Concerns for Uncertainty around the Contract of Employment in English Law: The Response of Lord Justice Elias

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ARTICLE

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Emiko Shinyashiki

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Ⅰ Introduction

This article presents the response of former Court of Appeal Judge Patrick Elias, Lord Justice Elias, to a questionnaire sent in March 2021.(1)

The author's questionnaire was sent to Lord Justice Elias after reading his review article(2) on *The Contract of Employment* (Oxford University Press, 2016), of which Mark Freedland was the principal editor. The book's intention seemed to provide a grand theoretical basis for accepting and looking at solutions to the various problems that have arisen in the current diversity of forms of work. It

（1） I am especially grateful to Lord Justice Elias, who kindly replied in writing to my questions and permitted me to publish his responses. Also, I owe a debt to my colleague, Mark Fenwick, who patiently discussed and commented on earlier drafts of this piece. The responsibility for any errors remains my own.

（2） Patrick Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 Oxford Journal of Legal Studies 869.

aimed to re-discover the contemporary position of the contract of employment as something 'between agreement and regulation'[(3)] and takes this epistemological significance as the basis for its theory. With the foundation as a starting point, it seems to have normatively concretised the law of contract of employment, which encompasses the functions and norms of contract law and statute law over the employment field, in the form of certain foundational principles, and to have examined and developed the law of contract of employment in situations where specific rights and obligations are at issue.

In his review article on the book, 'Changes and Challenges to the Contract of Employment' (2018) 38 *Oxford Journal of Legal Studies* 869, Lord Justice Elias was very critical of the book's basic methodology for grasping the law of the contract of employment. The article seemed to show how Freedland's claimed understanding of the law was fundamentally different from Lord Justice Elias's understanding of the law. As can be seen from what the author has mentioned above, the various arguments in the book are understood to be one big and crucial academic project in the context of which labour law is currently situated. Lord Justice Elias confronted the academic arguments presented in the book head-on because he perceived them as significant.

As such, the conflict of understanding of the law between academic theory and law cannot be missed. As the author understands it, that conflict is about the interrelationship between common law and statute law in the field of labour law, now and in the future. Furthermore, the conflict is about the new forms of work that will become to be encompassed in the law based on the respective understanding of the interrelationship, and therefore it is about form of the law for the new forms of work. Following the significant social transformation of information technology development and digitalisation, the application of legislation (such as the application of workers' compensation regulations for work-related

（3） Mark Freedland (gen. ed.), *The Contract of Employment* (OUP, 2016), 12.

accidents, working time regulations and minimum wage regulations) is currently an issue in the respective national contexts, particularly given the diversification of forms of employment. In this context, the conflict of understanding between academic theory and law in the UK concerning labour law must be of universal significance for the prospects of labour law, which should be considered, even if the jurisdictions and substantive content of the legal protections are very different.

The author believes that, given the interest mentioned above in the issue and the current employment context, the responses from Lord Justice Elias to the questionnaire are valuable material for considering the future of labour law. The article, therefore, presents the whole of the responses from him. Indeed, the author believes that the response from Lord Justice Elias stands alone as an independent statement and should be shared and read as such by as many readers as possible. However, it might be helpful to set out the purposes of the author's questions for a more precise understanding of what Lord Justice Elias intended in his writing. In the following section, the article will first outline the purposes of the author's questions and then include the questions by the author and the complete responses from Lord Justice Elias.(4)

Ⅱ The Purposes of the Questions

The purposes of the author's questions were fourfold.

1 Positioning of Mutuality of Obligations and Arising Issues

The first purpose was to ascertain the judicial understanding of 'mutuality of obligations,' which seems to be at odds with some academics' understanding of the concept. English common law seemed to have placed the 'mutuality of obligations,' which is often at issue in disputes. The question arises whether

(4) The author has already examined the significance of the conflict in the understanding of the law presented by Lord Justice Elias and Professor Freedland in light of the problematic situation of Japanese labour law (Emiko Shinyashiki, 'Changing Circumstances in Contracts of Employment, Contract Law, and Employment Legislation in English Law' (2022) 88 *Hosei-kenkyu* 1130).

so-called 'zero-hours contracts' create a contract of employment meaning that employment legislation would apply to a party providing labour or service as an employee.[5] The problem is the requirement of consideration in English law, as it is often not clear whether there is any consideration in less conventional employment relationships.[6] However, some leading British academics have not positioned it as such. For example, Simon Deakin and Gillian. S. Morris have positioned mutuality of obligations, in a slightly different way, as a required factor for a contract in the employment field to be classified as a contract of employment or service in the case law:[7]

> Notwithstanding the clarity of the test of 'economic reality', decisions of the courts since the late 1970s have placed a fresh emphasis on a form of personal control in the form of 'mutuality of obligation'. Mutuality is a necessary feature of all bilateral contracts: without reciprocal promises, the basic element of consideration will be lacking and the arrangement will have no contractual force. In this fundamental sense, mutuality of obligation is a feature not just of contracts of employment, but also of contracts for the supply of personal services; it cannot, therefore, function as an indicator of employee status.
>
> However, a *separate meaning* of 'mutuality of obligation' entered employment law in the late 1970s: with specific reference to the contract of employment, this was based on *the presence of mutual commitments to maintain the employment relationship in being over a period of time* [emphasis added]. It was an adaptation of the idea that the contract of employment is more than just a contract to serve in return for wages; in addition, there is a

（5） See Employment Rights Act 1996, s. 230 (1).

