

Vinculum Juris

the LSE Law Review Magazine



The Issue of Employment

WINTER ISSUE • 2026

Table of Contents

1	Editor's Note Marius Veiss
3	Special Contribution - You May Not be Interested in Employment Law, but Employment Law is Interested in You: Why You Should Become An Employment Lawyer Daniel Hallström - Barrister at Old Square Chambers
6	Winning Piece - Is Labour Labour? Surrogacy and the Limits of Employment Law Sam Ying
12	The Provisions That Never Were: Dead Letter and the Performance of Worker Protection Ibrahim Ghellache
17	Balancing Mobility and Retention: Employment Law and Healthcare Brain Drain in the European Union Anna van Impe
22	Purpose, Power and Remedy: Case Note on <i>Tesco v USDAW</i> Matthew Wai Kit Ngai
26	Damages for Psychiatric Harm Arising from Defective Disciplinary Processes: The Case for Reform Dominic Rawlings
33	The Uncontrollable Problem with 'Akin to Employment' Marius Veiss
38	Beyond Any 'Sole Test': The Gig Economy and the Case for a Relational and Purposive Definition of 'Worker' Status Min Rebecca Yoo
43	The Crossword henlobirbo

Editor's Note

Employment law has a way of presenting itself as practical. One encounters it in the law of contract, tort, property, and a range of other areas besides. But as a field in its own right, it asks important questions about the nature of human relationships. What does fairness demand between parties whose bargaining strength is rarely equal? When does protection become paternalism, and when does freedom simply conceal coercion? This issue deals with such questions, though under the familiar guise of employment law.

A helpful starting point in understanding this issue is to recognise that certain common threads run through employment law, namely control, dependency, and dignity. Whether discussing the concept of 'worker', the decision in *Tesco v USDAW*, the healthcare brain drain, or any of the other fascinating topics in this issue, the essays are not simply concerned with doctrine. They also engage with the broader political and moral choices embedded within it.

Keeping in line with the previous edition, a brief word on this issue's name: *Vinculum Juris*. The term's literal translation is 'a bond of the law'. In the context of employment law, the term captures the idea that an employment relationship is not simply a practical or convenient arrangement for doing work. It is a mutually binding legal obligation, recognised by law as the bond that links the parties in a relationship of bipolarity, such that each party possesses enforceable rights and correlative duties vis-à-vis the other. *Vinculum Juris* is therefore intended as more than a classical allusion. It gestures toward a central insight of employment law itself: that one's ability to work gives rise to a distinctive legal relation.

We are especially grateful to Old Square Chambers for sponsoring this issue and making its publication possible. The underlying importance of employment law is aptly captured by the contribution of Old Square's own Daniel Hallström. His piece argues that employment law is both increasingly significant and uniquely revealing because it does not simply govern contracts. It governs the unequal and deeply human relationships created by work.

Finally, thank you to our authors, editors, and sponsors for their generosity, patience and effort. This issue exists because of your contributions - and we hope it repays them by giving readers something worth arguing with.



Marius Veiss

Editor-in-Chief, LSE Law Review

You May Not be Interested in Employment Law, but Employment Law is Interested in You:

Why You Should Become an Employment Lawyer

by Daniel Hallström, Barrister at Old Square Chambers

The Employment Rights Act received Royal Assent on 18 December 2025. It legislates for just about every conceivable area of individual and collective labour law. It delivers on key Labour manifesto promises: a 6-month qualifying period for the right to unfair dismissal, rights to guaranteed hours for ‘zero-hours’ workers, simplification of trade union recognition and the repeal of the great majority of the Trade Union Act 2016. Further, wide-ranging measures will be brought forward in the Government’s proposed Equality (Race and Disability) Bill later this year. The Act has been described by Professors Alan Bogg and Michael Ford KC as potentially “*the most ambitious reform agenda since the Industrial Relations Act 1971*” (the piece of legislation by which Edward Heath’s government – successfully – legislated for the right to unfair dismissal, and – less successfully – sought to impose comprehensive constraints on trade union action at the height of the union movement’s militancy) [1].

Bogg and Ford contrast the “*tentative and pessimistic*” politics of the Employment Rights Act with the optimism of New Labour’s labour market reforms in 1998-99. Unlike New Labour’s emphasis on ‘social partnership’ and ‘competitiveness’, a self-confident vision befitting the spirit of the age, Starmer’s government’s Act paints a rather bleaker picture of the UK labour market (and through it, British society) in 2026, as one dominated by in-work poverty, precarity, and corporate excess. The Act evinces its architects’ conviction that our society has not been paternalistic enough in enacting employment law: it has not done enough to protect workers from poor treatment by their employers. The balance must be struck again.

In recent weeks, a competing vision of labour market reform has been espoused by self-designated ‘shadow equalities minister’ Suella Braverman of Reform UK, announcing the party’s

to scrap the Equality Act 2010, and to introduce a “Workplace Fairness Act” in its place. Braverman invokes a Britain “*ripped apart by DEI* (‘*diversity, equality and inclusion*’)” initiatives in the workplace (rhetoric and terminology imported wholesale from US ‘culture war’ debates - ‘EDI’ is the more common acronym in the UK). On Braverman’s account, our society, through its employment law, has been too paternalistic, encouraging and rewarding a politics of personal and collective “*victimhood*” [2].

These rival diagnoses of modern British society and its discontents, and their accompanying prescriptions, focus on employment law. Why should that be? What, if anything, is special about employment law?

In his Hamlyn Lectures, the jurist Tony Honoré identified two features of the nature of employment in an industrial society: the *contract* of employment and the *relationship* of employment [3]. It is these two features of employment law that, I would like to suggest, make employment law special, and make its practice particularly rewarding.

The contract of employment is a legal device by which a worker, by agreement, puts the majority of their waking time and their physical capacities “*at the disposal and under the authority of*

another” [4]. Formally, they do so as an equal party to that bargain, and are free to leave it at any time, but we recognise that they (at least, in most cases) have no alternative but to enter it. They are thus (though, not, of course, always) the underdog in that contract. Our society, through employment law, has intervened to regulate against possible abuses of power by the worker’s employer, who wields economic power over them and their colleagues in ways that can affect their non-working life. Conversely, in a capitalist society, we also recognise the need for the employer’s business to remain profitable, which may require employers to exercise a managerial prerogative. If the right balance is not struck, the protection of the individual worker may come at the expense of the collective.

The relationship of employment is, above all, *personal*. It generally involves day-to-day contact between people who might not otherwise choose to spend their time together, generating human relationships in all their fractal complexity and messiness. Those relationships are often hierarchical. These daily interactions throw up wider social issues that, collectively, as a pluralistic society, we may decide that we want to regulate: discrimination, harassment, free speech, and so on. Where do our priorities lie? How best are they to be achieved?

What is the role of the employment lawyer in all of this? They are under a professional duty to advance their client's case at its highest. To do so faithfully, they must put their convictions about the answers to these questions to one side. By their participation in the business of law, they are engaged in an exercise (even if, at times, a limited and halting one) in collective introspection. Exploring the boundaries of employment law through litigation holds a mirror to the choices we, as a society, have made, to regulate the contract and the messy relationship of employment.

In this article, then, I want to make two modest claims. First, the scale and ambition of the changes enacted in the Employment Rights Act 2025 means there has never been a more exciting time to be an employment lawyer. Second, employment law itself has an endless capacity to generate far-reaching questions that touch on every facet of human life. It strikes at an activity that “*constitutes the trunk, rather than the branches or twigs, of the tree of life*” [5]. For those reasons, and many others besides, I commend a career in employment law to you. □

All views are the author's own.

[1] Alan Bogg and Michael Ford KC, “From ‘Fairness at Work’ to ‘Making Work Pay’: a Preliminary Assessment of the Employment Rights Bill” UK Labour Law Blog website (14 October 2024).

[2] Greg Heffer, “Suella Braverman vows to abolish the Equalities Office if Reform win power and warns Britain is being 'ripped apart' by diversity policies” Daily Mail (London, 17 February 2026).

[3] Tony Honoré, *The Quest for Security: Employees, Tenants, Wives* (London, 1982).

[4] *Ibid.*

[5] *Ibid.*, xiii.



About the Author

Daniel Hallström is a barrister at Old Square Chambers, having been called to the bar in 2024. His broad expertise covers employment, personal injury, clinical negligence, and public law matters. He regularly represents clients across the Employment Tribunal, Employment Appeal Tribunal, and Upper Tribunal.



Is Labour Labour? Surrogacy and the Limits of Employment Law

By Sam Ying

Employment law exists, as Otto Kahn-Freund famously articulates, as a “countervailing force to counteract the inequality of bargaining power which is inherent to the employment relationship”. It intervenes where general contract law cannot, to shield workers from the exploitative tendencies of a free market where labour is commodified.

But what happens when the ‘labour’ in question is pregnancy itself, and where the worker’s body is not merely the instrument of production but its very site? A surrogate provides a service to the intended parents, involving the sustained deployment of her bodily capacity over time and at significant personal cost, to produce something of immense value — a child — for them. She could conceivably be read as a worker, or even an employee.

Surrogacy offers an illuminating case study: not because surrogates should necessarily be classified as workers, but because the attempt to do so probes how the law constructs the categories of worker and non-worker, what counts as work and what does not, and ultimately exposes the structural and ideological assumptions which underpin employment law itself.

Context: Current Frameworks for Surrogacy in the UK

Surrogacy in the UK operates under highly outdated legislation. The current framework follows the Surrogacy Arrangements Act 1985, which was introduced hastily following public outcry over the Baby Cotton case (where a woman was paid £6,500 to carry a child for an American couple) and notably predates the advent of gestational surrogacy via IVF. The later Human Fertilisation and Embryology Act 2008 reiterates that only “altruistic” surrogacy is permitted and commercial payment is strictly forbidden. Critically, surrogacy agreements are not enforceable by law, and any disputes are resolved in family court on the basis of the child’s welfare.

Hence, surrogates are deliberately constructed as non-workers and intended parents as non-employers. Yet the relationship is strikingly employment-like: the Law Commission’s review of 52 family court files found that UK surrogates typically receive between £12,000 and £35,000 for expenses, which is notable given that the NHS provides free comprehensive maternity care. While the law stipulates the payment must not exceed ‘reasonable expenses incurred’, there is no statutory definition of what counts as reasonable, and no parental order has ever been refused because too much was paid.



In practice, expenses are very often pre-agreed as a general acknowledgement of inconvenience rather than itemised costs.

The ‘expenses only’ framework rests on the categorical distinction that costs incurred are not wages, and so no consideration flows for the service itself. But this is an intentional legal construction: as the figures above suggest, the boundary between reimbursement and remuneration is legally porous and practically difficult to maintain. It is thus worth asking whether our current approach is the best one to protect surrogates and intended parents alike, and whether recognising surrogacy as work under employment law would provide a better alternative.

