, working time, and unfair dismissal protections still apply, along with a raft of other protective legislation, the standards albeit typically set at a low level.

These rights on which this segment of the workforce relies are not enforceable in the ordinary courts, but in specialist tribunals which were designed to provide a cheap and accessible form of rough justice. Recent procedural changes, however, push this category closer to the third segment at the bottom of the pyramid which, as a result, continues to grow. Although workers in the second category may have statutory rights, these rights are increasingly difficult to enforce. Concern has been expressed in political circles about the large number of cases brought annually to employment tribunals, with the statistics for 2010-11 revealing a staggering 50,000 unfair dismissal cases alone. There is clearly a problem here, though there is no consensus about what that problem is.[32] Rather than see these statistics as evidence of a general problem of the misuse of employer power in the modern economy, the government, with the support of employers, has read this to mean that access to tribunals is too easy. As a result, employees bringing tribunal claims must now pay the State for the privilege of doing so, with the cost depending on the nature of the claim, but with unfair dismissal claims, for example, requiring the worker to pay £1,200 for the case to be heard.[33]

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[28] Though there are exceptions: *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157.
[29] These would be mainly the legal costs of the successful party, as well as also having to absorb one's own costs.
[30] See also in this vein, *Societe General, London Branch v Geys* [2012] UKSC 63, [2013] 1 AC 523. For background, see D Cabrelli and R Zahn, "The Elective and Automatic Theories of Termination at Common Law: Resolving the Conundrum?" (2012) 41 *Industrial Law Journal* 346.
[31] See, for a good example, *Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (QB), [2010] IRLR 606.
[32] For a discussion of this matter, see K D Ewing and J Hendy QC, "Unfair Dismissal Law Changes – Unfair?" (2012) 41 *Industrial Law Journal* 115. Compare D Mangan, "Employment Tribunal Reforms to Boost the Economy" (2013) 42 *Industrial Law Journal* 409.
[33] See Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, SI 2013 No 1893; *R (Unison) v Lord Chancellor* [2014] EWHC 218 (Admin) – legal challenge to fee regime fails. This is in addition to the legal and other

It is not surprising that the introduction of fees should have led to a massive decline in the number of tribunal applications, falling by 79 per cent as access to justice is beyond the means of many workers[34] and, in many cases, with the cost of bringing a claim exceeding its value.[35] In this way, formally protected workers in the middle segment fall unwittingly into the burgeoning segment of largely unprotected workers in the third segment at the bottom of the pyramid, and do so for procedural reasons. There, they will find workers who are there because they have no rights to enforce, usually because they do not fall within the statutory definition of employee, or because they do have sufficient continuous service as an employee to qualify for the bringing of a complaint. In order to bring an unfair dismissal complaint, the employee must now be continuously employed by the same employer for at least two years, which for one reason or another typically excludes temporary agency workers and zero hours contract workers, as well as those who have a bogus relationship of self-employment with their employer.[36]

A measure of the problems facing workers in this third segment is revealed by *James v Greenwich London Borough Council*,[37] where the applicant had been supplied to the council by an agency to perform services as a care worker. When the council changed the agencies from whom it recruited workers, Ms James changed to the new agency and continued to provide services to the council, though she was paid more by the new agency. She had a contract with the agency, not the council; and the contract stated expressly that she was engaged under a contract for services rather than a contract of service.[38] Following a period of sickness, Ms James was replaced by another worker from the same agency and brought a claim against the council that she had been unfairly dismissed, having worked for the council for three years as a result of her assignments by the two agencies. In order to bring a claim against the council, Ms James would have to establish that she was an employee, an argument she was never going to win. This is because there was "no obligation upon the claimant to provide her services to Greenwich Council and there was no obligation on the part of Greenwich Council to provide the claimant with work".[39]

V

Segmentation reinforces commodification, and indeed helps to create extreme forms of commodification, our virtual pyramid suggesting that more and more workers are gravitating from the second to the third segments as more practices are being developed and used by employers prepared to draw workers into the "orbit of the market",[40] stripped of even modest social protection.

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cost that the employee may encounter in enforcing his or her rights. It should be added that there is a complex system of fee remission for low paid workers.

[34] A decline that has caused concern even on the part of the most robust employer-side law firms, one of whom (who shall remain anonymous) reflected on 21 March 2014 that "Few employers opposed the introduction of Tribunal fees and there is little doubt that they have curbed claims perceived as dubious or tactical. That said, it is in the interest of all that the Tribunal system is stable, robust and fit for purpose. The fact that the figures could serve to re-enforce a perception that Tribunals are less accessible casts an unwelcome shadow over the future stability and certainty of the current system'.

[35] This would be true, for example, where the employer fails to provide a statement of the terms of the employment, unlawfully withholds wages, or fails to make a redundancy payment to those with short periods of service.

[36] Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, SI 2012 No 989.

[37] *James v Greenwich London Borough Council* [2008] EWCA Civ 35, [2008] ICR 545.

[38] This meant that she was a self- employed contractor rather than an employee of the agency.

