

## *Agency Workers: a Labour Anomaly or the New Norm?*

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### I. INTRODUCTION

The growing phenomenon of agency workers demonstrates how the current legal framework concerning employment status in England and Wales is inadequate and in desperate need of statutory intervention.<sup>1</sup> An agency worker (AW) is an individual who is “supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer [the ‘end-user’]”.<sup>2</sup> As whether AWs are ‘atypical’ depends on the perspective taken, the question posed requires a vast oversimplification of the subject matter.<sup>3</sup> For reasons of scope, this paper will primarily narrow its focus to whether AWs are ‘atypical’ from a legal perspective, before then broadening its focus to account for prominent socio-economic trends

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<sup>1</sup> Donald Storrie, ‘Temporary Agency Work in the European Union’ (*European Foundation for the Improvement of Living and Working Conditions*, 2002) 1 <<http://edz.bib.uni-mannheim.de/www-edz/pdf/ef/02/ef0202en.pdf>> (accessed 14 October 2020); Michael Wynn and Patricia Leighton, ‘Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of the Temporary Agency Worker’ (2006) 35(3) *Industrial Law Journal* 301, 301; Sonia McKay and Eugenia Markova, ‘Agency and Migrant Workers Literature Review’ (2008) Working Lives Research Institute, 3 <<http://www.vulnerableworkers.org.uk/wp-content/uploads/2008/08/literature-review-final.pdf>> (accessed 6 October 2020).

<sup>2</sup> Agency Workers Regulations 2010 (SI 2010/93), Reg 3(1)(a); *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217 (CA) [9] (Mummery LJ).

<sup>3</sup> Andries De Grip, Jeroen Hoevenberg and Ed Willems, ‘Atypical Employment in the European Union’ (1997) 136(1) *International Labour Review* 49, 49–50.

in the employment sphere; in order to provide a practical proposal for how the law may be reformed.

This paper will show how AWs shed light on how the law on employment status is inadequate in three ways. Firstly, it will be shown that agency workers are ‘atypical’ as they do not conform with the binary nature of the current law. Secondly, the failure and inherent inability of the common law to accommodate AWs will be considered. Lastly, it will be demonstrated that statutory reform on a broad scale is the only suitable vehicle for resolving this area of law. This paper will therefore conclude that as AWs are poorly accommodated by the current law, they serve to illuminate the law’s failure to adjust to the changing socio-economic climate in which employment law operates and thus, statutory reform is long overdue.

## II. AGENCY WORKERS AS ‘ATYPICAL’?

Firstly, it will be shown that AWs are ‘atypical’ as they do not conform with the binary nature of the current law. This necessitates two considerations: what constitutes a ‘typical’ worker in law, with the term ‘worker’ here being attributed its neutral meaning, and whether or not AWs can be reconciled with this understanding. In law, a ‘typical’ worker may be regarded as an ‘employee’: one who enters into or works under a “contract of employment”.<sup>4</sup> To be an employee, this must be a “contract of service” rather than a “contract for service”; with the latter indicating self-employment.<sup>5</sup> The law has been somewhat progressive in incorporating ‘fixed-term’ and ‘part-time’ workers into the employee definition, alongside affording some rights to a self-contained category of ‘workers’.<sup>6</sup> However the law has generally preserved its binary architecture and the ‘typical’ worker remains either an employee or self-employed.<sup>7</sup>

<sup>4</sup> Employment Rights Act 1996 (ERA) s 230(1).

<sup>5</sup> *ibid* s 230(2).

<sup>6</sup> ERA s 230(3); Council Directive 1999/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP [1999] OJ L175, Art 3; The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), Reg 2(1); Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034), Reg 1(2). See also Chrispas Nyombi, ‘A Response to the Challenges Posed by the Binary Divide between Employee and Self-Employed’ (2015) 57(1) *International Journal of Law and Management* 3, 5.

<sup>7</sup> *Hobbs v Young* [1689] 91 ER 517, 517; *Byrne Brothers (Formwork) Limited v Baird* [2001] UKEAT 542/01 [21] (Mr Recorder Underhill QC); *Webley v Department for Work and Pensions* [2005] EWCA Civ 1745 (CA) [43]–[45] (Wall LJ).

AWs do not conform with this binary and are therefore ‘atypical’.<sup>8</sup> The reasons for this are twofold. Firstly, an agency relationship is usually missing one or more of the following: a full-time contract; a single employer; an indefinite period of time; personal service; or employer premises.<sup>9</sup> Secondly, this is significant as such factors correlate with the common law requirements for employee status: notably personal service, mutuality of obligations, and that the employer has a significant right of control over the individual.<sup>10</sup> There is often a lack of personal service in agency work as the end-user has not contracted for a specific individual.<sup>11</sup> There is an exception to this rule, stating that a substitute may be sent if selected from an “approved... list”, which might suggest that AWs are not ‘atypical’.<sup>12</sup> Such an exception might facilitate an AW seeking to establish employee status, as any substitute sent in an agency context is likely to be from the “list” of those “approved” by the agency.<sup>13</sup> However this view is limited as an AW must also fulfil the remaining elements; the mutuality of obligations and right of control, which is unlikely as an AW is rarely paid directly by, or is subordinate to, the end-user.<sup>14</sup>