Testing surrogacy through employment law categories

Employment law in the UK distinguishes between independent contractors, employees and statutory workers. An independent contractor is self-employed: able to choose how,

when, and where to work, to accept or reject engagements, and to work for multiple clients simultaneously with no mutuality of obligation. A surrogate is none of these things — she is bound exclusively to the intended parents and cannot work for competitors simultaneously, and she has a very limited ability to terminate the relationship on her terms.

The more interesting question is whether a surrogate could be classified as a worker or employee. A worker is somebody under a contract or arrangement to do work and services personally for a reward. An employee is identified through further tests: control (whether there is somebody who directs how the work is done), integration (whether the work is embedded in a business organisation), and economic reality (whether the worker is economically dependent on the business).

On some axes, surrogacy fits surprisingly well. A surrogate undeniably provides a personal service: there is no way to subcontract a



pregnancy. The level of obligation is arguably extreme, as gestation is a continuous biological process from which the surrogate cannot easily withdraw. And most significantly, the surrogate is not only economically dependent but physically connected to the intended parents and intensely vulnerable if they withdraw support: under the 1985 Act, she remains the legal mother until a parental order is made, and because surrogacy agreements are unenforceable, she has no clear remedies if the relationship breaks down.

Yet on other metrics, the relationship resists classification. The surrogate is not integrated into the intended parents' organisation, and there is no 'business risk' in the conventional sense, though the surrogate clearly bears very high personal, physical, emotional and psychological risk. And the question of 'control' is profoundly complicated by the immutable principle of bodily autonomy.

What emerges is an unusual profile encompassing total personal service and obligation, high personal risk, some financial compensation, some control, low exit rights for both parties, but no market dimensions or profit motive on the side of the intended parents. This strikingly inverts current debates on casualised labour and the gig economy. There, the problem is a deficit of mutuality, discontinuous engagement, and insufficient commitment from the putative employer. Instead, surrogacy is continuous and totalising, involving maximum personal commitment over nine months. Yet both occupy the same ambiguous legal territory, leaving the surrogate with the same vulnerability and absence of legal protections.

Power, control, and bodily autonomy.

Yet the attempt to classify surrogacy under employment fails in more fundamental terms. To return to control, the employer's sphere of

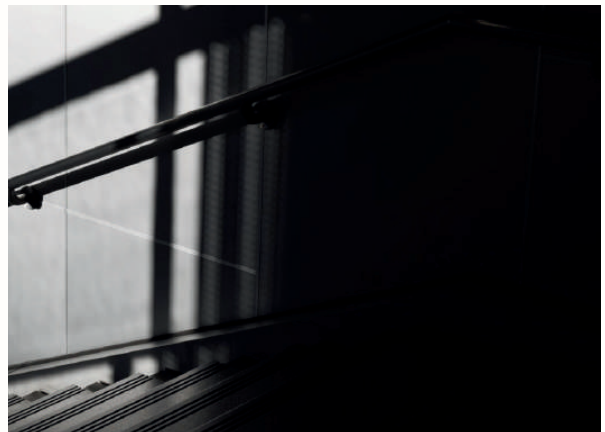
control in a standard employment relationship is limited to the course of employment rather than extending to the worker's private life. In this case, no such boundary exists, and intended parents cannot dictate how a surrogate manages her pregnancy, including diet or medical interventions, where they infringe on her bodily autonomy. On a more profound level, surrogates retain their reproductive rights through pregnancy and childbirth: the intended parents cannot compel a surrogate to terminate a pregnancy against her will, nor prevent her from doing so if she so chooses.

As these questions reveal, employment law rests on a core separability between labour and personhood and between the worker and the work they perform.



By contrast, the surrogate's body is not merely the tool but the very site of production. Once this separation dissolves, so does the conceptual architecture on which employment protections are built. What would 'entitlement to the national minimum wage' mean in this context, and how would 'working time' be calculated in a pregnancy that proceeds continuously? What about rest breaks, limits on working hours and paid leave?

Even if these difficulties could somehow be resolved, a further structural problem remains. Employment law governs bilateral relationships between employer and worker. Surrogacy introduces a third party — the child — whose welfare trumps the contractual interests of both the surrogate and intended parents. This shift from contractual entitlement to welfare-based resolution, as played out in family court, is a departure from the logic of employment law so fundamental that it cannot be accommodated within it.



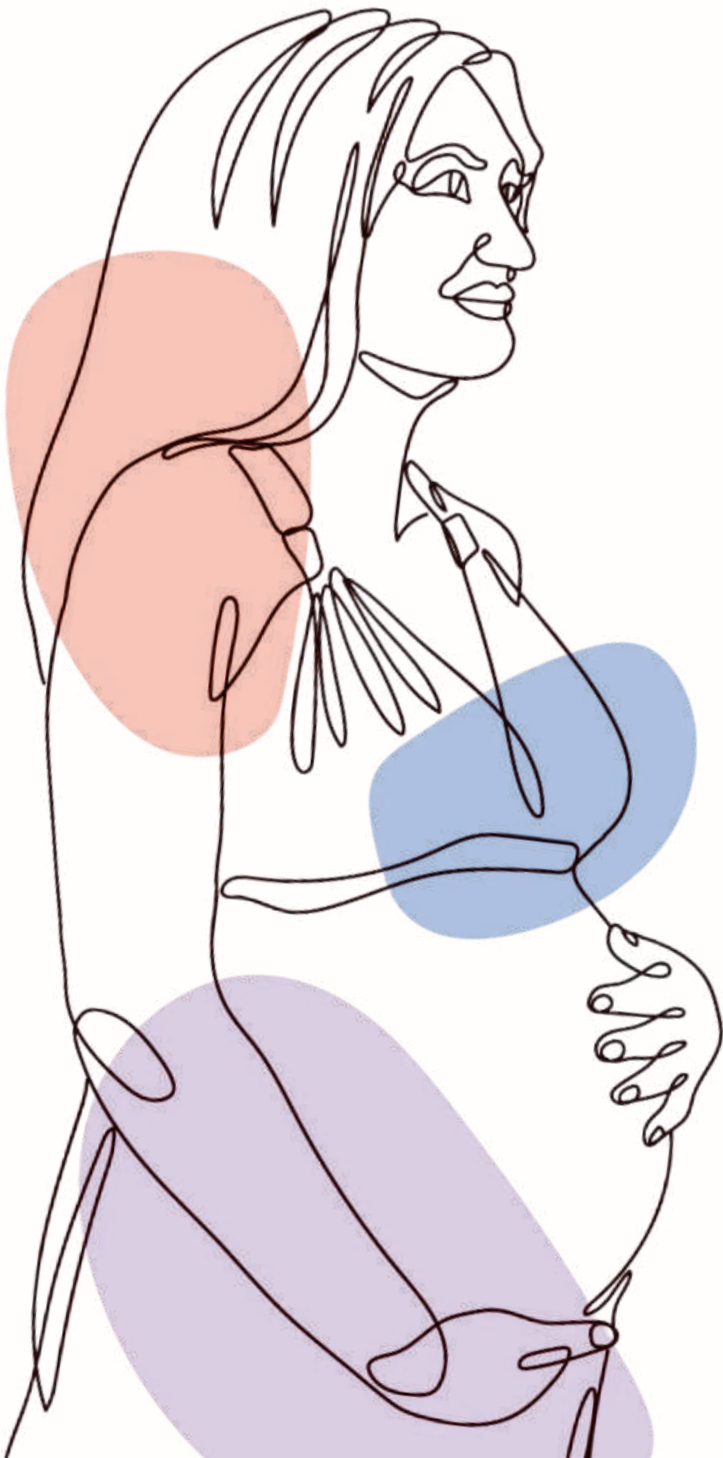
Conclusion: Towards a Bespoke Framework

The attempt to classify surrogacy as employment does not fail because surrogacy is insufficiently work-like. On the contrary, it exhibits many of employment's hallmarks and vulnerabilities — personal service,

dependency, and obligation. It fails because surrogacy is more-than-work in ways that the law is not equipped to recognise, disrupting its most foundational assumptions about the separability of labour and personhood, work and private life, and the bilateral structure of the employment relationship.

The Law Commission's 2023 review of surrogacy frameworks gestured towards reform, though its recommendations have not yet been enacted. Notably, they sought to retain the non-enforceability of surrogacy agreements. Perhaps what they recognised is that non-enforceability is, in a sense, its own form of protection: one that refuses to subject the surrogate's body to a market framework of contractual obligation. The issue is that the law still, frustratingly, offers too little beyond that.

What surrogacy ultimately requires is a bespoke legal framework that draws on employment law's protective instincts, while accepting that the surrogate's body cannot be governed by the contractual logic on which employment law depends. The challenge, then, is to build protections around a relationship that the law must support but cannot, and should not, enforce. ■



The Provisions That Never Were:
Dead Letter and the Performance of
Worker Protection

By Ibrahim Ghellache

Introduction

Lon Fuller argued that law carries within it an internal morality. For a legal rule to function as law, it must satisfy eight internal conditions, among them that the law must be promulgated, intelligible, non-contradictory, and capable of being followed and enforced (Fuller, 1964). Where law systematically fails the last of these conditions, something has gone wrong not in the drafting but in the mechanisms that determine whether a right can be practically used. The rule may exist in the statutes, and it may be technically valid, but it cannot be meaningfully invoked by those it purports to protect. It is, in the fullest sense, not law at all.

The Fuller Test and the Enforcement Gap

Fuller's internal morality of law is often read as a matter of formal validity alone, but that reading is too narrow. A provision that a worker cannot realistically invoke, because the remedy is negligible, the evidentiary burden is prohibitive, or the litigation cost exceeds any recoverable award, fails Fuller's conditions as surely as a statute drafted in impenetrable obscurity. Marc Galanter's analysis explains why this gap persists: repeat players possess compounding advantages that individual workers, litigating infrequently under financial stress, cannot match (Galanter, 1974). Where

legal aid remains unavailable for Employment Tribunal claims, the gap between formal entitlement and practical access is a predictable consequence of design choices.

Section 44 ERA 1996: The Stress Test that Failed

Section 44 of the Employment Rights Act 1996 illustrates what happens when that gap is exposed under pressure. A worker cannot be subjected to a detriment or dismissed for taking steps to protect themselves or others from serious and imminent danger in the workplace, and there is no qualifying period. The COVID-19 pandemic provided the largest workplace safety crisis in a generation: claims citing s.44 rose sharply in 2020 and 2021, yet the Court of Appeal's decision in *Rodgers v Leeds Laser Cutting Ltd* [2022] demonstrated precisely how a structurally sound provision can be rendered functionally narrow under doctrinal pressure. The claimant had refused to attend work during the first national lockdown, citing concerns around transmission to vulnerable family members. The Court held that s.44 requires a reasonable belief in serious and imminent danger at the specific workplace, and that a generalised apprehension about a pandemic could not satisfy that threshold.