[39] *James* above n 37 at [21] citing the decision of the employment tribunal.

[40] Polanyi, as quoted by S B Endresen "We Order 20 Bodies': Labour Hire and Alienation" in Bergene, Endresen and Knutsen (eds) above n 21 at 223.

But, while the need for regulation to counteract these developments is obvious, recent attempts to regulate one of the major groups of workers in the bottom third segment in order to provide protection and eliminate the worst forms of exploitation has backfired spectacularly. These are the attempts relating to temporary agency workers, who are said to represent a "purification of the commodity form of labour power",[41] the attempts at regulation leading, ironically, to the liberation of employers and to limited, contingent and porous protections for agency workers.

Unlike the EU Part-time Workers directive and the EU Fixed-term Workers directive,[42] the Temporary Agency Workers Directive (TAW Directive) was not the product of the social dialogue procedure in what is now the TFEU. The first of these two directives were a monument to another era now long past, and it is implausible to think that social dialogue will produce any more meaningful regulatory initiatives in the foreseeable future. For all practical purposes, social dialogue is dead as a regulatory tool, killed by the same logic that created the need regulatory intervention in the first place. So it is left to the political institutions to "strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalization".[43] But these are the same political institutions dominated by national governments, who include those who have consciously segmented their labour laws in the manner described above for reasons of competitive advantage in the global economy, and who are unlikely to welcome external threats which are inconsistent with the evolution of their regressive regulatory model.

It is, thus, hardly surprising that the TAW Directive should be, at best, seeking to reconcile contradictory impulses: to be simultaneously permissive and protective. Stripped of its presentational rhetoric; however, the first aim reflects the

> need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.[44]

In other words, the first purpose of the Directive is to remove national restrictions on the use of agency labour in those countries where it was not previously permitted, or where it was permitted but subject to tight regulation. This aim is reflected, in turn, in the provisions of Art 4 which requires the removal of "prohibitions or restrictions" on the use of temporary agency work, unless these prohibitions or restrictions can be justified,

> only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

In place of "prohibitions or restrictions" are measures designed "to ensure the protection of temporary agency workers and to improve the quality of temporary agency work".[45] But, as already suggested, the means by which protection is to be secured – the principle of equality – is deeply flawed. True, Art 5 expresses the principle in apparently wide and unequivocal terms:

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[41] At 223.

[42] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, and Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, respectively.

[43] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Preamble, Recital 9.

[44] TAW Directive, Art 2.

[45] Art 2.

> The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

But, all is not as it seems, with “basic working conditions then defined narrowly to mean only working and employment conditions relating to (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; and (ii) pay”.[46] It is then left to Member States to define what is meant by “pay” for these purposes,[47] while a major omission from the narrow scope of “basic working conditions” is any reference to job security for agency workers, particularly important in view of the real problems encountered by workers such as Ms James above.

But that is not all. Even this narrowly-scoped application of the principle of equal treatment is subject to exceptions. The first – labelled inappropriately as the ‘Swedish derogation’ in Art 5(2) – provides that the principle of equal treatment may be denied by national law to “temporary agency workers who have a permanent contract of employment with a temporary work agency”, and “continue to be paid in the time between assignments”. This is stated to be an acknowledgement of “the special protection such a contract offers”,[48] and acknowledges also that the agency assumes the risk of paying the worker even though no work is being done on behalf of a client. But it is a grotesquely inadequate provision, which imposes no obligation about the substance of the contract between the temporary agency worker and the agency. Thus, there is no obligation of proportionality, with the agency worker entitled to receive whatever the market will bear rather than what directly employed colleagues of the client are being paid. Nor is any provision made to regulate how much is paid between assignments. Is the agency worker entitled to be paid the same when not working, or only a fraction thereof, and if the latter, how big a fraction thereof?

The other major exception is what might be referred to as the ‘British derogation’ in Art 5(4). Although other countries have since made use of this provision, it appears to have been tailored specifically to deal with the United Kingdom in particular, applying only in Member States where

> there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area.[49]

Although this is a distinguishing feature of the British system of collective bargaining, it is far from clear why it is relevant to whether or not there should be a derogation from the principle of equal treatment. On the contrary, it might be argued that, in such systems, the regulatory deficit is likely to be greatest, and the need for regulatory intervention, therefore, most acute. Nevertheless, where these conditions are met, it is possible for the Member State in question to “establish arrangements concerning the basic working and employment conditions which derogate from the principle [of equal treatment]”.[50] It is specifically provided that “such arrangements may include a qualifying period for equal treatment”.[51]

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[46] Art 3(1)(f).
[47] It is to be noted that by virtue of Art 5(4), “Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions”. Here the find the language of obligation being used as a mask to disguise the fact these items may be excluded from the national implementation of the Directive.
[48] Preamble, Recital 15.
[49] Art 5(4).
[50] Art 5(4).
[51] Art 5(4).

