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Building a Purposive Approach to UK Labour Law

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Date of submission – 11 December 2020

Word count – 32,789

Abstract: *this thesis stresses the need for a reconceptualization of the judicial role in UK labour law. It will be argued that a purposive approach is the most appropriate approach for judges to take in this respect. Indeed, there has been an increasing willingness to use the purposive approach, using non-EU-derived legal sources, by the UK Supreme Court in labour law cases. It will be argued that a change in approach, as described, has the potential to redress the power imbalance in the employment relationship and mitigate the adverse effects of (increasingly likely) labour law deregulation on workers' rights in a post-Brexit, post-COVID-19 UK. Consequently, the thesis will build a model of purposive interpretation, as it progresses, with reference to the theories of Aharon Barak, Guy Davidov, Ronald Dworkin and labour law cases in the House of Lords and UK Supreme Court. The thesis will use this model to make a descriptive and normative assessment of how the UK Supreme Court should decide Uber v Aslam.*

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Preface

I am a Solicitor, specialising in employment and discrimination law, having represented both employer and employee clients during my career. I was motivated to write this thesis for two main reasons. I have seen new methods of working take hold in the UK over the years, particularly the rise of the "gig" economy, and the damaging effect that such developments have had on workers' rights. The power disparity in the employment relationship in this country seems to be getting stronger. I am also concerned that Brexit will lead to a reduction in EU-derived labour rights in the UK labour market. Given that the EU has been an important source of progressive labour rights in the UK for several decades, Brexit poses a real threat to such rights. My concern is heightened by the COVID-19 pandemic. The toxic combination of Brexit and COVID-19 may provide a currently dominant Conservative Government, which has had labour law deregulation on its mind for some time, an ideological catalyst to reduce workers' rights in the name of economic recovery.

Given these developments, and the possibility of labour market deregulation, I believe that a reconceptualisation of the judicial role in UK labour law is required. A move away from the traditional literal approach to labour law interpretation is necessary. It should be replaced with a more flexible, dynamic approach to legal interpretation which will allow the judiciary to keep pace with rapidly changing patterns in the workforce and society. I believe that the purposive approach to labour law embodies these necessary qualities. The purposive approach can also be applied across a whole range of non-EU-derived legal sources, such as the common law, the European Convention on Human Rights and Fundamental Freedoms, and other international treaties to help ameliorate the power imbalance in the employment relationship and, should deregulation come to pass, to potentially ease the burden of deregulatory measures on workers' rights.

Acknowledgements

Thank you to Professor Ruth Dukes and Professor Emilios Christodoulidis of the University of Glasgow Law School for the consistent guidance, support and kindness they have offered throughout the last 12 months. I also wish to thank my wife, Anne, who has been a constant support of love and inspiration during the writing process. I am deeply indebted to you all.

Declarations

I am solely responsible for researching and writing this thesis. This thesis has not been accepted in fulfilment of the requirements of any other degree or professional qualification.

Introduction

UK labour law has been in a state of crisis for several decades.[1] Rapid technological progress and globalisation have led to different styles of working during this time-period. Workers such as those on zero hours contracts, and those working in the "gig" economy, are increasingly atomised from their colleagues. As a result, these workers are often less likely to know about their employment rights, and their employers' corresponding obligations towards them, than workers in a unionised workforce.[2] To make matters worse, trade union representation has been on a steady decline in the UK since the 1980s and the Trade Union Act 2016 has further diluted the powers of trade unions.[3] This damaging combination of socio-economic factors on UK labour law has been exacerbated by the fact that employers are using "armies of lawyers"[4] to draft convoluted contractual documents whose purpose is to evade the employer's obligations under the employment relationship.[5] Our labour laws are not keeping pace with these changes.[6]

Brexit – an escalation in the crisis?

If UK labour law has been in a state of crisis for some time, this crisis looks like it may escalate. The UK is set to leave the European Union with effect from 31 December 2020. This carries the threat that the UK Government will impose deregulatory measures in the labour market by repealing, or regressively amending, EU-derived domestic legislation which protect workers' rights. Greater deregulation of labour law in the UK has been on the Conservative Government's agenda for some time.[7] Opinion is split as to whether there will be a political appetite to reduce workers' rights in a post-Brexit UK. The current Conservative Government owes many of its votes in the last General Election to former Labour voters. This factor militates against the possibility of an overhaul of workers' rights. However, the situation is now complicated by the COVID-19 pandemic. The UK is currently experiencing an

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[1] Davidov, G, Langille, B Understanding Labour Law; A Timeless Idea, a Timed-Out Idea, or an Idea whose Time has now Come? In Davidov, G, Langille, B, The Idea of Labour Law (Oxford University Press 2011) p.1.
[2] Davidov, G, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) p.228
[3] Ford, M, Novitz, T, *Legislating for Control: The Trade Union Act 2016,* I.L.J. 2016, 45(3), 277-298, at p.277.
[4] Per Elias L.J, *Consistent Group Limited* v *Kalwak and others* [2008] EWCA Civ 430, paragraphs 57 – 59.
[5] The term "employment relationship" is used in this Thesis as a broad term to describe an employer's relationship with both employees and dependent contractors under section 230 of the Employment Rights Act 1996 ("the 1996 Act"). Any reference to a "worker" in the study may refer to an employee (under section 230(3)(a) of the 1996 Act as well as a dependent contractor under section 230(3)(b). If another piece of legislation referred to in this Thesis alludes to a "worker" and this meaning departs from the meaning of "worker" under section 230, this will be specified. The position of officeholders and other non-contract-based workers is also considered in this study and this will be specified where appropriate.
[6] Davidov, n.2, p.2.
[7] Department for Business, Innovation and Skills, *Flexible, Effective, Fair: Promoting Economic Growth through a Strong and Effective Labour Market* (2011) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32148/11-1308-flexible-effective-fair-labour-market.pdf)

unprecedented socio-economic crisis. Given the damaging economic impact of the pandemic, which seems likely to continue for a prolonged period, it is suggested that economic recovery will be at the forefront of the Conservative Government's agenda. This unique dynamic between Brexit and the COVID-19 crisis might present an ideal opportunity for a dominant Conservative Government to bring about some swift deregulatory measures to labour law as part of their overall economic recovery plan.

This study takes the view that the measures, implemented by the Johnson Government, makes it likely that we shall see a reduction of workers' rights through new legislation in a post-Brexit UK. Safeguards to workers' rights were initially protected under the binding Withdrawal Agreement.[8] However, the Johnson Government has managed to negotiate out of this. These provisions are now contained in the non-binding Political Declaration.[9] The Government's powers to repeal, and / or amend, EU-derived labour laws are contained in the European Union (Withdrawal Agreement) Act 2020 ("2020 Act"). Under sections 2 – 4 of the 2020 Act, a body of retained EU law will remain in place after the current transition period ends (on 31 December 2020). Any UK legislation passed on or after 31 December 2020 will take precedence over EU law. The Court of Justice of the European Union (CJEU) loses all jurisdiction over British tribunals and courts from that date and any future decisions of that court will not bind domestic courts and tribunals. In addition, under section 6 of the 2020 Act, the UK Supreme Court, and the appellate section of the High Court of Justiciary in Scotland, will not be bound by any EU law that remains in place on or after 31 December 2020. There is also scope, under section 6 of the 2020 Act, for the Government to make Regulations to extend this exemption to lower courts and tribunals. In short, the Johnson Government will have a vast array of legal powers to repeal, or regressively amend, EU-derived employment rights in a post-Brexit UK.

The threat posed by Brexit to UK labour law is a serious one. The EU has strengthened employment rights in the UK through several of its key institutional mechanisms. As Ford has highlighted, a considerable number of our labour rights derive from the EU, including protection against discrimination on the grounds of sex, pregnancy, race, disability, religion and belief, age and sexual orientation and the right to equal pay between men and women.[10] The EU has also provided a wide range of health and safety protections for pregnant women,

[8] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Committee, endorsed by a Special Meeting of the European Council on 25 November 2018.
[9] Political declaration setting out the framework for the future relationship between the European Union and United Kingdom (2019 / C384 I/02).
[10] Ford, M, *The impact of Brexit on UK labour law,* (2016) International Journal of Comparative Law, 32(4), 473 – 96, at p.476.

as well as rights to maternity and parental leave. In addition, fixed-term, part-time and agency workers have obtained stronger levels of protection from EU law.[11] Ford has also identified how the EU has introduced equivalent terms and conditions, and protections against unfair dismissal, on the transfer of an undertaking, into domestic law, as well as enhancing general health and safety standards at work.[12] Moreover, the right to a written statement of terms and conditions of employment and most of our laws regarding working time limits derive from the EU.[13]

This list of EU-derived rights is not exhaustive. However, it demonstrates the wide breadth, and scope, of the labour rights which the UK has acquired as a result of EU membership. Most of these rights are potentially at risk of dilution or repeal in a post-Brexit UK. Furthermore, under the 2020 Act, UK courts will no longer be able to make references to the CJEU on points of law. The ability to make such references has proved a source of progressive labour reforms in the past. As Grogan has illustrated,[14] past decisions of the CJEU removed compensation caps on discrimination claims,[15] extended the scope of anti-discrimination laws to protect transsexual people[16] and developed the existing discrimination jurisprudence to include discrimination by association.[17] In addition to these institutional mechanisms of protection, the EU principle of effectiveness[18] has proven to be a more general, yet effective, constraint on Government's ability to deregulate labour laws which derive from the EU.[19] The Government will be free to disregard this principle in a post-Brexit UK.

