Nicola Countouris

National report UK: Legal analysis part 1

Existing facilitators and obstacles in national regulation of social dialogue

National report 2026

Funded by
the European Union

Grant Agreement No	101177913
Project Acronym	Integrate Dialogue
Project Title	Integrating diversity in social dialogue: Strengthening the EU labour Market in the digital and green age
Deliverable title	National report UK: Legal analysis part 1
Deliverable number	
Deliverable version	
Contractual date of delivery	
Actual date of delivery	
Nature of delivery	
Dissemination level	
Work package	2
Task(s)	
Partner responsible	University College London (UCL)
Author	Nicola Countouris
Version	

National report UK: Legal analysis part 1. Existing facilitators and obstacles in national regulation of social dialogue

Funded by the Horizon Europe Social Dialogue In The New World of Work. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or European Research Executive Agency (REA). Neither the European Union nor the granting authority can be held responsible for them."

Table of contents

Preface by the project managers **3**

Preface by the leader of Work Package 2 ..... **4**

1 Non-Standard Workers in UK Labour Law **5**

1.1 Legal norms on employment status 5

1.1.1 Introduction 5

1.1.2 The concept of employee 6

1.1.3 Legal tests to identify employees 6

1.2 Categories of non-standard workers 9

1.2.1 Point of reference: the 'standard' worker/employee 9

1.2.2 Employees with non-standard terms of employment 10

1.2.3 Limb-b workers 13

1.2.4 The self-employed 17

2 Access to collective bargaining **19**

2.1 Concept of collective agreement 20

2.1.1 Legal framework 20

2.1.2 Access to representation and internal voice in collective bargaining 22

2.2 Process of bargaining to conclude collective agreement 23

2.2.1 Legal framework 23

2.2.2 Access and participation to the bargaining process 25

2.2.3 Access to collective action 26

2.3 Legal effects of a collective agreement 26

2.3.1 Legal Framework 26

2.3.2 Access to being covered by a collective agreement 27

2.4 Enforcement of collective agreements 28

2.4.1 Legal Framework 28

2.4.2 Access to enforcement of collectively bargained conditions of work 28

2.5 Other types of collective agreements 29

2.6 Obstacles and facilitators 29

3 Access to information and consultation at company level **31**

3.1 The system of information and consultation at company level 31

3.1.1 Legal Framework 31

3.1.2 Access to representation and to information and consultation 32

3.1.3 Enforcement 33

3.2 Obstacles and facilitators 34

4 Access for non-standard workers to Social Dialogue 35

Preface by the project managers

The INDI project (Integrating Diversity in Social Dialogue: Strengthening the EU Labour Market in the Digital and Green Age), funded by Horizon Europe (101177913), examines how social dialogue can better include non-standard workers in a transforming labour market shaped by digital and green transitions. Focusing on the EU, the UK and Norway, the project explores existing and emerging models of worker voice and representation, with the aim of preventing rising inequality, in-work poverty, and social exclusion.

While social dialogue is a cornerstone of the EU's social market economy, non-standard workers often find themselves on the margins of such processes. This contributes to an increasing dualization of the labour market, with a clear divide between the better-off 'insiders' and the non-standard 'outsiders', who often find themselves in vulnerable positions. Both the scale and the consequences of such dualization vary significantly across countries, sectors, and business models.

The project adopts a comprehensive, multidisciplinary, and comparative approach encompassing eight countries, different business models, various forms of non-standard work, and social dialogue processes at various levels. We place the needs, interests, and motivations of non-standard workers for representation and voice at the centre (bottom-up perspective). These insights will be matched with strategies, willingness, and distributional costs among social partners when including workers in non-standard positions in social dialogue processes, as well as how these dynamics play out within different industrial relations and employment regimes (top-down approach). Our main research questions are:

i. How can non-standard workers strengthen their power resources?
ii. How are these processes influenced by prevailing industrial relations regimes, employment regimes, and business models?
iii. How are these processes shaped by the interests of (different groups of) workers in non-standard positions?
iv. How are these processes shaped by the interests of employers, investors, and contractors?
v. How can power resources be translated into social dialogue with favourable outcomes for workers in non-standard positions?

Researchers from Belgium, Denmark, Ireland, Italy, the Netherlands, Norway, Slovakia, and the United Kingdom are participating. The project is coordinated by The Fafo Foundation in Oslo, Norway. The project was launched in February 2025 and will be completed at the end of January 2029.

We wish to thank the European Commission and the Horizon Europe programme for providing the opportunity to carry out this important and exciting research project.

Oslo, August 2026

Sissel C. Trygstad, Project Coordinator

Preface by the leader of Work Package 2

The legal work package (WP 2) of the INDI-project will present a legal analysis that aims to evaluate the impact of EU and national legal frameworks as barriers or facilitators for inclusion of non-standard workers in social dialogue, with a focus on reform recommendations. With a four-step analysis, this will contribute to the realization of the aim of the INDI-project of creating a more cohesive, effective, and legally robust environment for social dialogue, by addressing and proposing enhancements to the existing legal framework.

Part 1 is the first step and focuses on the existing legal framework at a national level, with an aim to identify and compare legal obstacles and facilitators for access to social dialogue for non-standard workers in selected national systems. The analytical framework for the analysis is presented in a separate working paper (deliverable 2.1). This has guided analysis of facilitators and obstacles in national law in Denmark, Italy, the Netherlands, Norway and the United Kingdom.

Part 1 will be concluded with a comparative analysis of existing facilitators and obstacles in national law (deliverable 2.3). Here, we will discuss commonalities and variations regarding access to social dialogue for non-standard workers with a focus on how this relates to differences in the national systems of social dialogue.

The next steps will be to examine the interplay between EU measures with potential to strengthen access to social dialogue for non-standard workers (Part 2, deliverable 2.4) and national law (Part 3, deliverable 2.5 and 2.6). Based on this, the aim is to develop recommendations for new strategies for including non-standard workers in social dialogue (Part 4, deliverable 2.7)

Oslo, August 2026

Marianne Jenum Hotvedt, WP Leader

1 Non-Standard Workers in UK Labour Law

1.1 Legal norms on employment status

1.1.1 Introduction

UK employment law is fundamentally regulated by three key statutes (the Employment Rights Act 1996, dealing with most individual employment rights; the Equality Act 2010, covering anti-discrimination legislation; and the Trade Union Labour Relations (Consolidation) Act 1992, containing most collective labour rights), and by an intricate network of secondary instruments, Regulations, as well as of course by judicial precedent. Collective agreements once played a central role in shaping rights at work, with state legislation being of marginal importance until the early to mid-1960s, a state of affairs that was aptly defined by Otto Kahn-Freund as 'collective laissez faire'. For the last half century however, the power of trade unions and the solidity of the UK industrial relations framework have been progressively undermined by successive governments, in particular by conservative or conservative-led ones. The decline in the role of collective agreements as a source of rights at work has been matched by a rise in statutory intervention, also on the back of EU instruments and their domestic transposition.

The personal scope of application of UK labour law is fundamentally premised on a **reformed 'binary divide'** between **employment** and **self-employment**, reformed in the sense that it also encompasses an **intermediate concept of 'worker'** that attracts some, but not all, statutory employment protections.

Employees with a contract of employment (which statute and judicial precedent often refer to with the synonymous term 'contract of service') enjoy all the statutory protections. The self-employed (working under 'contracts for services'), enjoy a very limited range of rights. The intermediate category of 'workers' (in reality a sub-category of self-employment, according to the Supreme Court in *Clyde & Co LLP and Another v Bates van Winkelhof* [2014] UKSC 32, paragraph 25, *per* Lady Hale) enjoys a limited range individual and collective labour rights. The rights that each of these categories attract will be discussed later, in section 1.2.

The concepts of 'employee' and 'worker' are defined by statutes, with a very broad brush, and shaped by case law, with judicial precedent playing a central role in defining the 'legal tests' that identify the precise employment status of working people. The 'self-employed' (or 'genuine' self-employed, as they are sometimes called) are not defined in statute, and there is very little by way of case law tests. They are, in reality, a 'residual' category. If a working person does not meet the judge-made tests to be classified as an 'employee', nor those to be classified as a 'worker', then – almost by default – they will end up being classified as self-employed.

Around these three fundamental concepts, a series of other typologies of working people are identified and defined by specific statutes conferring specific labour rights. From the more traditional 'part-time', 'fixed-term', 'temporary agency', and 'home' workers to the more recent 'zero hours contract' and 'zero hours arrangement' workers, UK

labour law provides no shortage of examples of categories and sub-categories of non-standard workers.

1.1.2 The concept of employee

Especially since the middle of the 1950s onwards, successive UK employment law statutes have typically afforded employment protection rights to 'employees' working under a 'contract of employment'.

Currently, the core provision defining the concept of 'employee' in UK law is s. 230 of the Employment Rights Act 1996 (hereinafter ERA 1996). Its first two paragraphs read as follows:

> 230 Employees, workers etc.
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

It is self-evident that this provision provides, at best, a very rudimentary and circular definition of who is an 'employee' under UK labour law. In essence, it establishes that an employee is somebody working under a contract of employment, and that a contract of employment means a 'contract of service', which is the somewhat archaic way in which English law, and courts, refer to employment contracts. The definition has at least the merit of including contracts of apprenticeship under the 'employee' rubric, and – very much in line with traditional English law contractual formation canons – accepts that contracts of employment can be both express and implied, and both written or oral. In reality though, most contracts of employment these days fundamentally rely on written documents (though not necessarily a written contract of employment, as understood in most European legal systems).

In the absence of a more detailed statutory definition, the task of identifying the necessary elements, indicia, and test to establish the existence of a contract of employment has been left to courts and tribunals.

1.1.3 Legal tests to identify employees

Judicial reasoning has produced a very rich jurisprudential body of legal precedents setting out a number of key 'tests' to establish the existence of a contract of employment. British doctrinal understanding of the contract of employment is disproportionately shaped by these judge made tests, more so than the equivalent understanding in other jurisdictions.