（6） The author described the evolution of case law in English law to position mutuality of obligations from one factor to characterize a contract in question to consideration necessary for the formation of a contract (see Emiko Shinyashiki, (n. 4)).

（7） Zoe Adams, Catherine Barnard, Simon Deakin and Sarah Fraser Butlin, *Deakin and Morris' Labour Law* (7th edn.) (Hart Publishing, 2021), [2.16] (129); Simon Deakin and Gillian S Morris, *Labour Law* (6th edn.) (Hart Publishing, 2012), [3. 29] (164).

> *second tier of obligation* consisting of mutual promises of further performance [emphasis added by Deakin and Morris].

It is noted that, in the understanding of Deakin and Morris as to mutuality of obligations, mutuality of obligations has two meanings: consideration for the formation of a contract in the employment field and a factor to classify the contract in question as a contract of employment in the same way that the 'economic reality' test does. They seem to regard mutuality of obligations as a factor that requires for a contract 'the presence of mutual commitments to maintain the employment relationship in being over a period of time' to be classified as a contract of employment. In the book, *The Contract of Employment*, as Lord Justice Elias pointed out, some academics showed the same understanding of mutuality of obligations, i.e., as a factor that requires for a contract the presence of mutual commitments to maintain the employment relationship in being over a period to be classified as a contract of employment. In his review article referred to above, Lord Justice Elias stated[(8)]:

> I shall start with the problem of zero-hours contracts, which, in turn, is closely linked to the doctrine of mutuality of obligations. It is now firmly established at the highest level, following the decision of the House of Lords in *Carmichael v National Power plc*, that where a worker is employed intermittently, and there are no contractual obligations in play during the gaps, there will be no contract of employment in place between engagements—no 'umbrella contract', as it is often put. If there are continuing obligations, and typically this will arise where the employer is under some obligation to offer work that is available and the worker is under some duty to accept work offered, this will create an umbrella contract which will continue to subsist

（8） Patrick Elias, (n. 2), 880-881 and 883.

> even in the periods when no work is being performed. It remains a matter of some debate as to the nature of the umbrella contract…
>
> In a chapter where they analyse the way in which contractual practices have led to what they describe as social exclusion, Einat Albin and Jeremias Prassl are highly critical of *Carmichael* and claim that 'no clear explanation exists as to why a contract of employment should require continuity of employment and of contract'. I find that a very surprising statement. How can one properly describe the relationship as contractual when no mutual obligations exist between the parties so that neither can make a claim on the other? There is simply no consideration from either side.
>
> [I]t is wrong to suggest, as the book does in a number of places, that the courts have held that there can be no contract of employment in place even for each separate engagement unless there is a continuing mutuality of obligations.

Lord Justice Elias showed his understanding that mutuality of obligations had not been a test or factor to classify a contract in question. He understood that the courts had not required for each separate engagement to involve a continuous mutual commitment (as mutuality of obligations) in order to be classified as a contract of employment. His explanation is simple if he has regarded the mutuality of obligations discussed in cases as consideration. Depending on that understanding, apart from the cases in which the parties are not in dispute as to the formation of a contract, a long-term contract formation would require the existence of continuous obligations for labour or service and payment of remuneration as a mutuality of obligations or consideration. In contrast, a one-off contract formation would only require the existence of obligations corresponding to its duration. In the latter case, determining the nature of the contract after the determination of formation, it is not necessary to question the continuity of

the obligations theoretically. Then, it is possible to find contracts of employment for each separate engagement with the finding of good control by the putative employer over the putative employee but without questioning the continuous mutual obligations or commitments.

It, therefore, seemed necessary to confirm with Lord Justice Elias the legal position and significance of mutuality of obligations. This was because the author considered the following. The requirement for the formation of a contract is for the law to decide whether to recognise the existence of a legal relationship. Then, whether the mutuality of obligations is understood as a requirement for the formation of a contract is directly related to the line drawn between the world of fact and law. It is furthermore said to be related to the character of the law as a whole. As the forms of work in society becomes more diverse, what should be understood as the primary character of the law that accommodates such changes? What facts in society would the law accept as legal facts in the legal world? Also, what possibilities and limitations of the existing law can appear through examining these differences of views between academics and judiciaries? They are too fundamental to misunderstand or overlook.

To ascertain those points, the author asked questions (i) and (ii), found in Section **III 1**.

2 Role & Relationship of Contract law and Statute Law

Second, some of the author's questions were directed at identifying the conflict in understanding the interrelationship between contract law (common law) and statute law between academics and the courts and knowing the causes of that conflict. Through the lens of those familiar with Japanese labour law, the understanding of a contract of employment 'between agreement and regulation,' as argued by Mark Freedland, was very attractive.[(9)] Positioning a contract of

(9) For the author's brief understanding of Mark Freedland's conception of the law of contract of employment, see Emiko Shinyashiki (n. 4).

employment in that way seemed to allow for and encourage an understanding of the development of the law in a systematic and orderly way, incorporating facts surrounding the contract of employment and various elements of the law (including statute law) into the law of the contract of employment. Freedland argued that the common law judges understood this development of the law of contract of employment as being, and should be, realised in the scene of interpretation of the law. In particular, Freedland seemed to intend to theoretically incorporate the reality of agreements closely linked to the development of facts into the law of the contract of employment and present a challenging and valuable theory that could respond to the realities resulting from the currently developing forms of work.