The effect of this latter provision, of course, is to ride roughshod over the principle of equal treatment by providing that agency workers who are not employees of the agency have no right to equal treatment for a period of time not determined by the Directive. The old two-card trick is thus complete: no equal treatment if the agency worker is an employee of the agency, and used under a contract of service (Art 5(2)); and no equal treatment where the agency worker is not an employee of the agency, but used under a contract for services (Art 5(4)). The only protection for the worker is to be found in Art 5(5), which provides that

> Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive.

Although the latter is welcome, it is wholly inadequate. Measures against misuse do not remove the freedom of agencies to alter the way in which they use labour. Nor do they overcome the licence given to the agencies to avoid the commitment to equal treatment.

It is thus open to question just how effectively the TAW Directive overcomes the commodification of agency labour. The truth is that, perhaps, it was never intended to. Rather, by legitimising the practice of temporary agency work throughout the EU and beyond, the TAW Directive has reinforced the acute commodification of this form of labour, and has reinforced it still further by regulatory gaps in the protection the directive was ostensibly intended to provide. To this end, one easily overlooked provision of the directive stands as a metaphor for the text as whole. This is Art 6(2) which provides that

> Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void.

It is then provided, however, that temporary agencies may "receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers". [52] To adapt a well-known phrase, under EU law the worker has become "a commodity, no more, no less so than is the sugar".[53]

VI

The limitations of the TAW Directive were soon revealed by the implementing regulations in the United Kingdom, where every regulatory gap was fully exploited.[54] It begins with Regulation 5, which provides that the agency worker is entitled to the same basic working and employment conditions to which he or she would have been entitled had he or she had been directly recruited by the hirer. However, it is open to the agency to defeat the claim by establishing that the agency worker is working under the same relevant terms and conditions as a 'comparable employee'.[55] For this purpose a comparable employee means someone engaged on work which is the same or broadly similar, having regard to qualification and skills.[56] Even where there is no employee doing

[52] Compare under the Acquired Rights Directive, *Case C-132/91 C-138/91, C-139/91, Katsikas v Konstantinidis* [1992] ECR 1-6577.
[53] K Marx, *Wage Labour and Capital*, chapter 2.
[54] Agency Workers Regulations 2010, SI 2010 No 93.
[55] Reg 5(3).
[56] Reg 5(4)(a)(ii).

comparable work in the establishment where the agency worker is engaged, the claim can be defeated by the employer establishing that there is a comparable worker engaged elsewhere in the undertaking.[57]

It is important to note here that there may be several comparable workers, not all paid the same. There is no obligation on the part of the agency to identify the "most comparable" worker, and no presumption that the most comparable worker is the one who will best promote the principle of equal treatment. Indeed, it has been pointed out that there is no prohibition on the employer recruiting a "token" employee at a low wage in order to be the comparison for what may be a workforce heavily supplied by an agency.[58] The principle of equal treatment can, thus, be defeated either by the absence of a comparable worker (not unlikely where the employer is heavily segmented and dependent on agency workers), or by the presence of several categories of comparable worker (not unlikely where a large employer has a mixed workforce).

The main problem with the regulations, however, relates to the extent to which they have exploited the provisions of Art 5(4) and 5(2) of the Directive. So far, as the former is concerned, the regulations introduce a 12 week qualifying period, which is thought to have the effect of excluding from the scope of the principle of equal treatment about 40 per cent of the United Kingdom's estimated 1.3 million temporary agency workers.[59] It will be recalled that the Directive permits a qualifying period only after "consulting the social partners at national level and on the basis of an agreement concluded by them". This gives rise to questions about why the TUC would have made such a major concession to the government. Extracted on 22 May 2008 (some six months before the Directive was made), it seems that the agreement was a necessary condition of the British government's support for the directive, the TUC being placed in the invidious position of having to agree to business demands to exclude 40 per cent in order to secure protection for 60 per cent. Having secured this concession from the trade unions, the (Labour) government undertook to "engage with its European partners to seek agreement on the terms of the Agency Workers Directive".[60]

Implementing this agreement was far from straightforward, the regulations providing that "the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments".[61] The problem here is how to avoid employers effectively extending the qualifying period by (i) introducing short breaks in service, or by (ii) rotating staff and rotating functions, so that it never becomes possible for the agency worker to say that he or she has been continuously employed in the same role for 12 weeks. The danger is made clear in the regulations, which accept that an agency worker may work for the same user, but not in the same role, if the worker is assigned to a new role and the work or duties in that new role are "substantively different" from the previous role.[62] That said, however, two anti-abuse mechanisms are included in

[57] Reg 5(4)(b).
[58] A Davies, "The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity" (2010) 1 *European Labour Law Journal*.
[59] Department for Business, Enterprise and Regulatory Reform, *Explanatory Memorandum to the Agency Workers Regulations 2010* (2010) at 13. According to the government, "There is good reason to think the distribution of assignment lengths will change with the implementation of the Directive. One of the incentives to hirers will be to switch towards greater use of short-term agency working (i.e. assignments lasting less than 12 weeks) in an attempt to minimise costs. This will depend on the degree of extra cost, how sensitive hirers are to these cost changes, as well as the overall labour market situation and the feasibility of switching to shorter-term placements".
[60] Department for Business, Enterprise and Regulatory Reform, *Agency Workers: Joint Declaration by Government, the CBI and the TUC* (2008). The agreement was only a page in length.
[61] SI 2010 No 93, Reg 7(2).
[62] Reg 7(3).