These 'tests' superimpose themselves over a number of more fundamental contractual requirements that descend from common law- contract law reasoning, for example standard English law doctrinal principles such as 'freedom of contract', 'legality', 'consideration'. But these common law fundamental principles (and certainly the principle of

'freedom of contract') continue to play a, comparatively speaking, significant and preponderant role in shaping the form and contents of the English law notion of the contract of employment.

The key tests deployed by UK judges to establish the existence of a contract of employment are the following:

- The **control test**. First established in in *Yewens v Noakes* [(1880) 6 QBD 530] and, more recently, rephrased in somewhat broader terms in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 considers whether the employing entity has the right to give orders and directions over the worker's activity. It is, in some respects, the functional equivalent of the continental European concept of 'subordination', while not strictly being (as it is in some European systems) the 'object' of the contract, but certainly an important element.
- The **integration test**. A relatively more recent test, developed by courts to facilitate the inclusion in the 'employee' category of skilled workers who were not under the constant supervision of their foremen, line managers, and other employment agents. As developed by Lord Denning in *Stevensons* [1952] 1 TLR 101, the integration test takes into account the extent to which a person's activity is structurally part of the business. This test was somewhat emblematic of a period after WW2, where the welfare state was rapidly expanding, thus requiring a broader tax base, that the 'employee' category was increasingly asked to contribute to.
- The **economic reality test**. As established in *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 and later developed in *Hall v Lorimer* [1994] ICR 218, the economic reality test essentially assesses whether the working person takes the ultimate risk of loss or chance of profit, in which case they will typically be understood as being self-employed.
- The **mutuality of obligation test**. Perhaps the most debated and equally most problematic test, it assesses whether the contractual terms demonstrate some sort of mutual promise by the employer to provide future work and a corresponding one by the employee to accept that work, what Freedland famously described as a 'mutual promise of future performances'. In cases such as *O'Kelly v Trusthouse Forte plc* [1983] ICR 728, *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, and *Carmichael v National Power plc* [1999] UKHL 47, it has variably been deployed to deny employment status to casual, on-call, and intermittent workers, either by excluding that each of their assignment was a contract of employment, or by establishing that, even if each assignment could potentially be a contract of service, the absence of mutual obligation meant that these were all separate contracts, without an overarching 'umbrella' contract bringing them together into a continuous employment relationship.
- **The multiple test**, which is arguably better understood as **a 'multi-factor approach'** rather than a specific 'test' identifying a particular factor or aspect of the contract of employment. In *Ready Mixed Concrete* [1968] 2 QB 497, it was established that a contract of employment would be established if 'three conditions' are fulfilled, namely i) work is done in exchange for pay; ii) there is a sufficient degree of control;

iii) 'The other provisions of the contract are consistent with its being a contract of service'. It is of course especially the 'condition' under iii) that has opened up the judge's discretion to focus on virtually every aspect of the provision of work, including all the other tests mentioned above. It is far from clear that the use of this test leads to a more inclusive understanding of what amounts to a contract of employment. Often judges see it as a prompt to revisit all other tests, including mutuality of obligation, and conclude that on balance the contract is not one of employment.

These tests are not cumulative, and judges enjoy considerable discretion in applying them to concrete cases. Authorities such as Simon Deakin have expressed the view that 'The parcelisation of 'tests' into 'factors' and 'indicators' resists attempts to unify the case law or restate it at a higher level of principle, invites repeat litigation over subtle differences in the facts of cases, and encourages the use of contractual boilerplate to take work arrangements outside the scope'[1] of UK labour law. This is of course of major concern for NSW of any type, as well as for employers at least to the extent that it makes status classification very unpredictable.

In reality, and in recent decades in particular, control and mutuality of obligation have played a key role in shaping the understanding by UK judges of who is an employee and what is a contract of employment. Mutuality of obligation in particular has had an adverse effect on casual workers seeking to establish both employee status and 'continuity' (essentially to qualify for certain employment rights, such as protection against unfair dismissal, that are not 'day one' rights, but only apply after, say, two years of continuous service with the same employer). Decision such as *Secretary of State for Justice v Windle and Arada* [2016] EWCA Civ 459, where the lack of an 'umbrella contract', linked to the absence of sufficient mutuality, was reverse engineered to conclude that each individual assignment could not be a contract of employment, shows how pernicious the application of this test can be. There are some indications that, in the tax law context (i.e. when workers are to be classified as employees or self-employed for the purposes of their income tax liabilities) mutuality of obligation may begin to lose its grip (*Commissioners for His Majesty's Revenue and Customs (Respondent) v Professional Game Match Officials Ltd* [2024] UKSC 29), it remains an insurmountable obstacle for most casual and intermittent (including 'gig') workers to establish full employment status (courts often use the expression that status 'founders on the rock of absence of mutuality').

Overall the UK concept of 'contract of employment' is understood as being **more narrow than equivalent concepts in other European jurisdictions**, and more than once the CJEU of the EU has found that the UK judicial interpretation of what amounts to a contract of employment or employment relationship, fell short of EU requirements and the EU worker concept (see for instance Case C-256/01, *Allonby*; Case C-432/17, *O'Brien*).

[1] S. Deakin, 'Judging in the Common Law Tradition: Sir Patrick Elias on Employment Status' (2025), ILJ, 792-815, 808.

1.2 Categories of non-standard workers

1.2.1 Point of reference: the 'standard' worker/employee

As mentioned in the previous section, UK law demands little to no formal requirement for the establishment of a 'contract of employment', and the common law notion of 'freedom of contract' is central to its establishment. Contracts can be oral or written, express or implied (i.e. from oral exchange, or conduct), and can contain a number of variation clauses that exponentially increase their flexibility. In many ways, the extreme flexibility in terms of formation (and variation) of employment contracts means that a much broader range of forms of work can potentially fit the contract of employment 'type'. As long as the basic requirements of legality and capacity, offer and acceptance, and consideration are present, a contract of employment can be concluded for virtually any duration, frequency, object, and so on. Unlike other legal systems, there is little in terms of, for instance, statute imposing that certain types of non-standard contracts or terms need to be evidenced in writing.

But it would be mistaken to assume that a consequence of this flexibility is that more types and forms of work actually fall under the standard employee model. In fact, there is nothing in UK law assigning to the contract of employment a 'point of reference' role. Unlike other systems there are neither general presumptions that work is typically expected to be performed under a contract of employment, nor are there any specific presumptions that certain forms of work or certain professions (for example the work of journalists, or platform work) are presumed to be performed under a standard contract of employment model. In fact, the very 'freedom' that allows parties to conclude very flexible contracts of employment, also allows them to conclude other types of contracts, including contracts for services/self-employment. Freedom of contract is understood as somewhat antithetical to the idea of 'legal presumptions'.

This freedom is not unlimited, and UK law has its own 'sham contract' doctrine that is in many way comparable to other European '*fictio iuris*' doctrines (although it was established fairly recently in *Autoclenz Limited v Belcher and Others* [2011] UKSC 41- prior to that a contract would be called a 'sham' only if both parties had effectively colluded to misrepresent it). The limits to the parties' freedom to 'design' their contracts is also expressly restated by s.203 ERA 1996, providing that '1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports— (a)to exclude or limit the operation of any provision of this Act'.

But even though freedom of contract encounters some notional limits, UK judges will often be guided by contractual terms, rather than by the reality of the performance of work, especially when that reality (as is often the case with casual and non-standard forms of work) is contested. As put by Lord Denning in *Massey v Crown Life Insurance Company* [1978] IRLR 31, CA:

> If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it … On the other hand, if that relationship is ambiguous and capable of being one or the other, then the parties can remove the ambiguity, by the very agreement itself which they make with one another. The agreement

> itself then becomes the best method from which to gather the true legal relationship between them.

Similarly, as opined more recently by Elias LJ in *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735

> It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant facts. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive.

Quashie is an important case because, although courts will be guided by 'the reality of the situation where written documentation may not reflect the reality of the relationship' (*Autoclenz*, para [22]), employment status disputes typically emerge in cases 'where the position is uncertain', and where contractual construction will be decisive.

Overall, while standard employees still constitute the large majority of the UK workforce (In November 2025 to January 2026 there were 29.72 million people working as employees, while a further 4.39 million were self-employed),[2] it would be erroneous to suggest that the employee category constitutes a point of reference. UK labour law does not contain any 'presumption', general or specific, that work is normally to be performed under contracts of employment. Nor does it provide specific formal requirements for non-standard contracts to be concluded, including fixed-term or part-time contracts.

Although the flexibility of the contract of employment (in terms of formal requirements for its formation) would theoretically allow for a greater diversity of terms and conditions of employment to be reconciled with its structure (what the analytical framework of this project refers to as 'non-standard with respect of contractual terms'), the strictures of certain legal tests (notably mutuality of obligation), and the dominant 'freedom of contract' legal culture, means that status classification remains a vexed question for UK labour law, and that workers in non-standard forms of employment, and casual workers in particular, are disproportionately affected and excluded from basic employment rights, individual and collective.

1.2.2 Employees with non-standard terms of employment

UK labour law is of course familiar with a wide range of non-standard employment relations, in the sense understood by the project's Analytical Framework, i.e. 'workers, who have clear legal status as employees and are clearly in a subordinate employment relationship. However, they have contractual terms which deviate from those of a standard worker one way or another'.

The flexible nature of the UK concept of contract of employment means that, at least in theory, all forms of work that meet the English contract law fundamental requirements of legality, consideration, and agreement between the parties, as well as the

[2] https://researchbriefings.files.parliament.uk/documents/CBP-9366/CBP-9366.pdf

employment tests of control, mutuality, integration, and economic reality, can be classified as contracts of employment, regardless of a presence of a non-standard term.