Lord Justice Elias seemed to be opposed to such a way of constructing the law of contract of employment, i.e., the methodology taken by Freedland. Why, then, and what are the disadvantages of the methodology that, as Freedland argues, incorporates new events and the normative significance that regulations encompassed into the operation of the law? Moreover, how are such disadvantages unacceptable to the judges administering the law? It would, perhaps, present the limits of judiciary law in the UK on the issues borne in mind there. It may be part of Freedland's argument that the judiciary should not find its limits. However, comprehending the conflict between academics and judiciaries in the methodology for constructing or interpreting the law will contribute to the prospects of the law of contract of employment or the labour law.

The questions corresponding to these aims are questions (iii) to (vii) listed in Section III 2.

3 Legislation in Response to Uncertainty and the Transformation of Common Law

Third, the author intended to confirm with Lord Justice Elias whether employment regulation adopted in response to the spread of what the author refers to as 'indeterminisation'[(10)] could be understood by judges as transforming

the common law or the whole system of law.

What does 'indeterminisation' mean in this context? This can be pointed out, for example, with regard to so-called zero-hours contracts. In the UK, the existence of 'mutuality of obligations' has been disputed with regard to zero-hours contracts, particularly in the context of decisions on the application of employment legislation. Parties who have entered into a zero-hours contract do not have a definitive obligation to provide or receive labour under the zero-hours contract. Consequently, by entering into the zero-hours contract, the parties cannot be assessed as having entered into a continuous contract in the employment field, such as a so-called umbrella contract covering the entire relevant period (the circumstances in this regard are explained in detail in the response of Lord Justice Elias below.). This problem arises because, under the initial contractual arrangement, obligations regarding working hours or the provisions of labour are not definitive enough to have legal significance or be evaluated as a legal fact. Therefore, concerning zero-hours contracts, consideration as a requirement for the formation of a contract is an issue. Furthermore, judging perhaps from the intention of the parties to create such a state of facts, the existence of a contractual intention would also be an issue, strictly speaking, as the intention as such would lead to an assessment that the parties did not intend to enter into a legal relationship with the zero-hours contract. Thus, the zero-hours contract would merely set out a 'framework'[(11)] for the individual transactions (contracts) that would follow with the zero-hours contract. Thus, although a zero-hours contract sets out certain matters regarding the content of the provision of labour and remuneration and prompts or creates an expectation of certain conduct on each part of the parties, contract law still

(10) Emiko Shinyashiki, 'The Changes in Forms of Work and the Functions and Limitations of Employment Law' (2020) 156 (1) Minshoho-zasshi 4.

(11) *Carmichael v National Power* [1999] ICR 1226 (HL), 1229 D-E. However, the focus of the House of Lords' decision in *Carmichael* was on the mutuality of obligations, i.e., the existence of consideration.

permits the parties to leave the conclusion of the contract undetermined by making certain matters indeterminate. In this way, the parties drive out the boundaries of the legal world and keep themselves in the world of facts.

The author is, of course, not alone in focusing on these issues of indeterminisation. For example, Ann Davies is noted for pointing out further indeterminacy problems in this respect: as a problem for the 1998 Working Time Regulations as a whole. Davies pointed out:[12]

> For most casual workers, the working time 'problem' is not excessive hours but either insufficient hours (and insufficient pay) or unpredictable hours, making it difficult to achieve an effective work/life balance. There is a real risk that casual workers who believe that they will be penalised for turning down work will accept too many hours when the employer is busy, leading to significant risks to health. The WTR regime, which is designed around a traditional employment paradigm, is not effective at addressing any of these deeper problems.
>
> [T]he problems associated with mutuality of obligation relate primarily to the legal status of the worker's undertaking to be available and to the promises—if any—made by the employer. No amount of discussion of the content of the employee's or worker's obligations can solve these problems.

Notably, Davies' point is not that not fixing the point of contract formation creates problems, but that the parties' lack of fixing the *content* of the contract creates problems. The point made by Davies is that the regulation of statute law is based on the assumption that the parties have determined certain details or quantities, and therefore the labour law does not regulate the employment relationships in question where the parties have not determined sufficient

(12) A.C.L. Davies, 'Getting More Than You Bargained for? Rethinking the Meaning of "Work" in Employment Law' (2017) 46 ILJ 477, 505.

details or quantity to be subject to regulation based on a traditional employment paradigm. In short, it is pointed out that even if the labour or service provider is acknowledged to be a worker, the regulation will not be of sufficient effects if there is no determination by the contracting parties of the content of the contract to subject it to the traditional regulation. Thus, Davies astutely points out the problem that the contract's *content* is made indeterminate, which prevents the traditional regulations from having the effect at which they are aimed.

The author refers to two problems mentioned above as those of 'indeterminisation' of the formation and/or content of contract in the employment field. Indeterminisation stems from the parties' free exercise of their freedom of contract, which becomes problematic in English law, in conjunction with the common law doctrine of consideration and/or the content of labour law regulation whose institutional design is based on the traditional employment paradigm.