the regulations, the first providing that weeks worked either side of a break or breaks in service can count in establishing the 12 week period of continuous employment. The other applies where roles are reassigned deliberately to prevent the worker from building up 12 weeks service in the same role.[63]

Although the 12 week qualifying period is a significant weakening of the protection offered by the regulations, it is nevertheless the other major concession to employers that has given rise to the greatest immediate concern.[64] This is the arrangement referred to as 'pay between assignments contracts', permitted by Art 5(2) of the Directive. This has been a major concern of trade unions, it being reported shortly after implementation that some agencies were issuing agency workers with contracts of employment in order to defeat the principle of equal treatment, and with unions claiming that, in some cases, agency workers were being paid up to £135 a week less than directly employed staff of the user for doing the same work.[65] There are clearly concerns to be overcome on the part of the agency before it issues agency staff with contracts of employment, not least because such a move transfers the risks associated with employment from the worker to the agency. If the agency staff are no longer self-employed, the agency will assume liabilities for maternity rights, redundancy and unfair dismissal, suggesting that the costs saved by taking people into direct employment would have to be considerable.[66]

This is a risk to the employer that becomes easier by virtue of the terms of Regulation 10, which requires the employer to provide only a minimum of one week's pay in any week during which the employee is not assigned to a client. It is a risk that becomes easier still if employers are to follow the example of one contract drawn to my attention in which the agency supplying dock workers places people on contracts of employment with *Bateman*-style terms, whereby

> the company reserves the right to vary these terms and conditions for operational, commercial of financial reasons according to the needs of the business. Any changes will be notified to you by direct correspondence.[67]

Not only does all this appear to contradict the terms of the Directive, it also directly contradicts the terms of the agreement between the government, the TUC and the CBI, which states clearly that there should be

> Appropriate anti-avoidance measures reflecting Art 9(2), in particular relating to the treatment of repeat contracts for the same worker and the position of workers with permanent contracts of employment with agencies who continue to be paid between assignments; it is not intended that Art 5(2) will be used to evade the aims of the Directive.[68]

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[63] Reg 9, which refers to "the most likely explanation for the structure of the assignment, or assignments' being that it was 'intended to prevent the agency worker from being entitled to, or from continuing to be entitled to, to the [right to equal treatment]" (Reg 9(4)).

[64] It has also given rise to a formal complaint to the European Commission by the TUC that the United Kingdom has failed properly to implement the Directive: TUC, *TUC Lodges Complaint against Government for Failing to Give Equal Pay to Agency Workers*, 2 September 2013.

[65] Above n64. See also the 'Justice for Agency Workers Campaign' by the Communication Workers Union to have this 'loophole' closed: <www.cwu.org/agency-loopholes.html>.

[66] See J Tanfield, 'What is the Swedish Derogation and could it be the Answer to your AWR Model?', *Global Recruiter*: <www.theglobalrecruiter.com/news/features/what-is-the-swedish-derogation-and-could-it-be-the-answer-to-your-awr-model-jim-tanfield-takes-a-look/3198>

[67] The contract also states explicitly that "by entering into this employment contract you are fully aware that you do not have any entitlement to equal pay in accordance with Regulation 12 of the Agency Workers Regulations".

[68] Department for Business, Enterprise and Regulatory Reform, *Agency Workers: Joint Declaration by Government, the CBI and the TUC*, above. The risk to the employer of "pay between assignments" contracts is also much easier for

But – as discussed above – even where the principle of equal treatment applies, it remains the case that it does not apply to all terms and conditions of employment, but only to those relating to pay, the duration of working time, night work, rest periods, rest breaks, and annual leave (including holiday pay). It is true that 'pay' is widely defined to mean "any sum payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emoluments referable to the employment, whether payable under contract or otherwise".[69] But it is also true that there is a list of exceptions long enough to fill every place in a football team. Thus, the definition of pay does not include occupational sick pay, pensions or allowances in connection with retirement, maternity or paternity pay, redundancy pay, payment for time off to take part in trade union duties.

VII

The treatment of temporary agency workers in the United Kingdom is a symptom of regulatory failure in an advanced post-industrialised economy now guided by neo-liberal policies. As Bergene, Endresen and Knutsen suggest, the expansion of agencies and the use of agency workers present formidable challenges for unions,[70] not least because it reflects a declining regulatory role of organised labour in the contemporary workplace.[71] But it is not only the trade union function that is mutating in the modern economy. So, too, are employment practices, with agency work being only form in which working people are being commodified. Mutation takes several forms, one of which we have already encountered. This is the mutation of the nature of regulated activity in order to avoid a regulatory framework, as in the paradoxical example of businesses moving their staff from self-employment to contracts of employment, in order to avoid the principle of equal treatment, by taking advantage of the misnamed 'Swedish derogation'.