The flexible nature of the English notion of contract of employment is such that, traditionally, UK labour law has eschewed the ad hoc regulation of non-standard forms of employment since, after all, a contract term providing that the contract would come to an end after a fixed period, or providing that the employee had to work 20h/week, did not require any dedicated legislative intervention to subsume such contracts under the general scheme of the contract of employment. By virtue of not having a 'type' in the contract of employment (unlike many Continental European legal systems), UK law has not felt the spontaneous need to create dedicated legislative instruments to regulate 'atypical' contracts for work.

EU membership, and the adoption of EU directives on part-time, fixed-term, and temporary agency work, did however result in the UK government passing three dedicated Statutory Instruments, namely the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000; The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002; and The Agency Workers Regulations 2010. These statutory instruments encapsulate the core provisions of the three directives they seek to implement, in particular the 'equal treatment' principle and, as far as fixed-term contracts are concerned, the conversion of successive fixed-term contracts for four years or more into open ended contracts. These instruments have been retained after the departure of the UK from the EU.

The extent to which these three instruments foster an inclusive approach towards NSW is, to say the least, debatable. At least three exclusionary elements can be identified. Firstly, their inclusivity is heavily dependent on their respective (and slightly different) personal scopes of application. While the part-time and agency worker regulations apply to 'workers', the fixed-term regulations apply to 'employees', a category that – in English law – is understood as narrower than the 'worker' category (on which see below). This concern is probably of limited practical importance as ultimately the personal scope of these instruments must comply with the minimum requirements defined by the jurisprudence of the CJEU, that on numerous occasions has superimposed its own definition of 'worker' on the somewhat narrower domestic, UK, narrower employee or worker definitions (see *O'Brien*, cited above). Even so, English law is clear that the rights and protections contained in these three instruments do not apply to self-employed persons, and – as discussed in the previous subsection and will become clearer in the following ones – English law allows substantial leeway to employers seeking to label work relations as autonomous.

Secondly, the inclusivity of the agency workers regulations is severely diminished by the 12-week continuous employment qualifying period contained in Reg. 7, that at the time of its introduction was understood as excluding 55-60% of the then 1.3 million agency workers.[3] It is also severely diminished by its Reg. 10, offering the possibility to opt-out of Equal Treatment principle by providing a 'permanent contract providing for

[3] See Explanatory Memorandum 2010:
http://www.legislation.gov.uk/uksi/2010/93/pdfs/uksiem_20100093_en.pdf

pay between assignments', and even more so by the decision in *Moran v Ideal Cleaning Services* (Appeal No. UKEAT/0274/13/DM) that established that 'the concept of "temporary" in the Regulations and the Directive means not permanent' (para 50) thus excluding from the scope of the Regulations those agency workers that are 'placed' by an agency with a 'user company' on a 'permanent' basis.

Thirdly, and in spite of the Agency Workers Regulations 2010, workers providing their labour through intermediary entities are also particularly exposed to the risk of misclassification as self-employed contractors because such intermediaries can often be construed as 'personal service companies', limited companies/commercial structures that render the working person the director and majority shareholder of the company, and therefore an independent contractor with a corporate structure (see *Partnership East London Co-operatives Ltd v Maclean* [2025] EAT 142; although see also some emerging stricter scrutiny in *M Appiah v Tripod Partners Ltd and Home Office*: 2302929/2023, an ET decision, currently under appeal), in effect shifting their status into what this study refers as 'NSW3'. Sometimes such intermediaries will be structured as 'umbrella companies' (employment intermediaries that employ workers on behalf of agencies and end clients), that while not necessarily transforming workers into self-employed contractors can negatively impact on continuity of employment, as they will be generally considered employees only during active assignments, not under a continuous "overarching" contract (see *Mainpay Ltd v HMRC* (2025); *Exchequer Solutions Ltd v HMRC* (2022).

Aside from these three dedicated regulatory instruments, the UK has been reluctant to establish ad hoc rules for the myriad of non-standard forms of work and employment that are present in the British labour market. For example, there is no specific instrument regulating platform work, even though case law plays a role in determining the rights of platform workers. And even more traditional forms of non-standard employment, such as on-call work, home-work, or telework, have not received specific legislative attention. A reversal to this somewhat agnostic approach is however apparent in the recent Employment Rights Act 2025, that has introduced new rules to regulate the practice of zero-hour contracts, essentially mandating guaranteed hours and reasonable notice for zero-hour workers. But crucially, for all these forms of non-standard work, employee status is usually precluded by the difficulty of establishing mutuality of obligation, usually on account of the inherent intermittence and discontinuous patterns in the provision of these forms of work, sometimes on account of the lack of control or integration.

Overall, the contract of employment remains the dominant legal status in UK employment law and is certainly the employment status around which both employment rights and social security entitlement orbit. However, the is perhaps less of a watertight separation between the contract of employment and other forms of NSW in the sense that it is comparatively easier for UK employers to alter particular terms of the contracts they issue to their workforce and thus construe them as contracts falling under NSW1, NSW2, and even NSW3 arrangements. This is partly due to the absence of a strong doctrine of inderogability in employment relations, but also to the low coverage of collective agreements and to some common law peculiarities in the construction of contracts of employment, such as the doctrine of mutuality of obligation.

1.2.3 Limb-b workers

As noted above, UK labour law is no longer premised on a 'binary model' of the employment relationship, being instead endowed with an intermediate category of 'worker' at least since 1998, a category that is functionally located between employment and self-employment. This intermediate category is what most closely approximates what the current study refers as NSW2, at least to the extent that it includes workers that share some of the traits of dependent work but also some of independent employment, although it is important to stress that their status is not 'unclear', at least to the extent that UK law encompasses this 'worker' status as one of the three main employment statuses, alongside the employee and the self-employed statuses.

This intermediate category is understood as stemming from the definition of 'worker' contained in s.230(3) ERA1996 that reads as follows:

> 3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

To note that what is commonly referred as 'worker' in UK law is usually the type of contract referred to in letter (b) of s.230(3) (hence the colloquial term typically used to describe them as 'limb (b)' workers).

The definition of limb-b 'worker' was introduced in ERA1996 after the adoption of the National Minimum Wage Act 1998, establishing the rights to a statutory minimum wage for all 'workers', i.e. for employees and for limb (b) workers.

This definition is very similar to a pre-existing definition of worker shaping the personal scope of application of most of the (collective labour law) rights included in s.296 of the Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA1992), a definition 'inherited' from its predecessor the Trade Union and Labour Relations Act 1974, s. 30. S.296 TULRCA1992 reads as follows:

> Meaning of worker and related expressions.
>
> (1) In this Act worker means an individual who works, or normally works or seeks to work—
>
> (a) under a contract of employment, or
>
> (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or

(c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

The similarities between the two definitions of 'limb-b' worker are striking and the only difference is that s.296(1)(b) TULRCA1992 excludes from the concept of 'worker' professionals performing work or services to clients, whereas s.230(3)(b) ERA1996 also excludes from that concept businesspersons providing services to customers, possibly suggesting a slightly narrower concept[4] (though this difference between the two definitions does not appear to have any practical implication on the case-law, that uses the two concepts as equivalent and synonymous). The Supreme Court has clarified that 'limb-b' workers ought to be understood as a species of the self-employed genus.[5]

Limb-b workers receive some specific labour law protections, though not all of them. They are covered by the National Minimum Wage ct (NMWA 1998, s 54), the Working Time Regulations (1999, Reg 2), protection for whistleblowers (ERA ss 43A-43L), part-time status (see above), Health and Safety at Work, and of course by the bulk of the rights included in TULRCA1992 and by the Equality Act 2010 (the latter mainly thanks to anti-discrimination legislation deriving some of its fundamental concepts by EU equality law, a point explored further in the next paragraph). They are not covered by statutes protecting against unfair dismissal, statutory redundancy pay, minimum notice periods, and statutory sick pay. Recent changes contained in the Employment Rights Act 2025 (ERA2025) have offered some protections against 'detriment' to workers, for example in connection with the new right of zero-hour workers to guaranteed hours, also introduced by ERA2025, with a new s. 47H ERA1996 inserted by Schedule 2, para 10 of the ERA 2025.

Courts have defined limb-b workers essentially by applying the same tests used to identify 'employees' with a contract of employment, but by applying a 'lower passmark'. As put by Mr Recorder Underhill QC (as he then was) in *Byrne Bros (Formwork) Ltd v Baird* [2002] I.C.R. 667, 'The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers'.

Limb-b workers have risen to prominence in recent years, especially since the London Employment Tribunal in 2016 attributed this status to Uber drivers in *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET), later confirmed by the Supreme Court in *Uber BV and others v Aslam and others* [2021] UKSC 5. Casual workers both inside and outside (*Pimlico Plumbers Ltd v Smith* [2018] UKSC 29) the gig-economy have successfully established 'limb-b' worker status.

Overall establishing limb-b worker status appears to be less exposed, but not entirely immune, to the challenges posed by mutuality of obligation. Because of that some workers on casual contracts, including zero-hour contracts, are likely to fall under this

[4] N. Countouris, 'Not Delivering: the UK 'worker' concept before the UK Supreme Court in Deliveroo - *IWGB v CAC and another* [2023] UKSC 43', (2024) ELLJ, 786-802, at 797.

[5] *Clyde & Co LLP and another* v *Bates van Winkelhof* [2014] UKSC 32, paragraph [31].

status, even though mutuality of obligation will prevent them from achieving full employee status. However, even limb-b workers with enough mutuality to qualify as workers during the performance of their work, may be prevented from establishing continuous employment between their serparate limb-b contracts in the absence of mutual obligations for future performance.