As a matter of statutory interpretation, the decision is defensible. What it exposed is the provision's brittleness when confronted with diffuse, systemic risk rather than discrete workplace hazards.

Parliament's response was partial. Following a judicial review by the Independent Workers' Union of Great Britain, it amended s.44 in 2021 to extend coverage to workers, but left the threshold question of serious and imminent danger open. When Rodgers resolved that question narrowly the following year, confining the provision to site-specific hazards and excluding generalised pandemic risk, Parliament's silence was complete. A provision broad enough on its face to protect workers during a national health emergency had been judicially confined and legislatively abandoned. The causation problem compounds further: workers invoking s.44 must prove that health and safety concerns were the principal reason for detriment or dismissal. Where employers advance parallel justifications such as redundancy or performance, that burden is, in practice,

prohibitive without documentary evidence that low-paid workers rarely possess. The gap between safety grievances lodged with the Health and Safety Executive and s.44 claims pursued in Tribunals reflects a provision whose formal reach and practical utility have diverged considerably.

The Employment Relations Act 2023: Reform as Architecture

If s.44 illustrates a provision degraded by judicial narrowing and legislative inertia, the Employment Relations (Flexible Working) Act 2023 illustrates something structurally different: a provision that arrived deficient. The Act made flexible working requests a day-one right, reduced the employer's response window from three months to two, and permitted two requests annually rather than one. What it did not change was the list of eight statutory grounds on which an employer may lawfully refuse a request, grounds broad enough to accommodate virtually any business decision, including the burden of additional costs, planned structural changes, and detrimental effect on the ability to meet customer demand. The appellate mechanism introduced by the Act addresses only procedural compliance: a worker may challenge whether the employer followed the correct steps, but the merits of the refusal are beyond review entirely.



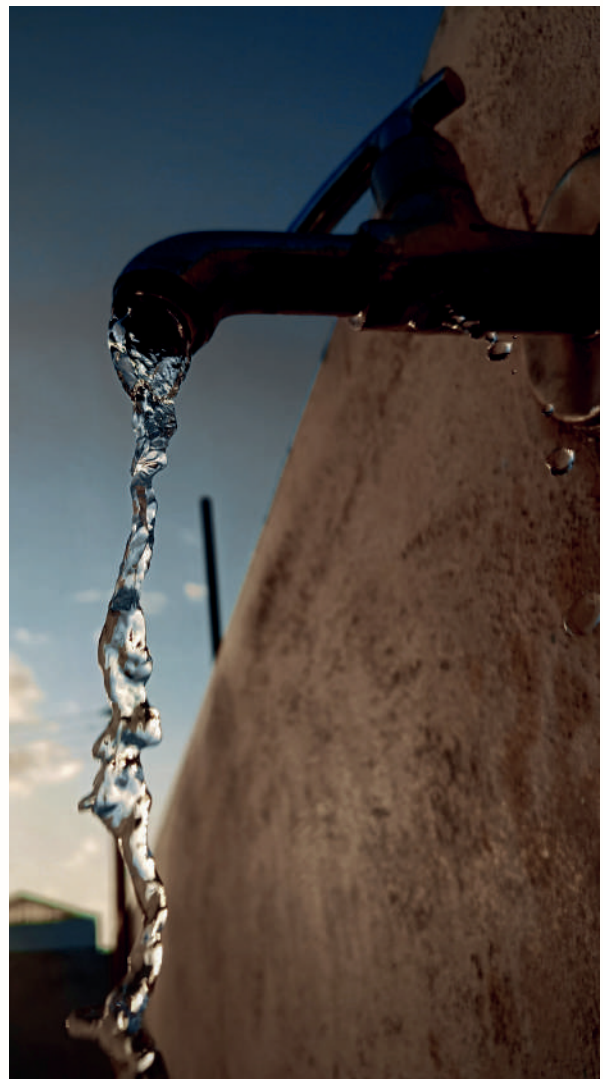
Lon L. Fuller.

Wesley Hohfeld's taxonomy of legal relations illuminates this structural problem (Hohfeld, 1913). In Hohfeld's framework, a claim-right necessarily correlates with a duty in another party to act or refrain accordingly. What the 2023 Act creates is closer to a Hohfeldian liberty: a permission to ask without a corresponding duty to grant. The employer's discretion to refuse on broad statutory grounds, subject only to procedural scrutiny, means the entitlement is architectural rather than substantive. The remedy for procedural breach remains between two and six weeks' pay, regardless of the merits of the refusal, a sum so modest that claims are routinely absorbed into broader discrimination proceedings rather than pursued independently (Pearson, 2025). That Parliament has since legislated a merits review of refusals under the Employment Rights Act 2025 is a tacit acknowledgement that the 2023 Act delivered something less than a right.

The Employment Rights Bill 2024: Dead Letter in Real Time

The Employment Rights Bill 2024 is the most instructive example of this pathology because it can be observed prospectively, before secondary legislation has obscured what was promised. Unlike the 2023 Act's permission to ask, the Bill purports to create something closer to a Hohfeldian claim-right: employers would bear a correlative duty to offer guaranteed

hours to eligible zero-hour workers following a qualifying reference period. The distinction is significant in principle. The definition of regular hours, the length of the qualifying period, and the enforcement mechanism are all reserved for secondary legislation, meaning the duty exists formally while its content remains unspecified. The qualifying period for day-one unfair dismissal protection, also contained in the Bill, remains subject to a statutory instrument whose terms are unpublished.



Roberto Unger argued that formal legal rationality serves ideological functions that extend beyond its stated purposes (Unger, 1976). Secondary legislation is not inherently suspect — it serves legitimate purposes that primary legislation cannot accommodate. But where the entire substance of a right is deferred, and its instruments remain unpublished when workers are invited to welcome the reform, the gap between framework and substance becomes a political resource: the framework is visible and celebrated while the content is settled later with less scrutiny. Zero-hour workers are precisely those for whom Fuller's accessibility condition is designed to protect — unable to plan around legal uncertainty or influence what the secondary instruments will provide. To enact the promise of guaranteed hours while deferring every element that would make this real is not a legislative technique, but a structural

choice whose cost falls on those least equipped to bear it.

The provisions examined here share a structural logic rather than a common defect. They are framed broadly enough to generate political capital, then narrowed judicially without legislative correction, constructed on enforcement architectures whose remedy levels preclude meaningful litigation, or left substantively incomplete pending secondary instruments. Fuller's internal morality demands more than correct drafting - it demands enforcement architecture and remedy levels sufficient to make the right real for the workers it names. Where those conditions are absent, the gap between law on paper and law in action is not a regrettable accident. It is a structural choice, and identifying it is the precondition for any reform programme serious about closing it. ■



PRESCRIPTION

R_x

Balancing Mobility and Retention: Employment Law and Healthcare Brain Drain in the EU

By Anna van Impe

Introduction

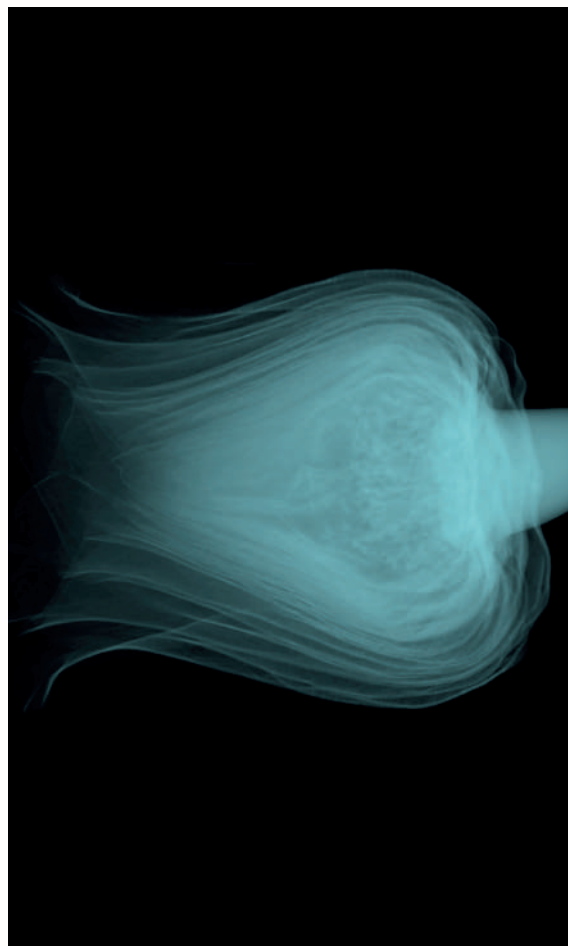
Free movement of workers is a core EU right, but it exacerbates brain drain from sending countries. Especially in the ever-important field of healthcare, this perpetuates an already rooted inequality (Galvin, 2024). Firstly, it is legally permissible for Member States to deploy domestic employment law mechanisms to limit healthcare worker emigration without breaching Article 45 TFEU (freedom of movement of workers). However, the effectiveness of

such measures remains limited. The competitive dynamics of the integrated EU labour market structurally undermine national retention strategies, necessitating supranational coordination grounded in solidarity and shared responsibility. Thus, this article will aim to explore the limits of employment law as a retention initiative in coordinating healthcare inequality in the EU, arguing that supranational coordination can ease the tensions between employment law and Article 45 TFEU.

Limits of EU Law in Confronting the Brain Drain

Although the number of doctors and nurses per capita has increased in most EU Member States over the last twenty years, it has not kept pace with the more rapid growth in demand for healthcare professionals (De Ruijter, Schrauwen, 2025). Whilst this issue affects all of the EU member states, there is undeniably a disparity in the problem: wealthier states (Ireland, Germany, Austria, Sweden) rely heavily on foreign-trained health workers, while Central/Eastern Europe (Hungary, Poland, Latvia, Bulgaria) suffers brain drain to these destinations (De Ruijter, Schrauwen, 2025). Poorer Member States subsidise the training of healthcare workers whilst wealthier Member States capture the benefit of that investment, resulting in sending states losing both labour capacity and public investment. Moreover, healthcare systems in Central and Eastern Europe generally perform less well than those in Western Europe in terms of access, efficiency and resource availability (Galvin, 2024). This disparity is partly due to already lower levels of public investment. The combination of constrained funding and comparatively low wages creates structural incentives for healthcare professionals to emigrate. In turn, this trend exacerbates the disparity in healthcare quality within the European Union, thereby entrenching a vicious cycle.

The EU faces a challenge in addressing this inequality. As healthcare is currently largely a national competence for Member States, the Union lacks robust tools to mandate redistribution, restrict outflows, or compensate sending states for the loss of trained professionals. The EU's inherent prioritisation of Article 45 within its free market further develops this challenge. Existing measures as per Article 168 TFEU are limited to a supportive nature, given the breadth and genericity of the EU's 'health strategy'. Therefore, the primary measures taken to deal with this brain drain have unsurprisingly been in the area of national employment law, especially through retention initiatives.