The author believes that one of the possible means in labour law to deal with this uncertainty or indeterminisation in the current situation of diversified forms of employment is setting minimum limits and sanctions for deviations from these limits chosen and set by parties, as proposed in the UK. Specifically, the UK Government consulted the public as to compensation for shift cancellation or curtailment without reasonable notice.[13] Under the scheme set out there, it is envisaged that the parties would first have certain matters or minimum determined and fixed by their contract. Indeed, those regulations do not presume that the parties would fix working hours that would, for example, touch the upper limits set by the Working Time Regulations 1998.[14] What such regulations presuppose is that the parties are to determine only certain minimums. Nor do such regulations directly provide for indeterminacy per se. Rather, such regulations presuppose a typological uncertainty concerning the conclusion of a type of contract or contractual arrangement and place a certain burden on the actual

(13) See footnote 28 below.
(14) ex. the Working Time Regulations 1998, reg. 4 (1).

realisation of the risk posed by that uncertainty. Here, regulations give parties critical room to manage the uncertainty of indetermination, which have roots in freedom of contract. These regulations no longer focus on setting general upper limits. It is about the uncertainty that zero-hours contracts typologically bring to workers' lives, as the Good Work Plan takes issue with,[15] or as Davies points out above. Regulation of this kind problematises the harmful effects of the contractual mechanism or contract law operation, which, together with the function of employment regulation, which assumes a traditional employment paradigm, allows for no contract to be made or the content of the contract not to be sufficiently determined.

The advantage of this regulatory approach of having the parties set a lower limit (minimum) and imposing sanctions for any behaviour that deviates from that limit is that the fact that the parties have set the lower limit by their own choice can be said to affirm the legal system in a certain sense. From that fact, it can be said that they should be subject to regulation as a liability for that fact. In modern times, as can be seen from the development of implied terms by law, even in common law, once the parties have concluded an employment contract, they are subject to terms and obligations that cannot be directly attributed to the intention of the parties.[16] Even in the future diversification of forms of employment, the parties can make a breakthrough in the minimum legal facts that they cannot avoid forming. That is because the parties cannot avoid wanting such a minimum force of law, even if there might be factual enforcement, such as nudges and architecture, which require further consideration. Therefore, it is both practical and legally justifiable to envisage how regulation can cover the contractual arrangement or a pack of uncertainty prepared by employers from that breakthrough.

(15) HM Government, *Good Work Plan* (December 2018) (Cm 9755) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf)(last visited on 14/05/2022).

(16) *Malik v BCCI SA* [1997] IRLR 462; *Societe Generale, London Branch v Geys* [2012] UKSC 63.

However, on the other hand, if the effect of such external contractual regulations leads to guarantee the status of workers in the same way as, for example, in the case in which continuous mutuality of obligations was recognised, the introduction of such regulations would theoretically or practically be sharply opposed to the freedom of parties not to contract and the freedom of parties to determine the content of the contract. Can such a situation of legal instability be accepted rather positively as a transformation of the law of contract of employment as a whole, as Freedland argues, and can we look forward to the development of the law, including common law? Or should we still understand the law based on the distinction between common law and statute law and keep the legal principles in common law as distinctive legal principles? Furthermore, if it should be so understood, what are the reasons for that? This is the third purpose of the author's questions to Lord Justice Elias, and questions (viii) and (ix) set out in Section **III 3** ask about this point.

4 The Scope of the Supreme Court Decision in the *Uber* Case and the Function of the Common Law

In light of the above issues, the author also asked Lord Justice Elias about the significance of the Supreme Court decision in the *Uber* case,[17] presented in February 2021. In the Supreme Court decision in *Uber* which reinforced the justification for the 'purposive approach' affirmed by Lord Clarke in *Autoclenz*,[18] Lord Leggatt says:[19]

> Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the

(17) *Uber BV v Aslam* [2021] UKSC 5; [2021] IRLR 407.
(18) *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] ICR 1157.
(19) [2021] IRLR 407, [69].

> legislation required it, to identify whether, under the terms of their contracts, *Autoclenz* had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

The reasoning here seems to be one affirming the construction of the function of contractual interpretation, which should per se be performed by the common law, taking into account the purpose and policy of the enactment in question. In this way, it seemed possible to understand that Freedland's understanding of the law of the contract of employment as integrating common law and statute law and the Supreme Court's decision in the *Uber* case were compatible with each other. The author asked Lord Justice Elias how he perceived the Supreme Court decision in the *Uber* case in Question (x) of Section **III 4**.

Ⅲ The Response of Lord Justice Elias

The author's interest in the issue as described above led her to ask questions to Lord Justice Elias. However, as the questions were not answered orally, supplementing the purposes of the questions, it should be strictly avoided to understand the content of the responses given by Lord Justice Elias in an extended manner in line with the purposes of the author's questions. For this reason, the author's questions and Lord Justice Elias's responses are presented below as original as possible.[(20)]

(20) The file containing the author's questions and Lord Justice Elias's responses was sent by e-mail; E-mail from Lord Justice Elias, former judge of the Court of Appeal, UK, to Emiko Shinyashiki, Associate Professor of Law, Kyushu University, in Fukuoka, Japan (14 April 2021)

1. Mutuality of Obligation

Questions:

In the article 'Changes and Challenges to the Contract of Employment' (2018) 38 *Oxford Journal of Legal Studies* 869, you wrote 'it is wrong to suggest, …… that the courts have held that there can be no contract of employment in place even for each separate engagement unless there is a continuing mutuality of obligations.'(at p. 883)

According to your sentence, it seems that there are some possibilities for employees to establish that there is a contract of employment for each separate engagement. (i) With that suggestion, what particular points did you intend to clarify with this remark? Also, (ii) What, specifically, is wrong with such an understanding shared by some scholars which you referred to here?