Partly because of this reason, the new protective provisions on zero-hour contracts introduced by the ERA2025 have introduced a new legal status for zero-hour workers that entirely bypasses the obstacles posed by the test of mutuality of obligations, the status of 'zero hours arrangement'. This status is defined (with very broad brushes) in s.6 of the Act. The definition has two parts. One part that defines the word 'arrangement' as 'an arrangement (whether contractual or non-contractual) other than a worker's contract' (new s. 27BZ2(1) ERA 1996). And a second part that defines the entire expression 'zero hours arrangement' as 'an arrangement under which (a) an employer and an individual agree terms on which the individual will do any work where the employer makes it available to the individual and the individual agrees to do it, but (b) the employer is not required to make any work available to the individual, nor the individual required to accept it'. This 'relational' concept has presumably been introduced to ensure that rights such as the right to be offered guaranteed hours cannot be easily circumvented by employers simply by claiming that the zero hours worker is not a 'qualifying worker' because the absence of sufficient mutuality of obligations (hence the reference to the two parties not being required to make work available or to accept it) calls into question the very existence of a worker's 'contract', i.e. calls into question its contractual nature. This new expansive and 'relational' definition is likely to cover many casual workers currently struggling to establish mutuality.

This brief discussion of 'zero hours arrangements' offers an opportunity to clarify that the personal scope of application of UK labour law is arguably much more fragmented than the notions of a 'binary divide' or 'modified binary divide' models can possibly convey. In reality, the UK statute book contains more than three employment status definitions. Aside from the classic 'employee' and 'limb-b' worker definitions, discussed above, other labour law statutes, for example s.35 of the National Minimum Wage Act (NMWA) 1998, have introduced additional, ad hoc, definitions and concepts, such as the 'home worker' definition, that either do not require strict 'personality'[6] in the provision of work and services, or offer an 'extended definition of worker',[7] for example s. 43K ERA 1996 for the purposes of whistleblowers' protection legislation. Case law has further fragmented worker status definitions, with judgments such as National Union of Professional Foster Carers v The Certification Officer [2021] EWCA Civ 548 arguably suggesting that for certain ECHR rights a broader and more 'relational' employment status may be appropriate, even in the absence of the habitual contractual elements necessary to

[6] In James v Redcats (Brands) Ltd [2007] IRLR 296, Elias J persuasively opined that 'unlike the worker, it is not necessary that the home worker should personally carry out the work at all. It is the provision of services that is enough, irrespective of who provides them, as long as they are not provided in the course of running a business or profession'.

[7] Day v Health Education England [2017] EWCA Civ 329.

establish a contractual relationship.[8] When it comes to the personal scope of application of anti-discrimination legislation, precedent[9] appears to cast an unduly narrow personal scope of application, and one that may be inconsistent with the protective aspirations and purposes of UK and EU equality legislation.[10]

Overall, the scope of UK employment legislation is unduly complex and unduly fragmented, while simultaneously being inadequate in terms of protecting, in particular, casual workers. This has not escaped the attention of the Labour Party, now in government, that in its 2024 *Labour's Plan to Make Work Pay*, pledged to 'move towards a single status of worker and transition towards a simpler two-part framework for employment status'.[11] It also proposed to 'consult in detail on a simpler framework that differentiates between workers and the genuinely self-employed'.[12] From these suggestions, one can reasonably assume that the consultation (that has been postponed and delayed and has yet to take place) will be largely preoccupied with taking views on the abolition of the current, intermediate, category of 'limb-b' workers. In fact, *Labour's Plan* expressly envisages that UK labour law will move away from the current 'three-tier system of employment status [that] has contributed to the rise of bogus self-employment, with some employers exploiting the complexity of the UK's framework to deny people their legal rights'.[13]

Finally, it is worth noting that, in contrast with the personal scope of application of employment legislation, UK tax law is still essentially premised on a strict binary divide between employment and self-employment, without an intermediate 'limb-b' category existing for tax purposes. Under tax legislation, the employee status is in some respects an 'augmented' status, expanded by the application of what is colloquially referred as IR35, an anti-avoidance scheme contained in Chapter 8 of Income Tax (Earnings and Pensions) Act 2003. IR35 has the effect of identifying independent contractors providing personal services through companies (often limited liability companies known as 'personal service companies') and reclassifying them as employees for tax purposes. It is also worth pointing out that the main type of social security contribution, National Insurance, is also premised on a binary scheme that essentially follows tax law status. IR35 will typically extend its effects on national insurance contributions as well as tax liabilities. Even though the tests used to ascertain the application of IR35 are modelled on the contract of employment tests discussed above, these tests are deployed and applied more liberally in tax cases, possibly in consideration of the binary nature of the

---

8 [2021] EWCA Civ 548, para 81 in particular. But cf. A Bogg and M. Ford QC, 'Employment Status and Trade Union Rights: Applying Occam's Razor' (2022) ILJ, 717-743, arguing that, in fact, the foster carers in NUPF should have been able to pass a 'contract' test under domestic law principles, regardless of the Article 11 ECHR dimension of the case identified by the Court of Appeal.

9 *Jivraj* v *Hashwani* [2011] UKSC 40. M. Freedland and N. Kountouris, 'Employment Equality and Personal Work Relations—A Critique of *Jivraj* v *Hashwani*' (2012) ILJ, 56-66.

10 N. Countouris and C. O'Cinneide, 'Time to remedy the legal consequences of *Jivraj* v *Hashwani*? The personal scope of application of equal treatment legislation', UK Labour Law Blog (25 September 2024).

11 Labour Party, Labour's Plan to Make Work Pay: Delivering A New Deal for Working People (2024), page 7.

12 Ibid.

13 Ibid.

divide and possibly due to the more aggressive enforcement by the UK tax authorities.[14] A finding of employee status for tax purposes does not necessarily imply a finding of employee status for labour rights claims, raising concerns that some workers can pay taxes for which they receive no corresponding labour rights.[15]

1.2.4 The self-employed

Neither statute nor case law offer a legal definition of who is a 'self-employed', or 'genuinely' self-employed person, what the present study refers to as NSW3. Judges in particular do not attempt to engage at any particular level of detail with this category, that is typically understood as including 'people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them' (*Clyde & Co LLP v van Winklehof* [2014] UKSC 32, para 25).

In effect, in the UK, as in other countries, self-employment is a 'residual category': if a judge is unable to classify a working person as an 'employee' on the basis of the various tests developed by courts, then they will typically classify them as 'self-employed'. It is almost a game of round holes that will only accept equally round pegs, any other shape or form ending in what is effectively a 'default basket', a default category, that is 'self-employment'. That residual 'basket' essentially contains all those who are not 'employees', an extremely heterogeneous array of working people, ranging from 'giggers' (with substitution clauses), to journalists, to medical practitioners, and share fishermen. Being a 'residual category', the concept of self-employment is essentially shaped by (the breadth and shape of) the 'employee' category – whatever does not fit into that category falls into self-employment.

Traditionally, working persons that have failed to qualify as employees and have ended up falling into the self-employment category have tripped on three common hurdles. The first one is 'mutuality of obligation', discussed above. The second one is 'personality'. The third one, which is to some extent an emanation of the second one, is the presence of an intermediary corporate structure – typically a personal service company - enveloping the provision of work and services and construing that provision as a 'business to business' contract for services.

O'Kelly v Trusthouse Forte plc [1983] ICR 728 is a prime example of how the absence of sufficient mutuality of obligation can disenfranchise workers from (in this case) collective labour rights by casting their employment status as one of self-employment. In this case some causal waiters tried to form a union and were dismissed for that reason. When they tried to activate the judicial remedies in support of the (then newly introduced) protections against discriminatory dismissal on trade union membership

[14] Cf National Audit Office, 'Investigation into the implementation of IR35 tax reforms - HM Revenue & Customs' (2022); Judith Freedman and Helen Miller, 'Tax and employment status: myths that are endangering sensible tax reform' (2020, IFS);

[15] House of Lords Economic Affairs Committee Finance Bill Sub-Committee, 'Off-payroll working: treating people fairly', 1st Report of Session 2019–20 HL Paper 50 (2020). H. Dhorajiwala, 'PAYEr Beware: Analysing the Treatment of Employment Status in Atholl House and Kickabout' (2023) ILJ, 751-775.

grounds, they failed to establish the necessary 'employee' status, due to the absence of sufficient mutuality with their putative employer.

The more recent *Deliveroo* judgement - *IWGB v CAC and another* [2023] UKSC 43 – is a strong authority on the proposition that the presence of 'substitution clauses' can be relied upon by employers to suggest that what would normally be workers contracts are in reality contracts for services due to the absence of sufficient 'personality' in the provision of work and services. In this case the result of this finding was that the union IWGB could not trigger the statutory trade union recognition procedure contained in Schedule A1 of TULRCA 1992, as this process is reserved to trade unions organising and representing 'workers' (and the couriers in this case failed to establish even 'limb-b' worker status, because of the substitution clauses in their contracts).

The use of personal service companies (PSC) has been prevalent to mask employment relations as relations of self-employment. PSC are limited companies, typically set up by a single freelancer or consultant (that is the sole director and shareholder) to provide services to clients. The corporate structure has usually prevented the establishment of personal work relations, while offering a number of tax advantages to the director-employee[16] and so far English courts have resisted the suggestion that the *Autoclenz* 'sham' doctrine should apply in this domain.[17] More recent judgments such as *Partnership of East London Co-operatives Ltd (PELC)* v *Maclean* [2025] EAT 142, suggest that English tribunals are increasingly open to piercing through the corporate veil of 'personal service companies' and establish that, in reality, a contract was concluded directly between the working person and the user (the limited company becoming a mere 'discharge mechanism' for the payments to take place). However, they also exemplify the persisting challenge that mutuality of obligations poses to both employee and worker status. In *Maclean*, in spite of years of regular service, the contractual documents were not assessed as displaying a mutual commitment for future performance, as the offer of future work was subject to a highly artificial 'monthly bidding and allocation system', an arrangement that was arguably facilitated by the presence of a 'limited company' intermediary structure making the bids.

Statute, and courts, have interfered (very limitedly) with this 'residual' nature of self-employment only to a very limited extent. The most notable interference has been generated by the introduction of the 'limb-b worker' status, and – as pointed out in the previous section - by the UK judiciary clarifying that this status is to be understood as a species of the self-employed genus.[18]

[16] M. Ford, 'The Fissured Worker: Personal Service Companies and Employment Rights' (2020) ILJ 35-85.