Contractual Retention Clauses

Contractual retention clauses, or training-cost repayment clauses, require healthcare graduates to work for a certain time in the public sector after taxpayer-funded training. As such, these are, to an extent, restrictive of the free movement of workers. Nevertheless, *Commission v Netherlands* (2012) established that the measures will stand if they satisfy the test of proportionality. There, the Court held that requiring graduates who received public funding for their studies to repay it if they moved abroad could, in principle, restrict Article 45 TFEU. However, such measures may be justified if they pursue a legitimate objective, such as protecting public investment in education, and are proportionate. It is therefore clear that the proportionality test, under the discretion of the judiciary, is the crux in determining the breadth of Article 45's application. Nevertheless, this essay contends that the overreliance on proportionality leaves far too much uncertainty in the validity of negative national retention measures. The flexibility it affords becomes a double-edged sword, preventing member states from confidently implementing such schemes, creating a chilling effect on the very retention initiatives the framework purports to permit. Therefore, contractual retention clauses, when

situated within the wider EU framework, remain in tension with Article 45, thereby failing to adequately mitigate brain drain in the EU.

Positive, Incentivising Employment Schemes

Conversely, it is easier for positive, incentivising schemes to survive the restrictions in Article 45. This is because they do not directly impinge on the principle of freedom of movement, but instead disincentivise it by improving conditions domestically. For example, improved working conditions and pay scales, or reforms addressing long hours, work-life balance, or workplace culture (as done in Romania (Szóo, 2021)), where the salaries of doctors were substantially increased or even doubled since 2018. Nevertheless, these reforms cannot fully engage with the problem of brain drain as they do not address the fundamental problem plaguing it: other wealthier Member States that have greater investment capabilities still offer more competitive and desirable options. This can be seen in the ineffectiveness of the Romanian initiative, where it failed to outweigh the benefit of practicing in wealthier states. Therefore, as a matter of practical and economic concern, positive retention measures also cannot confidently mitigate the brain drain problem in healthcare.

Mobility without Solidarity

Furthermore, there is a theoretical difficulty in reconciling workforce planning as a legitimate employer prerogative in healthcare with the EU's freedom of movement. Retention initiatives broadly reflect Deakin and Morris' concept of functional flexibility, enabling employers to allocate labour according to system needs rather than individual preferences. In the healthcare context, this manifests as workforce planning: structuring employment conditions to retain trained professionals within national systems. However, the CJEU's interpretation of Article 45 heavily prioritises individual mobility rights over such collective planning objectives, hence functional flexibility yields to the individual's right to move freely. Free-movement rules limit national restrictions whilst offering no basis to harmonise labour conditions, which, when combined with underlying market asymmetries, produces a free market in labour that

lacks a corresponding framework of solidarity. This gap in the framework is fatal in the healthcare sector, as labour shortages have direct consequences for patient outcomes and the effective functioning of national healthcare services.

Proposals

Although universal healthcare is a primary objective across all EU Member States, it is largely pursued through national capacity. By contrast, the free market constitutes a core EU value regulated at the supranational level, meaning market integration tends to take precedence over national healthcare objectives when the two come into conflict. This asymmetry cannot be resolved through national employment law alone. Supranational coordination is therefore not merely desirable but structurally necessary to rebalance a framework that currently subordinates collective healthcare capacity to market logic.



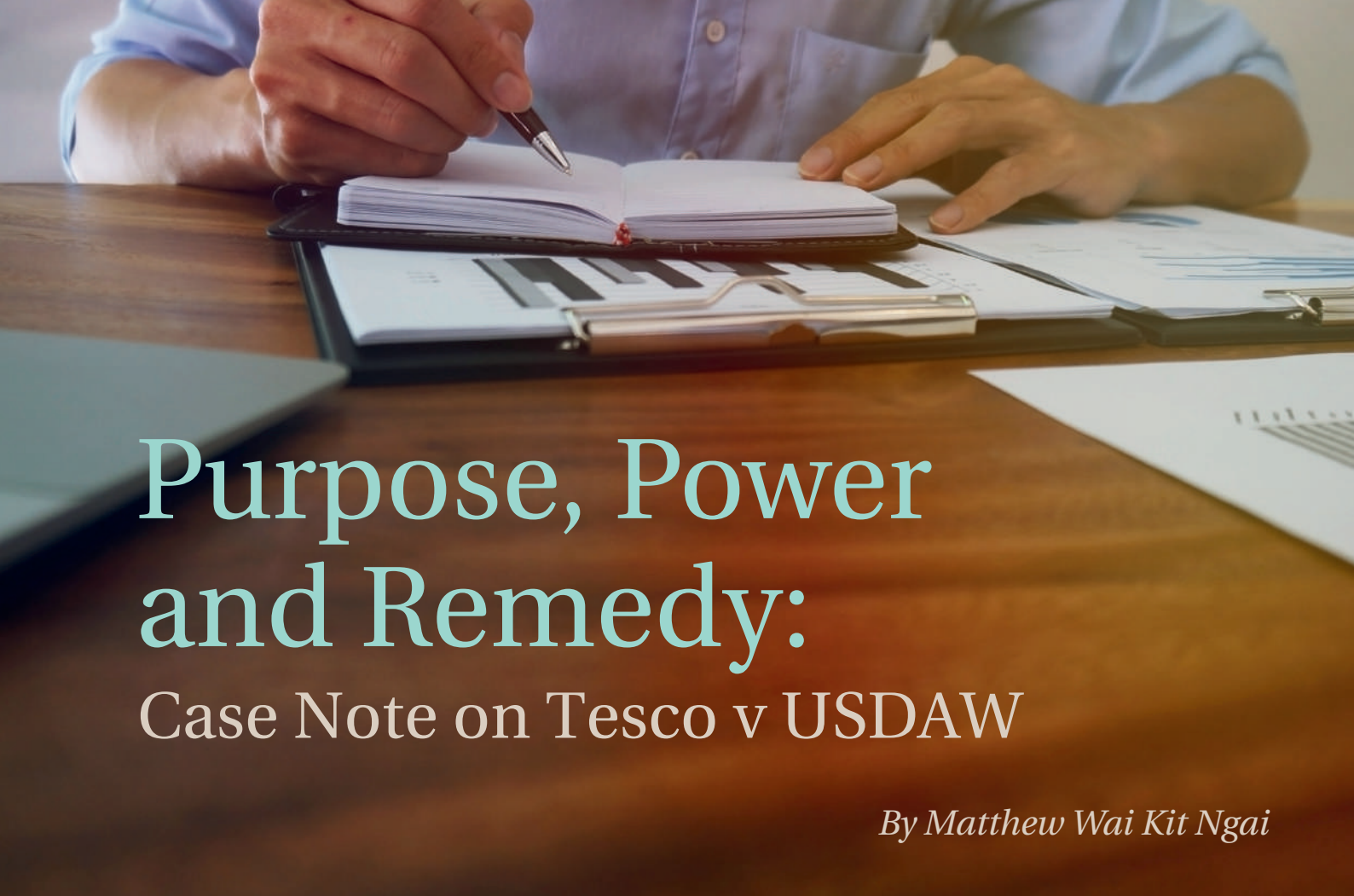
Firstly, it is proposed that the Union should make an effort to clarify the scope of freedom of movement in the specific context of healthcare. Given the targeted issue this article seeks to address (healthcare workers), the EU should aim to cautiously set out contextual guidance rather than a formal redefinition of the scope of Article 45. This lowers the procedural cost and prevents any unintended spillover effect to workers across other sectors. To this end, the Commission should issue recommendations under Article 153(2)(a), establishing public-health justifications for proportionate national retention (like training-cost recovery). As legitimate public interest is already a ground for exception under Article 45, this recommendation comfortably operates within existing doctrines. The proportionality requirement, specifically the rational connection limb, would thus serve as a limiting principle, distinguishing genuine public health retention measures from disguised restrictions on mobility. As such, the tension between the freedom of movement of workers and the need for equal healthcare across the member states of the European Union could be resolved without generating broader legal uncertainty.

Secondly, the potential for more supranational coordination should be explored. As already proposed to the

Parliament by the SANT committee, EU funding should be used to support retention measures: employing ESF+, the Recovery and Resilience Facility, Horizon Europe, and EU4Health (De Ruijter, Schrauwen, 2025) to improve pay, working conditions, and career pathways. As such, funding could reduce the economic incentives driving healthcare worker migration. Supranational coordination in this sense is the remedy to the diagnosis: as the root problem is structural asymmetry in fiscality, supranational funding directly counteracts this. Therefore, these measures address the gap left by Article 45 within the sphere of healthcare workers, providing tools to address the structural consequences arising from the mobility it so strongly protects.

Conclusion

In conclusion, national employment law strategies cannot sustainably counter healthcare brain drain amid the CJEU's prioritisation of Article 45 and fundamental EU market asymmetries. Therefore, this article argues that both re-evaluation of the legal doctrine of proportionality, as well as supranational funding, should be implemented to maximise the potential of the European Union's collective healthcare system and minimise the problem of brain drain. ■



Purpose, Power and Remedy:

Case Note on Tesco v USDAW

By Matthew Wai Kit Ngai

Introduction

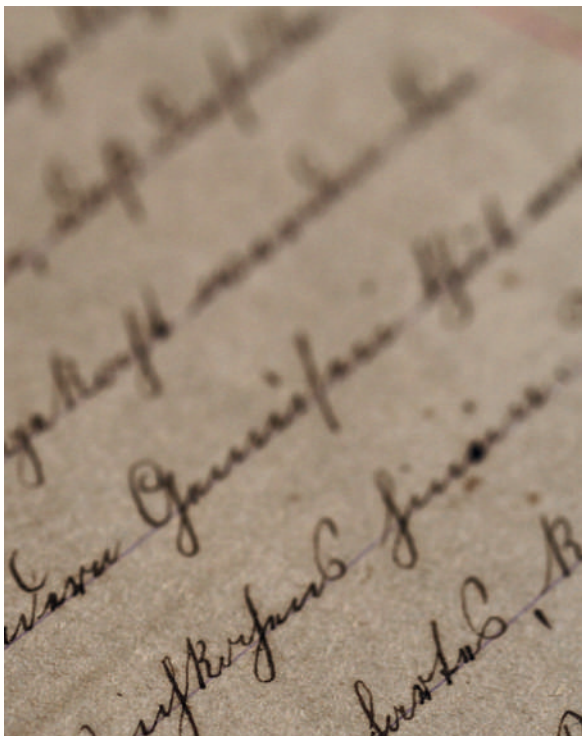
In employment contexts, the practice of ‘fire and rehire’ – the dismissal of employees solely to re-engage them on less favourable terms – is commonly deployed. However, in its 2024 decision, *Tesco Stores Ltd v USDAW* [2024] UKSC 28 (“**Tesco Stores**”), the Supreme Court intervened significantly in this practice. The Court granted an injunction preventing Tesco from dismissing staff purely to remove their contractual entitlement to “retained pay”, a guarantee to maintain their salary level if moved to a different or inferior position. This case note examines this decision.