Response:

I think that many academics have misunderstood the concept of mutuality of obligation. I do not think it is a difficult concept. In English law, in order for there to be a binding legal contract, there must be consideration. This means there are mutual obligations of one kind or another. In the context of labour law this means that typically there will be an obligation on the employer to pay and on the employee to serve. If there are no mutual obligations in place, there is not contract at all. The point is not that there is no contract of employment (as opposed to contract to provide work personally (what is often referred to as a "limb (b) contract because the definition is found in section 230(3)(b) of the Employment Rights Act 1996). The point is that there is no contract in place if there is no mutuality of obligation.

(on file with the author). The questions and responses contained in the file are presented below in their entirety, except for deleting personal information and some trivial corrections, such as italicizing case names or modifying footnote numbers.

The problem typically arises where persons are employed on zero hours' contracts. i.e., there are no express terms in the contract either obliging the employer to offer them work and no obligation on the worker to accept work if offered. If there is no such obligation, then in the periods when no work is actually being performed, there is no contract in place at all.

Why does this matter? It is because in order to claim many of the statutory rights, it is necessary for a worker to have a period of continuity of employment e.g., 2 years for unfair dismissal or redundancy. The continuous employment is broken if there is no contract in place. Exceptionally, the continuity is maintained by statute even when no contract is in place in the gaps between employment (see section 212(3) of the ERA 1996) but this is rare. So it is important for a worker to establish some kind of overarching or what is sometimes called an "umbrella" contract between individual engagements. Sometimes the courts have been able to do this by implying an obligation to offer at least some work when it is available, or to say that a longstanding pattern of offering and accepting work (e.g., for homeworkers putting clothing kits together at their homes) has crystallised into a contractual obligation: see e.g., *Nethermere (St Neots) v Gardine*r [1984] ICR 612. But again, this is rare. In the absence of any such obligation, how can one say there is a contract in place if there is no continuing obligation on the employer to offer work and no obligation on the employee to accept any further work? Both can simply ignore the other party without any legal sanction of any kind because they have not bound themselves to offer or accept work, as the case may be. The authoritative case on this now is *Carmichael v National Power* [1999] UKHL 47. (Note that the only argument in that case was whether there was an umbrella or overarching contract. There was no issue about whether each engagement constituted a contract of employment).

None of this is relevant for the periods of engagement when the worker is

actually doing work. There is obviously a contract of some kind in place when the work is being performed. There are mutual obligations whilst the work is being undertaken. The employer could legally complain if the worker were to walk out without justification (although no doubt in practice it would be futile to take legal action); and the worker could sue for his wages if the employer failed to pay.

The point of some difficulty is what is the nature of that contract. Is it a contract of employment, or a limb (b) contract, or neither? In practice, it will often not be important whether it is a contract of employment or a limb (b) contract because of the need to establish continuity of employment for most of the statutory rights which are conferred only on employees but not on limb (b) workers. This means that even if there is a contract of employment in a particular engagement, there will be no continuity of employment enabling the employee to enforce his or her rights. But they will be able to do so where they can rely upon the statutory provision which treats a person as continuously employed even where there is no contract in place: see *Cornwall County Council v Prater* [2006] ICR 731. That case shows how there may be a contract of employment in place during engagements even where there is no contract in existence between engagements i.e no umbrella contract.

There is a further problem for workers who have no umbrella contract in place. Some rights depend upon establishing a dismissal e.g., unfair dismissal and redundancy. But if the employer simply notifies the worker between engagements that he will not be wanted in future, there is no contract being terminated. The employer is simply telling the worker that if he had any expectation of being asked to work again, he should no longer have that expectation. The expectation does not, of itself and without more, amount to or give rise to any legal obligation.

The relevance of mutuality to the classification of the contract when the worker is engaged.

A controversial issue is whether the lack of mutuality of obligations between engagements i. e. the lack of any contract between engagements, is relevant to the question of what kind of contract is in place during an engagement. In *O'Kelly v Trust House Forte* [1984] QB 90, the Court of Appeal held that it was. The industrial tribunal (now called an employment tribunal) had held that there was no worker contract of any kind during engagements and that the workers in that case (so called regular casual wine waiters) were not employed under a contract of employment. The Court of Appeal held that the industrial tribunal had been entitled to reach that conclusion. The main factor which caused the industrial tribunal to make that holding was that there was no mutuality of obligation between engagements. So it was clearly a relevant, and in fact in that case an important, factor in classifying the nature of the contract during engagements. I followed that decision in *Quashie v Stringfellows* [2013] IRLR 99. In the case of *Windle v Ministry of Justice* the Court of Appeal held that it was also relevant when considering whether someone was a limb (b) worker or self-employed and in the judgment of Lord Leggatt in the Supreme Court in *Uber*, he referred to that case apparently with approval. What weight should be given to that factor is very much up to the employment tribunal. Its relevance, as Lord Leggatt pointed out, is that it may cast light on how dependent and/or subordinate a worker is on his employer, and these are the critical criteria which determine whether the worker is employed under a contract of employment, is a limb (b) worker, or is self-employed.