[17] HMRC v Atholl House Productions Ltd [2022] EWCA Civ 501, [2022] STC 837. Dhorajiwala, above.

[18] *Clyde & Co LLP and another* v *Bates van Winkelhof* [2014] UKSC 32, paragraph [31].

2 Access to collective bargaining

Broadly speaking collective bargaining in the UK can be ascribed to the general features of what is often referred to as a Liberal-pluralist model of industrial relations, albeit with some peculiarities that have contributed, in the last 40 years in particular, to render collective bargaining in the UK largely:

a) regressively voluntaristic – virtually with no state support, including through auxiliary mechanisms such as wage councils, fair wage indicators, or public procurement, now all but abandoned; it is arguable that the introduction of a statutory recognition procedure in 1999 (discussed below) does not alter this feature of the system;

b) marginal - both in terms of coverage, scope, content, especially in the private sector, where in 2024 pay was set 'with reference' to collective agreements (i.e. not necessarily through a collective agreement, only by 'reference' to one) either through employer level agreements (8.2%) or workplace agreements (6.9%).[19]

c) largely unenforceable – particularly in terms of legal effects and remedies in case of breach, and with unions experiencing serious constraints to their freedom to take collective action in support.

While some of these feature are partly the legacy of the 'collective laissez faire' model so aptly described in the 1950s by Sir Otto Kahn-Freund, the present state of UK industrial relations and collective bargaining institutions owes as much, if not more, to 'the neoliberal assault the period 1980 to 2017 saw the contraction of union density from 54.5 per cent to 23.2 per cent, while collective bargaining coverage fell from 70 per cent in 1980 to 26 per cent in 2016'.[20]

These negative trends have not been affected by the introduction, in 1999, of a statutory recognition procedure, allowing unions that are unable to secure voluntary recognition to trigger a ballot supervised by the Central Arbitration Committee (CAC) and, if successful, issuing a statutory recognition declaration.

Against this bleak background it must be acknowledged that the current Labour Government is seeking to adopt reforms partly aimed at re-institutionalising some aspects of collective bargaining in the UK, especially in the adult care sector, a sector characterised by endemic levels of precarious and non-standard forms of work (ERA2025, s. 39-55).

Equally, it can be argued that the relative absence of statutory intervention in collective bargaining matters allows for a greater level of access to a wider range of negotiating

[19] DBT, 'Trade union membership, UK, 1995 to 2024: statistical bulletin' 22 May 2025 available at https://www.gov.uk/government/statistics/trade-union-statistics-2024/trade-union-membership-uk-1995-to-2024-statistical-bulletin#:~:text=This%20compared%20to%2010.0%25%20of,is%20a%20survey%20of%20individuals.

[20] J. Waddington, 'United Kingdom: a long-term assault on collective bargaining', Chapter 29 in T. Müller, K. Vandaele, and J. Waddington (eds.), *Collective bargaining in Europe: towards an endgame* (ETUI, 2019), p. 306.

actors, including non-affiliated unions and other professional bodies representing non-standard workers (including professional workers, such as doctors and nurses). Traditionally, part-time, fixed-term, or temporary agency workers have not faced any legal obstacles to joining unions. Although this loose and permissive framework can sometimes entail the risk of agreements being concluded with non-representative organisations, and even 'sweetheart unions' or staff associations (to note that, in theory, the statutory recognition procedure under Sch A1 TULRCA1992 can only be triggered by a trade union with a certificate of independence issued by the Certification Officer).

2.1 Concept of collective agreement

2.1.1 Legal framework

Owing to the legacy of 'collective laissez faire', UK industrial relations and labour law statutes only set out the key concepts of the system, including the notion of collective agreement, with a very broad brush. The key provision in TULRCA 1992 on collective agreements merely describes them as 'any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below' (s.178(1)), followed by a rather obvious list that includes 'terms and conditions' of employment and the usual topics covered by collective agreements. Unions are very loosely defined by s.1 TULRCA 1992 as an 'organisation (whether temporary or permanent)— (a)which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or (b)which consists wholly or mainly of— (i)constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or (ii)representatives of such constituent or affiliated organisations, and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations'

Essentially, agreements can be concluded by any two organisations representing the two sides of industry recognizing each other for that purpose, at whatever level, and in whatever form. While for a collective agreement to have some binding force it needs to be concluded in writing, typically UK collective agreements are not binding (see below) and there is no formal requirement for collective agreements to be written, or to be written in a particular form. Most large unions provide 'model' agreements for their affiliates, with Unite the Union, providing a trade union recognition template (available at https://www.unitetheunion.org/media/1245/trade-union-recognition-template-word-version.docx).

The default position is that there are no strict rules about representativity, process, or content. Voluntarism prevails. This means that a collective agreement can be concluded by unions or other organisations representing a range of both standard and non-standard workers. For example, the National Union of Journalists has traditionally affiliated and represented both employees and freelancers, and has negotiated rates with a plurality of employers in the sector (e.g. BBC, The Guardian, the FT), for both. It also sets

Annual Freelance Fees Guides offering suggested minimum rates[21] to help freelancers negotiate, and decline, low fees, and its Freelance Industrial Council and the NUJ freelance office advise members on negotiating contracts, copyright, and rates, particularly urging members to resist "race to the bottom" pay. Similarly, trade union GMB has concluded voluntary recognition agreements with a number of employers active in the 'gig-economy' (Uber, Evri, Deliveroo), setting out specific entitlements for gig-workers that the parties define as 'self-employed plus'.[22]

Paradoxically, while voluntary recognition allows for bargaining processes to be carried out with little formality and to include non-standard workers, including the self-employed, it is the statutory recognition procedure that is understood as introducing some limits to the beneficiaries of collective agreements. This procedure was first introduced by the ERelA 1999 (and later amended with ERelA 2004) and is now contained in Schedule A1 TULRCA 1992. It allows for unions that are unable to secure recognition on a voluntary basis to trigger a ballot supervised by the Central Arbitration Committee (CAC) and, if the ballot returns a majority of workers voting,[23] receive recognition for the purposes of bargaining with the employer on (at least) pay, working time, and paid holidays. But in order to be able to trigger the procedure, the union must represent 'workers' as defined by s.296 TULRCA 1992, which in the *Deliveroo* litigation discussed above ended up excluding couriers with contracts containing 'substitution clauses', as – despite little to no evidence of their pratcical use - their presence resulted in the courriers' contracts being classified as contracts for services, placing them outside the 'worker' definition.

Statutory recognition procedures are, however, deemed to be inadmissible if other collective agreements are already in force. This can often result in employers recognising staff associations that would not meet the ILO notion of independent unions, in order to preempt and frustrate a separate statutory recognition application by an independent union[24] (as in order to trigger a statutory recognition process a union requires a 'certificate of independence' issued by the Certification Officer).

To note that, to this day, UK competition law has not interfered with collective bargaining and that there are no precedents or decisions by the Competition and Market Authority raising concerns analogous to the ones raised by CJEU decisions such as Case C-413/13, *FNV Kunsten*. On the contrary, in March 2025 In March this year, the CMA fined a number of media companies (the BBC, BT, IMG, and ITV) a total of £4.24 million for colluding on the rates of pay for freelance sport presenters and other production

[21] https://www.londonfreelance.org/feesguide/index.php?&section=General&subsect=What+freelances+need+to+charge+and+why&page=Advice

[22] C. Stylogiannis, 'The effective application of the right to collective bargaining for self-employed (platform) workers: 'Not such an easy task'' (2023) ELLJ, 494-513.

[23] Until 2026, the rules additionally required at least 40% of the workers constituting the bargaining unit also to vote in favour of receognition, in effect a 'double majority'. As of April 2026 the Employment Rights Act 2025 has repealed the 40% requirement, and a simple majority of voters is enough.

[24] *R (Boots Management Services) v CAC* [2014] IRLR 278. See also BECTU v Picturehouse (CAC) TUR1/895(2014). Cf. A. Bogg and R. Dukes, 'Article 11 CHER and the Right to Collective Bargaining: Pharmacists' Defence Association Union v Boots Management Services Ltd (2017) 46 ILJ 543.

staff.[25] This decision was commented by trade union BECTU as requiring 'broadcasters and [the Producers Alliance for Cinema and Television] to come to the table and negotiate with the union on freelancer rates to ensure fair and transparent pay, which would act as an important starting point to address some of these wider issues.'[26]

2.1.2 Access to representation and internal voice in collective bargaining

As noted above, generally speaking, under the voluntary recognition process, non-standard workers of any category, including potentially those falling under NSW2 and NSW3, can be members of trade unions and unions may negotiate agreements on their behalf. Some of the large trade unions actively organize various categories of NSW, including Unite the Union, UNISON, Usdaw, GMB, with dedicated recruitment and capacity building activities targeting agency workers. Unions in sectors with high incidence of NSW (including self-employed workers) such as the NUJ, BECTU, GMB also have dedicated resources and structures for their representation, see for instance the NUJ's Fair Deal for Freelances initiative (https://www.nuj.org.uk/resource/fair-deal-for-freelances.html), inviting 'Chapels' (as local branches are referred to in the printing industry) to 'include freelance members in negotiations with management and give them full voting rights so they can fully participation in chapel activities. The freelance representative should also be invited to take part when chapels are negotiating freelance pay and conditions with employers. Some non-affiliated unions, such as the IWGB, and even bodies such as The Workers' Union (an organisation that does not operate as a union, but more as a limited company and commercial organisation that offers employment-related services to their members as individuals[27]) also have a track record in representing and organising NSW, including self-employed persons.