Purpose: The Implied Term as a Power Constraint

In the employment contract concerned, two express provisions stood in tension: a specific promise that ‘*retained pay will remain a permanent feature*’ (“**Retained Pay Promise**”) and a standard clause granting Tesco the right to terminate employment on notice (“**Termination Right**”). The question is whether the Retained Pay Promise is only permanent for as long as the contract lasts and imposes no restriction on Tesco’s Termination Right. Delivering the majority judgment, Lord Burrows and Lady Simler applied the established ‘business efficacy’ test. They implied a

term that Tesco's Termination Right cannot be exercised for the purpose of removing or diminishing the employees' right under the Retained Pay Promise.

Yet the orthodoxy of the method should not obscure the novelty of the output. The business efficacy test traditionally asks an objective question: what does the contract *need* to function? The implied term here, however, imposes a purpose-based constraint on the *exercise* of a contractual right. Termination on notice has long been understood as absolute, requiring no justification. The implied term disrupts this by requiring courts to assess *why* the termination right was exercised. This risks subjecting employers' exercise of contractual rights to judicial scrutiny of their subjective motivations.



Power: The Jurisprudential Divergence

Beneath the unanimous outcome lies a fundamental theoretical disagreement. What is the legal nature of the Termination Right? Lord Leggatt classifies the Termination Right not as a right but as a power. This classification has some force to be gained from Hohfeld's taxonomy. In the Hohfeldian framework, a right held by one party correlates with a duty borne by the other, whilst a power held by one party correlates with a liability on the other — a susceptibility to having one's legal position changed unilaterally by the powerholder (Hohfeld, 1913). The Termination Right sits more comfortably with the latter category because Tesco's exercise of it unilaterally alters the employees' legal position under the employment contract, rather than imposing a corresponding duty on them. If Lord Leggatt's classification is correct, the Termination Right, as a contractual power, may generally be subject to the implied constraints of good faith and proper purpose, namely the *Braganza* duty. Lord Leggatt pressed further, questioning whether the 'old common law rule' that an employer can act 'unreasonably or capriciously' is 'any longer consistent with community expectations and values'. If accepted, this would extend the *Braganza* duty from discretionary benefit decisions to

to virtually every employment termination.

In contrast, Lord Reed represented a more conservative approach, explicitly rejecting the view that *'a contractual power... is in general circumscribed by an implied qualification that the power must be exercised in good faith.'* This divergence represents a battle for the underlying values of contract law. Lord Reed adheres to the classical theory of 'freedom of contract' where rights are absolute unless expressly limited. Lord Leggatt, however, leans toward 'relational contract theory' where discretionary powers are subject to an inherent duty of rationality and good faith.

If Lord Leggatt's view prevails, the termination clause transforms from an absolute right exercisable at will into a power that is quasi-fiduciary in character and must be exercised for proper purposes. For now, the majority held the middle ground, implying a term tied to the specific promise of permanence rather than endorsing a general good faith duty. The tension between these philosophies, however, remains unresolved.

Remedy: Indirect Specific Performance and the Structural Paradox

Perhaps the most disruptive aspect of

the decision is the remedy. By reinstating an injunction preventing Tesco from giving notice to the affected employees for the purpose of removing their retained pay entitlement, the Court effectively granted indirect specific performance of the employment contract. Historically, English law has been reluctant to compel continued employment. Lord Leggatt clarified the underlying principle. He reasoned that the objection to specific performance in employment contexts is not absolute but is based on the impropriety of compelling a relationship where mutual confidence has collapsed. In the present case, the circumstances suggest that mutual confidence remained intact, and Tesco was still willing to re-engage the same employees in the same roles – merely at a lower price.

The doctrinal implication here is a remedial revolution driven by the inadequacies of the common law. The Court justified equitable relief by noting that damages would be 'inadequate'. Firstly, the quantification of damages would be extraordinarily difficult as it requires speculation as to how long the employees would have otherwise remained employed. Secondly, the '*Johnson* exclusion zone' and *Addis* principle – which excludes injured feelings or reputational harm when awarding damages for wrongful dismissal – would mean that the

damages recoverable from wrongful dismissal would not reflect the non-pecuniary loss. The result exposes a structural paradox within the common law of remedies. The very limitations on damages, designed to protect employers from open-ended liability, became the justification for the far more intrusive remedy of injunctive relief. The common law's restrictive approach to compensation, rather than shielding employers, drove the Court toward a remedy employers would find considerably more disruptive than expanded damages.

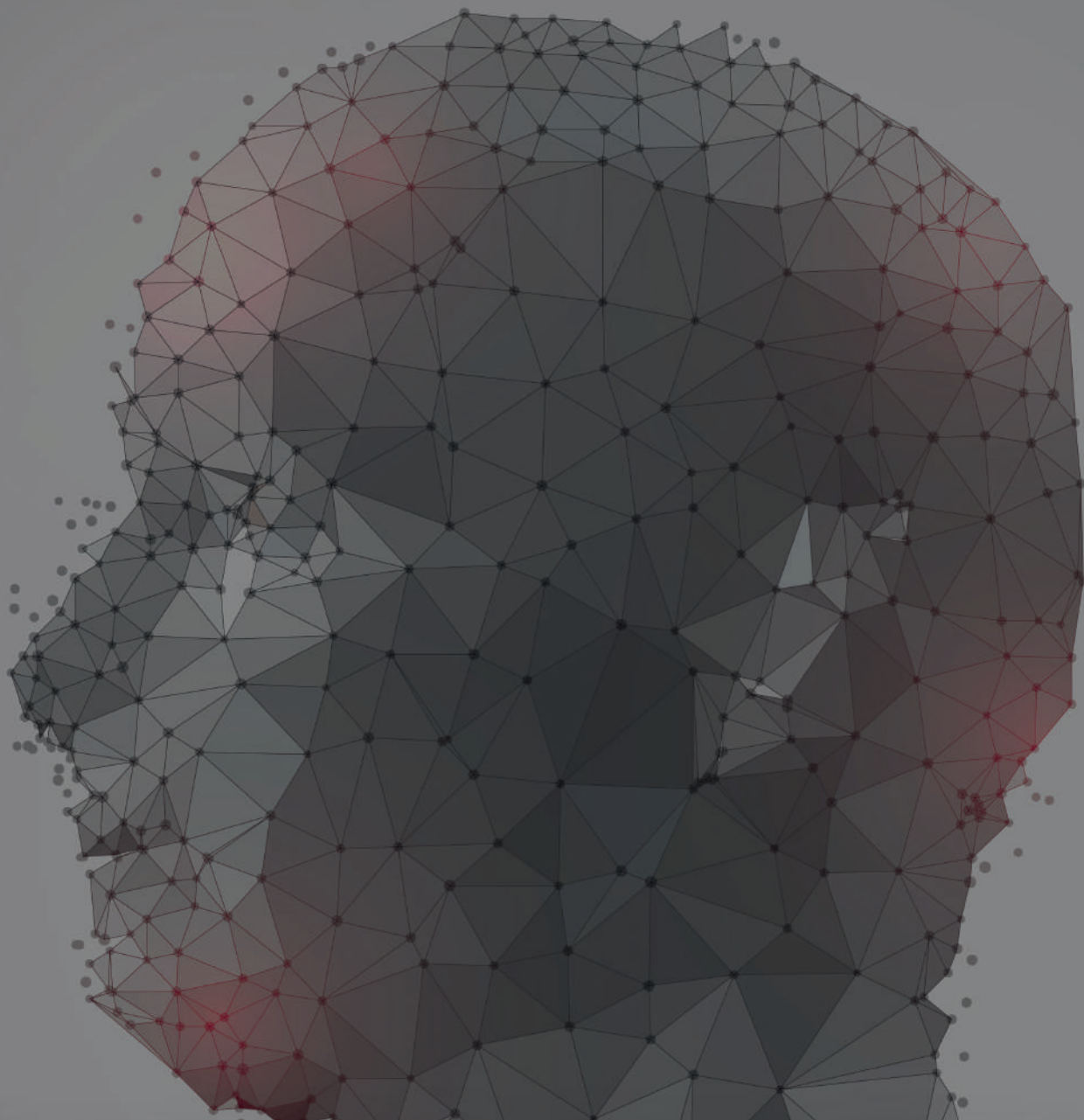
The doctrinal implications extend well beyond this case. Any dispute involving a permanent contractual benefit will encounter the same structural deficiencies: speculative quantification and the *Johnson/Addis* constraints. Given the inadequacy of damages is virtually guaranteed in such contexts,

injunctive relief shifts from exceptional to routine whenever fire and rehire threatens a permanent benefit. This signals the judiciary's willingness to deploy equity to fill the 'justice gap' left by the common law's artificial limitations on recovery.

Conclusion

Tesco Stores establishes that the express power to terminate on notice is not an absolute trump card where exercising it would defeat the very permanence the contract promised. While the majority grounded their reasoning in orthodox interpretation, the concurring judgments signal a deeper shift: toward a landscape where the exercise of termination power is policed by proper purpose and good faith, and where equity stands ready to enforce what damages cannot adequately protect.





Damages for Psychiatric Harm Arising from Defective Disciplinary Processes: The Case for Reform

By Dominic Rawlings

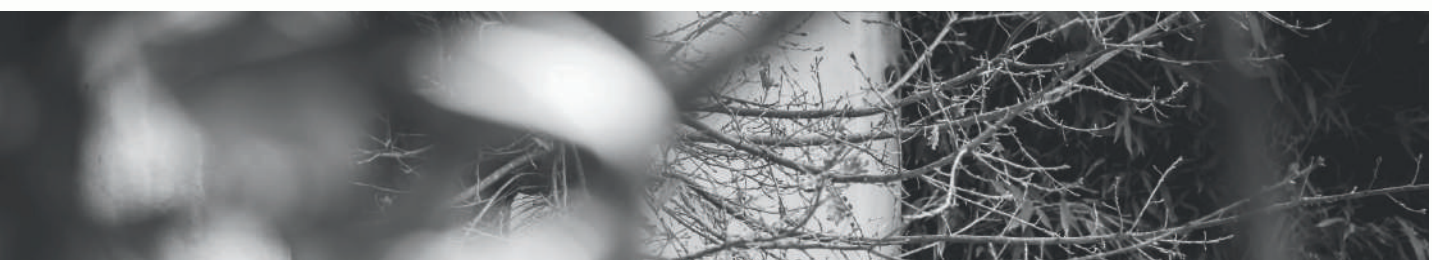
Introduction

Whilst English employment law emphasises procedural fairness in disciplinary processes, employees who suffer psychiatric illness when employers fail to follow those procedures lack a clear and adequate remedy. Employers are expected to adhere to their contractual disciplinary procedures and meet the minimum standards outlined in the ACAS Code of Practice. The current framework, however, offers limited remedies where a defective disciplinary process causes serious psychiatric harm to an employee. Negligence claims offer little relief, as recovery for psychiatric injury requires a high threshold of foreseeability that most employees cannot meet. Accordingly, this gap in English law undermines both fairness and accountability. Reform is therefore necessary to allow recovery for psychiatric injury arising from breaches of express contractual disciplinary obligations, enabling employment law to regulate employer conduct *ex ante* and ensure meaningful protection for vulnerable employees.