Given the importance of EU law to the UK's system of labour laws, the seriousness of the threat of post-Brexit deregulation of EU-derived labour rights should not be underestimated. Given this level of seriousness, the critical question for labour lawyers and scholars is: can the threat be mitigated using legal mechanisms?

Reconceptualising the judicial approach to labour law

The answer to the question set is a both a cautious and a qualified "yes." The next question is how this can be achieved. Given the current political climate, it is unrealistic to expect that

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[11] *Ibid*, p.476
[12] *Ibid*, p.476
[13] *Ibid*, p.476.
[14] Grogan, J, *Rights and remedies at risk: implications of the Brexit process on the future of rights in the UK* 2019, P.L. Oct, 683 – 702, p.688
[15] *Marshall v Southhampton and South West Hampshire AHA (No.2)* (C-271 / 91) EU:C: 1993:335; [1994] Q.B. 126.
[16] *P v S and Cornwall County Council* (C13/94) EU:C: 1996:170; 1996 E.C.R. I-2143.
[17] *Coleman v Attridge Law* (C-303/06) EU:C: 2008:415; [2008] E.C.R. I-5603
[18] Treaty on European Union 2012/C 326/01, Article 19.
[19] Ford, n.10, p.480.

progressive legislation will be forthcoming any time soon. A reconceptualization of the judicial role in labour law disputes is therefore a better focal point for addressing the main challenges, and goals, within contemporary UK labour law. Given the rapid changes in working methods, which are constantly evolving in tandem with technological growth, coupled with employer's evasive tactics, a flexible and dynamic mode of judicial interpretation is required. This mode of reasoning must also be one which is congruent with the specific goals, and needs, of modem labour law. Given these fundamental requirements, this thesis advocates a purposive interpretative approach to labour law cases. The recommended purposive model of interpretation will be defined in greater detail, and then developed throughout the course of the thesis. For now, a very basic definition will suffice: the purposive approach to judicial interpretation focuses the judge's mind on the purpose of the law being interpreted. The primary building blocks of the purposive model of interpretation being advocated will be forged from an articulation of the main goals of labour law, focusing on the writing of Kahn-Freund, a review of UK labour law cases in the House of Lords and, latterly, the UK Supreme Court, which adopted a purposive method[20] and an analysis of labour law and jurisprudential scholarship; primarily the theories of Aharon Barak, Guy Davidov and Ronald Dworkin.

Consequently, the principal aim of this thesis is to build a purposive mode of judicial interpretation that can be applied to labour law disputes. It does not focus on other areas of the law. Indeed, judicial modes of reasoning will be based on different background presumptions and requirements depending on the area of law being adjudicated. These presumptions, and requirements, are necessary for the set of laws to achieve their purposes. For instance, in criminal law, the judicial mode of reasoning must view the circumstances of the case, and the application of the law to those circumstances, with the presumption of innocence at the forefront of the judge's mind. In addition, the judge must be acutely aware of various evidential rules and the requirement that guilt must be proven beyond a reasonable doubt. These specific presumptions and requirements (and many others) are necessary in the criminal law context for the law to achieve its purposes. However, the judge will not apply the same presumptions and requirements when adjudicating a commercial law dispute. She will adopt a different set of presumptions and requirements. So, the most appropriate mode of judicial reasoning for a certain area of the law must contextualise the fundamental presumptions, and requirements, relative to the area of law being adjudicated. A central point made by this thesis is that judges should not generally be adopting the same mode of reasoning in labour law cases that they

[20] This thesis will be restricted to labour law cases in one judicial forum - the House of Lords and the UK Supreme Court. Cases in lower courts and tribunals, and those involving references to the CJEU, are not included.

would apply in general commercial law cases. The distinction, and the reasons for it, will be explained in the analysis of *Autoclenz Limited* v. *Belcher* (*Autoclenz*)[21] in Chapter 2.

It will therefore be necessary, throughout the course of this thesis, to build presumptions and background requirements on to the purposive model of interpretation that is being advocated. Indeed, the purposive mode of judicial reasoning that this thesis seeks to build is tailored to labour law's specific goals and requirements. This raises a key question, addressed in Chapter 1 of the thesis: what are those goals and requirements?

Summary of thesis

Chapter 1 analyses the main policy goals of labour law. There will also be a review, and critical analysis, of the House of Lords' historical approach to labour law cases, which evidences a judicial willingness to adopt a purposive method of legal interpretation. Chapter 2 reviews the existing literature on the purposive approach to law in general, and labour law, focusing primarily on the theories of Davidov and Barak. The purposive approach is both defended from its critics and normatively justified. Ronald Dworkin's theory of adjudication, specifically his emphasis on the use of legal principles by the judiciary, is also reviewed in Chapter 2 to help build the model of purposive interpretation advocated in this thesis.

In Chapter 3, the model will be developed, and shown in its practical application, by reference to labour law judgements in the UK Supreme Court. These judgements show that the judicial approach to purposive interpretation in UK labour law is gathering pace. They also demonstrate how a purposive approach, using sources of law which are not derived from the EU, can assist judges in the determination of hard legal cases whilst also conferring broader systemic benefits to labour law. In relation to the latter, it will be shown how the purposive approach adopted by the UK Supreme Court has helped to ameliorate the power imbalance in the employment relationship. This, it will be argued, is of fundamental relevance when assessing the judiciary's potential capacity to mitigate the adverse effects of Brexit.

In Chapter 4, the purposive model will be applied to the pending Supreme Court decision in *Uber* v *Aslam*.[22] It will show how the components of the purposive model that have been built

[21] [2011] UKSC 41.
[22] [2018] EWCA Civ 2748

can be applied to this specific case in order to secure a favourable outcome for vulnerable workers. Chapter 5 will conclude.

Chapter 1 – A purposive approach to UK labour law

1.1 The goals of labour law

Otto Kahn-Freund is widely regarded as the "founding father" of UK labour law.[23]

For Kahn-Freund there were two "universal truths"[24] to labour law. The first was that there was an inequality of bargaining power between employer and employee.[25] The other flowed from an innate conflict in the employment relationship.[26] As Dukes has observed, Kahn-Freund believed that freedom of contract, in the labour law context, was a "sham" due to the power disparity in the employment relationship.[27] Consequently, Kahn-Freund believed that the primary goal of labour law has always been, and always will be, to redress the inequality of bargaining power in the employment relationship.[28] Kahn-Freund also saw the need to re-assert the worker's dignity as part of redressing the power disparity in the employment relationship.[29] The primary way of achieving these goals was through the adoption of collective bargaining and industrial action, which he advocated in his model of *collective laissez-faire*.[30]

Consequently, the most prominent foundational writer in UK labour law saw the primary goals of labour law as the reduction in the power disparity in the employment relationship and the resultant reassertion of the worker's dignity through a process of collective bargaining. However, collective bargaining has been in consistent decline in the UK since the 1980s. Whilst a widespread return to it would be welcomed by many labour lawyers and academics, this is unlikely to happen in the foreseeable future. In the meantime, other ways of redressing

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[23] Vranken, M, *Autonomy and Individual Labour Law: a Comparative Analysis,* (1989) *International Journal of Comparative Labour Law and Industrial Relations*, 5(2) 100.
[24] Dukes, R, *Constitutionalising Employment Relations: Sinzheimer, Kahn-Freud and the Role of Labour Law,* Journal of Law and Society, Sep 2008, Vol 35 No 3, pp341 – 63, at p.352.
[25] *Ibid*, p.352
[26] *Ibid*, p.353
[27] Dukes, R, *Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?* (2009) 72(2) MLR 220 – 46, at p.221.
[28] Kahn-Freund, O, *Arbeit und Recht,* (Bund Verlag, 1979) 7. (Referenced from Weiss, M, *Re-inventing Labour Law?* in Davidov, Langille, (ed.) n.1, p.50)
[29] Dukes, n.24, p.363
[30] *Ibid*, p.363.

the power imbalance will have to be found. This is where the purposive approach to labour law becomes relevant.

Before moving on to an analysis of the purposive approach, it is necessary to establish whether there actually *is* an inherent inequality of bargaining power in the employment relationship. This thesis takes the view that there is such inequality and that it has been created by the law. The employment relationship is a legal construct. Using capitalist legal concepts such as freedom of contract and private property, the law created the employment relationship. These private law rules of contract and property, by their nature, favour the employer's interests. Indeed, as Davidov notes, the "free market" inevitably "creates an unfair default in favour of employers because the market is based on private laws of contract, property and corporations which are heavily weighted in favour of the employer.[31]

There is a great deal of merit in Davidov's claim. Freedom of contract is typically an artificial construct in labour law.[32] The "freedom" weighs heavily in favour of the employer.[33] The employer generally has access to greater collective financial and technical resources than each individual employee. This means that employers can instruct legal advisers to draft convoluted contractual documents to evade their legal responsibilities towards their workers. As was the case in *Autoclenz*, if the worker wishes to work, she must generally accept these terms as they stand.[34] The differential in financial and technical resources also results in a situation where employers typically own, or at least control, the property within which the workers operate, and the materials they require to perform work-related tasks. In addition, corporate law often restricts the liabilities of businesses and transfers the risk to workers.[35] These factors combine to create a power imbalance in the employment relationship. This imbalance is then strengthened even further by the employer's power to dismiss the worker. Indeed, the ever-present possibility of dismissal by the employer is perhaps the most prominent example of the power disparity in the employment relationship.