But there are other ways by which employment practices can mutate, partly to ensure that employment falls beyond the regulator's reach. The experience of the last 20 years is that as certain forms of precarious working relationship has been the subject of regulation, so others have emerged to take their place. The EU has regulated for part time work, it has regulated to address the abuse of fixed-term contracts and, most recently, as we have discussed it has (albeit inadequately) responded to the problem of temporary agency work. But there is now a new virus that will be much more difficult to address, this being the virus called 'zero hours contracts'. Information about the prevalence of these arrangements attracted a great deal of publicity in the summer of 2013, when some effective journalism revealed failings on the part of the Office for National Statistics properly to account for the practice. The ONS had appeared grossly to underestimate the nature of the problem, as business after business was revealed to make use of such contracts.[72] Located heavily in retail, hospitality and social care sectors, it is impossible to say how many people are employed on zero hours contracts, revised official now at 1.4 million, believed likely to be an under-estimate.

The controversy about these contracts was fuelled more recently by newspaper claims that the State-owned RBS was recommending the use of such contracts to its small business clients, on the ground

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employers to take as a result of the recent changes to the enforcement of employment rights considered above. As was already discussed, these changes have priced the enforcement employment rights beyond the means of many workers, with vulnerable workers – such as agency workers – being likely to be among those most likely to be disadvantaged.

[69] SI 2010, No 93, Reg 6(2).

[70] Above n 21.

[71] K D Ewing, "The Function of Trade Unions" (2005) 34 *Industrial Law Journal* 1.

[72] *Guardian*, 9 March 2014. For a revised estimation from ONS, see *Guardian*, 1 May 2014.

that they are “ideal for employers whose businesses experience variations in demand”.[73] As the same newspaper correctly identified, what is involved in these contracts is the complete transfer of risk and responsibility from the employer to the worker, without the need to engage the services of a third party agency or labour supplier. The logic of the employer is why pay someone unless their services are formally required? This leads to arrangements whereby the employer directly retains a pool of workers (who may be required by the terms of the arrangement to provide exclusive service, and prohibited from working for others), and uses them only when work is available. These practices perhaps reflect the final commodification, in the sense that the worker is engaged ad-hoc only when labour is required, and paid only in return for the labour provided. There are no guaranteed hours, there is no regularity of employment, and there is no security of income. It is not surprising, then, that the average income of zero hours contract workers is below the average wage of both permanent staff and agency workers.[74]

For employers, it is the ultimate flexibility, and for workers it is the ultimate insecurity. So far, as the regulatory framework is concerned, two questions confront these workers. The first question is the question of their employment status. Are they employees (and, therefore, covered by statutory minimum standards), or are they self-employed (and, therefore, largely excluded from such standards)? The problem here is that the employer is not required to offer work to the individual, and if work is provided, there will often be a term in the contract that the individual is not required to accept the offer of an assignment, if unavailable for any reason. It will, thus, be difficult for the labourer to say that there is a ‘mutuality of obligation’, which under English law is an essential precondition of having the status of an employee under a contract of employment.[75] Although the courts have expressed concern about what are no more than sham arrangements to enable employers to avoid obligations to the people they employ,[76] arrangements of this kind are, nevertheless, common and have even been used to defeat claims by labourers that they have been victimised for reasons relating to trade union membership.[77]

More difficult, however, is the second question, which is that many employment rights have qualifying conditions that must be met, in particular that the employee must have been employed for a minimum period of time in order to be eligible for the benefit in question. This is not the case, of course, in relation to the national minimum wage, working time, or (now following the intervention of the CJEU) in relation to paid holidays. But in the case of other employment rights (such as those relating specifically to redundancy payments and unfair dismissal), there is a requirement that the employee should have been continuously employed for a period of what is now two years following recent Coalition-led changes.[78] Although legislation provides that various interruptions from employment (such as illness or maternity, as well as a host of others) do not break continuity of service,[79] an employee with an intermittent employment record as a result of engagement under a

[73] *Independent*, 7 April 2014.
[74] *Independent*, 9 April 2014. In addition, it is said that “more than three-quarters (76 per cent) of workers on zero-hours contracts in London and more than a half outside the capital earn less than the living wage which is currently fixed at £8.80 an hour in the capital and £7.65 elsewhere in the UK”.
[75] See *O’Kelly v Trust Houses Forte plc* [1984] 1 QB 90.
[76] See especially *Autoclenz Ltd v Belcher* above n 28. For comment, see A Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *Industrial Law Journal* 328.
[77] *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430, [2008] IRLR 505.
[78] In the case of unfair dismissal, the length of the qualifying period has fluctuated over the years, depending largely on the political complexion of the government in power at any one time. Labour governments have favoured six months to a year, while Conservative and Liberal Democrat governments have favoured two years. The last Labour government (1997-2010) reduced the qualifying period from two years to one year; the current Conservative- Liberal Democrat government reinstated the two year qualifying period.
[79] Employment Rights Act 1996, s 212.

zero hours contract is, nevertheless, unlikely to be able to satisfy a continuity of service requirement. This may be true even though the same employer may have engaged the employee in question for a number of years.