2. The Structure of the Contract of Employment and the Law of the Contract of Employment

Questions:

Professor Mark Freedland proposed 'structural principles'[(21)] at p. 29 in his book, *The Contract of Employment* (OUP, 2016). From the viewpoint of judges, (iii) Do you think it is possible to identify a legal basis for those structural principles within the field of contract law, as it currently exists?

Professor Freedland also suggested that there is 'an over-prioritization of "common law" over "statute"'[(22)], and Professor A.C. L. Davies seems to share that comprehension of law as the traditional interaction between common law and statute in employment law.[(23)] (iv) Do you agree with their understanding of the hierarchy of norms on this point?

Your article (referred to above), at p. 880, says, 'With respect to Professor Davies, I have reservations about the metaphor of requiring the common law to 'fit' with statute. Legislation is typically passed to deal with a specific problem, and the danger in attempting to fit the common law to it is that the legislation will have greater impact than it ought to have. This is particularly undesirable where the statute is politically controversial, as is the case with much labour legislation. The common law should not be developed to undermine the statute, but nor should the statute be treated too readily as conferring a ceiling rather than a floor of rights.'

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(21) Principles 'serve to identify and define the basic shape of contract of employment and their functioning'. Also, they 'are factors in determining whether a personal work relation takes the form of a (valid) contract of employment or not, or in determining the key legal attributes of such a contract of employment.' (Mark Freedland (gen. ed.), (n. 3), 29-30).

(22) Ibid., 34.

(23) A. C. L. Davies, 'The Relationship between The Contract of Employment and Statute' in Mark Freedland (gen. ed.), (n. 3), 75-80.

(v) What are the main dangers in making the common law 'fit' with statute law? Also, relating to the second underlined sentence, (vi) What do you see as the primary role of common law as it relates to the function of statute law (if there is any)?

Professor Freedland raised three structural principles as below:[24]

> '(1) a contract of employment should be regarded as essentially consisting of an exchange, or more usually a series of exchanges, of work and remuneration taking place in the context of a personal work relationship ('the exchange principle');
> (2) where there is such an exchange or a series of exchanges of work and remuneration taking place in the context of a personal work relationship, the worker should be regarded and treated as being integrated into the organization of the employer or employing enterprise, ('the integration principle'); and
> (3) where there is such an exchange or a series of exchanges of work and remuneration taking place in the context of a personal work relationship, the employer or employing enterprise and the worker should be regarded and treated as being committed to reciprocal co-operation in the conduct of that contractual relationship ('the reciprocity principle').'

(vii) What do you think the structural principles for the contract of employment should be?

Response:

I think there are two distinct issues which you raise:
First, do I think that Professor Freedland's structural principles are helpful/desirable? In that context the issue is whether I agree with them.

(24) Mark Freedland (gen. ed.), (n. 3), 42.

Second, what is the relationship between the common law and statute law in the context of labour law?

Structural principles.

These principles are fine as far as they go, and they helpfully identify the key elements of a typical contract of employment. To the extent that they provide a *description* of the essential features of a contract of employment, I find nothing in them with which to disagree. But I don't think that they are normative as Prof Freedland…claims. The third principle lies behind the important duty of trust and confidence which has become a central term in the contract of employment in the UK, and is a recognition of the fact that it is what is sometimes called a "relational" contract.

These principles do not, in my view, help when seeking to identify whether in a particular case a worker is employed under a contract of employment or under a limb (b) contract. A limb (b) worker will be in an employment relationship and will have a degree of integration into the employing enterprise, albeit not as thoroughly as someone employed under a contract of employment. So these factors are not exclusive to persons employed under a contract of employment, it seems to me, although they will operate with more force in that relationship.

Furthermore, they leave a number of issues in doubt. First, what does it mean to say that the exchanges take effect in the context of a "personal work relationship"? How regular must a series of engagements be to amount to a "personal work relationship"? Second, when it comes to defining whether a contract exists I do have a problem with a definition which gives the central role to the "employment relationship". The definition of someone working under a contract of employment requires that the worker is employed under a contract: this is precisely why the mutuality of contractual obligations is a pre-requisite to a contract being in place. So if there is to be an employment relationship it

must have its foundation in contract. Take, for example, the guides whose status was in issue in the *Carmichael* case. It may be said in a loose and sociological sense they were in an employment relationship with their employers even between the particular engagements when they actually took visitors around the power plant. But as the House of Lords held, they did not have any contractual obligations in place between engagements; the employer was not obliged to offer work nor the worker to accept it. So although the fact that the workers did in practice work regularly for the employer meant that they might, in a general sense, be said to have been in a working relationship with the employer, they were not contractually bound to the employer between engagements. A focus on the employment relationship independently of the question whether that relationship was rooted in contract could, on Prof Freedland's analysis, lead to a false conclusion as to the proper status of the worker in such a case.

Common law and statute

The basic principle in English law is clear. Where common law (i.e., the law developed by the judges) and statute conflict, the courts must give effect to statute. There is no doubt about that; the hierarchy of norms is not in issue. (At one time the judges used to construe statutes narrowly so that they were interpreted so as to interfere with the common law as little as possible, but that is certainly not the current approach.)