Consequently, the employment relationship is, in essence, a continuous cycle of power imbalance and worker subordination. The legal system, which supports the capitalist model, created the unfair power default in favour of employers. This default is exploited by the employer to impose terms and conditions of employment on the worker which typically favour the employer's interests. The contractual framework then allows the employer a significant

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[31] Davidov, n.2, p.21
[32] See n.27.
[33] Langille, B, *Labour Law's Theory of Justice* (Davidov, Langille, n.1, p.101).
[34] *Autoclenz*, paragraph 11
[35] Davidov, n.2, p.21.

level of control over the worker. This leads to the second form of subordination where a relationship of dependency, reinforced by the worker's vulnerability, can thereby flourish.

As a result, this thesis proceeds on the basis that there is an inequality of bargaining power in the employment relationship, which reinforces the power imbalance between employers and workers, and that the primary goal of labour law is to redress that imbalance and thereby restore the dignity of the worker. (Moreover, as the case analyses will show, even in some situations out with the employment relationship, individuals engaged in work, such as officeholders, which is not strongly associated with a power imbalance, can find themselves in highly vulnerable situations in the workplace.[36])

It has been argued that the traditional paradigmatic goal of labour law, to redress the inequality in bargaining power, is not the most appropriate paradigm for modern labour law.[37] Indeed, scholars such as Langille question the relevance of this task to modern labour law, asking the question why it is important to care about it.[38] Other scholars, such as Kountouris and Freedland, support the traditional paradigmatic goal in principle but argue that changing conditions in the workforce have rendered the paradigm outdated.[39]

By contrast, this thesis holds true to the traditional paradigm. As noted above, the inequality of bargaining power is inextricably linked to a cycle of subordination. The worker's subordination arises from the capitalist constructs of the legal system, which create a power default in favour of the employer, and this results in an inequality of bargaining power which then, in turn, increases the worker's subordination to form a continuous cycle of subordination and dependence. As Dukes has noted, Kahn-Freund was not solely concerned with inequality of bargaining power, as Langille appears to believe, but he "understood inequality of bargaining power as but one expression or particular manifestation of the deeper-seated problem of the subordination of the worker to the employer, labour to management. His concern was not only with contractual bargaining power, in other words, but with "social power" more broadly conceived."[40] Dukes' observation is supported by Kahn-Freund's reliance on more general concepts of power, subordination and submission when he comments on the need to redress the inequality of bargaining power in the employment relationship:

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[36] *Gilham* v. *Ministry of Justice (Gilham)* [2019] UKSC 44, paragraph 7.
[37] Langille, B, *Labour Law's Theory of Justice*, (Davidov, Langille, n1, p.116).
[38] *Ibid*, p.116.
[39] Dukes, R, *The Labour Constitution* (Oxford University Press 2014) Kindle edition - loc 7285.
[40] *Ibid*, loc 7294

"But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment." The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."[41]

Consequently, Kahn-Freund's paradigm is broader than Langille conceives. This is relevant in the present context. The continuous cycle of subordination, as described in this thesis, reflects Kahn-Freund's view that inequality of bargaining power was part of a larger problem relating to worker subordination. As will be shown, this broader concern of worker subordination is even more relevant today than it was when Kahn-Freund wrote about it. Given Kahn Freund's broader concerns with worker subordination, and its continuing relevance to modern working practices, this thesis agrees with Dukes' position that these broader aspects of Kahn-Freund's theory make it more difficult to dismiss his paradigm as outdated.[42]

Instead, the changing nature of the workforce *reinforces* the continued relevance of Kahn-Freund's paradigm. Globalisation and technological progress, together with a large range of other socio-economic factors, have changed methods of working. That much is true. However, these methods of working are still based on the same capitalist model as existed during Kahn-Freund's era.[43] Moreover, this system has generated new methods of working, such as "gig" and zero hours contracts, which have generally *greater* degrees of inequality and subordination than the traditional employee with union representation. These modern workers are therefore generally *more* prone to exploitation and abuse than the traditional employee with union representation. Consequently, as Weiss notes, the increasing vulnerabilities of these workers does not require a shift in the labour law paradigm.[44] Instead, they reinforce its importance – redressing the power imbalance in the employment relationship, and reasserting the dignity of the worker, is even more important today than it was several decades ago.

Nevertheless, another objection to the traditional paradigm might be that the efficiency of markets should be the primary purpose of labour law. This argument rests on the contention that markets should be allowed to develop freely, without unnecessary restrictions, the labour

[41] Quoted from McColgan, A, Collins, H, Ewing, KD, *Labour Law* (Cambridge University Press, 2019), p.138
[42] Dukes, n.39, loc 7303
[43] *Ibid*, loc 7188.
[44] Weiss, M, *Re-Inventing Labour Law*, (Davidov, Langille, n.1 p.46).

market being no exception.[45] The point often made by free market theorists is that, if employers can operate their businesses without restrictions, they will be able to compete in a highly globalised economy.[46] However, it is suggested that the free-market model does not sit well with the unique nature of the labour market. Markets, in general, deal with the flow of commercial commodities. There may be some merit in the claim that these commercial markets should be left unregulated; this thesis does not attempt to dismantle the free market theory in general. Instead, it stresses that such theories are unsuitable to the labour market because human beings are *not* commercial commodities. As human beings, they have inherent dignity and are entitled to equal treatment. This necessitates a market which *must* be regulated. The purpose of such regulation must therefore be to ensure that the power imbalance in the employment relationship is redressed with a view to preventing exploitation of that power, and to thereby protect human dignity.

Given the attraction of the traditional paradigm, it is unsurprising that many prominent modern labour law scholars continue to see the redress of inequality of bargaining power, and reducing the power disparity, in the employment relationship as being a central goal of UK labour law.[47] Indeed, Collins has argued that inequality of bargaining power requires a judicial approach to labour law disputes which departs from the general principles of contractual interpretation.[48] This view is echoed by Bogg, who argues that the *Autoclenz* decision, which rested on the inequality of bargaining power in the employment relationship, necessitates a new approach to labour law which is distinguishable from the general contractual approach. In addition, Brodie sees the power imbalance in the employment relationship as the "central feature in the employment contract"[49]

Moreover, the need to redress the inequality of bargaining power in the employment relationship is also being increasingly recognised in the UK Supreme Court's approach to labour law cases, such as *Autoclenz, Unison* and *Hounga v Allen.*[50] These cases will be analysed in Chapter 3. In the meantime, the thesis will proceed on the basis that the judge, in her interpretative task, must adopt a mode of reasoning which has the inequality of bargaining power, together with its result, the worker's subordination and vulnerability; and the consequent need to re-assert the worker's dignity, at the forefront of her mind. These are the

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[45] Davies, ACL, Perspectives on Labour Law, (Cambridge University Press, 2009) p.27
[46] Ibid, p.27
[47] For a review, see Pitt, *Crisis or Stasis in the Contract of Employment?* (2013) 12(2) CIL 193 – 206, p.193.
[48] *Ibid*, p.193
[49] *Ibid*, p.193
[50] [2014] UKSC 47.

first building blocks of the purposive approach to judicial interpretation which is advocated in this thesis.

Of course, a move to a purposive approach relies on a judicial willingness to do so. It could be argued that such a move is highly unlikely given the House of Lords' historical bias in favour of employers in labour law cases.[51] However, this thesis takes the view that there is evidence, from relatively early labour law decisions of the House of Lords through to very recent Supreme Court decisions, which demonstrates a willingness by the senior judiciary to embrace the purposive approach to UK labour law. To demonstrate this, a review of the earlier House of Lords' approach to labour law cases will be carried out before the Supreme Court jurisprudence is considered.

1.2 Labour law decisions in the House of Lords

In the field of labour law, one of the most prominent critics of the English judiciary was Lord Wedderburn.[52] He saw the judiciary as possessing a class bias which favoured employers' interests over the interests of trade unions and employees.[53] Wedderburn saw this class bias as inevitable because these middle-to-upper class "judges are men, and like other men their decisions are influenced by the social background they have known and the unconscious premises they acquire."[54] For Wedderburn, labour law cases were infused with a political dimension, involving an unavoidable conflict between the interests of labour and capital, and the class bias of the judiciary favoured the interests of capital. In addition, Wedderburn took the position that the ordinary courts were inadequately equipped to deal with labour law disputes. Indeed, he believed that the only potentially appropriate legal forum to adjudicate such disputes would be specialised industrial courts,[55] As a result, Wedderburn was keen to keep the ordinary courts out of labour law disputes, instead favouring a voluntarist approach.[56]

Wedderburn's insights on a pro-employer bias are reflected by the findings of Honeyball's statistical review of all labour law cases decided by the House of Lords between May 1997 and June 2004.[57] Honeyball's study found that "there was a far higher likelihood of success for

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[51] See Honeyball, S, *Employment Law and the Appellate Committee of the House of Lords* (2005) C.J.Q. 24(Jul), 364 – 87. Davies, A.C.L, *Judicial self-restraint in Labour Law* 2009 I.L.J, 38(3), 278 – 305.
[52] Bogg, A, *The hero's journey: Lord Wedderburn and the "political constitution" of labour law,* 2015, I.L.J, 44(3), 299 – 348, at pp.304 - 5.
[53] *Ibid*, p.313
[54] Wedderburn, K.M. *The Worker and the Law* 1st edition (Hammondsworth: Penguin, 1965) p.21 (quoted from Bogg, *ibid*, p.313).
[55] Dukes R, *Wedderburn and the theory of labour law: building on Kahn-Freund* 2015 ILJ 44(3), 357 – 84, at p.382.
[56] *Ibid*, p.364.
[57] Honeyball, n.51.

employers than for employees, with employees succeeding in just 11 cases whereas employers succeeded in 21."[58]

Honeyball's findings have, in turn, been supported by Davies' study of the British judicial approach to labour law disputes.[59] Davies stresses that the senior judiciary has shown a historical "deference" to employers in labour law cases.[60] She refers to the House of Lords' decisions in *Associated Newspapers* v *Wilson,*[61] *Rainey* v *Greater Glasgow Health Board*[62] and *Barry* v *Midland Bank plc*[63] to exemplify this difference.[64]

This thesis agrees with Davies' analysis that the House of Lords decisions *she cites* demonstrate examples of a deference towards employers in labour law cases. However, her study fails to recognise another line of cases, running contemporaneously with the authorities she cites, which shows a judicial willingness, on the part of the House of Lords, to adopt a purposive approach to interpretation in labour law disputes, and which runs counter to presumptions of judicial deference towards employers. This line of case-law, *Pickstone* v *Freemans,*[65] *Litster* v *Forth Dry Dock Engineering Company Limited*[66] and *Rhys-Harper* v *Relaxion Group plc.*[67] will now be analysed.