The widespread use of zero hours contracts in an abusive way, thus, presents a new regulatory challenge. Some commentators have drawn parallels with forms of employment that operated in a previous generation which, it had been thought, had been eradicated. The parallels were drawn in particular with the employment of dockworkers before the Second World War, when dockworkers would queue for work every day to be selected by the employer or his or her agent.[80] That practice was stopped by the introduction of the statutory National Dock Labour Scheme (since abolished) for the better regulation of working conditions. The challenge for trade unions today is to reproduce an effective regulatory framework in an environment where the voice and impact of trade unionism are much diminished since 1946 when the dock labour scheme was first introduced. The obvious regulatory solution is collective bargaining, which would accommodate the need for flexibility in a fair and structured environment. However, unlike in 1946 when collective bargaining density stood at 86 per cent, today, it is no more than 30 per cent and falling, being largely absent from the much of the private sector. [81]

There is no contemporary evidence to suggest that any future British government will confound the wishes of employers by engineering a restoration of the collective bargaining structures that were once prevalent in the United Kingdom, in common with much the rest of the EU.[82] The United Kingdom was the first EU member state to construct sectoral bargaining machinery, and the first to dismantle it. As a result, the most likely regulatory solution to the zero hours contract problem will be another round of legislation, likely again to be imperfectly tailored to the nature of the problem, producing an ill-fitting suit that sags at some crucial points and reveals great gaps at others. The basic problem, of course, is that, like water, work is a scarce global resource which needs to be rationed, with a regulatory focus now on minimum hours as much as maximum hours.[83] To that end, it ought to be possible to require employment contracts to specify the guaranteed minimum number of hours on a weekly and/or monthly and/or annual basis, and to regulate for abuse by providing that

[80] S Milne, 'Zero-hours Contracts: in Cameron's Britain, the Dockers' Line-up is Back', *The Guardian*, 6 August 2013.

[81] For a an excellent account of the legal and political context of collective bargaining decline in the United Kingdom see A Bogg *The Democratic Aspects of Trade Union Recognition* (Hart, Oxford, 2009). For proposals to rebuild collective bargaining machinery, see K D Ewing and J Hendy QC, *Reconstruction after the Crisis – A Manifesto for Collective Bargaining* (Institute of Employment Rights, Liverpool, 2013). This decline in levels of collective bargaining coverage raises other questions about compatibility with the Declaration on Social Justice, given the undertaking made by states when adopting the latter to "the effective recognition of the right to collective bargaining". The problem of ZHC workers also reinforces the insight in the Declaration about the importance of collective bargaining as a means of promoting all of the four strategic objectives of the Declaration.

[82] For an account of these structures, see Ministry of Labour, *Industrial Relations Handbook* (1961). There is now no Ministry of Labour and no representation of the voice of working people in government.

[83] For a precedent, see ILO Convention 47 (Forty Hour Week Convention, 1935), created in recognition of the fact that "unemployment has become so widespread and long continued that there are at the present time many millions of workers throughout the world suffering hardship and privation for which they are not themselves responsible and from which they are justly entitled to be relieved"; and that "it is desirable that workers should as far as practicable be enabled to share in the benefits of the rapid technical progress which is a characteristic of modern industry". Made in the aftermath of depression at a time of Keynesian expansion in many countries, this attempt to reduce working hours to 40 from 48 hours a week ("in such a manner that the standard of living is not reduced in consequence" (Art 1(a)) did not come into force until 1957 as a result of the low number of ratifications, by which time the reason for its existence had long since passed.

a worker may not be required to work more than a prescribed number of hours beyond the contractual minimum without penalty overtime rates.[84]

It is unlikely, however, that measures of this kind will be adopted, with the Labour Party proposing a number of initiatives, one of which would be to remove the exclusivity requirement that prevents workers on zero hours contracts from being permitted to work for other employers.[85] But apart from serving to legitimise the illegitimate, such a move could be counter-productive, allowing courts to draw conclusions about zero hours contract workers being self-employed contractors providing labour services to a range of clients. Labour's other proposal appeared to follow the twisted logic of the Agency Workers Regulatons 2010, by providing that workers on zero hours contracts will be entitled to be offered a standard hours contract after 12 weeks of employment on zero hours. But while this was better, it was most recently displaced by a much diluted commitment that will allow workers to request regular hours after six months and to be provided with regular hours after 12 months. It is unnecessary to say anything by way of comment, save that, "employers can already see ways to game these rules".[86]

VIII

All of which brings us back to the *Bateman* case with which this soliloquy began. The segmentation, commodification and mutation identified above take place in the context of the disintegration of the standard employment relationship. The latter is, thus, being challenged by both internal and external threats, returning the law to a primitive era when what is now known as labour law was known as the law of master and servant, for good reason.