The Current Framework: Protections for Employees from Flawed Disciplinary Processes

Unfair Dismissal and Wrongful Dismissal

English employment law offers two main paths for redress when dismissal stems from a flawed disciplinary process: wrongful dismissal and unfair dismissal. Wrongful dismissal, which is a common law claim for breach of contract, compensates employees for losses arising from termination in breach of contractual notice or procedural requirements. Damages are ordinarily limited to the notice period but may extend to the time required to complete a binding contractual disciplinary procedure where such a procedure would have delayed dismissal (*Gunton v Richmond upon Thames LBC* [1981]). Unfair dismissal, under the *Employment Rights Act 1996*, prevents employers from dismissing employees without a fair reason and procedure. Such claims, however, are limited by a qualifying period and a compensation cap. Importantly, both



avenues prioritise financial losses and do not account for psychiatric injury caused by the disciplinary process. Further, the existence of the unfair dismissal regime has also curtailed the development of common law remedies, as courts are reluctant to recognise claims that could circumvent the statutory scheme (*Johnson v Unisys Ltd* [2001]).

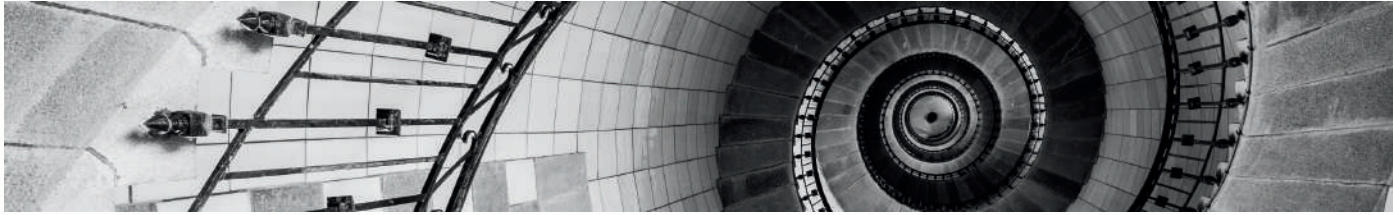
ACAS and Procedural Compliance

The ACAS Code of Practice on Disciplinary and Grievance Procedures reinforces procedural fairness by setting minimum standards. These include written notification of allegations, adequate preparation time, and the right to be accompanied at disciplinary hearings by a companion (*Employment Relations Act 1999*, s 10). If an employer unreasonably deviates from the Code, employment tribunals may adjust any compensation awarded by up to 25 per cent (*Trade Union and Labour Relations (Consolidation) Act 1992*, s 207A). While this mechanism encourages procedural compliance, its effectiveness is limited because it merely increases the compensation payable for unfair dismissal. It provides no scope for additional damages for psychiatric injury resulting from an employer's failure to follow its disciplinary procedures. Consequently, it cannot adequately address cases where a defective disciplinary process leads to serious psychiatric harm.

Addis and the Bar on Psychological Harm

A key legal barrier to recovering damages for psychiatric injuries is *Addis v Gramophone Company Ltd* [1909], where the House of Lords held that damages for wrongful dismissal cannot include compensation for the manner of dismissal, including emotional distress. Although the case primarily dealt with reputational damage and distress, courts have broadly interpreted it to preclude recovery for psychiatric injury caused by the way employment ends. This creates a significant remedial gap: even where an employer breaches contractual disciplinary procedures and causes serious psychiatric harm, employees cannot claim damages under wrongful dismissal.





Current Limitations on Employee Protection

The Nature of Harm and the Inadequacy of Pecuniary Remedies

The harm suffered by employees subjected to defective disciplinary processes is often not predominantly financial. In many instances, the employee would have faced dismissal regardless of whether the correct procedures were followed, resulting in minimal wrongful dismissal damages. Yet the psychological impact of a flawed process can be profound. Accusations of misconduct and improperly conducted investigations may lead to distress, humiliation, and a loss of professional identity. This may sometimes manifest as diagnosable conditions like depression or anxiety (see e.g., *Yapp v Foreign and Commonwealth Office* [2014]). The inadequacy of existing remedies is particularly clear where the defective process itself causes lasting psychiatric illness.

This reality was emphasised in *Elisha v Vision Australia Ltd* [2024], where the High Court of Australia recognised employment as a central source of

identity and self-esteem; the employee developed major depressive disorder following a fundamentally unfair disciplinary process.

The Court ultimately held that the employee was entitled to damages for psychiatric injury caused by the employer's breach of its disciplinary procedures. English law offers no comparable remedy in such circumstances.

The Implied Term of Trust and Confidence and Its Limits

English law has sought to address unfair treatment through the implied term of mutual trust and confidence, which prevents employers from acting without reasonable and proper cause in a manner likely to destroy or seriously damage the employment relationship (*Malik v Bank of Credit and Commerce International SA* [1998]). In principle, breach of this term can allow recovery for losses caused by harmful employer conduct during employment.

The scope of the implied term was significantly restricted in *Johnson v Unisys Ltd* [2001], where the House of Lords held that damages cannot be



recovered under the implied term of mutual trust and confidence for losses arising from the manner of dismissal. In doing so, the Court established what has become known as the “*Johnson* exclusion area”. This exclusion was reaffirmed in ***Edwards v Chesterfield Royal Hospital NHS Foundation Trust*** [2011], where the Supreme Court held that losses flowing from the manner of dismissal fall exclusively within the statutory unfair dismissal regime, even where an express contractual disciplinary procedure is breached. The result produces what Lord Nicholls described as “strange results”, namely that employees may recover damages for psychiatric harm caused before dismissal, but not for identical harm caused by the dismissal process itself.

Negligence and the Foreseeability Barrier

Employees may also try to file a negligence claim based on the employer’s duty to ensure a safe work environment, but compensation for psychiatric injuries requires that the harm was foreseeable. Courts typically demand that employers be aware of a specific vulnerability for psychiatric injury to be deemed foreseeable (*Koehler v Cerebos (Australia) Ltd* (2005)) since employers often assume employees can handle the usual pressures of work. As a result, negligence claims rarely succeed when mental illness stems from a flawed disciplinary process affecting an otherwise healthy worker.

In *Yapp v Foreign and Commonwealth Office* [2014], the Court of Appeal indicated that foreseeability necessitates evidence that the employer knew or should have known of a particular risk. Although liability may arise where employers proceed despite clear medical warnings (*Woodhead v WTTV Ltd* [2025]), such cases are exceptional. Accordingly, the high foreseeability threshold in negligence leaves most employees without recourse where psychiatric illness results from a defective disciplinary process, highlighting the need for a remedy within employment law itself.

Recommendations for Reform: Contractual Damages for Psychiatric Harm

To bridge the remedial gap in English law, employees should be allowed to recover damages for psychiatric injuries caused by an employer's violation of clear contractual disciplinary procedures. This change would address the gap produced by the combined effect of *Addis* and the *Johnson* exclusion area.

In *Elisha v Vision Australia Ltd* [2024], the High Court of Australia unanimously rejected the traditional interpretation of *Addis*, holding that psychiatric injury is a form of personal injury recoverable under contract.

The Court emphasised that the statutory unfair dismissal regime does not bar recovery for breaches of express contractual obligations, building on prior authority recognising personal injury claims in contract (*Baltic Shipping Co v Dillon* [1993]).

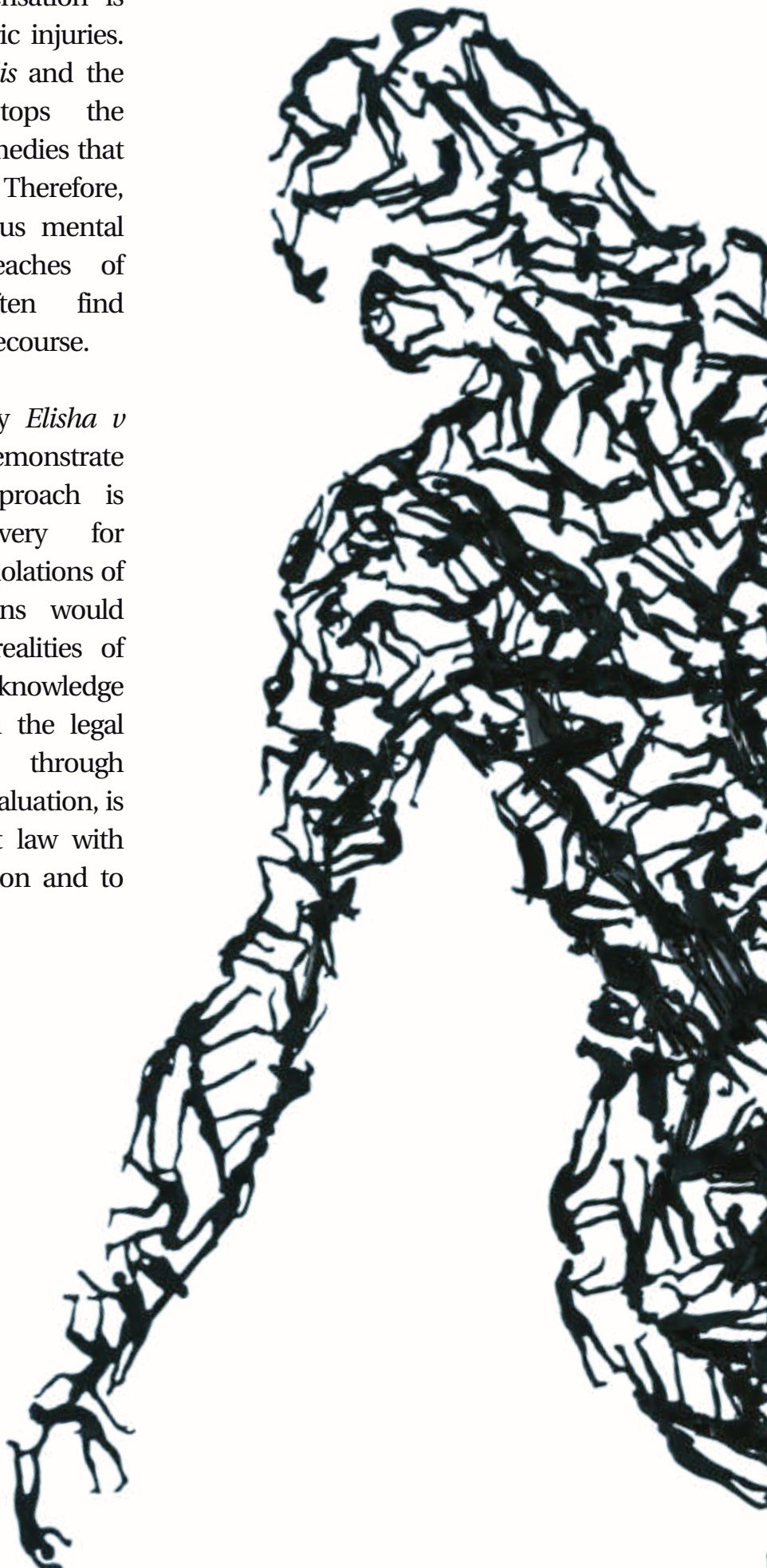
By contrast, UK courts remain constrained by the *Johnson* exclusion area, which bars recovery for psychiatric injury arising from the manner of dismissal, even where express contractual obligations have been breached. Reform could be achieved through legislation, such as amending the Employment Rights Act 1996 to allow uncapped claims for psychiatric injury in employment tribunals. Alternatively, judicial reconsideration could narrow the *Johnson* exclusion area, as Baroness Hale suggested in *Edwards*, confining it to the implied term rather than extending it to breaches of express contractual provisions. Allowing recovery would both incentivise fair disciplinary procedures and ensure that employees who suffer serious psychiatric harm have access to a meaningful remedy.