Pickstone

In *Pickstone,* which was an equal pay case, Mrs Pickstone, the respondent, was employed by the appellant as a "warehouse operative" and claimed that her work was of equal value to a male comparator who was employed at the same place of business as a "checker warehouse operative" and who was paid £4.22 per week more than the respondent.[68] The appellant's defence was that there was one man (not the comparator) doing the exact same job as the respondent at the same place of business and at an identical rate of pay.[69] On a literal interpretation of the relevant equal pay legislation, the employer had a valid defence: there *was* one man doing the same job as Mrs Pickstone. Nevertheless, the House of Lords ruled in favour

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[58] *Ibid*, p.367
[59] Davies, n.51.
[60] *Ibid*, pp.287 - 8.
[61] [1995] 2 AC 454 (Davies, *ibid*, p287)
[62] [1987] AC 224 (Davies, *ibid,* pp.301 - 2).
[63] [1999] 1 WLR 1465 (Davies, *ibid*, p.301).
[64] Davies, n.51, p.304.
[65] [1989] AC 66
[66] [1990] 1 A.C. 546.
[67] [2003] UKHL 33
[68] N.65, p.111.
[69] *Ibid,* p.111.

of Mrs Pickstone.[70] In its ruling, the court read additional wording into the equal pay legislation.[71]

In *Pickstone,* the majority arrived at their decision via the use of purposive interpretation. Lord Keith expressed concern that a literal interpretation of the relevant equal pay legislation would not only mean that Mrs Pickstone's claim would fail, but that a literal interpretation would "...leave a large gap in the equal work provision, enabling an employer to evade it by employing one token man on the same work as a group of potential women claimants who were deliberately paid less than a group of men employed on work of equal value with that of the women."[72]

In addition, Lord Templeman, who gave the leading speech, scrutinised Hansard and the relevant Government Minister's speech in the House of Commons to ascertain the purpose of the relevant equal pay legislation.[73] This was an unprecedented step for a Law Lord to take at the time as *Pickstone* pre-dates *Pepper* v *Hart.*[74] Lord Templeman took this novel measure to highlight the purpose of the equal pay legislation, as expressed by Parliament in debate. He also justifies the "purposive interpretation" by stating that it is in accordance with European Community law.[75]

So, in *Pickstone*, the House of Lords adopted a purposive mode of interpretation to find in favour of the employee whilst fulfilling the systemic purpose of the equal pay provisions by plugging a lacuna in the legislation.

Litster

In *Litster*, a company, Forth Dry Dock, went into receivership in September 1983.[76] On February 6, 1984 the company and its receivers entered into an agreement with another company, Forth Estuary, for the transfer to Forth Estuary of certain business interests of Forth Dry Dock with effect from Forth Dry Dock's close of business that day at 4.30 p.m.[77] Later the same day, at about 3.30 p.m., the receivers dismissed the workforce of the company.[78] Several of the employees claimed unfair dismissal. The basis of this claim was that the employees

[70] *Ibid*, pp.66-7.
[71] *Ibid*, pp,66-7.
[72] *Ibid*, p.111.
[73] *Ibid,* pp.121-2.
[74] [1992] UKHL 3
[75] N.65, p.123.
[76] N.66, p.556.
[77] *Ibid*, p.557.
[78] *Ibid*, p.557.

should have transferred over to the employment of Forth Estuary under the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE 1981").[79]

The statutory provision which was under dispute in this case was Regulation 5(3) of TUPE 1981 which stated:

"Any reference in paragraph (1) . . . above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions."

The employer's argument before the Law Lords was that, since the dismissals took place one hour before the transfer, the dismissed employees were not "employed immediately before the transfer" and so Regulation 5(1) did not transfer any liability from the old owner to the new owner.[80]

The difficulty for the Law Lords was that a literal interpretation of Regulation 5(3) would allow the old owners (who were, and often are, insolvent) and new owners to agree that the old owners should dismiss its employees a short time before the transfer took place so that they would not be "employed immediately before the transfer" under section 5(3). In this way, the new owner would have no liability towards the employees. In addition, the employees would not have a realisable remedy for unfair dismissal against the old owners. In effect, one of the main purposes of TUPE 1981, to protect the employees' rights, and jobs, when a transfer took place, could be completely evaded by a simple act of collusion between the old and new employer.

The House of Lords was not prepared to let the employer evade its obligations under TUPE 1981. All the Law Lords agreed that it was necessary for the United Kingdom to interpret national law in conformity with (TUPE) European Council Directive (77 / 187 / EEC) dated 14 February 1977.[81] Again, on this occasion, they were unwilling to accept a literal interpretation of Regulation 5(3) as it would allow employers to evade their obligations under TUPE 1981. Accordingly, they read additional wording into Regulation 5(3) to allow the

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79 *Ibid*, pp.555 - 6.
80 *Ibid*, p.557.
81 *Ibid*, p.547.

employee's claims to succeed and to close the "loophole" in the TUPE protections, thereby allowing them to fulfil their purpose.[82]

So, similar considerations are at play in *Litster* and *Pickstone*: a purposive method of interpretation was adopted to reach findings in favour of the employees, to ensure that unscrupulous employers could not evade their labour law obligations, and to ensure that the purpose of the legislation was met.

Rhys-Harper

In this conjoined series of test cases, the principal question before the House of Lords was whether discriminatory acts done by an employer after the termination of employment fell within the scope of anti-discrimination legislation.[83] Despite the absence of any reference to "former employees" in the anti-discrimination legislation under consideration, the court adopted a purposive approach to statutory interpretation and held that former employees were protected by the legislation if there were incidences of the employment relationship which still had to be dealt with after the employment had terminated.[84] The analysis will focus on the *Rhys-Harper* case for the sake of brevity and because this was the lead case in the conjoined action.

In this case Ms Rhys-Harper, the appellant, complained about her employer's failure to conduct a proper investigation into a sexual harassment complaint she had made against a former employee.[85] This complaint was made after her employment had terminated.[86] Ms Rhys-Harper had been dismissed for gross misconduct and she appealed against this decision using her employer's internal process.[87] During her appeal, the appellant claimed that a former colleague, Mr Osborn, had sexually harassed her during her employment.[88] On 30 November 1998, the company informed the appellant that her appeal was unsuccessful.[89] She was also informed that the employer had investigated her sexual harassment claim and there was insufficient evidence against Mr Osborn.[90]

[82] *Ibid*, p.547.
[83] N.67, p.33, paragraph 1.
[84] *Ibid*, paragraph 47
[85] *Ibid*, paragraph 4.
[86] *Ibid*, paragraph 2.
[87] *Ibid*, paragraph 3.
[88] *Ibid*, paragraph 3.
[89] *Ibid*, paragraph 3.
[90] *Ibid*, paragraph 3.

Ms Rhys-Harper lodged Employment Tribunal claims for unfair dismissal and discrimination which occurred after her employment had terminated.[91] The question of whether discrimination claims under the relevant legislation could be brought after the termination of employment went to the House of Lords.

The relevant legislation in this case was section 6(2) of the Sex Discrimination Act 1975 which states:

"It is unlawful for a person, in the case of a woman *employed by him* at an establishment in Great Britain, to discriminate against her:

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her or subjecting her to any other detriment" (my emphasis).

The difficulty for the judges was that the plain meaning of the wording "employed by him" did not, on a literal construction, extend to former employees. As a result, the literal interpretation of this phrase clearly excludes former employees from the scope of the anti-discrimination provisions. This created difficulties for the House of Lords because the Law Lords recognised that, to exclude former employees from protection leads to unjust, and at times absurd, consequences.[92] In addition, Lord Nicholls, who gave the leading speech, noted that, in *Adeyeke* v *Post Office*[93] the Court of Appeal held that a claim for race discrimination could not succeed because the alleged act of discrimination took place after the employee had been dismissed.[94] However, he went on to state that the "*Adeyeke* interpretation is insufficiently purposive. It pays insufficient heed to the context."[95] Lord Nicholls also observed that, in the sex discrimination case of *Coote* v *Granada Hospitality*[96] the CJEU held that a former employee could bring a victimisation claim in relation to alleged post-termination acts of discrimination because the "employment relationship" extended beyond the duration of the contract of employment.[97]

[91] *Ibid*, paragraph 4.
[92] *Ibid*, paragraphs 38-39,
[93] [1997] I.C.R. 110
[94] *Ibid*, p.118.
[95] *Rhys-Harper (SC)*, paragraph 43.
[96] (1998) 3 C.M.L.R. 958
[97] *Ibid*, pp.974 - 5.

Consequently, Lord Nicholls then goes on to adopt a more purposive construction – the "employment relationship" – which is broader, in temporal terms and in scope, than the contract of employment itself, and which he derives from the *Coote* case. As a result, Lord Nicholls goes on to allow Mrs Rhys-Harper's sex discrimination appeal because the circumstances of it arise from the employment relationship.