The issue between Professors Davies/Freedland and myself is over how far that principle extends. I think that the courts should give a realistic interpretation of a statute and to the extent that this incompatible with the common law, statute must prevail. But I don't think that the courts should make the common law "fit" with what the courts might think is the underlying thrust or policy of a statute. The difference between the two approaches is summarised in my article, and relates to what Prof Freedland called his "third methodological principle". I am not sure that I

can do better in explaining my objection to that approach than I did in that article[25]:

> "The third methodological feature is said to be a particular doctrinal analysis which is designed to see the operation of the contract of employment not as something separate from—and occasionally modified by—legislation, but as a body of doctrine inextricably inter related with it. Professor Freedland suggests that the time has now come when common law and statute should be seen as 'a consolidated and inseparable body of legal doctrine' so that 'each of those two elements has to be seen as a function of the other one.'[26] This is a highly controversial claim. Whilst there is no doubt that legislation can, and has, directly affected the development of the common law—the so-called dismissal exclusion zone following the House of Lords' decision in *Johnson v Unisys*[27] (which I discuss below) is an obvious example—I confess to having considerable doubts as to whether it is either accurate in a descriptive sense or desirable in a normative sense to link the development of the common law to the shifting patterns of potentially highly political legislation. A proper appreciation of the law's impact on the worker will, of course, need to take fully into account what will often be a complex interplay of common law and legislative principles, and there are clearly various points of intersection between them. Moreover, at a general level, both will be concerned with mitigating the imbalance in bargaining power. But in my view, treating these two independent legal sources as giving rise to an inseparable body of doctrine exaggerates the interplay of what I believe still constitute distinct sources of law which are subject to their own distinct principles."

The case which brought this issue to a head, and which supports The Anne

(25) Patrick Elias, (n. 2), 873-874.
(26) Mark Freedland (gen. ed.), (n. 3), 24.
(27) [2001] UKHL 13, [2003] AC 518.

Davies/Freedland line, is *Johnson v Unissys* [2001] UKHL 13. I discuss it a bit in my article. That raised the question whether a common law claim based on breach of the duty of trust and confidence could be brought and the House of Lords said that it would be inconsistent with the development of the statutory law of unfair dismissal for this to be allowed. As Lord Nicholls noted in a later case (and I mention this in my article) this could not sensibly be said to be because Parliament had indicated an intention that such a claim could not be taken. It was really a policy decision.

I think that the case was wrongly decided (as do many labour lawyers). But some academics, including Professors Anne Davies, and Freedland, agree with it. As Professor Freedland accepted in his book, he was departing from traditional orthodoxy: "the time has come" when common law and statute should be seen as an inseparable body of legal doctrine, he claims. But I am troubled by this. I am worried that the statute will have a wider effect than it ought to have and might undermine the protection which the common law has given to employment rights. Another way of putting the point, perhaps, is to say that there is an issue about how far developments in the common law have been implicitly precluded by legislation even where there is no express bar to such developments. I think that the courts should be slow to infer from the legislation that common law developments should not be permitted.

3. Introduction of Regulations to Make Employers Determine Minimum Conditions in their Relations with Employees

Questions:

The Government consulted the public as to compensation for shift cancellation or curtailment without reasonable notice.[28] The paper shows the Low Pay Commission recommendation, 'workers who have their shifts cancelled without reasonable notice should be compensated.'[29]

I think that if this policy is enacted, it might compel parties to determine or fix the content of their employment contracts, resulting in an indirect requirement for parties to enter into relatively continuous contracts. Then, (viii) Could that enactment be compatible with the mutuality of obligation in case law, which you clarified in your article? (ix) If not, how might judges adapt the concept of mutuality of obligation to the change within statute law ?

Response:

I agree that if the policy is enacted, and employers have to compensate workers when shifts are cancelled without reasonable notice, then it must follow that the workers must be given (even longer) notice that they are required to work a particular shift in the first place. This might put some pressure on employers to formalise the relationship and that in turn could give rise to the mutual obligations needed to create a contract even when no work is actually being performed i.e., between engagements. But this is not an inevitable consequence. There might still be a situation where the employer does not undertake to

(28) Department for Business, Energy, & Industrial Strategy, 'Good Work Plan: Consultation on measures to address one sided flexibility' (October 2019) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818674/Good_Work_Plan_one_sided_flexibility-consultation_.pdf) (last visited on 19/13/2022).
(29) Ibid, 15.

offer the worker any work, but agrees that if he is going to do so, he will give a certain period of advanced notice that they will be required (although it is in fact more likely that statute will require this). Similarly, the worker might say that even of offered work well in advance, he or she is entitled to refuse to do it for any reason whatsoever. It seems to me that in that situation there would still be no mutuality of obligation and therefore no contract between breaks.

4．Supreme Court's decision in *Uber* and Common Law

Questions:

Finally, I have been reading the recent decision of the Supreme Court in the *Uber* case.[30] (x) How do you think current trends in the labour market—specifically relating to the gig economy and new technologies—are likely to transform employment law in the medium-long term?

Response:

Uber is a particularly difficult case, I think, and it may well transform labour law in the longer term. … In my view *Uber* can be read as a small modification of the earlier jurisprudence or as marking a significant departure from it.