However, studies have pointed out that, in spite of the absence of obvious legal barriers and of the presence of some organising efforts, the unionisation of freelance workers under NSW2 and NSW3 remains low (around 7% according to a 2019 study)[28] and 'In practice relatively few collective agreements covering self-employed workers have been negotiated and most have been in the traditional areas of the media, arts and

[25] https://www.gov.uk/government/news/sports-broadcast-and-production-companies-fined-4-million-in-freelancer-pay-investigation

[26] https://bectu.org.uk/news/bectu-responds-to-cma-announcement-regarding-collusion-on-rates-of-pay-for-freelancers

[27] In 2021, the UK's Advertising Standards Authority (ASA) banned advertisements for The Workers Union after ruling they were misleading. The watchdog concluded that the company's ads implied it was an official trade union, when it was actually a limited commercial organization, see https://www.asa.org.uk/rulings/the-workers-union-ltd-a21-1104649-the-workers-union-ltd.html

[28] https://fabians.org.uk/wp-content/uploads/2019/06/Final_Self_Employment_Unions_-FINAL-JUNE-WEB-FILE.pdf

entertainment'.[29] Attempts to organise self-employed through 'community' and cooperative oriented unions[30] have also proved difficult.[31]

So overall, while there are no apparent legal obstacles to organising NSW and even to conclude voluntary agreements covering them, and while some unions appear to have committed resources to that effect, in practice it remains difficult to give NSW genuine 'voice'. Decisions such as *Deliveroo* may have had a chilling effect (though limitedly to the statutory recognition process). The generally low level of coverage of collective agreements, especially in the private sector where NSW is more prevalent, may render collective representation less appealing to NSW, especially since some studies suggest low paid self-employed to be more inclined towards service model trade unionism.[32] If unions are unable to offer practical support, NSW are unlikely to want to join. On the other hand, unions such as IWGB have proven that the organising model[33] can also succeed in attracting NSW.

2.2 Process of bargaining to conclude collective agreement

2.2.1 Legal framework

It is once more important to distinguish between the traditional voluntarist system of collective bargaining, that requires no particular formalities, and the statutory processes, both the statutory recognition process first introduced by ERA1999 and the more recent provisions introduced with ERA2025, establishing Social Care Negotiating Bodies and School Support Negotiating Bodies, effectively statute enabled collective bargaining structures for the social care and the school support staff sectors, both sectors with a high incidence of NSWs.

Under the voluntary bargaining process, both recognition (a prerequisite for bargaining) and bargaining itself, are almost entirely free of any statutory constraints or obligations. Sections 181-185 TULRCA 1992 contain some general duties for employers to disclose information for collective bargaining, but that's as much as the law requires for voluntary collective bargaining. S. 178(3) TULRCA 1992, defines 'recognition' very loosely as 'the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining'. Bargaining can take place for any of the matters mentioned in s.178(2).

---

[29] Fulton https://www.etuc.org/sites/default/files/publication/file/2018-10/CES-Brochure%20Report%20on%20self%20employment-UK.pdf page 58.

[30] https://committees.parliament.uk/writtenevidence/76167/pdf/

[31] Frederick Harry Pitts 1, Paolo Borghi 2, Annalisa Murgia 'CASE STUDY Organising the self-employed: combining community unionism, coworking and cooperativism across contexts [version 1; peer review: 1 approved with reservations] https://open-research-europe.ec.europa.eu/articles/3-80

[32] https://fabians.org.uk/wp-content/uploads/2019/06/Final_Self_Employment_Unions_-FINAL-JUNE-WEB-FILE.pdf

[33] A. Marshall and J. Woodcock, 'The IWGB and strategic litigation: using the law within the strategies and tactics of work organising' (IER, 2022) available at https://www.ier.org.uk/comments/the-iwgb-and-strategic-litigation-using-the-law-within-the-strategies-and-tactics-of-work-organising/ E. Petrini and A. Wettergren, 'Organising outsourced workers in UK's new trade unionism - emotions, protest, and collective identity' (2023), *Social Movement Studies*, 513-529.

The 1999 statutory recognition procedure introduced a considerable amount of juridification in what is otherwise an eminently voluntaristic system, Schedule A1 of TULRCA1992 being one of the most procedurally cumbersome processes in UK industrial relations. The key implications for NSW are the following. Firstly, a statutory recognition request can only be made by a union if the employer employs at least 21 workers (para. 7 Sch. A1), and this number will typically exclude agency workers (that are employed by agencies) as well as workers that are not 'limb-b' workers or employees of the employer, such as independent contractors. So, a union with members in a small enterprise is typically not allowed to trigger the procedure. But also, a union in workplaces with a large proportion of casual, outsourced, and independent contractors may be similarly disempowered, as the employer may formally have fewer staff than the required 21 even though it avails itself of a much larger number of NSW that do not count towards that threshold. Even if the employer meets the requisite threshold, the union will still need to demonstrate support of at least 2% of all workers (it was 10% until April 2026) just to have its application considered and admitted by CAC (para 14), and also a majority of workers voting in a ballot ordered by CAC (para 29). Again, these have to be 'workers' in the sense understood by TULRCA 1992 (employees and 'limb-b' – see para 165), to the exclusion of NSW that are self-employed, even those that as in the *Deliveroo* case, are self-employed on a technicality, due to the presence of 'substitution clauses' in their contracts.

Once recognition is established, the statutory procedure provides some (admittedly loose) indications in terms of the 'meaning of collective bargaining' (para 94) and the 'method of collective bargaining' (para 95).[34] As a general rule, 'references to collective bargaining are to negotiations relating to pay, hours and holidays' (para 94(6); para 3(3)), unless both 'parties agree matters as the subject of collective bargaining' (3(4)).

As far as the new sectoral collective bargaining process for the care and school support sectors inaugurated by ERA2025, it is worth noting that this process will only bear its first fruits in 2028 and is currently subject to the adoption of dedicated Codes of Practice, that should be released in the coming months. This new process is also highly juridified by comparison to the traditional voluntaristic systems of industrial relations. The process operates at a sector level, as opposed to an enterprise level one. At the time of writing, the core provisions contained in the Act are as follows. S. 39 ERA2025 provides that Adult Social Care Negotiating Bodies will be established in October 2026 to negotiate pay, terms, and conditions for the sector. There will be one for England, one for Wales and one for Scotland. S. 40 establishes that ASCNB are non-departmental public bodies that bring together employer and worker representatives. Consultations about their exact composition and procedural powers are currently ongoing. S. 41 offers some insights into the matters covered by these new forms of sectoral bargaining, essentially 'remuneration; terms and conditions of employment and 'any other specified matter relating to employment'. S. 42 casts a broad definition of 'social care worker', defined as 'a person who is employed wholly or mainly in, or in connection with, the provision of social care' (with s.51 specifically including agency workers who are not otherwise

[34] See also The Trade Union Recognition (Method of Collective Bargaining) Order 2000.

workers, although there are concern among academics that this could be narrowed down as only covering employees and limb-b workers).

So overall a broad scope that will allow ASCNB to establish collective terms of pay and employment for a large range of standard and NSW, including those under NSW2 and, if s. 42 is read broadly, even NSW3. S. 45 provides that if the ASCNB cannot reach agreement on negotiations, regulations will set out the powers of each regional authority to make provisions about resolving disagreements, including 'requiring the Negotiating Body to act in accordance with a decision of the appropriate authority or a person specified in the regulations' – so in effect the Secretary of State could decide the matter. Under s. 46 if agreement is reached the SoS can 'ratify' it, in full or in part, effectively making it applicable to the entire sector. S. 47 specifies that any ratified agreement cannot alter contractual terms and conditions of employment to the social care workers' detriment – so there is a hierarchy of sources, and the Fair Pay Agreements are effectively a 'floor of rights' for the sector. To note that s. 54 of ERA2025 expressly provides that the status of these agreements is not that of collective agreements under s. 178 TULRCA1992.

2.2.2 Access and participation to the bargaining process

Access varies considerably depending on the nature of the bargaining process. Under the voluntary system, all types of workers, standard and non-standard, including NSW2 and NSW3, can potentially enjoy both access and coverage. Under the statutory recognition process it is quite clear that access is limited to 'workers', which may well include part-time and fixed-term workers, but is unlikely to include temporary agency workers and it certainly excludes contractors and the self-employed under NSW3. Under the recent Fair Pay Agreement arrangements introduced by ERA2025, access is technically restricted to sector level trade unions but coverage could potentially benefit a very wider range of workers, defined as 'person[s] who [are] employed wholly or mainly in, or in connection with, the provision of social care' including agency workers.

Section 59 of ERA2025 has also introduced provisions on the right of trade unions to access workplaces with more than 21 workers (including both physical and digital access), essentially enshrining a right for unions to request entry to the workplace or digital communication channels (such as emails or intranet platforms) to connect with members and non-members in categories NSW1 (except for agency workers employed by the agency) and NSW2. If employers do not accept or fail to engage with the union within a certain timeframe, either party can refer the matter to the CAC, that can impose financial penalties for non-compliance with access agreements or an access order by the CAC itself. It is hoped that the widespread use of this new right could encourage trade union recognition as well as bargaining. A draft code of practice[35] has recently been released and is out for consultation.

[35] https://assets.publishing.service.gov.uk/media/69d6380c45510a54bcccad98/draft-code-of-practice-right-of-trade-unions-to-access-workplaces.pdf

2.2.3 Access to collective action

Collective action in the UK is regulated by TULRCA1992 so the s. 296 definition of 'worker' applies. This is understood as including various types of employees and workers, but to exclude the self-employed under NSW3. Workers are entitled to the immunities from tort and contractual liabilities that would normally arise from industrial action, and from strike action in particular. But these immunities are excluded if the action is secondary action (s.224 TULRCA 1992); if it is taken for a 'forbidden reason' (such as enforcing a closed shop arrangement, or in support of unlawful and unofficial action or a trade dispute that is not protected). S. 244 TULRCA defines a trade dispute as 'a dispute between workers and their employer'. The emphasis on 'their employer' has typically excluded agency workers. So overall this is a very restictive framework, that excludes a number of NSW, certainly the self-employed and agency workers (though the latter can bargaing with their agencies if they are employed by them).