Even if all of the above elements were present, an AW is unlikely to fulfil the test by default. This is because the test assumes that the ‘worker’ is performing duties for the same party that they have contracted with; which is not the case in an agency context.<sup>15</sup> Instead, the agency relationship is plagued by an unanswered and cyclical question: with whom does an AW have a contract, the agency or the end-user (the contract question)?<sup>16</sup> As the strictly binary law provides no definitive answer, it is almost impossible for an AW to establish employee status.<sup>17</sup> The AW is consequently denied valuable rights available to employees, such as holiday allowances, redundancy, sick and maternity pay, and protection from unfair dismissal.<sup>18</sup> From a legal perspective, therefore, AWs are atypical due to the law’s

<sup>8</sup> Nyombi (n 6) 5.

<sup>9</sup> David Cabrelli, *Employment Law in Context: Text and Materials* (3rd edn, Oxford University Press 2018) 101.

<sup>10</sup> *Express and Echo Publications v Tanton* [1999] 3 WLUK 216 (CA) 700 (Peter Gibson LJ); *Carmichael v National Power Plc* [1999] 1 WLR 2042 (HL) 2051 (Lord Hoffmann); *MacFarlane v Glasgow City Council* [2000] IRLR 7 (EAT) [10] (Lindsay J).

<sup>11</sup> McKay and Markova (n 1) 3.

<sup>12</sup> *MacFarlane v Glasgow City Council* (n 10) [13] (Lindsay J).

<sup>13</sup> *ibid.*

<sup>14</sup> *Consistent Group Ltd v Kalwak* [2007] EWCA Civ 430 (CA) [57]–[58] (Elias J).

<sup>15</sup> Storrie (n 1) 23; Wynn and Leighton, ‘Will the Real Employer Please Stand Up?’ (n 1) 311; Keith Ewing, ‘Future Prospects for Labour Law – Lessons From the United Kingdom’ (2008) 18(2) *The Economic and Labour Relations Review* 103, 105.

<sup>16</sup> Storrie (n 1) 8.

<sup>17</sup> Nyombi (n 6) 3. See also *Hobbs v Young* (n 7) 517; *Byrne Brothers v Baird* (n 7) [17] (Mr Recorder Underhill QC).

<sup>18</sup> ERA ss 1(d)(i), 71–78, 88, 98(1)–(4), 135, 155.

binary approach and the statement in question is accurate. Although, as will be considered later in this paper, this contention is only justified through the lens of the current legislative framework.<sup>19</sup>

## II. COMMON LAW INADEQUACY

This paper's second assertion is that the courts have failed to provide an adequate answer to the contract question, and therefore find employee status for AWs.<sup>20</sup> Three devices deployed by the courts demonstrate this: applying the traditional tests for employee status; implying a contract of employment; and broadening the mutuality of obligations principle. Whether the issue posed by AWs can be answered at all through the common law will also be considered.

### A. APPLYING THE TRADITIONAL TESTS FOR EMPLOYEE STATUS

Firstly, the courts in applying the traditional tests for employee status in cases concerning AWs have maintained the status quo.<sup>21</sup> The multiple test, which fused together all existing tests, will be this paper's focus for reasons of scope.<sup>22</sup> For employee status, this test requires that the individual in question is a "servant" that agrees with a "master" to provide their services in exchange for a wage; is "subject" to that "master[']s contract" in sufficient degree; and in such contract there are no terms inconsistent with a contract of service.<sup>23</sup> Holistically, the test is akin to the aforementioned mutuality of obligations requirement which, as stated above, is elusive in the AW context. This has meant that AWs have generally failed this test.<sup>24</sup> This conservative approach is epitomised by the test's preservation of the 'master-servant' dynamic, which only captures the 'typical' employment relationship rather than one of a multilateral nature.<sup>25</sup> Other tests such as the integration test, which requires a significant degree of 'integration' in a business on the worker's part for employee status, at first appear to provide a more flexible approach which would be

<sup>19</sup> Efrén Córdova, 'From Full-Time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations?' (1986) 125(6) *International Labour Review* 641, 642.

<sup>20</sup> Nicole Busby and David Christie, 'The Regulation of Temporary Agency Work in the European Union' (2005) 36(1) *Cambrian Law Review* 15, 18.

<sup>21</sup> Wynn and Leighton, 'Will the Real Employer Please Stand Up?' (n 1) 301.

<sup>22</sup> *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515 (McKenna J).

<sup>23</sup> *ibid.*

<sup>24</sup> *Wickens v Champion Employment* [1984] ICR 365 (EAT) [21] (Nolan J); *Ironmonger v Movefield Ltd (t/a Deering Appointments)* [1988] IRLR 461 (EAT) [21] (Wood J); *McMeehan v Secretary of State for Employment* [1997] 12 WLUK 192 (CA) 562–563 (Waite LJ).