So, in *Rhys-Harper*, we see another example of the House of Lords adopting a purposive interpretative method to find in favour of the employee whilst ensuring that the purpose of the relevant sex discrimination provisions was properly fulfilled. The purpose of the provisions, to combat discrimination, meant that it was necessary to extend anti-discrimination protections to former employees.

1.3 Overview of the House of Lords' literature - the existing literature does create a vivid picture of a House of Lords which has a pro-employer bias. The 3 House of Lords cases referred to by Davies, cited at section 1.2, do create the impression of a judicial deference to the interests of employers. Nevertheless, the analysis of the 3 cases above provides a counterbalance to the findings in Davies' study. Indeed, the Law Lords did not take a deferential attitude towards the employers' interests in *Litster*, *Pickstone* or *Rhys-Harper*. Instead, they went to great interpretative lengths in these 3 cases, adopting a highly purposive approach in each, to ensure that the employees' claims were not frustrated by an unduly literal interpretation of the relevant statutory provisions.

Litster, *Pickstone* and *Rhys-Harper* also demonstrate a willingness on the part of the Law Lords to depart from a deferential attitude towards employers' interests when systemic considerations and compliance with EU law was at stake. Indeed, cases such as *Litster* have led Ford to the recent conclusion that, in labour law cases, "...the UK courts have been perfectly prepared to go far beyond the "ordinary" meaning of domestic legislation and to "read in" additional words to ensure that it achieves the result required by the relevant Directive...a radical domestic approach to interpretation has thus largely overcome the domestic court's initial unfamiliarity with social rights, and plugged any gaps exposed by the government's policy of minimalist implementation"[98]

Ford's analysis is accurate. The purposive approach to interpretation gave the Law Lords, in the cases analysed above, a much greater degree of flexibility, and judicial leeway, than the

[98] Ford, n.10, p.481.

strict literal tradition allows. This need for flexibility needs to be built into the purposive approach as it allows the courts to keep pace with the rapidly changing nature of labour law.

Given that the House of Lords adopted a purposive approach in the *Pickstone*, *Litster* and *Rhys-Harper* cases to ensure that domestic law complied with EU law, this could lead to the argument that, in a post-Brexit UK, the Supreme Court will see no need to continue with a purposive approach to interpretation. However, as will be demonstrated in Chapter 3, such an argument lacks strong foundations. Since the Supreme Court's inception, the purposive approach has gained further pace in its labour law decisions. The thesis will analyse this line of Supreme Court cases and, in so doing, it will be shown that none of the cases involved a direct application of EU law. Instead, the line of cases analysed in Chapter 3 show an increased willingness by the UK Supreme Court to adopt a purposive mode of interpretation to a broad range of legal sources, including the common law, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and other international treaties.

Chapter 2 – Building a purposive approach to UK labour law

2.1 Historical roots of the purposive approach

The traditional interpretative method adopted by the judiciary, particularly in relation to statutory interpretation, has been to ascertain the plain meaning of the words.[99] This is also known as the literal rule of judicial interpretation.[100] Nevertheless, the roots of the purposive approach to statutory interpretation can be traced back several centuries to *Heydon's case*.[101] This early decision established the "mischief rule" in cases of statutory interpretation.[102] In essence, the rule requires the judge to identify the mischief which the statutory provision under consideration was designed to cure. The judge should then interpret the provision in such a way as to cure the mischief. This approach to judicial interpretation has been applied in relatively recent decisions of the House of Lords.[103] The mischief rule is a restrictive example of a purposive approach to interpretation. It only allows the judge to look to the purpose of the

[99] MacCormick D.N, Summers, R.S, *Interpreting Statutes: A Comparative Study* (Routledge 2016 (first published 1991)) at p.365.
[100] *Ibid*, p.365.
[101] (1584) 3 Co Rep 7, 76 E.R. 637
[102] Lowe D, Potter C, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (Hart Publishing - Kindle version), section 3.46.
[103] *R v Secretary of State for the Environment, Ex parte Spath Holme Limited* [2001] 2 A.C. 349.

statute, or statutory provision, when the text is ambiguous.[104] As this thesis progresses, a model of purposive interpretation will be built which is considerably wider in scope than the traditional mischief rule.

2.2 A purposive approach to law

Whilst the literal rule of interpretation has traditionally dominated, a gradual move towards a purposive approach has been identified by several commentators. MacCormick noted that there has been "a certain tendency in the judiciary towards more purposive and less formalistic styles of interpretation in the UK since 1969."[105] This shift in emphasis towards a purposive approach was also observed by Lord Diplock but he saw the change as having commenced in the 1940s:

"If one looks back to the actual decisions of this House (of Lords) on questions of statutory construction over the last thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions."[106]

Two prominent theorists of the purposive approach to law are Aharon Barak and Guy Davidov. Barak, a former President of the Israeli Supreme Court, has formulated a theory of purposive interpretation which he applies across all legal systems.[107] Davidov has developed a theory of purposive interpretation which applies specifically to labour law.[108] Both theories will be analysed. Thereafter, a modified form of purposive interpretation will be suggested which, it will be argued, is a better fit for modern labour law.

2.3 Barak's theory of purposive interpretation

For Barak, the starting point of purposive interpretation is to "realise the goal that the legal text is designed to realise."[109] By this, he means that the aim of the act of interpretation is to satisfy the purpose of the legal text being considered. He sees the judge as a partner with the legislature in the development of the law, rather than an agent.[110] The judge's role in this partnership "is to help bridge the gap between law and society's changing needs... (and to) ...preserve democracy and defend the constitution."[111] This aspect of judicial partnership will be referred

[104] Barak, A, *Purposive Interpretation in Law* (Princeton University Press 2005) p.331.
[105] MacCormick D.N, Summers, R.S, n.99, p.397
[106] *Carter* v *Bradbeer* [1975] 3 All ER 158, at p.161.
[107] Barak, n.104, p.88.
[108] Davidov, n.2.
[109] Barak, n.104, p.88.
[110] *Ibid*, p.236
[111] *Ibid*, p.236

to again later in this thesis. For now, the theory of purposive interpretation which will be advocated in this thesis sits well with the foregoing aspects of Barak's theory.

However, other aspects of Barak's theory are unsatisfactory. His attempt to apply the purposive approach across all areas of the law, without considering the differences between separate areas of law, is guilty of over-generalisation. As outlined in the Introduction, different areas of the law will require different modes of judicial reasoning. Barak's theory fails to take this into account. His aim is to construct a "one-size-fits-all" judicial approach to cover the entire legal system. The sheer scale of the approach he attempts can lead him into forging concepts which are, at times, both confused and confusing. For instance, he describes how the judge, who engages in purposive interpretation, must simultaneously synergise subjective and objective purposes.[112] Subjective purpose relates to ideas such as authorial intent (legislative intent, intentions of parties to a contract).[113] Objective purpose relates to concepts such as the intent of the reasonable author, the legal system's underlying values, policies and aims.[114] However, he does not give concrete guidance on *how* the judge should go about synergising this wide range of factors in a simultaneous fashion.

This over-generalisation also leads Barak in different directions when he wishes to move forward in a logical and consistent fashion. This is particularly problematic in his theory of statutory interpretation. For instance, he stresses the importance for the judge to respect the subjective intent of the author[115] (by which he often seems to mean the actual intention of the legislature in relation to the statutory provision in question[116]) whilst also maintaining that the interpreter can pick from a range of whatever semantic possibilities the words of the interpreted text can sustain.[117] It is suggested that the former approach ignores the (sometimes insurmountable) difficulties of trying to ascertain subjective legislative intent. A Parliamentary majority is not a singular entity when it comes to the voting process. It is, instead, a multiplicity of different voices, with different ideals and agendas, and it is sometimes not possible to ascribe a single intention to it as if it was a unitary whole. Given the indeterminate nature of language, coupled with the subjectivity inherent within each Member of Parliament's understanding of what they were voting for, this notion of subjective legislative intent will often be difficult for the interpreter to ascertain with precision. Sometimes, it will of course be necessary for the court to look to Parliament's subjective intentions, but this should be approached with caution

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[112] *Ibid*, p.88
[113] *Ibid*, p.89
[114] *ibid,* p.89
[115] *Ibid*, p.90
[116] *Ibid*, p.91
[117] *Ibid*, p.89

for the reasons given. Instead, the judge should prefer to look to the broader, underlying purposes of the statute and the broader legal system to influence her interpretation of a statutory provision. Indeed, ascertaining the abstracted levels of purpose in a statute is inevitably going to be easier, and more accurate, than trying to second-guess the intent that the legislature ascribed to specific statutory provisions. Consequently, it is suggested that, in the case of statutory interpretation, a better course for the judge to adopt is to explore the range of possible meanings which the words are capable of bearing, and to contextualise their meanings within the purpose of the statute and the legal system. As noted above, Barak does endorse this as one possible approach to statutory interpretation. This aspect of purposive interpretation will be explored in further detail shortly.