2.3 Legal effects of a collective agreement

2.3.1 Legal Framework

As a general rule collective agreements are not legally binding (s. 179 TULRCA). There are both historical and practical reasons for this. The Trade Union Act 1871 provided that sector level agreements between trade unions (employers' associations were considered 'unions') were unenforceable. This was repealed with Ind Rel Act 1971 (and in any case it never covered agreements signed with a single employer) but the general presumption of unenforceability was maintained. English law also embraces a strong general doctrine of privity of contract (contracts can only be enforced by those who are party to it). Although this changed after Contract (Rights of Third Parties) Act 1999, the principle was retained for collective agreements. Currently s. 179 TULRCA 1992 hypothetically allows for the creation of binding agreements, but it is still rarely used (exc. in some 'single union' deals that are very rare and often problematic). Historically unions have resisted the idea of a binding nature of collective agreements, for fear of being forced to comply with peace clauses. There is no concept of hierarchy between different levels of collective agreements, and 'concession bargaining', while rare, is possible.

Some areas covered by EU Directives might permit the introduction of binding agreements, e.g Reg. 23 of the WTR1998. The 'binding nature' of a collective agreement (or more precisely of a term contained in a collective agreement) is usually linked to the incorporation of collectively agreed terms into individual contracts. And incorporation can occur expressly, through express clauses in individual contracts ('bridging terms'), or by means of implied incorporation, though a (hard to establish) evidence from the conduct of the parties of a pattern of compliance, or custom and practice (see *Henry v LGTS* (2002)).

In more recent judgments such as *Kaur v* MG Rover Group Ltd [2004] EWCA Civ 1507 – a collective agreement with a written 'THERE WILL BE NO COMPULSORY REDUNDANCY' term was deemed to be an 'aspiration rather than a binding contractual term'. So, wording and construction are very important. Ideally for being binding a collective agreement should specify that 'the parties intend that the agreement shall be a legally enforceable contract' (the wording of 179(1)(b) TULRCA 1992).

Typically, a breach of a voluntary recognition agreement or of a collective agreement will be referred to ACAS for conciliation.

However, case law has introduced some special cases and exceptions to this voluntary system. Building on earlier case law (esp. *Wilson/Palmer v United Kingdom* [2002] IRLR 568) the recent decision of *Kostal*[36] has established that under Section 145B TULRCA 1992, it is unlawful for an employer to make direct offers to workers to bypass a collective bargaining agreement if their main purpose is to prevent terms from being collectively negotiated. In this case the decision led to fixed penalty awards (currently £4,545 per worker per unlawful offer).

Recognition agreements established by CAC receive a greater degree of protection under the law, as Schedule A1 TULRCA1992 contains a dedicated de-recognition procedure for employers to activate (no sooner than 3 years after the recognition has occurred). Therefore, breaching statutory recognition agreements can lead to requests for CAC remedial order and even court action (including for specific performance).

2.3.2 Access to being covered by a collective agreement

The voluntary nature of collective agreements means that enforcement, rather than coverage, is the concern typically faced by NSW. On paper voluntarily concluded collective agreements can apply to all workers regardless of their employment status. Collective agreements can go as far as including 'rates' for self-employed contractors working for a particular employer or in a certain sector. For example, trade union BECTU and the Independent Theatre Council (ITC) maintain specific collective agreements for independent theatre directors, designers, and freelance theatre producers, outlining standard baseline terms for the subsidised arts sector. BECTU has gone as far as agreeing One Night Concert Rates with the Ambassador Theatre Group (ATG) for non-permanent, casual technical staff working on single-night concert events. https://bectu.org.uk/get-involved-in-the-union/ratecards/ UK Competition authorities have never raised any concerns about these voluntary practices.

Since the *Deliveroo* judgment, it is now probably accepted that any agreement that is the product of a statutory recognition process under Schedule A1 TULRCA 1992 is only applicable to employees and limb-b workers.

The new Fair Pay Agreements are supposed to apply to a broad scope of workers. Both 'school support staff',[37] 'social care workers',[38] and 'seafarers'[39] are defined by reference to the concept of 'person', a concept that seemingly seeks to avoid the strictures arising from the contractual and strict personality requirements discussed above.

[36] Kostal UK Ltd v Dunkley & Ors [2021] UKSC 47.

[37] Schedule 4 of ERA2025, introducing a new s. 148C into the Education Act 2002.

[38] S. 42 ERA2025.

[39] Schedule 5 ERA2025, introducing a new s 4E in the Seafarers' Wages Act 2023.

2.4 Enforcement of collective agreements

2.4.1 Legal Framework

The enforcement of collective agreements is in many ways the Achilles' heel of the UK voluntaristic systems of industrial relations. Section 179 TULRCA1992 is pretty conclusive when it says that 'A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement— (a)is in writing, and (b)contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract'. Collective agreements typically do not contain such provisions.

In the absence of legal enforceability, the contract of employment has oftentimes taken it upon itself to give collective agreements some legal effects through the doctrine of incorporation, when individual contracts of employment contain clear bridging terms (or more rarely by 'practice'). The effect of this express incorporation is that aspects of (legally unenforceable) collective agreements become part of the legally enforceable express of the individual contract of employment. As noted above, the clauses of collective agreements must be deemed capable of incorporation, and typically English courts have tended to favour substantive clauses about wages, working time, and redundancy payments over procedural ones, let alone clauses that courts deem as 'aspirational' (see above *Kaur*).

There is no in principle objection against limb-b workers contracts (or any other contract for that matter) being capable of including such bridging terms, but it is in practice a much rarer occurrence. To note that s. 180 TULRCA 1992 introduces some additional hurdles for the enforceability of 'peace clauses' in collective agreements. A provision of major importance given the centrality of collective action as the prime tool to enforce collective agreements.

The statutory recognition procedure contained in S 1A TULRCA1992, is enforceable before CAC and so is the procedural method for bargaining agreed by the parties (or imposed by the recognition declaration by the CAC). The actual substantive outcome of those processes, which are typically limited to pay, working time, and holidays, follow the principles described in the previous paragraph.

Regarding the new Fair Pay Agreements established by ERA2025, s. 54 provides that they are not to be treated on a par with collective agreements under s. 178 TULRCA 1992. ERA2025 does not provide an express enforcement mechanism either. In the absence of detail, it remains unclear what remedy, if any, may be available to a social care worker whose employer has refused to apply a ratified social care agreement.

2.4.2 Access to enforcement of collectively bargained conditions of work

The voluntary nature of collective bargaining and collective agreements in the UK means that there is only limited case-law on access to the (limited) enforcement for clauses contained in collective agreements. As noted above there is no objection in principle to the incorporation of clauses from collective agreements into limb-b workers contracts, or into contracts for services for that matter.

Ultimately, under the voluntary framework of British industrial relations it is through collective industrial action that collective agreements, and collective interests, are truly enforced. In this respect it is noticeable that only employees are protected against (unfair) dismissal for participating to lawful industrial action (see TULRCA 1992 s. 238A), although it is arguable that a similar protection may accrue, in practice, on workers on the basis of the protection against 'detriment' contained in s. 236A TULRCA 1992 (recently added by ERA 2025, s.76), which refers to 'workers', and would thus cover what this study refers to as NSW2.

2.5 Other types of collective agreements

The informality and voluntaristic nature of UK industrial relations means that there is a range of agreements between workers and employers that could be characterized as collective agreements, within our outside of the meaning provided by TULRCA 1992, including agreements between employers and groups of workers that are not organized as trade unions but are more likely to be perceived as 'staff associations'. No concerns have been raised, in respect of these or other agreements, by the competition authorities.

2.6 Obstacles and facilitators

The unique nature of the UK industrial relations system means that it comes with a long list of obstacles to NSW enjoying the effective protection of collective bargaining and union representation, and with some (minor) facilitators.

Among the obstacles the first, and most obvious, is the very limited coverage of collective agreements and trade union density in the private sector, where NSW relations tend to be more prevalent. Figures range in the low-tens (11-13%). A second obstacle is linked to the fact that, even if an agreement exists, it is typically non-enforceable, unless incorporated in contracts for work. Again, it is far more likely to find bridging terms in contracts of employment than in other non-standard contracts, especially in contracts for services under NSW2 and NSW3 (although there is nothing in English law that would prevent the presence of such clauses in any contract for work). A third obstacle arises in the context of the statutory recognition procedure, that is made clear by the *Deliveroo* litigation, is both limited to 'workers' (including employees, NSW1, and NSW2, but excluding NSW3), and vulnerable to spurious substitution clauses. A fourth obstacle clearly emerges from the fact that only employees are protected against unfair dismissal for taking lawful industrial action, even though it is now understood that other 'workers' are protected against 'detriment' (which should include termination of limb-b workers contracts, thus protecting NSW2, though the law is recent and yet to be tested). Finally, it is important to appreciate that these 'collective labour law' difficulties are strictly connected to the extreme laxity of the 'individual employment rights' framework that for the past many decades has promoted flexibility at the cost of dignity at work and even legal certainty. The case of Zero Hours Workers is paradigmatic of this type of concern, though it has been noted that ERA2025 is attempting to address, and possibly redress this problem.

Given these concerns, the few facilitators arising from the informality and voluntary nature of UK collective relations that potentially could cover most if not all NSW under the terms of collective agreements, quickly dissipate. There are examples of collective agreements setting terms for self-employed workers, and of course for other types of NSW, and it is important to point out that UK competition authorities have typically not interfered with them. But the extent to which these rights can be enjoyed, let alone claimed, in practice is dubious.

3 Access to information and consultation at company level

3.1 The system of information and consultation at company level

Traditionally, collective bargaining has been the focal point, the fulcrum of the British system of industrial relations, information and consultation takin a distant second place. Up until the mid-1970s, when EU legislation, and in particular Directives 75/129 on collective redundancies and 77/187 on transfer of undertakings, introduced information and consultation as self-standing rights, these were at best seen as precursors to collective bargaining processes or as being of some relevance in the specific context of the Health and Safety at Work Act 1974.