<sup>25</sup> *Tevens v Noakes* [1880] 6 QBD 530 (CA) 537 (Bramwell LJ).

more favourable to AWs.<sup>26</sup> Yet even this apparent flexibility has been stifled by the court's reluctance to depart from established principles; demonstrated by the fact that the demarcation line for 'integral' in the integration test has been interpreted in line with the orthodox 'employee-self-employed' binary.<sup>27</sup> As a result, the courts have failed to apply the traditional tests for employee status in AW cases.<sup>28</sup>

## B. IMPLYING A CONTRACT OF EMPLOYMENT

Secondly, the courts have also sought to imply a contract of employment between AWs and an end-user, in accordance with section 230(2) of the Employment Rights Act 1996 (ERA), to establish employee status.<sup>29</sup> This has been led by Lord Mummery in a series of cases: *Frank v Reuters*, *Dacas v Brook Street Bureau*, and *Cable & Wireless v Muscat*.<sup>30</sup> However, Reynold argues this has been pursued at the expense of one of the most fundamental legal principles: the *Aramis* principle.<sup>31</sup> This states that when implying a contract it is necessary to identify that such was intended by the parties.<sup>32</sup> As Bingham LJ has said, the lack of any such intention will be "fatal" to such an "implication".<sup>33</sup> In the context of AWs, as there is a lack of certainty as to which of the parties a contract should be implied between in the first place,<sup>34</sup> the only way to attribute intention in such an arrangement would be to fictionalise the intention itself by inferring that a multilateral intention must exist between all the parties for a contract to exist between two of those involved.<sup>35</sup> Such a legal fiction would be undoubtedly "fatal" to an implication and it is perhaps for this reason that the courts in *Frank*, *Dacas* and *Muscat* chose to overlook the *Aramis* principle.<sup>36</sup> Had the *Aramis* test been applied in *Muscat*, for example, there is no "plausible basis" on which it would have been satisfied; especially as the end-user did not pay the AW directly as is common in agency work.<sup>37</sup>

<sup>26</sup> *Stevenson Jordon & Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 (CA) 110 (Denning LJ).

<sup>27</sup> *Stevenson v Macdonald* (n 26) 111 (Denning LJ); *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2006] EWCA Civ 1151 (CA) [79] (Rix LJ); *E v English Province of Our Lady of Charity and another* [2013] EWCA Civ 938 (CA) 771 (Ward LJ).

<sup>28</sup> Dominik Arnold, 'Temporary Agency Workers in the UK: Who Is the Employer and Can Certainty Be Avoided?' (2013) Bristol Law Review 9, 33.

<sup>29</sup> ERA s 230(2); Frederic Reynold, 'The Status of Agency Workers: A Question of Legal Principle' (2006) 35(3) Industrial Law Journal 320, 320.

<sup>30</sup> *Frank v Reuters Ltd* [2003] ICR 1166 (CA) 1174-1175 (Mummery LJ); *Dacas v Brook Street Bureau* (n 2) [53], [69] (Mummery LJ); *Cable & Wireless Plc v Muscat* [2006] ICR 975 (CA) 990-992 (Smith LJ).

<sup>31</sup> *The Aramis* [1989] 1 Lloyd's Rep 213 (CA) 224 (Bingham LJ); Reynold (n 29) 320.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.* See also Hugh Beale, *Chitty on Contracts* (29th edn, Sweet & Maxwell 2004) paras 1-066.

<sup>34</sup> Storrie (n 1) 8.

<sup>35</sup> Wynn and Leighton, 'Will the Real Employer Please Stand Up?' (n 1) 303.

<sup>36</sup> *Frank v Reuters* (n 30); *Dacas v Brook Street Bureau* (n 2); *Cable & Wireless v Muscat* (n 30).

<sup>37</sup> *The Aramis* (n 31) 224 (Bingham LJ).

*Muscat* also highlights how the courts' approach can disadvantage an AW.<sup>38</sup> For example, the court implied a contract in this case despite the fact that under the revised IR35 taxation scheme, the AW may have instead been found to be a 'quasi-dependent worker', with more rights akin to an ordinary employee than under the contract that was implied.<sup>39</sup> The outcome can be equally abstruse for an agency or end-user, as was the case in *Royal National Lifeboat Institution v Bushaway*, where an expressed contract for short-term services between an AW and their agency was used to imply a permanent contract between the AW and the end-user.<sup>40</sup>

The courts have since retreated from cases such as *Dacas* by holding in *James v Greenwich London Borough Council* that a contract can only be implied within the scope of the usual criteria of an employment contract.<sup>41</sup> Yet this case did little to clarify the law, as Lord Elias somewhat contradicted the *ratio* by noting, *obiter*, that the length of time worked by an AW, and whether a substitute could be sent, could be considered when implying a contract.<sup>42</sup> Nevertheless, the overall position post-*James* appears to be that only in "rare" cases will an AW be found to be an employee, with the unsatisfactory effect being to return the AW to its former "vulnerable" existence leaving the contract question unanswered.<sup>43</sup> Hence, the courts' have failed to resolve the issue of AW status through implying a contract.

### C. BROADENING THE MUTUALITY OF OBLIGATIONS

#### PRINCIPLE

Lastly, alongside the implied contract approach, the courts have sought to pursue another remedial course by adapting the mutuality of obligations principle.<sup>44</sup> It has already been noted that there can be no mutuality of obligations in most AW relationships due to the absence of the AW's definitive subordination to either the agency or the end-user.<sup>45</sup> However the courts have sought to broaden the mutuality of obligations requirement for employee status to the extent that

<sup>38</sup> *Cable & Wireless v Muscat* (n 30) 990 (Smith LJ).