To this end, it should be emphasised that the *Bateman* case is not alone in exposing what might be described as 'master and servant clauses', so called because they enable the employer unilaterally to change the terms of the engagement. As already suggested, the same kind of term was to be found in the standard form contracts of another large employer, in this case British Airways, which claimed the power to make 'reasonable changes' to the terms of employment of cabin crew.

The problem erupted, there, in a case involving the reduction in the number of cabin crew on long haul flights leading to the intensification of work for the reduced crew.[87] It was held that even if the change was not reasonable, the court would not, in any event, grant a remedy to prevent the change being imposed. This was because the balance of convenience was 'strongly' against such a course,[88] on the ground that it would impose 'a quite exceptional burden' on BA in terms of cost, planning and reorganisation.[89]

Problem compounded. Even if there is no right (of the employer), there is no remedy (for the employee). But this is by no means an isolated example of the capture of labour law and the betrayal of its historic purpose. Austerity has led to employers – mainly in the public sector – making changes to working conditions, in circumstances where the employer has omitted to impose

[84] K D Ewing, 'Zero Hours Contracts: Some Policy Proposals' (Institute of Employment Rights, Liverpool, 2013), where these core ideas are more fully developed.
[85] *The Guardian*, 8 September 2013.
[86] *The Guardian*, 1 May 2014. Government proposals are imminent. Labour has made it very easy for the government.
[87] *Malone v British Airways plc* [2010] EWHC 302 (QB), [2010] IRLR 32.
[88] At [32]
[89] At [31].

'master and servant clauses' in employment contracts. The normal rule in such circumstances is that no change can be imposed without the consent of the employee.

Yet, we find public sector employers imposing large-scale changes on thousands of employees, in the case of Birmingham City Council alone, the changes covering some 26,000 employees.[90] The various employers were able to do this by capturing and exploiting what had been designed as a protective redundancy consultation procedure introduced by the Collective Redundancies Directive,[91] in what many saw as a cynical manoeuvre to drive through change.

Employers apparently with no intention of dismissing anyone for reason of redundancy, nevertheless, issued redundancy consultation notices to trade unions effectively to impose a timetable on consultations. The unions were, thus, consulting with a gun at their heads: either agree to change the terms and conditions of members (to their detriment) or risk the selective dismissal of their members who, in some cases, would be left to reapply for their jobs on reduced terms in a competitive process. The unions typically agreed to the changes.[92]

In these ways, the standard employment relationship is being developed in a manner that suits the interests of employers, the law both facilitating the naked exercise of employer power and, inadvertently, providing procedural frameworks within which that power can be exercised. It is a short step from this to remove altogether the substantive rights that derive from the standard form contract, including the right not to be unfairly dismissed which, as we have seen, is being gradually removed by stealth.

This erosion of substantive rights is, however, an ongoing and dynamic process, as most vividly revealed by a study authored by a venture capitalist, commissioned by the Prime Minister's Office in 2010. It was the view of Mr. Adrian Beecroft that if unfair dismissal law could not be abolished altogether, a new 'no fault dismissal' scheme should be introduced, enabling employers to dispose of workers who were allegedly under-performing at a minimum cost to the employer.[93] The proposal does not yet have enough political support.[94]

IX

The problems of segmentation, commodification and mutation referred to above have been deliberately sandwiched in this essay between two slices of evidence that the standard employment relationship is disintegrating. **As the distinction between standard and non-standard employment begins to dissolve, the relationships from which employers are seeking to escape are becoming more like the relationships to which they are seeking to move**.

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[90] G Gall, *Guardian CiF*, 7 July 2011.
[91] Council Directive 98/59/EC of 20 July 1998, implemented in United Kingdom by Trade Union and Labour Relations (Consolidation) Act 1992, s 188 and following (as amended).
[92] For a brief discussion of this process, see H Collins, K D Ewing and A McColgan, *Labour Law* (Cambridge University press, Cambridge, 2012) at 623-4.
[93] A Beecroft, *Report on Employment Law* (2011). For comment, see K Ewing, *Morning Star*, 24 May 2012, ('24 pages of ideological poison').
[94] According to the (Liberal Democrat) Secretary of State for Business, Inovation and Skills, "The UK already has one of the most flexible labour markets in the world . . . At a time when workers are proving to be flexible in difficult economic conditions it would almost certainly be counterproductive to increase fear of dismissal": BIS, *Statement by Vince Cable on the Beecroft Report on Employment Law*, 21 May 2012..

The dispossession of workers' legal protection and the ineffectiveness of labour law are, thus, profound. Segmentation, commodification and mutation are symptoms and consequences of that ineffectiveness. Segmentation is caused by a failure to observe (i) the first principle of effectiveness to the extent that some workers have no rights, (ii) the second principle of effectiveness to the extent that different workers have rights of variable quality which, in some cases, are unable to meet the limited standards of the Declaration on Social Justice; and (iii) the third principle of effectiveness to the extent that workers lack the capacity or the same capacity to enforce their rights.