Even the implementation of these EU instruments (respectively through ss. 188-198 TULRCA 1992 and the Transfer of Undertakings (Protection of Employment) Regulations 2006, as successively amended), has not generated a significant shift in this attitude, with information and consultation rights failing to gain greater popularity among unions. Generally speaking, unions have often viewed with suspicion any attempts to introduce additional channels of representation, fearing that I&C representatives (often elected or nominated within companies with no union presence) could be vulnerable to employer pressure or even co-option, and I&C arrangements ultimately giving employers a veneer of democratic workplace engagement without the substance of participation.

3.1.1 Legal Framework

To note that when first introduced in 1975, information and consultation obligations in the context of collective redundancy processes applied to the representatives of a recognised trade union. But that meant that if there was no recognised union in a workplace, the employer was free not to inform or consult prior to collective redundancies, something that the CJEU found to be in breach of the directive in Case C-383/92, *Commission v. United Kingdom*. As noted by Ewing, following that decision, the law had to be changed 'and the employer's duty to consult is now a general duty, which applies even where there is no recognised trade union. Where there is a recognised trade union, the union enjoys a priority status in the sense that it is with the union that redundancy consultation take place'[40] under 1992, s. 188(1B)(a) TULRCA 1992. When no union has been recognised the employer can choose to consult with employee representatives nominated by the affected employees, either prior to the redundancies or on an ad hoc basis.

The adoption of Directive 2002/14 and its implementation with the Information and Consultation Regulations 2004 (ICE Regulations) have not significantly altered this state of affairs. Although the Regulations set out a process through which, eventually through a ballot, 10% of a company's employees can request the establishment of an information

[40] H. Collins, K. Ewing, A. McColgan, *Labour Law* (CUP, 2025), p 655. See P.L. Davies, 'A Challenge to Single Channel?' (1994) 23 *ILJ* 272.

and consultation procedure, regulations 8 and 9 provide that employers can refuse negotiations if a 'pre-existing agreement' already applies and ask for a ballot in the workplace to gauge the support of the request, which will need a majority of votes supporting the request. There is usually little scrutiny regarding the quality of these prior agreements and the representativity of the unions that have concluded them.[41] Furthermore, if negotiations take place and an agreement is reached that agreement can incorporate information and consultation rights that fall below the 'default procedure' contained in regulations 18-20.

Overall, this is a weak regulatory framework that has done little to support the spread of bona fide information and consultation rights in the UK. The following paragraphs set out in greater detail the extent to which both this general framework and some specific peculiarities within it have also greatly contributed to disproportionately excluding NSW from information and consultation rights.

3.1.2 Access to representation and to information and consultation

There are three particular aspects of the information and consultation UK regulatory framework that, cumulatively, contribute to disenfranchising NSW from the enjoyment of information and consultation rights at work.

Firstly, all the various I&C processes contained in UK legislation are subject to thresholds that exclusively take into account the number of employees (not workers) affected or employed by the company. Therefore limb-b workers (NSW2) and external contractors (NSW3) are typically excluded from these thresholds, and of course from any ensuing information and consultation processes. The threshold for I&C processes under the 2004 Regulations is set at 50, which is understood to exclude 1,16 of the 1,2 million UK employers. Regulation 3A of the ICE Regulations 2004 was inserted by The Agency Workers Regulations 2010 (the statutory instrument implementing Directive 2008/104) to allow for temporary agency workers to be accounted towards the threshold of their hirer.

Secondly, of particular concern is regulation 4 of the ICE Regulations 2004 that, as well as requiring direct employment (which excludes temporary agency workers from the 50-employee threshold, although of course agency workers may seek to establish I&C processes within their agencies), provides that part-time employees working less than 75 hours per month can be calculated on a pro-rata basis, rather than on a head count one. Ewing has rightly pointed out that this is particularly dubious as 'there is no provision for it in the Directive, but also because it appears to cut across initiatives such as the Part-Time Workers Directive' as well as running against the grain of CJEU decisions such as Case C-385/05, *CGT* and Case C-176/12, *AMS*.[42]

A third obstacle arises from the fact that UK has decided to implement Directive 2002/14 by reference to 'undertakings employing at least 50 employees in any one Member State' (Article 3(1)(a) of the Directive) as opposed to the 'establishments

[41] *Morey Council v Stewart* [2006] IRLR 598.

[42] H. Collins, K. Ewing, A. McColgan, *Labour Law* (CUP, 2025), p 669.

employing at least 20 employees in any one Member State' criterion (Article 3(1)(b)). UK judges have clearly struggled with this implementation choice in ways that have adversely affected workers in businesses with complex corporate and productive structures, as best exemplified by *Pye v Partnerships in Care Ltd* (Case No. IC/11/2007). Partnerships in Care Ltd operated a large number of centralized psychiatric and care facilities across the UK. The CAC ruled against the idea that a single local union branch could trigger a separate employee information and consultation process. Because the company used a centralized management and HR structure, the "undertaking" was deemed to be the company as a whole, rather than the isolated ward or hospital. This decision has made it harder for employees at individual, multi-site organizations (such as large healthcare providers or care homes) to trigger independent information and consultation agreements if they do not meet the broader, company-wide workforce thresholds.

A variant of this obstacle can be seen in *Moyer-Lee v Cofely Workplace Ltd* [2015] IRLR 879. In this case a request under the ICE Regulations was made by 28 employees who worked as part of a team of 210 employees on a separate service contract with the University of London (so a request made by 13% of the team under that contract which exceeded the 10% required by the Regulations). However, the employer successfully argued before the Employment Appeal Tribunal that the 'undertaking' referred to by the Regulations was the legal entity employing the workers making the request, and because they employed 9,200 people in some 600 different sites, the request had been made by just 0.3% of the workforce and therefore was invalid.

Overall, these three factors, individually and cumulatively, restrict the effective enjoyment of information and consultation rights by NSWs. Limiting these rights to employees with contracts of employment automatically excludes NSW2 and NSW3. The very peculiar way of calculating part-time workers for the purpose of the 50-employee threshold of the ICE Regulations is a further example of the type of obstacles faced by even the more established forms of NSW. Employers with a vertically disintegrated business model are even more likely to benefit from the disenfranchisement of NSW, partly because the UK transposition of Dir 2002/14 has opted for the 'undertaking', as opposed to the establishment, model.

3.1.3 Enforcement

The implementation of the enforcement provisions of Dir. 2002/14 have created a novel, yet complex, enforcement system that distinguishes between breaches of a negotiated agreement or the standard default mechanisms under the Regulations on the one hand, and breaches of a pre-existing agreement. The enforcement system only applies to breaches of a negotiated agreement or to a default mechanism.

Complaints of breaches can be made to the CAC by employee representatives and if the complaint is found to be well founded the CAC can make a declaration to that effect. It may also make an order requiring the employer to take steps necessary to comply with the terms of the negotiated agreement or with the standard procedure, although regulation 22(9) provides that these orders do not suspend or delay any of the decisions taken by the employer in breach of the information and consultation terms. If these

orders are not complied with the applicant can refer the matter to the Employment Appeal Tribunal for a penalty notice to be issued, though Regulations 23(1) and (2) provide a cap of 75,000 GBP for these fines. These fines are not paid to the unions or the employees, but to the government, which reduces the incentives for unions to commit their limited resources to litigation.

3.2 Obstacles and facilitators

As noted above, there are several obstacles and very few facilitators. By and large the ICE Regulations have had a very limited impact. Ewing suggests that 'it is widely thought that the ICE Regulations have had a limited impact' and that there has been a 'failure of trade unions to engage more fully with the information and consultation procedures', partly out of fear that 'ICE Regulations can be used in principle by non-members to dilute the role of the union by requiring the established of two separate channels of representation in the same workplace'.[43]

[43] Ibid. 681-682.

4 Access for non-standard workers to Social Dialogue

Social Dialogue in the UK is not an institutionalised process and is markedly different to what other European countries understand by this term. Instead of formal tripartite negotiations covering the whole economy, it operates primarily through statutory consultations, and government-appointed advisory bodies with some union presence, the most prominent of which are the Low Pay Commission, where representatives from trade unions, employers, and independent experts advise the government on the National Living Wage. The LPC is of some relevance to NSW as the national living wage/statutory minimum wage applies to all 'workers' including NSW1 employees and NSW2 limb-b workers.

With education and training becoming a devolved competence, there are now some indications that some forms of social dialogue on policy making around skills and training are slowly emerging at a regional level in Scotland and Wales.[44]

Furthermore, the recently established Adult Social Care Negotiating Body, the sectoral collective bargaining bodies in England, will include representatives from trade unions Unison, GMB, Unite, and the Royal College of Nursing, as well as officials from provider organizations, led in coordination by the Care Provider Alliance. Similar bodies will be established in Scotland and Wales where the remit is broader as it includes the entire social care sector and not just adult social care. These are ongoing but important developments as the social care sector employs several NSW across the spectrum of precarious jobs (including several migrant workers).

Finally, it is worth noting that the recently established Fair Work Agency (the equivalent of European labour inspectorates) has a tripartite board that includes independent members but also employers and trade union members. The powers of the Board are, however, rather limited.[45]

[44] M. Simms, 'Social Dialogue in Scotland: Experiences of Employers and their Representative Organisations in Policy Making around Skills and Training. Project Report' (2021) available at: https://digitalpublications.parliament.scot/ResearchBriefings/Report/2021/11/4/40be045f-d19e-4b90-b2ff-6f2963b0012e

[45] See R. Duke and D. Whyte, 'IER Briefing on the Fair Work Agency' (IER, 2026) available at: https://www.ier.org.uk/publications/briefing-the-governments-fair-work-agency-risks-becoming-a-toothless-watchdog/