<sup>39</sup> *ibid.* See also Nicole Busby, 'IR35: Resolution of a Taxing Problem?' (2002) 31(2) *Industrial Law Journal* 172, 173; Simon Deakin and Gillian Morris, *Labour Law* (5th edn, Hart Publishing 2009) 168.

<sup>40</sup> *Royal National Lifeboat Institution v Bushaway* [2005] IRLR 674 (EAT) [47] (Reid J).

<sup>41</sup> *James v Greenwich London Borough Council* [2008] ICR 545 (CA) 558 (Mummery LJ). See also *Muschett v HM Prison Service* [2010] EWCA Civ 25 (CA) [38] (Rimer LJ).

<sup>42</sup> *James v Greenwich London Borough Council* (n 41) 558 (Elias LJ).

<sup>43</sup> International Labour Organisation, 'Celebration of the 60th Anniversary of Convention No 98: The Right to Organise and Collective Bargaining in the Twenty-First Century' (International Labour Organisation 2010) 4.

<sup>44</sup> *Carmichael v National Power* (n 10) 2051 (Lord Hoffmann); *Cotswold Developments Construction Ltd v Williams* [2005] IRLR 181 (EAT) [55] (Langstaff J).

<sup>45</sup> *Consistent Group v Kalwak* (n 14) [57]–[58] (Elias J).

only “some” obligation to work for “some” party is necessary: an “irreducible minimum of obligation”.<sup>46</sup> This would appear more accommodative to AWs, as the contractual enigma is less likely to hinder a court finding employee status.<sup>47</sup> However this development has only served to complicate the law further as it cannot be reconciled with the decisions in both *Muscat* and *Bushaway*.<sup>48</sup> In addition, even if this broadening did assist the AW in achieving employee status, the contractual question still remains unanswered. Given that a number of authorities suggest that a contract cannot exist with an end-user as the obligation to pay the AW’s wages remains with the agency, it may be that the only logical answer is that the AW has a contract with the agency.<sup>49</sup> Yet this outcome would again conflict with the line of authority where the courts have implied a contract between the AW and the end-user.<sup>50</sup> Ultimately, judicial attempts to broaden the mutuality of obligations principle are yet another example of how the courts have failed to resolve the issue of AW status.<sup>51</sup>

It is however arguable that the courts’ failures are justified. This can be considered in two ways. Firstly, Davidov and Freeland assert that there is less need to carve out a common law solution to AWs due to the fact that they may be subsumed into the ‘worker’ category.<sup>52</sup> Underlying this assertion is the notion that the term ‘worker’ includes AWs, alongside casual and freelance workers.<sup>53</sup> Indeed, this is how it is defined within the European Union’s (EU) Working Time Directive 2003, which was transposed into domestic law by the Working Time Regulations 1998.<sup>54</sup> The Tribunal’s contention in *Byrne Brothers v Baird* that workers include all those in a “dependent” position would also appear to welcome AWs into the definition, particularly as the Court of Appeal and House of Lords have taken a consonant approach to the term.<sup>55</sup> If ‘worker’ is ascribed this more expansive definition, this would be advantageous for AWs for two reasons. Firstly, there is

<sup>46</sup> *Cotswold Developments v Williams* (n 44) [55] (Langstaff J).

<sup>47</sup> Anne Davies, ‘Casual Workers and Continuity of Employment’ (2006) 35(2) *Industrial Law Journal* 196, 201.

<sup>48</sup> *Cable & Wireless v Muscat* (n 30); *Royal National Lifeboat Institution v Bushaway* (n 40).

<sup>49</sup> *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 (EAT) [26], [36] (Elias J).

<sup>50</sup> *Stephenson v Delphi* (n 49) 481 (Elias J); *Cotswold v Williams* (n 44) [47] (Langstaff J).

<sup>51</sup> *Cotswold v Williams* (n 44) [47] (Langstaff J).

<sup>52</sup> Mark Freedland, *The Personal Employment Contract* (Oxford University Press 2003) 23; Guy Davidov, ‘Who is a Worker?’ (2005) 34(1) *Industrial Law Journal* 57, 57–58.

<sup>53</sup> *ibid.*

<sup>54</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 Concerning Certain Aspects of the Organisation of Working Time [2003] OJ L 299, Arts 2, 17 and 23; Working Time Regulations 1998 (SI 1998/1833), Reg 2(1).

<sup>55</sup> *Byrne Brothers v Baird* (n 7) [17] (Mr Recorder Underhill QC); *Relaxion Group plc v Rhys-Harper* [2003] UKHL 33 [98], [218] (Lord Nicholls); *Dacas v Brook Street Bureau* (n 2) [18] (Mummery LJ).

an increasing number of Acts and regulations attributing rights to ‘workers’.<sup>56</sup> For example, section 230(3) of the ERA now entitles ‘workers’, and therefore AWs, with rights to the minimum wage and part-time work.<sup>57</sup> Secondly, the courts have generally taken a more flexible approach to the mutuality of obligations requirement when establishing ‘worker status’, meaning that this would be less hindering to AWs seeking such a finding.<sup>58</sup> If this trajectory is accurate and AWs are within the ambit of the ‘worker’ definition, it would be unnecessary for the courts to provide a solution to AW status.