Whilst this thesis has some reservations about certain aspects of Barak's theory, there are other aspects which are more appealing. For example, Barak's model of purposive interpretation favours a dynamic approach to legal interpretation.[118] This thesis progresses on the basis that a dynamic approach to legal interpretation is essential to allow labour law to keep up with fast-moving technological changes, shifts in societal values and different styles of working. When he advocates a dynamic approach to interpretation, Barak recognises that such changes take place over time and it is therefore necessary for the judge to view the statute as a creation which must evolve with those changes.[119] So, under this model of dynamic interpretation, which is advocated by Barak and with which this thesis agrees, legal meaning is not "set in stone" at its creation but evolves in tandem with changes in society. This dynamic mode of judicial interpretation is necessary to allow labour law to achieve its principal purposes of redressing the inequality of bargaining power in the employment relationship and restoring the dignity of the worker. The capitalist system, which pre-exists, and has subsisted throughout, these societal and technological changes, relies on an unequal power dynamic in the power relationship. Indeed, the system continually exploits such changes to its own benefit. A good example of this is the emergence of the gig economy. The capitalist system has exploited technological advances to introduce modes of working, such as the gig economy, which reinforce and strengthen the power imbalance in the employment relationship. Legal interpretation must be dynamic and fluid to keep pace with these constantly evolving tactics.

Given the suitability of dynamic interpretation to modern labour law, and its general congruence with a purposive approach, it will be added as a further component to the purposive approach which is being built in this thesis.

[118] *Ibid*, p.155
[119] *Ibid*, p.154

Whilst Barak's theory is directed to the entire legal system, Davidov focuses his approach on labour law. Consequently, it is necessary to analyse his theory to see if it can assist in constructing a judicial approach to purposive interpretation in UK labour law.

2.4 Davidov and a purposive approach to labour law

Davidov sees the purposive approach to labour law as being the most intuitive approach – he says, "it is even trivial."[120] Davidov makes a good point: it does make intuitive sense for the law to be developed in accordance with its fundamental purposes. However, as Davidov notes, there is a "mismatch between goals and means in labour law."[121] When he refers to this mismatch, Davidov means that there is an increasing divide between those workers who need labour law protections and those who have them.[122] This can be as a result of the inadequacy of legal tests which determine employment status.[123] It can also be the result of compliance and enforcement problems.[124] He also means that labour laws are becoming increasingly "obsolete" because the law has failed to keep up with profound changes in working patterns.[125] Davidov recognises that the tactics which are being increasingly used by employers, to evade their obligations towards workers, is one of the root causes of the mismatch.[126] He also attributes the increasing obsoleteness of labour laws to factors such as globalisation, shifting cultural norms and technological progress.[127] This thesis agrees with Davidov's broad outline of the some of the main challenges facing labour law today, and their root causes. They are largely to blame for the crisis in UK labour law that was described in the introduction.

Davidov's definition of the purposive approach is simplistic yet effective:

"When thinking about a specific law...whether it requires changes, or how to interpret it, or whether it is constitutional – one must articulate the goals of the specific law...At the same time it is useful in such cases to have a *general* understanding of why labour laws are needed, using it as a starting point to examine the purpose of the specific regulation."[128]

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[120] n.2, p.255
[121] *Ibid*, p.2
[122] *Ibid*, p.2
[123] *Ibid,* p.2
[124] *Ibid*, p.2
[125] *Ibid*, p.2
[126] *Ibid*, p.3
[127] *Ibid*, p.3
[128] *Ibid*, p.23

Davidov also places considerable emphasis on the dignity of the worker.[129] He cites the minimum wage as an example of how the worker's dignity can be reasserted.[130] On a more abstract level, the thrust of Davidov's argument, and it is a sound one, is that the worker is a human being, not a commodity, and this necessarily entails that, whilst the worker should be free to sell her labour power, "some limitations are necessary, and labour and employment regulations accordingly try to protect our health and our rights at work."[131] As Atkinson has astutely observed, Davidov's ideas on the purposes of labour law are not dissimilar to Kahn-Freund's.[132]

Davidov argues that labour laws are necessary because "employment is characterised by a set of unique vulnerabilities, which can best be described from three separate viewpoints: organisational, social / psychological, and economic."[133] The organisational viewpoint is substantiated by his valid observation that managerial control is necessary to operate in the workplace.[134] This need for hierarchical levels then results in a "democratic deficit"[135] in the workplace and strengthens the employer's ability to exercise control over workers.[136] This hierarchy results in a relationship of subordination in the employment relationship.[137] In addition to economic dependency, which is the most obvious form of dependence, Davidov highlights the social and psychological dependence of the worker on the employer.[138] He produces an impressive array of empirical evidence to substantiate these claims.[139] As he rightly points out, with reference to empirical examples, work:

"...gives us opportunities for personal expression and creativity. It is a source of intellectual progress and advancement. It shapes our personal identities, facilitating self-development and realisation...provides the means to dignity, self-respect and self-esteem. It is part of our conception of human flourishing."[140]

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[129] *Ibid*, p.82
[130] *Ibid*, p.82
[131] *Ibid*, p.82
[132] Atkinson, J, *A Purposive Approach to Labour Law* 2017 I.L.J. 46(2), 303 – 6, at p.305.
[133] Davidov, n.2, p.35
[134] *Ibid*, p.37
[135] *Ibid*, p.37
[136] *Ibid*, p.38
[137] *Ibid*, p.38
[138] *Ibid*, p.43
[139] Davidov points to empirical studies which stress the social and psychological aspects of work – MOW International Research Team, *The Meaning of Working* (Academic Press 1987) Robert E Lane, *The Market Experience* (Cambridge University Press 1991), Itzhak Harpaz, *The Meaning of Work in Israel: Its Nature and Consequences* (Praeger 1990) Chapter 13.
[140] Davidov, n.2, pp.43 - 4

As Adams has pointed out, this element of Davidov's work goes further than Kahn-Freund by emphasising the function of work on social identity.[141]

This thesis agrees with the foregoing elements of Davidov's theory. However, at this point, the theory of purposive interpretation advocated in this thesis departs from Davidov's model. This thesis constructs a theory of purposive interpretation with reference to relevant case-law. Davidov's theory lacks that component and his theory is liable, in this respect, to operate at an insufficiently high level of abstraction.[142] Concrete examples of the purposive approach, by way of references to case-law, are necessary because they demonstrate how the theoretical components work in everyday practice. In addition, Davidov's theory is intended to be applied to any national system of labour law.[143] In this way, it is too broad in its perspective. There can be wide variations in the substance, and form, of different national systems of labour law.[144] Davidov's approach fails to take this into account. This thesis differs from Davidov's as it focuses on the application of the purposive method of interpretation to one jurisdiction. The scope of this thesis is also narrower than Davidov's model. Whilst Davidov's theory incorporates desired legislative reforms and the judicial approach to labour law,[145] this thesis focuses solely on the judicial approach for reasons that were outlined in the Introduction. In addition, Davidov's theory claims that redressing the "inequality of bargaining power" in the employment relationship should not be a central goal of labour law[146] whilst this thesis takes the opposite view. Accordingly, Davidov's argument on this point needs to be explored in more depth at this stage.

Davidov's argument, in essence, is that inequality of bargaining power is not a helpful goal for labour law because all contracts have inequality of bargaining power. Indeed, Davidov seems to apply this feature to all contracts, including those out with the employment sphere.[147] Consequently, he prefers to focus on ameliorating the worker's dependence on the employer and her vulnerabilities in the workplace as this is more tailored to the specific goals of labour law.[148] However, Davidov's approach here does not resemble the reality of many contractual agreements. One can think of many contracts which have approximate equality of bargaining

[141] Adams, Z, *Review, Guy Davidov, A Purposive Approach to Labour Law* (2016) CLJ 632, at p.632.
[142] Dukes, R, *identifying the purposes of labour law: Discussion of Guy Davidov's A Purposive Approach to Labour Law,* (2017) Jerusalem Review of Legal Studies, 16(1), pp.52-67, at p.67
[143] Davidov, n.2, p.5.
[144] Freeland, M, Kountouris, N, *Towards a comparative theory of the contractual construction of personal work relations in Europe* 2008 I.L.J, 37(1), 49-74, at p.55.
[145] Davidov, n.2, p.4.
[146] *Ibid,* p.31
[147] *Ibid*, p.118.
[148] *Ibid*, p.118.

power. Many commercial contracts, say a contract between two relatively sized small-to-medium-sized businesses (SMEs), will often involve an approximate equality of bargaining power. In addition, Davidov is vague on what he means when he says that no contract will ever have equality of bargaining power. He might mean that it is not possible to obtain absolute, mathematical symmetry in the bargaining power of two contracting parties; that there may be subtle nuances in the power dynamic. If that is what he means, it is not a strong objection. Mathematical symmetry, in the context of bargaining power, is probably impossible in the real world; the important point is that both parties have an approximation of equality. By contrast, the working relationship generally has a *wide* disparity of inequality of bargaining power. It is the *relative* difference in the bargaining power between, say, two SME businesses in a commercial contract on the one hand, and between the employer and the worker on the other, which justifies labour law's goal of redressing the inequality of bargaining power in the employment relationship. The gap in power is generally much greater in the latter than it is in the former. This has been recognised by the UK Supreme Court and this distinction has justified its differential treatment of employment and commercial contracts.[149]

Nevertheless, this thesis agrees with Davidov's contentions that the employment relationship is infused with vulnerabilities and dependency. The major difference between the model advocated here, and Davidov's, is that the present model does not see inequality of bargaining power as requiring a separation from subordination and vulnerability, as his theory seems to. Instead, as was outlined in Chapter 1, the subordination and vulnerability are inextricably linked with the original default position of the contracting parties – a stark inequality of bargaining power.