Commodification is a direct challenge not only to the principles of the ILO Declaration on Social Justice, but even more profoundly to the first principle of the Declaration of Philadelphia.[95] Commodification is to be seen in the explosion of agency work and the use of zero hours contracts, which appear to be growing out of control, like a virus exploiting the lack of any form of medical intervention. As such, commodification is a direct result of labour law's ineffectiveness, a consequence of the failure to ensure the robust application of the first principle that labour law should be universal in its scope, a failure clearly revealed by the *James* case (above), the TAW Directive, and the Agency Workers Regulations.

Although commodification is mainly about the failure of the first principle (the denial of some workers any protection), it also leads to a failure of the second in the sense that this extreme form of commodification leaves workers with few rights, and certainly without rights that would meet the expectations of the Declaration. To the extent that rights have been created by legislation, these were accompanied by measures that enable employers to escape the regulatory framework in what could only be described as a carefully constructed attempt to create by legislation a form of labour protection that would be ineffective. Ineffectiveness has been a deliberate policy choice, about to be repeated in relation to ZHCs.[96]

Mutation is, likewise, a symptom of ineffectiveness, in the sense that it allows employers to develop practices that escape the regulatory framework as a result of the lack of comprehensiveness of labour law's scope (principle 1), enabling these employers to make little commitment to substantive terms and conditions (principle 2), leaving workers with few rights to enforce, but in many cases without the means to enforce these rights (principle 3). The main issue of ineffectiveness here, however, is almost certainly the lack of universality that enables employers to take advantage of gaps that governments are largely unwilling to close, even when publicly exposed.

Yet, while segmentation, commodification and mutation reveal clear evidence of ineffectiveness, cases like *Bateman* and *Malone* reveal an even more worrying sign of a different kind of ineffectiveness. Here, the focus is not so much with labour law's scope (principle 1), as it is with its failure to constrain the nature of employer power (principle 2), or to enforce contracts where their terms have been breached (principle 3).

X

The Declaration on Social Justice is an important document that commits governments to various forms of action to put decent work at the centre of economic and social policies.[97] Integral to one of the four strategic objectives for the development of this agenda is the idea of effective labour law.

[95] 'Labour is not a commodity'. Compare K Marx above n 53.

[96] This point is pursued more generally in K D Ewing, "Future Prospects for Labour Law – Lessons from the United Kingdom" in J Riley and P Sheldon (eds), *Remaking Australian Industrial Relations* (CCH, Sydney, 2008).

[97] ILO Declaration on Social Justice for a Fair Globalisation (2008) Part IIB.

As already suggested, this is an interesting and intriguing idea, and one that demands more attention and fuller treatment than has been possible here, the preliminary inquiry above having identified three basic principles of effectiveness.

But even if we take the idea at the most elementary level proposed above, it is clear that in the United Kingdom at least, it is an idea that is not respected. Apart from the exclusion of many workers from labour law protection, perhaps the most visible illustration of this relates to recent steps to charge what appear to be prohibitively high fees for the enforcement of employment rights. This lack of respect is important not just because of the consequences for workers affected, but even more fundamentally from the lawyer's perspective because it reflects a failure on the part of government to comply with undertakings solemnly undertaken.

Moreover, in 2008, ILO Member States did not simply commit themselves to follow a series of optional principles and random strategic objectives when they adopted the Directive. It also committed them to methods of implementation that would impose obligations on the ILO as an organisation, as well as on member states individually.[98] Although, no doubt not on the radar of most governments at the moment (if ever in recent times), the Declaration makes clear that Members "have a key responsibility to contribute, through their social and economic policy, to the realisation of a global and integrated strategy for the implementation of the strategic objectives", which encompass the Decent Work Agenda.

And while making clear that it is up to each Member State to determine how to discharge its responsibilities (in consultation with the social partners), they are each urged to consider taking seven different initiatives for this purpose. It is the responsibility of labour lawyers to be informed about these obligations and to remind governments that they were voluntarily accepted at the time the Declaration was adopted. Having made these commitments, governments have a duty to comply with them, the first being "the adoption of a national or regional strategy for decent work", aimed at "targeting a set of priorities for the integrated pursuit of the strategic objectives".[99]

If anyone is reading this, they may like to ask just what steps are being taken by their own national government to this end, the obligation of not being to select one or two aspects of the agenda (such as job creation), but all aspects, including the development of an effective labour law. Although not defined, it would be a good start for national governments to develop their own understanding of the term, and to do so in consultation with the social partners, as the Declaration appears to require. At the risk of repetition and of sounding platitudinous and trite, an effective labour law is surely the first step in regulating for decent work.

This paper is based on a presentation at the Second New Zealand Labour Law Society Conference, "Regulating for Decent Work", at AUT University on 22 November 2013.

My thanks to Pam Nuttall and her colleagues for inviting me to speak at the event.

[98] Part IIB.
[99] Ibid, Part IIB(i).