However this line of argument oversimplifies the matter. As noted by Deakin and Morris, the contention that AWs may find refuge under the ‘worker’ definition overlooks the fact that the courts continue to apply the traditional employee requirements when determining worker status.<sup>59</sup> In *Byrne Brothers v Baird*, the Tribunal affirmed that personal service and contractual relations remain threshold requirements for worker status; a point that has been diligently upheld by the higher courts in cases such as *Redrow Homes v Wright* and *Dacas v Brook Street Bureau*.<sup>60</sup> In practice, the retention of the personal service requirement has meant that substitution clauses have been fatal to AWs seeking ‘worker’ status, a point neglected by Davidov and Freedland.<sup>61</sup> Given that substitution of personnel usually characterises agency work, such an outcome for AWs seeking worker status is unsurprising.<sup>62</sup> For this reason, AWs and other ‘atypical’ working relationships are unlikely to benefit from any increase in rights for ‘workers’.<sup>63</sup> This is only bolstered by recent regulation such as the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002; which connote a retreat from the ‘worker’ category by opting to use the narrower ‘employee’ concept instead.<sup>64</sup>

A second, more convincing argument is advanced by Freedland, who contends that the courts cannot be blamed for failing to answer the contract

<sup>56</sup> Freedland (n 52) 23; Davidov, ‘Who is a Worker?’ (n 52) 57.

<sup>57</sup> ERA ss 1(2)(a), 230(3).

<sup>58</sup> *Redrow Homes (Yorkshire) Ltd v Wright* [2004] EWCA Civ 469 (CA) [20]–[21] (Pill LJ); *Dacas v Brook Street Bureau* (n 2) [53], [75] (Mummery LJ).

<sup>59</sup> Deakin and Morris (n 39) 168.

<sup>60</sup> *Byrne Brothers v Baird* (n 7) [15]–[16], 25 (Mr Recorder Underhill QC); *Redrow Homes v Wright* (n 58) [21] (Pill LJ); *Dacas v Brook Street Bureau* (n 2) [69] (Mummery LJ).

<sup>61</sup> Freedland (n 52) 23; Davidov, ‘Who is a Worker?’ (n 52) 57; Deakin and Morris (n 39) 152.

<sup>62</sup> Deakin and Morris (n 39) 152.

<sup>63</sup> *ibid.*

<sup>64</sup> Maternity and Parental Leave Regulations 1999 (SI 1999/3312), Reg 2(1); Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations (n 6) Reg 2(1); The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002/3236), Reg 2(1).



question due to the glaring statutory vacuum in this area.<sup>65</sup> Indeed, the “absence of job protection for agency workers” is a political not judicial error, as has been highlighted by Lord Mummery.<sup>66</sup> The Employment Agencies Act 1973, the Conduct of Employment Agencies and Employment Businesses Regulations 2003, the Conduct of Employment Agencies and Employment Business Regulations 2003 and the Agency Workers Regulations 2010 currently regulate the terms of agreement in agency work, the charging fees that agencies can impose on AWs, and the right of AWs to be treated on a par with other workers after twelve weeks with an end-user.<sup>67</sup> However these regulations are limited. The 2003 regulations fail to identify with whom the “contractual nexus” exists, and therefore prescribe any status to AWs.<sup>68</sup> The more recent 2010 regulations are also limited in practice.<sup>69</sup> Since agency work must be conducted on a temporary basis under the regulations, those who are working on an open-ended contract, as is the case for many AWs, are denied the protections offered by the framework.<sup>70</sup> In addition, many employers avoid keeping AWs for longer than twelve weeks to avoid the parity pay provision.<sup>71</sup>

For those that do fall within the scope of the regulations, protection is negligible.<sup>72</sup> The fundamental right of parity of pay and equal treatment is hindered as ‘pay’ is defined narrowly; excluding sick pay, maternity pay, and pension payments, to name but a few.<sup>73</sup> Furthermore, AWs are only entitled to rights in line with those given to their ‘worker’ or ‘employee’ counterparts.<sup>74</sup> This approach lends itself to the possibility of end-users hiring “token” employees on low pay in a similar role to an AW, in order to minimise and in some cases “subvert” the operation of the regulations.<sup>75</sup> Although forthcoming regulation will supposedly consolidate the Employment Agency Standards Inspectorate, and abolish the

<sup>65</sup> Freedland (n 52) 23.

<sup>66</sup> *James v Greenwich London Borough Council* (n 41) 559 (Mummery LJ).

<sup>67</sup> Employment Agencies Act 1973, s 5; Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319), Reg 5; Agency Workers Regulations (n 2) Reg 5(1)–(6); Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work [2008] OJL 327, Arts 3, 5–8.

<sup>68</sup> Busby and Christie (n 20) 18.

<sup>69</sup> Agency Workers Regulations (n 2).

<sup>70</sup> *ibid* Regs 2 and 3.