2.5 - Defining a new model of purposive interpretation

This thesis proposes a new model of purposive judicial interpretation. The first, and most obvious component of the theory, the need to interpret the legal text considering its purpose, does seem simplistic or "trivial" as Davidov described it. Nevertheless, it is submitted that, despite its apparent simplicity, it is the most effective way for judges to interpret labour laws. As outlined earlier in this Chapter, the law constructs the employment relationship using apparently neutral legal concepts such as private property and freedom of contract. However, these concepts are weighed heavily in favour of the employer, for the reasons outlined above. This results in the employer having a "default" advantage over the worker in the employment relationship. This advantage places employers in a position where they can impose whatever

[149] *Autoclenz*, n.21, paragraph 28.

terms and conditions on workers they wish. Such a situation is morally unacceptable because it can lead to the exploitation of human beings and has the attendant risk of assaulting their intrinsic human dignity. Labour laws are therefore best seen as a series of interventions which are necessary to try and level the playing field in the power dynamics of the employment relationship in order to prevent scope for the abuse of workers and to thereby protect their dignity. Each sub-set of labour law in the UK system should therefore have a discrete purpose, or set of purposes, which work towards the goal of ameliorating the power imbalance between the employer and the worker.

Of course, a theory of purposive interpretation must have more than just one component. Indeed, it must be a model with multiple components which, operating together, allow the judge to interpret the law in question in a way which best conforms with the law's purposes. So far in this thesis, the purposive model being built comprises four theoretical components: (1) The need to interpret the legal text considering its purpose(s). (2) The realisation that the employment relationship is based on subordination and vulnerabilities. (3) A flexible and dynamic approach to legal interpretation. (4) A requirement for the judge to have the inequality of bargaining power that is inherent in the employment relationship, and the need to reassert the dignity of the worker, at the forefront of her mind when interpreting a legal text. Of course, the judge will also have to have other considerations at the forefront of her mind, including the economic interests of employers and the need for businesses to be profitable generators of employment, when deciding a labour law case. Consequently, the relevant legal, and factual, matrix in a labour law case must take account of the inherent power imbalance in the employment relationship along with broader economic considerations. It is then for the judge to decide which weight to accord these often-competing considerations.

These are the building blocks of the purposive "mode" in the labour law context and further blocks will be added as the thesis progresses. Having developed these theoretical components, it is now necessary to delve deeper into the purposive approach being advocated. This thesis has already stressed that a particular judicial "mode" must be contextualised to cater for the area of law that is being adjudicated. This "mode" will also differ depending on the nature of the legal source that is being interpreted. The three primary sources of labour law are statute, the common law and contracts. Each source of law, by its intrinsic nature, requires its own mode of interpretation. For instance, the common law, in general, gives the judge a wider margin of interpretative leeway than statutory interpretation allows. As a result, the judge will usually need to alter her mode of legal reasoning if she is alternating between statutory and common law interpretation in a case. For the sake of brevity, the need for the judge to alter her

mode of reasoning, depending on the source of law being interpreted, will be referred to as "contextual purposive interpretation." This concept will now be analysed in greater detail.

2.5.1 Statutory interpretation

Given the difficulties in ascertaining Parliament's subjective intent, a better way to begin the process of purposive interpretation is for the judge to identify the meaning of the relevant statutory provision. That does not mean the *plain* meaning of the words but the meaning which best fits the purpose(s) of the statute and the legal system (although sometimes the plain meaning will happen to be the meaning which best fits the purpose of the statute). To recap, a purposive approach to statutory intention must, given the indeterminacy of language, recognise that a statutory word, or words, are often capable of bearing more than one possible meaning. Some interpretations may be more obvious than others, but that does not exclude the others if the others fall within the range of possible meanings. So, the purposive approach allows the judge to depart from a more obvious meaning of a statute. The less obvious reason, which still must be a possible, or logical, interpretation, is chosen because it is the best interpretation of the statute's purpose. This allows the judge a greater degree of flexibility and room for interpretive manoeuvre than the literal approach (as was demonstrated in Chapter 1's analysis of the purposive approach in a lineage of House of Lords cases). Moreover, the judge may also have to examine the purposes of other, relevant statutes, and the purpose of the legal system, to assist her in the interpretative process.

Despite the measure of flexibility, and dynamism, in the purposive approach, there must still be limits on the level of discretion it gives to the judge. Otherwise, permissible interpretation may transgress into the boundaries of impermissible judicial legislation. This will be explored further in section 2.7. For now, a necessary constraint on the judge's discretion using a purposive approach will require, as Barak notes, that the meaning chosen must be one which is within the range of "semantic possibilities."[150] By this, Barak means that the word, or series of words, must be within the range of possible interpretations that the language can logically bear. So, the theory of purposive judicial interpretation being advocated here resembles Barak's approach in respect of the "semantic possibility" criterion.

The theory proposed in this thesis also places considerable emphasis on individual labour rights. International human rights treaties, such as the ECHR, are relevant in this context. Consequently, when the judge tries to ascertain the meaning of a statutory provision, she must also strive to find an interpretation which complies with the UK's international human rights

[150] Barak, n.104, p.89.

obligations. It will often be possible for the judge to find a meaning which both complies with the statute's purpose and the UK's international human rights obligations.[151] This will often be possible when the judge interprets the ECHR because of the purposive nature of the *Ghaidan* principle[152] which allows the judge to choose from within a range of possible semantic meanings when determining whether the statutory provision is capable of being interpreted in accordance with the ECHR.[153] So, the *Ghaidan* approach to statutory interpretation adopts a similar flexible purposive model of statutory interpretation as the model that is advocated in this thesis. A relevant example of this is the *Gilham* case which will be analysed in Chapter 3.

What, though, if there is a contradiction between the interpretation of the purpose of the statute and the UK's obligations under the ECHR? This is a difficult question, and one which seems to arise rarely in the case law.[154] If such a contradiction is irresolvable, the domestic interpretation must "win the day" and the judge must respect the Sovereignty of Parliament, and the Separation of Powers, and declare that the legislation is incompatible with the ECHR under section 4 HRA.

Worse still, what if it is not possible to ascertain a reasonable meaning from within the range of semantic possibilities? This is what happened in the *Litster* and *Pickstone* cases in Chapter 1. In such cases (which will often involve the literal interpretation resulting in an absurd or illogical result) the judge must interpret the statutory provision in accordance with the broad purposes of the statute and the legal system. If necessary, she may insert additional words into the statutory provision (or read the statute down) to allow the provision to cohere with the purposes of the statute and the legal system. In unusual cases such as these, the judge may also have to have recourse to subjective legislative intent, and refer to sources such as Hansard, to ascertain such intent. Whilst the potential weaknesses of such an approach have been highlighted, they may be necessary as part of a judicial effort to achieve a decision which both adheres with the purpose of the statute and respects Parliamentary Sovereignty.

The process of statutory interpretation, under the purposive model being advocated here, *must* involve dynamic, rather than static, interpretation. Static interpretation, which is associated with the literal or "plain-meaning" interpretation of the statute, has the effect of "freezing"[155]

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[151] For example, there have been a very small number of section 4 "declarations of incompatibility" since the Human Rights Act 1998 came into force – Stark, S.W, *Facing facts: judicial approaches to section 4 of the Human Rights Act 1998,* L.Q.R. 2017, 133(Oct), 631-655, at p.631.
[152] *Ghaidan* v *Ghodin-Mendoza* 2004 UKHL 30. The *Ghaidan* principle will be analysed in the *Gilham* case analysis later in this Chapter.
[153] *Ibid,* paragraph 30.
[154] See n.151.
[155] Barak, n.104, p.267.

the statute's meaning at the time of its enactment.[156] This literal mode of interpretation will therefore often fail to take account of societal changes. Given the rapid nature of technological advancement in our society, coupled with the ongoing transformations in working patterns, a static interpretation will not allow our labour laws to keep pace with such changes. Consequently, the need for flexibility and dynamism in labour law is another strong reason for preferring the purposive approach. This need for flexibility is also seen in the judicial approach to the common law, which will now be considered.

2.5.2 Common law interpretation

As mentioned earlier, the common law typically allows judges a greater degree of interpretative freedom than statute. As will be demonstrated in the *Autoclenz* case analysis, the judge may have to pick a rule or precedent, from among a conflicting line of authorities, to achieve the outcome which bests fits the purpose of the applicable law(s). This will generally involve identifying, and weighing, legal principles. This process will be exemplified in the *Autoclenz* and *Hounga* case analyses and expanded upon in the review of Ronald Dworkin's theory of adjudication in later sections and chapters. In the meantime, it should be stressed that the purposive approach advocated here may sometimes mean that the judge must apply a principle, rule or precedent which is not the most obvious one to apply to the circumstances of the case. It must, of course, be relevant and cohere with the broader legal system, but it need not be the most obvious, or apparent, route for the judge to traverse. This theory will be developed in later sections and chapters.

2.5.3 Contractual interpretation

The contract for services, or of service, are the predominant sources of contracts in labour law. These are the documents which confer employment status, or otherwise, and set out the parties' obligations. As described earlier, the issue of employment status is a pressing issue in modern labour law given technological advances which result in constantly evolving patterns of working, and the inequality of bargaining power that typically infuses the creation of contractual arrangements. As a result, contractual interpretation in labour law requires a highly particularised method of interpretation. As previously mentioned, some employers, typically with their legal advisors' assistance, use "boilerplate" contractual clauses to evade obligations towards their workers. These contracts are then offered on a "take-it-or-leave-it" basis. The typical practice is for the employer to provide a contract to the worker which deliberately

[156] *Ibid*, pp.267 - 8.

misrepresents her as a self-employed contractor[157] and thereby denies the worker her legal rights and protections. So, there is often an incongruence between the terms of the contract, and the everyday reality of the working arrangements. Given these evasive tactics, it will often be necessary for the judge, who takes a purposive approach to contractual interpretation, to look at a wide range of extrinsic evidence to the contract to ascertain the parties' real position. Such extrinsic evidence may include details of the day-to-day working practices to check whether they align with the contractual terms. This purposive approach to contractual interpretation will be fleshed out and exemplified in the *Autoclenz* case analysis.