Conclusion

The current English framework inadequately protects employees who suffer mental harm from flawed disciplinary processes. Damages for wrongful dismissal are limited to financial losses tied to termination,

while unfair dismissal compensation is capped and excludes psychiatric injuries. The ongoing influence of *Addis* and the *Johnson* exclusion area stops the development of contractual remedies that could otherwise fill this gap. Therefore, employees who develop serious mental health conditions after breaches of disciplinary procedures often find themselves without significant recourse.

Comparative cases, particularly *Elisha v Vision Australia Ltd* [2024], demonstrate that a more principled approach is achievable. Allowing recovery for psychiatric injuries caused by violations of express disciplinary obligations would more accurately reflect the realities of today's workplace and acknowledge serious psychological harm in the legal system. Reform, whether through legislative change or judicial revaluation, is essential to align employment law with basic principles of compensation and to provide employees with proper protection. ■



The Uncontrollable Problem with 'Akin to Employment'

By Marius Veiss



Introduction

Vicarious liability (VL) is a legal principle where one person or entity is held legally responsible for the wrongful actions of another, even though they did not personally commit the act. In the UK, VL arises where a relationship that is capable of giving rise to VL exists, and the wrongdoer commits a wrong during the course of that relationship. The first stage asks whether the relationship is one of employment, or ‘akin to employment’. The second stage asks whether there is a sufficiently close connection between the defendant’s relationship with the wrongdoer and the wrongful act, so that it is fair and just to hold the defendant liable. As per *Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* [2023] (‘*BXB*’), this is often called the ‘close connection’ test. The focus of this essay is on stage 1 of the VL test. It seeks to argue that there are two inconsistencies within that stage: 1) that the factors used to identify relationships ‘akin to employment’ are descriptive, and over-inclusive, yet do not provide a satisfactory justificatory basis for imposing VL, and; 2) that, based on the decision in *Bird v DP* [2024] (‘*Bird*’), formalism creates unjust differences in recovery.

Wrong question?

In *Various Claimants v Catholic Child Welfare Society* [2012] (‘*Christian*

Brothers’), Lord Phillips, while not attempting to set down an exhaustive list of factors, said that in determining whether a relationship is ‘akin to employment’ or not for the purposes of VL, the courts identify factors such as: 1) the defendant directing the activities of the tortfeasor, a hierarchical relationship and a common enterprise or aim. Voyiakis (2017) argues that these factors are not sufficient to justify VL for three reasons. Firstly, many relationships have those features but should not generate liability. Secondly, the factors do not explain the moral or legal reason why the employer should bear the cost of the employee’s mistake. Thirdly, and conclusively, the courts therefore risk expanding liability based on superficial similarities to employment, rather than a clear principle.

It would be unfair to consider that point in a vacuum, given that the law has changed since the decision in *Christian Brothers*. Lady Hale clarifies in *Barclays Bank plc v Various Claimants* [2020] that the ‘akin to employment’ approach should not be used if the tortfeasor is genuinely an independent contractor. The earlier factors are not a free-standing test. The real question is whether the relationship is one of employment or something very close to it.

Let us consider Voyiakis’ case regardless. He says that in a factual

example such as *Nettleship v Weston* [1971] ('*Nettleship*') (the classic friend-instructor driving lesson case), one can still find the three features (control, possible benefit, and integration or common aim). Yet, nobody thinks that the learner's negligence should therefore be attributable to the instructor for VL. More specifically, Voyiakis says that the instructor was directing the learner and had greater control than many employers have over employees. It is at the very least plausible that the instructor obtains some benefit from the activity, and the learner's conduct was integrated into the instructor's activity of giving the lesson.

However, after *Barclays*, the inconsistency identified by Voyiakis is reduced because the 'five incidents' identified by Lord Phillips are no longer treated as a free-standing test. However, Voyiakis' criticism remains. The factors are at best evidential indicators of a relationship 'akin to employment' and do not themselves explain why VL should be imposed. The issue is not simply that the law might overextend liability doctrinally, but that the factors are still descriptive indicators. Given that the 'five incidents' seek to draw a normative thread between employment and relationships 'akin to employment', they ought to explain why liability should follow. Yet they fail in providing a satisfactory account of the justificatory reasons for the imposition of VL.

Bird - Australia fights back!

The Australian High Court decision in *Bird v DP* criticised the 'akin to employment' test primarily because the test was too uncertain and lacked a clear principle. The Court said that there was no 'clear or stable' basis for expanding VL beyond true employment relationships, and that doing so would create 'uncertainty and indeterminacy' in the law. More specifically, the Court gave two main reasons. Firstly, it said that the test had already produced over-expansion in the UK, extending liability to relationships that usually would not be caught by secondary liability. Secondly, it said that if the law were to recognise an 'akin to employment' stage, it would make the distinction between independent contractors and employees even harder to draw.



It seems to me that the Court provided a harsh and formalistic interpretation of the decision in the UK, and thus failed to properly justify why the ‘akin to employment’ test creates a lack of clarity in the law. As Freeborn (2025) argues, the decision in *Bird* illustrates ‘the bluntness of a binary employment or nothing approach.’ As *BXB* shows, the ‘akin to employment’ requirement is still a demanding standard. Its expansion has not displaced the orthodox requirement that VL does not arise where the wrongdoer is genuinely an independent contractor. Nor is it sufficient that the wrongdoer acted in a way that was meant to benefit the defendant or further the aims of the enterprise. UK case-law makes it clear that something more is required before liability will be imposed.

Thirdly, a claimant’s ability to recover may now depend on a technical distinction between an employee and a priest, volunteer, contractor or other non-employee, even where the institution’s structure gave the abuser authority and access to the child. Suppose the following example: A church runs two youth programs. In Program A, the youth leader is a paid employee. In Program B, the youth leader is a priest appointed by the church, given the same authority, the same access to children, and the same institutional backing. If both abuse a child in the course of that role, the risk to

the child arises in the same practical way because the institution placed the adult in a position of trust and power. But on a strict employment-only approach, the child in Program A may have a viable VL claim while the child in Program B may not. Thus, *Bird* makes it the case that recovery depends on the formal classification of the abuser than on the substance of the institutional relationship that created the opportunity for abuse in the first place. Where the institution conferred the same authority and access, treating employees and non-employees differently is simply too difficult to justify.

A passing thought on ‘control’

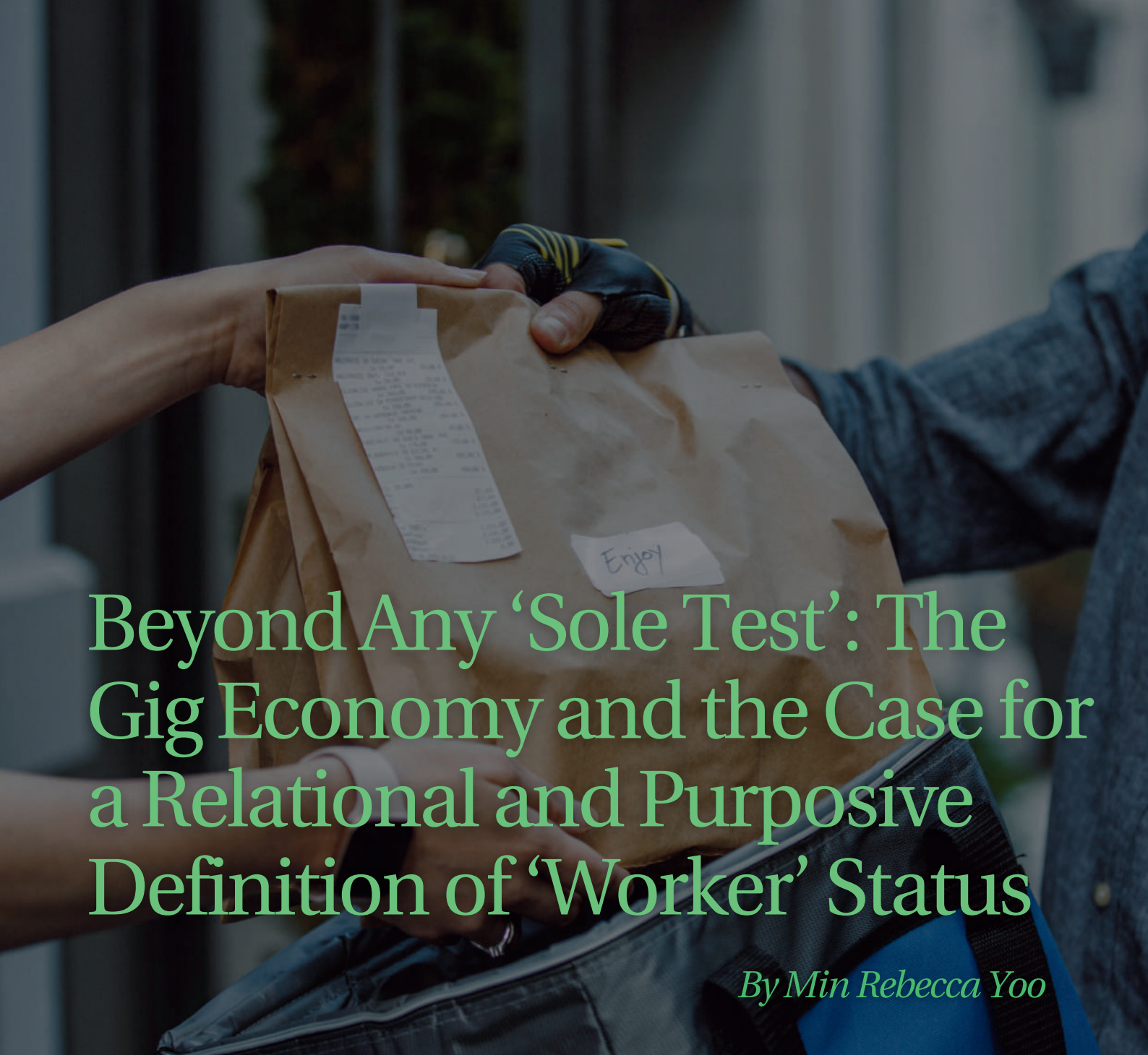
One issue with the idea of ‘control’ as identified above is its over-inclusiveness (McIvor, 2006). A person can exercise substantial supervision or direction over another without that relationship being ‘akin to employment’ in any meaningful sense. At the very least, what a factual matrix such as *Nettleship* shows is that control cannot be the central test or normative basis for VL. For instance, a teacher may exercise a high degree of control and supervisory power over a pupil by telling him what to do. In that sense, the teacher may have more immediate control over the pupil than some employers have over skilled employees. But it seems to me very odd to say that when (and hopefully never!)

little Erik pushes little Emma, little Erik's wrongdoing should be attributed to the teacher through VL. I think that this shows that control taken by itself is too broad a criterion. It also highlights why the court in *Cox v Ministry of Justice* [2016] (correctly) said that control is only relevant negatively - i.e. that its absence may count against liability.