<sup>71</sup> Elizabeth Jordan and others, *Employment Regulation: Part A - Employer Perceptions and the Impact of Employment Regulation* (Department for Business Innovation and Skills, *Employment Relation Research Series 123*, March 2013) 23 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/128792/13-638-employer-perceptions-and-the-impact-of-employment-regulation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/128792/13-638-employer-perceptions-and-the-impact-of-employment-regulation.pdf)> (accessed 14 October 2020).

<sup>72</sup> Wynn and Leighton, ‘Will the Real Employer Please Stand Up?’ (n 1) 301.

<sup>73</sup> Agency Workers Regulations (n 2) Regs 5(1) and 6(1)–(3).

<sup>74</sup> *ibid* Reg 2.

<sup>75</sup> Wynn and Leighton, ‘Will the Real Employer Please Stand Up?’ (n 1) 310.

‘Swedish Derogation’ under regulation 10 in April 2020 which currently enables AWs to contract directly with agencies and thus sidestep the twelve week parity rule, such measures go little beyond the failed Agency Workers (Equal Treatment) Bill of 2008.<sup>76</sup> In this light, whilst the courts have failed to answer the contract question and resolve the AW issue, it cannot be denied that they are not responsible for the significant legislative vacuum that exists.<sup>77</sup> The discussion, therefore, naturally progresses to a pivotal question: is the common law *capable* of providing an answer to the elusive contract question?

#### D. CAN THE COMMON LAW REMEDY THIS AREA OF LAW?

Having established that the courts have so far failed to resolve the contract question, it is necessary to consider whether the common law is capable of doing so. Whilst there have been a range of proposals made as to how this could be achieved, this question can only be answered in the negative. To understand why, one must return to the fundamental principles which underpin the common law: that the courts are bound to give effect to the intentions of Parliament, and *stare decisis*; that they must develop the common law in line with established principles.<sup>78</sup> As the legislative framework continues to favour a binary approach: namely between employees and the self-employed, judges are bound to develop principles within the scope of this binary to give effect to Parliament’s intentions, and deploy only these principles in cases.<sup>79</sup>

This paper has already shown how the courts’ loyalty to established doctrines in relation to the employment status tests, contract implication and mutuality of obligations principle, has served as an insurmountable hurdle for AWs. It is for this reason that the judiciary has struggled equally when implementing other remedial vehicles in the AW context, such as finding a “sham” contract, that an agency delegates ‘control’ to an end-user, or suggesting contractual illegality, in order to establish employee status.<sup>80</sup> Such an obstacle would therefore manifest in any common law remedy proposed in this area.<sup>81</sup> Brodie’s suggestion that the courts

<sup>76</sup> Agency Workers (Equal Treatment) Bill 2008; Agency Workers Regulations (n 2) Reg 10; Lidia Poczok, ‘Changes for Agency Workers After 6 April 2020’ (*Lexology*, 5 February 2020) <<https://www.lexology.com/library/detail.aspx?g=45db189c-d164-4a65-b51e-7aee32a10617>> (accessed 14 October 2020).

<sup>77</sup> Wynn and Leighton, ‘Will the Real Employer Please Stand Up?’ (n 1) 303.

<sup>78</sup> William Blackstone, *Commentaries on the Laws of England: Vol 1* (Clarendon 1765) 67–73; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 [21] (Lord Reed SCJ).

<sup>79</sup> Nyombi (n 6) 3.

<sup>80</sup> *Bunce v Postwoorth Ltd (t/a Skyblue)* [2005] IRLR 557 (CA) [29] (Keene LJ); *Enfield Technical Services Ltd v Payne* [2008] EWCA Civ 393 (CA) [15], [21], [32] (Pill LJ), [39]–[42] (Lloyd LJ); *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98 (CA) [73]–[74] (Smith LJ).

<sup>81</sup> Wynn and Leighton, ‘Will the Real Employer Please Stand Up?’ (n 1) 309.

could develop a concept of good faith to allocate AWs ‘worker’ status, for example, would fail as precedent dictates that the good faith doctrine be deployed alongside principles such as mutual trust and confidence, which would prove as elusive in an agency context as that of a mutuality of obligations.<sup>82</sup> It is clear, therefore, that as long as the statutory framework remains as present, namely a binary one, there can be “no magic [common law] test” to provide an answer to the contract question.<sup>83</sup>

#### IV. THE NEED FOR STATUTORY REFORM

This paper’s third and final contention is that statutory intervention on a broad scale is the only viable means of resolving this area of law. This will be shown in three ways: by demonstrating why statutory reform is needed, why this reform must extend beyond AWs, and how this reform may be actioned. Firstly, statutory reform, as the highest instrument of legislative protection, is needed in this area.<sup>84</sup> A neoclassical approach demonstrates this most potently as by focussing on the AW as an individual, it becomes clear that the current law fails to “prevent mistreatment” of AWs.<sup>85</sup> This is evidenced by the wage gap that has emerged between AWs and other workers in the United Kingdom (UK), and in jurisdictions such as Sweden, Japan and the United States where atypical worker protection is similarly limited.<sup>86</sup> Wages have been the “biggest area of complaint” for AWs in the UK, with such workers earning approximately 68% of the average weekly income of other employees.<sup>87</sup> AWs are also refused dismissal protections under section 94

<sup>82</sup> Douglas Brodie, ‘The Heart of the Matter: Mutual Trust and Confidence’ (1996) 25(2) *Industrial Law Journal* 121, 128. See also *Johnson v Unisys* [2001] UKHL 13 [24]–[25] (Lord Steyn); Nicola Countouris, ‘Uses and Misuses of “Mutuality of Obligations” and the Autonomy of Labour Law’ in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 169.