The small modification is to see it as a clarification of the *Autoclenz* case. This was the case which says that even if the written terms say, for example, that the worker does not have to do the work personally and can send a substitute to do it in any circumstance(which would stop it being either a contract of employment or a limb (b) contract because there is no obligation to do the work personally), this will not be treated as a true record of the contract if in fact it is plain that this term does not reflect how the parties actually intend to operate the contact. The explanation for this approach in *Autoclenz* was the inequality of bargaining

(30) *Uber BV v Aslam* [2021] UKSC 5.

power. Lord Leggatt in *Uber* was not impressed with that explanation; he said that is often the case in law yet it does not in general justify a refusal to apply normal contractual principles. He said that the real justification for adopting this approach is that the court has to give effect to the statutory policy of giving protection in certain areas (in that case minimum pay and holiday rights) to workers who are in a subordinate and dependent relationship with their employer. The key issue, therefore, is to focus on the relationship and ask whether it is in substance of the kind which justifies the application of the legislation.

On the facts in *Uber*, the issue was whether the Uber drivers were working on their own account with Uber facilitating their relationship with the users as their clients, or whether the users were really taking the service from Uber and the drivers were working for Uber. So it was a question whether Uber was an agent making the contract with the user on behalf of the driver, or whether Uber was contracting as the transporter in its own right, securing that service through the drivers it engages. All the courts, including the Supreme Court, found that it was the latter. In so doing it ignored written statements to the effect that Uber was only an agent saying that this did not reflect the reality. To that extent it was going no further than *Autoclenz*.

But the real issue with Uber is this; what if, say, an employer says: "I don't want to have to meet employment standards and therefore I will allow all my workers to employ substitutes. This is not a sham. I am content for them to do so. (*Deliveroo* is an example where it was held that their workers could not be employed under a contract of employment or be limb (b) workers because they did not have to undertake the work personally). This is not an *Autoclenz* situation because the written contract does not paint a false picture of the true relationship. It provides an accurate picture of what the worker can do. Can the courts say that nevertheless, since the worker is in a dependent and

subordinate position, and since the legislation is intended to benefit workers who are in such a position, it is legitimate for the courts to find that the worker falls within the scope of the definition of worker, at least for statutory purposes, even thought that worker does not have to do the work personally? Some academic commentators think that *Uber* does go that far. I think it may do but on balance probably not. If it does then I find it a difficult decision to support. I can see why it may be desirable in principle to support such workers and give them statutory rights, but the courts cannot just ignore the wording of the legislation when giving effect to its purpose. The protection is afforded to workers who are obliged personally to do the work and if they are not personally required to do it, I don't see on what basis the courts can simply ignore that fact. It is a condition precedent to the right arising that the worker must do the work personally. If there is no obligation of personal service, I don't see how the courts can effectively say that this does not matter in order to give effect to the court's view of the policy behind the legislation. It is principally for this reason that I am doubtful whether this broader analysis of the case is justified. Lord Leggatt is quite a traditional lawyer, and I don't think that he would intend simply to ignore words in a statute contrary to all basic principles of statutory interpretation.

I would agree that on the wider reading of *Uber*, it does focus on the employment relationship as Freedland says should happen. There may be good reasons why that should happen but if the law is to be applied in that way, in my view it must be as a result of Parliament changing the law rather than the courts adopting a relationship approach which in my view simply fails to give effect to what Parliament has said.

Ⅳ　Postscript

In the UK, there is a conflict of views between academics and judges on the

relationship between common law and statute law[31], but it also seems that there is a certain common understanding of a crisis related to the relationship. This is an awareness or recognition of crisis arising from the parties' freedom of contract, as manifested in Freedland's notion of the contract of employment 'between agreement and regulation.' Moreover, as mentioned with regard to the phenomenon of indeterminisation, the issue appears in a form not necessarily envisaged by the conventional common law jurisprudence or statute law. No one knows the answer to whether such situations should be dealt with by reforming the common law rather than statute law[32], by renewing the perception of the law as a whole at least in the employment field[33], or by waiting for the gradual development of the law, including the development of statute law[34]. However, it is true that we cannot take our eyes off English law, where a perceptive debate is developing around the core issues.

(31) For the detail of the conflict of views between Professor Freedland and Lord Justice Elias, see Emiko Shinyashiki, (n. 4).

(32) See Hugh Collins, 'Employment as a Relational Contract' (2021) 137 LQR 426. Collins argues that employment should be expounded with a relational contract theory. The 'approach to determining what obligations the parties have undertaken in a relational contract is to ask: what were the reasonable expectations of the parties in the light of the purpose of the contract?' (Ibid, 435.) He also suggests that 'relational contract theory suggests that the correct approach to an understanding of the mutual obligations of the parties is not to confine attention to the express terms of the contract, but rather to start with the implicit expectations of the parties regarding their transaction and business relation.' (Ibid.) In this way, he draws on relational contract theory to emphasize the expectations of the parties arising in the employment relationship and understands that such expectations are what give rise to legal rights and obligations. Therefore, '[i]f consideration needs to be discovered [concerning on-going employment relationships], it is composed of the mutual reasonable expectation of an on-going relationship combined with an implied obligation of mutual trust and confidence between the parties.' (Ibid, 441.) Hugh Collins tries to overcome the difficulties of zero-hours contracts by reforming common law based on the relational contract theory.

(33) Mark Freedland's challenges in Mark Freedland (gen. ed.) (n. 3) seem to be the case.

(34) Lord Justice Elias seems to be anticipating such a development of the law.