Conclusion

In conclusion, stage 1 remains conceptually uneasy. The law cannot rest on descriptive proxies like control, nor can it rely on the blunt formalism of employment alone. To paraphrase Aristotle's warning that equals should be treated equally, and unequals unequally. The present law, humorously perhaps, risks doing neither, and so remains inconsistent in both principle and outcome. ■





Beyond Any 'Sole Test': The Gig Economy and the Case for a Relational and Purposive Definition of 'Worker' Status

By Min Rebecca Yoo

Introduction

Labour law draws a foundational distinction between employees, who work under a 'contract of service', and independent contractors, who work under a 'contract for services'. Between these two categories sits the statutory 'worker': a dependent contractor whose working relations closely resemble employment and who accordingly attracts many of the

same rights and protections.

The extent of an individual's entitlement to workplace protections is entirely contingent on their classification, and therefore the criteria by which courts determine that classification demand precision and consistency. This demand is particularly acute in light of the

proliferation of the 'gig economy' — a labour market characterised by on-demand, platform-facilitated work — which erodes the conceptual distinctions between the categories (Liang et al., 2022). The indeterminacy surrounding their classification risks producing a lacuna of protection for some of the most economically exposed participants in the modern labour market. The characteristics that can be used to determine 'worker' status derive from both statute and case law: personal performance and integration from section 230(3)(b) of the Employment Rights Act 1996, and subordination and economic dependency from academic commentary and judicial reasoning. I argue that these four characteristics of the 'worker' should be treated as relational and mutually constitutive indicators of a single underlying condition: structural vulnerability to exploitation.

The Inadequacy of Single-Factor Tests: The Evidence from Uber

A test which focuses on a discrete factor, such as Davidov's criterion of economic dependency and Lord Wilson's 'sole test' of personal performance in *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 ('*Pimlico*'), problematically captures only part of the underlying vulnerability

from which workers should be protected.

Davidov (2005) argues that economic dependence on a single employer, and not subordination, should be the main characteristic of 'worker' status. He suggests that protective laws, such as the minimum wage, respond to the inequality of bargaining power rooted in dependency. A worker's reliance on a single employer for their livelihood makes them vulnerable and more likely to accept terms that society finds unacceptable, even absent formal subordination. In *Redrow Homes (Yorkshire) Ltd v Wright* [2004] EWCA Civ 469 ('*Redrow*'), for example, bricklayers were contracted personally and given autonomy over how the work was to be done (suggesting a *prima facie* independent contractor relationship). However, although the contract formally allowed the bricklayers to work elsewhere, the practical reality was that they worked solely for the company during the work period. The degree of economic dependency was significant enough to warrant extending 'worker' protection to the bricklayers, notwithstanding minimal managerial subordination.

Davidov's dependency criterion finds support in *Redrow*, but the gig economy exposes its limits. While Davidov advocates for a clean conceptual separation of subordination

and economic dependency, I argue that *Uber BV v Aslam* [2021] UKSC 5 (*‘Uber’*) exposes how subordination and economic dependency are mutually constitutive; each characteristic produces and is produced by the other. Analysing Uber through this lens helps operationalise the approach. Economic dependency creates the conditions for subordination: the more a driver needs access to Uber’s customers for their income, the more they are likely to accept Uber’s harsh, unilaterally set terms. Conversely, subordination deepens economic dependency: because Uber fixes the remuneration policy and prevents drivers from establishing any relationship with a passenger capable of extending beyond an individual ride, Uber effectively forecloses the drivers from building a customer base and commercial reputation outside the app, further enforcing their economic dependence on Uber.

In addition to demonstrating the existence of relationality between economic dependency and subordination, *Uber* highlights the necessity of embedding a multifactor approach into the definition of ‘worker’ to capture emerging forms of vulnerability. For instance, Uber drivers were subjected to bureaucratic control and disciplinary measures, such as being automatically logged out for cancelling or refusing rides and having their accounts deactivated if their customer rating fell beyond a set threshold. Algorithmic systems of control manufacture the obedience of workers to that platform, rendering resistance economically unviable. This demonstrates how, even in the absence of traditional face-to-face managerial subordination, gig economy workers can experience vulnerability in new ways from which they must be protected (Aloisi, 2016). Thus, Uber indicates how a single-factor test will be





ill-equipped to recognise emergent forms of exploitation, including the kind of opaque algorithmic subordination increasingly characteristic of digital labour platforms (Lata et al., 2023).

The Mutually Constitutive Nature of the Four Characteristics

If *Uber* demonstrates the mutual constitution of subordination and economic dependency in platform-based work, *Pimlico* demonstrates how both are expressed through and reinforced by integration and the requirement of personal performance. In doing so, this directly undermines Lord Wilson's claim that the sole test for defining a worker is, 'of course, the obligation of personal performance'. When working for Pimlico Plumbers, Mr Smith had an implied right of substitution, limited only to another Pimlico operative with his level of skill. This was nevertheless held to be a requirement of personal performance.

Lord Wilson's proclamation that there is a 'sole test' is rebutted by the analysis undertaken in that very judgement which also examined other factors. Importantly, the analysis in *Pimlico* helps further demonstrate relationality between the characteristics. Requiring Mr Smith's personal performance undermined his economic independence, because it effectively bound his productive capacity solely to Pimlico's operational structure. This integration prevented him from diversifying his hirers as a genuinely independent contractor would. This economic dependence and integration created the conditions for Pimlico to exercise bureaucratic control over Mr Smith in the form of dress codes, disciplinary codes, and managerial supervision, notwithstanding Pimlico's insistence on his independence. Pimlico, therefore, confirms that these characteristics are mutually constitutive manifestations of the same underlying vulnerability, in which each characteristic sustains the others. This explains why no single one of them can satisfactorily serve as the sole test.

The Normative Case for Purposivism

Furthermore, the normative case for a multifactor approach guided by statutory purposivism rests on an argument about the relationship between contractual form and employer power. Hepple (1986) suggests that because implied terms of employment contracts are derived from what employers impose in practice, such as informal commands and unspoken rules, contract law is structurally biased towards employers. The employer can leverage their choice of contractual form to arrange the contract to satisfy the single-factor test while preserving the underlying condition of vulnerability in practice (Collins, 1995). To illustrate, I contend that if the sole test were economic dependence, an app like Uber would *contractually* permit multi-apping (the practice of simultaneously using multiple rideshare or delivery apps) to evince how the driver can diversify their risk, while making it *practically* unviable through disciplinary measures that punish drivers who are not constantly logged on and who do not drive consecutive rides. Statutory purposivism is, therefore, not merely a pragmatic preference for flexibility in the definition of a ‘worker’, but a structural necessity to counteract the risk of contractual circumvention.

Conclusion

The gig economy has demonstrated why the characteristics used to determine ‘worker’ status — subordination, economic dependency, personal performance, and integration — should not be treated as discrete, rivalrous tests but relational and mutually constitutive indicators of a single underlying condition of vulnerability to exploitation. Courts have implicitly recognised this relationality in practice (Uber), even where the language of ‘sole tests’ has obscured it in theory (Pimlico). As Hepple and Collins identified, because contractual form is the primary instrument of employer power, a test that defers to any one characteristic can be gamed by employers to deny protection. The normative imperative of labour law demands a multifactor framework capable of capturing the interconnected nature of these conditions, tied to a purposive anchor of vulnerability, to protect those whose inequality of bargaining power renders them structurally exposed. Only such an approach can ensure that labour regulation is not outpaced by the evolving and often deliberately obscured mechanisms through which work vulnerability is produced. ■

	1	2	3	4	5	6		7	8	9	10
11								12			
13								14			
15					16		17				
18				19							
		20	21			22				23	
24	25		26		27		28		29		
30		31				32			33	34	35
36								37			
38				39			40				
41				42							
43				44							

Play online as well!

<https://crosshare.org/crosswords/eui/SrTV>
OvijnBfUBGQuw4s/clause-and-effect

A square QR code with a black and white pixelated pattern, used for quick access to the online crossword puzzle.

43

Sponsors



Law
School

Three
Verulam
Buildings
Barristers

serle court

ONE ESSEX COURT

OLD SQUARE
CHAMBERS 

Editor-in-Chief

Marius Veiss

Deputy Editor-in-Chief

Scheherazade Gul

Contributors

Oliver Chan	Ibrahim Ghellache	Daniel Hallström
Anna van Impe	Matthew Wai Kit Ngai	Dominic Rawlings
Marius Veiss	Sam Ying (Tin Sum)	Rebecca Min Yoo

Magazine

Nicholas Low

Alexandra Fenner	Dominic Rawlings	Khudadad Usman Virk
Sam Ying (Tin Sum)	Sonia Aashika Sanjay	Ibrahim Ghellache
	Sijia Cai	Vittoria Mancini
		Anna van Impe

Publications (Magazine)

Blanka Bochenek

Jessica Chen Mélina Le-Mentec

Liaisons

Oliver Chan

	Adrien Poon	Gloria Kim	Ezel Kupeli
Nicole Hee	Amelie Chiu	Yi Ning Lim	Sanjana Shikhar

Cover Design by Adrien Poon, Gloria Kim, and Ezel Kupeli

All rights reserved. The views expressed in the pieces are the author's own and do not necessarily represent the views of the LSE Law Review or our sponsors.