<sup>83</sup> *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32 [39] (Lord Neuberger PSC). See also Anthony Moffatt, ‘The Fine Line Between Employee and Temp’ (2009) 533(1) *Canadian Employment Law Today* 4, 5

<sup>84</sup> *R (Jackson) v Attorney General* [2005] UKHL 56 [9] (Lord Bingham); AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1885) 39–40.

<sup>85</sup> Anne Davies, *Perspectives on Labour Law (Law in Context)* (2nd edn, Cambridge University Press 2009) 27.

<sup>86</sup> Siv Gustafsson, Eiko Kenjoh and Cecile Wetzels, ‘Employment Choices and Pay Differences Between Non-Standard and Standard Work in Britain, Germany, Netherlands and Sweden’ (2001) Tinbergen Institute Discussion Paper No 01-086/3, 5 <<https://www.econstor.eu/bitstream/10419/85828/1/01086.pdf>> (accessed 14 October 2020); John Addison and Christopher Surfield, ‘Atypical Work and Pay’ (2007) 73(4) *Southern Economic Journal* 1038, 1065; Yoshio Okunishi, ‘Perceptions of Pay and Work by Standard and Non-Standard Workers’ (2009) 6(4) *Japan Labor Review* 116, 117; Hajo Holst, Oliver Nachtwey and Klaus Dörre, ‘The Strategic Use of Temporary Agency Work - Functional Change of a Non-standard Form of Employment’ (2010) 6(1) *International Journal of Action Research* 108, 137–138.

<sup>87</sup> Storrie (n 1) 55.

of the ERA in relation to any dismissal by an end-user, which has led to unjust outcomes in cases such as *Muschett v HM Prison Service*; where an AW was denied a claim for dismissal on the basis of race discrimination.<sup>88</sup> Statutory protection, therefore, is not only necessary but urgent in this area of law.

Secondly, such protection should not be limited to AWs. Whilst it has been conceded that AWs are ‘atypical’ from a legal perspective, by considering the wider employment landscape, AWs can be deemed an increasingly ‘typical’ work form.<sup>89</sup> It is in this respect that the statement in question is limited. Over recent years, the standard employment contract has been diminishing in light of the growth of ‘atypical’ arrangements such as temporary, zero-hour and agency work.<sup>90</sup> Accelerated by globalisation, technological developments and the UK’s increasing dependence on the service sector, this is particularly apparent in multi-national companies where having a flexible workforce which can be deployed on a short-term basis is advantageous in a climate of geo-political uncertainty.<sup>91</sup> It is for this reason that the number of AWs has risen by 40% in the past decade, that the gig economy has doubled since 2016, and that part-time workers account for 27% of the British workforce.<sup>92</sup> Such changes, which are only likely to continue given seismic technological and democratic shifts, are creating a workforce which is increasingly dominated by atypical workers, all of whom are unserved by the current law.<sup>93</sup> This trajectory is even raising concerns amongst employers, of whom 75% believe a regulatory review is “necessary”.<sup>94</sup> A statutory framework is therefore needed to accommodate not just AWs, but all ‘atypical’ working arrangements.

Lastly, how may this be achieved? The most suitable proposal to date was

<sup>88</sup> ERA s 94; *Muschett v HM Prison Service* (n 41) [32] (Rimmer LJ).

<sup>89</sup> Córdova (n 19) 642.

<sup>90</sup> Einat Albin, ‘Labour Law in a Service World’ (2010) 73(6) *The Modern Law Review* 959, 960.

<sup>91</sup> Guy Davidov, ‘Joint Employer Status in Triangular Employment Relationships’ (2004) 42(1) *British Journal of Industrial Relations* 727, 727–728; Albin, ‘Labour Law in a Service World’ (n 90) 960.

<sup>92</sup> Joe Sommerlad, ‘UK Economy Sees 40 Percent Rise in Number of Agency Workers over Last 10 Years’ (*The Independent*, 10 February 2018) <<https://www.independent.co.uk/news/business/news/uk-economy-latest-agency-workers-employment-workforce-labour-resolution-foundation-research-a8202686.html>> (accessed 14 October 2020); Richard Partington, ‘Gig Economy in Britain Doubles, Accounting for 4.7 Million Workers’ (*The Guardian*, 28 June 2019) <<https://www.theguardian.com/business/2019/jun/28/gig-economy-in-britain-doubles-accounting-for-47-million-workers>> (accessed 14 October 2020); House of Commons Library, *Understanding Statistics on Employment, Unemployment and Earnings* (Briefing Paper No 7950, 2019) 10.

<sup>93</sup> David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It* (Harvard University Press 2014) 177.

<sup>94</sup> Jordan and others (n 71) 34.

made by the Liberal Democrats in the party's 2019 Election Manifesto.<sup>95</sup> The party sought to create a “dependent contractor employment status” which would entitle atypical workers to minimum wage levels, sick pay and holiday allowances.<sup>96</sup> This would provide AWs and other atypical work edifices that defy binary classification with a status, and therefore enforceable rights, without having to work for twelve weeks and in the absence of an answer to the contract question.<sup>97</sup> Drawing on recommendations set out in a recent report by the Institute for Public Policy Research, the party also proposed a 20% higher minimum wage for AWs and zero-hour contractors, whilst giving them the right to request a fixed-hour contract after one year.<sup>98</sup> These proposals would deal with the current pay gap and low transition from temporary to permanent contracts for these individuals.<sup>99</sup> Overall, this approach would provide not only AWs, but many (if not all) current and future atypical workers, with the protection they are currently denied.<sup>100</sup>

Statutory alternatives have been advanced. Langille and Davidov, for example, have advocated a French policy that in the context of AWs, a contract must exist between the agency and the AW.<sup>101</sup> A broader approach has been offered by Deakin and Freedland, who suggest that a statutory “personal employment contract” should be allocated to all ‘workers’ regardless of status.<sup>102</sup> Yet, these proposals are unified by a common flaw: by only addressing existing atypical arrangements such as AWs and ‘workers’, they are not sufficiently flexible to protect future atypical arrangements which will inevitably emerge as geographical and technological changes reshape the workforce; leaving them “vulnerable to

<sup>95</sup> Liberal Democrats, ‘Manifesto 2019: Stop Brexit, Build A Bright Future’ (2019) <[https://d3n8a8pro7vhmx.cloudfront.net/libdems/pages/57333/attachments/original/1574258742/Lib\\_Dem\\_Manifesto\\_2019.pdf?1574258742](https://d3n8a8pro7vhmx.cloudfront.net/libdems/pages/57333/attachments/original/1574258742/Lib_Dem_Manifesto_2019.pdf?1574258742)> (accessed 15 October 2020).

<sup>96</sup> Liberal Democrats (n 95) 24.

<sup>97</sup> Busby and Christie (n 20) 18.

<sup>98</sup> Catherine Colebrook, *Unfair and In Need of Reform: Public Attitudes to the UK Economy* (Institute for Public Policy Research Commission on Economic Justice, September 2018) 24 <<https://www.ippr.org/files/2018-09/unfair-and-in-need-of-reform-report-september18.pdf>> (accessed 14 October 2020).

<sup>99</sup> Valerio De Stefano, ‘A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries’ (2014) 43(3) *Industrial Law Journal* 253, 285.

<sup>100</sup> Abi Adams, Mark Freedland and Jeremias Prassl, ‘The ‘Zero-Hours Contract’: Regulating Casual Work, or Legitimizing Precarity?’ (2015) *Oxford Legal Studies Research Paper No 11/2015*, 21.

<sup>101</sup> Brian Langille and Guy Davidov, ‘Beyond Employees and Independent Contractors: A View from Canada’ (1999) 21(1) *Comparative Labor Law and Policy Journal* 7, 35.

<sup>102</sup> Freedland (n 52) 23; Simon Deakin, ‘Does the ‘Personal Employment Contract’ Provide a Basis for the Reunification of Employment Law?’ (2007) 36(1) *Industrial Law Journal* 68, 83.

[future] exploitation” by businesses.<sup>103</sup> The only way to avoid this, therefore, is to create a statutory category which will accommodate current and future atypical engagements, as proposed by the Liberal Democrats, and in doing so remind industry leaders that workers’ rights, regardless of the type of contract, are of upmost importance.<sup>104</sup>

## V. CONCLUSION

In conclusion, the current law fails to accommodate AWs; an example of a growing number of atypical working arrangements in the UK. This has been shown by establishing how AWs are atypical in light of the binary legislative framework and through the courts’ inherent inability to accommodate AWs. It has then been demonstrated that the most suitable solution to the AW issue is legislative reform which provides broad protection for all atypical working relationships, as they are becoming increasingly ‘typical’ in the UK’s employment landscape.<sup>105</sup> By taking this trend into account, something which the statement in question omits to do, this paper has shown that the most credible solution would be to give a statutory footing to a dependent contractor status.<sup>106</sup> Such a measure will not only afford rights to all atypical workers despite any contractual ambiguity, a hindering factor for AWs, but will also safeguard any future atypical employment arrangements regardless of how the employment landscape shifts.

<sup>103</sup> Elizabeth Cotton, ‘Transnational Regulation of Temporary Agency Work Comprised Partnership Between Private Employment Agencies and Global Union Federations’ (2015) 29(1) *Work Employment and Society* 137, 138.

<sup>104</sup> Patricia Leighton, ‘Temporary Agency Working and the European Employment Strategy’ in Ralf Rogowski (ed), *The European Social Model and Transitional Labour Market* (1st edn, Routledge 2016) 125.

<sup>105</sup> Deirdre McCann, *Regulating Flexible Work (Oxford Monographs on Labour Law)* (Oxford University Press 2008) 168.

<sup>106</sup> Liberal Democrats (n 95) 24.