However, the purposive approach mentioned above, which looks to extrinsic aids, cannot always act as an effective judicial countermeasure to employers who use evasive tactics to misrepresent employment status. Sometimes, employers will use legal advisors to draft incredibly convoluted contractual arrangements which, on a strict literal reading, may highlight elements which are suggestive of self-employment status even though the overall relationship is more reflective of an employer / worker relationship under the relevant legislation. Indeed, the "sham" arrangements laid down in a multiplicity of such technically worded contracts may be a more subtle and insidious form of "sham" than was the case in *Autoclenz.* That was the situation in *Uber*. In such cases, the judge, if she is suspicious of the presence of a complex sham, must go further than looking at the working practices of the respective parties. In line with the purposive approach advocated in this thesis, she must also interpret the contract with an emphasis on the underlying purposes of the relevant legislation. So, if she needs to determine employment status as defined in a certain statute, but also suspects a complex sham is at play, this process of interpretation must contextualise the protective purposes of the statute over and above the literal terms of the contract. Only the purposive approach, used in this way - in an intuitive manner by the judge - can act as an effective counterbalance to employers' evasive tactics. If the judiciary eschews the purposive approach and prefers a literal, contractual approach in such cases (as was the approach of Underhill LJ in the *Uber* case), then legal advisors will continue to be able to draft, and re-draft, complex contractual arrangements to "get round" the latest case-law in this area. This semantic game of "cat-and-mouse" defeats the expansive, protective purposes of the statutory protections which Parliament conferred on the intermediate category of "worker". On the other hand, the purposive approach allows the protective purposes of the statute to be met. By way of example, the right to protection for "whistleblowing" is commonly claimed by "limb b" workers. Clearly, this is an example of legislation which has an elementary social purpose. Accordingly, Parliament included the

[157] Bogg, A, *Sham self-employment in the Supreme Court* 2012 I.L.J, 41(3), 328 – 45, at pp.328 - 9.

intermediate category of "worker" within the protective scope of the relevant legislation to allow a broader range of individuals to benefit from this right. This expansive requirement of greater inclusivity therefore necessitates a broad, purposive mode of interpretation. Otherwise, the purposes of the statute will be frustrated by an unduly restrictive interpretation of worker status. So, if a judge must decide on an especially difficult question relating to employment status, she should do so using her intuition to detect a potential sham as an initial starting point. If a sham is suspected, the judge must proceed with the interpretative exercise with the purposes of the legislation, rather than the nuances of the contractual wording, at the forefront of her mind. This purposive approach will be described, and analysed, in more detail in the *Uber* case analysis in Chapter 4.

The foregoing analysis allows a fifth and sixth component to be added to the purposive mode of interpretation advocated in this thesis: (5) There is a need for contextual purposive interpretation. (6) The judge must strive to come to an interpretation, when it is possible to do so, which accords with the UK's international human rights obligations. These components comprise the foundations of a basic working model of purposive interpretation. Further components will be added as the thesis progresses. To build further foundations, it will be necessary to analyse Dworkin's theory relating to the contextual use of legal principles and relevant case-law from the UK Supreme Court. However, before doing this, it is necessary to address criticisms which have been levelled at the purposive approach.

2.6 Defending the purposive approach

One of the most prominent critics of the purposive approach was Antonin Scalia, a former judge of the US Supreme Court. As Davidov notes, Scalia, one of the most prominent figures of the "new textualist" movement, argued that judges should focus on the legal text and interpret it in line with what a reasonable person would have understood it to mean at the time of its enactment.[158] Indeed, Scalia argued that a purposive approach would lead the judge to apply the law as he wanted it to be, rather than how it was.[159] However, it is submitted that this objection to the purposive approach is flawed. The purpose, or purposes, of the law allow the judge an objective measure which she can resort to when interpreting statutes. The judge is bound to adhere to the purpose(s) of the law when interpreting a legal text. Scalia's criticism ignores this. It also ignores the indeterminacy of language and the possibility that two reasonable people may interpret different, but equally plausible, meanings to a particular word

[158] Davidov, n.2, p.18
[159] *Ibid*, p.118

or phrase. Taking Hart's famous example of "no vehicles in the park,"[160] it is suggested that all reasonable people would interpret a car as a vehicle. However, the situation is likely to be different with mobility scooters: some reasonable people might regard them as vehicles whilst others will not.

Nevertheless, it is accepted that certain aspects of new textualism, such as its de-emphasis on subjective legislative intent[161], have solid theoretical grounding. However, even if the "new textualist" approach, as described above, has some merit in the interpretation of certain areas of the law, it is highly unsuited to judicial interpretation of *labour law* disputes. Labour law is a fast-changing area of the law. Working methods are constantly evolving in tandem with technological progress; a phenomenon most sharply exemplified by the rapid growth of the gig economy. New textualist interpretations freeze the statute's meaning at the time of its creation.[162] If such a method of interpretation was to be routinely applied to labour law disputes, the law would fail to keep pace with changes in working methods and technological growth. Instead, as has already been argued, a dynamic mode of judicial interpretation is necessary in labour law cases to allow the law to keep pace with these socio-economic changes and continue to meet its purposes despite these changes.

As Barak has highlighted, the other main line of criticism of the purposive approach is that it leads to less certainty and security than the literal approach. Again, this criticism lacks logical, or empirical substantiation – as Barak notes, there is no empirical evidence to suggest that the teleological systems of law in Continental Europe lack the certainty and security of English law, where the literal approach has historically dominated.[163]

So, the main criticisms of a purposive approach, at least with respect to labour law, are not well-founded. Having established this, it is now necessary to build further components onto the purposive model advocated in this thesis.

2.7 - Dworkin and legal principles

Ronald Dworkin's theory of adjudication, as it relates to legal principles, will be shown to be a crucial component of the purposive approach advocated in this thesis. As will be demonstrated, the use of such principles simultaneously fosters judicial flexibility whilst acting

[160] Hart, HLA, *The Concept of Law* (Oxford University Press, 2012 (first published 1961)) p.126.
[161] Barak, n.104, p.277
[162] *Ibid*, p.283
[163] *Ibid*, p.124

as a necessary constraining factor on the judge's discretion. Before moving on to consider how Dworkin's theory can benefit the purposive approach, it is necessary to analyse what he meant when he referred to the utility of legal principles in the context of adjudication.

Dworkin's theory relating to legal principles, which he focuses heavily on in his earlier work,[164] stems largely from his criticisms of the theory of legal positivism espoused by HLA Hart.[165] Dworkin found Hart's description of the law, and its purported interpretation by the judge, unconvincing.[166] He was opposed to Hart's position that the judge decides cases either according to rules or, where no clear rule applies, the judge must then invoke extra-legal considerations to fill the legal lacuna.[167] Dworkin's view was that this account of adjudication ignored the application of legal principles in cases.[168] He also saw Hart's position as undemocratic because it allowed the unelected judiciary to engage in acts of judicial legislation (when invoking extra-legal considerations) and to issue binding legal decisions against parties *ex post facto*.[169]

This attack on Hart's positivist theory allowed Dworkin theoretical space to stress the importance of legal principles to the law. Dworkin illustrated the existence, and importance, of legal principles in adjudication by referring to the case of *Riggs* v *Palmer*.[170] In this case, a New York court had to decide whether a man who had murdered his grandfather, in order to obtain his inheritance under his grandfather's will, could benefit from the inheritance. A literal interpretation of the legal rules relating to wills, and the circumstances of inheritance, would have allowed the murderer to obtain his ill-gotten inheritance.[171] Despite this literal interpretation of the applicable rules, the court denied him the inheritance based on the principle that "no man should benefit from his own wrong,"[172] So, in *Riggs*, the court was able to circumvent the application of the apparently relevant legal rules, and avoid a morally unacceptable outcome, by applying legal principles instead of legal rules. This begs the question: what, according to Dworkin, is the difference between a legal rule and a legal principle?

According to Dworkin, either a rule applies to the factual circumstance in a case, or it does not. The rule decides the case if it applies to the facts. If it does not apply, it is irrelevant to the case

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[164] Dworkin, R, *Taking Rights Seriously* (Bloomsbury, Kindle Edition, first published 1977).
[165] I*bid*, chapter 2.
[166] *Ibid*, pp38 - 45
[167] See n.165.
[168] *Ibid*, pp.38 - 44.
[169] *Ibid*, p.108
[170] *Ibid*, p.39.
[171] *Ibid*, p.39
[172] *Ibid*, p.39.

at hand.[173] By contrast, legal principles do not necessarily decide a case, one way or another, but can be applied by the judge in a contextual fashion.[174] This is because principles have a relative "weight" which may lean in favour of (or against) the application of a particular rule, whilst not being a determinative reason for the decision.[175] For Dworkin, the resolution of hard cases involved the weighing of these competing principles. In addition, even when a principle is defeated in a case, it generally survives as a valid principle in the legal system. This is exemplified by Dworkin when referring to the principle that no man may benefit from his wrong. As he correctly observes, this is not a hard-and-fast rule: a long-established custom of trespass will grant the trespasser the right to cross land at his leisure.[176] This is just one example of where the law allows an individual to benefit from his wrong. The important point is that principles have relative weight which depends on the factual circumstances of the individual case, and this will be expanded upon in this Chapter and in Chapter 3. In the meantime, the operation of these principles requires further explanation.

A principle, or set of principles, can help to establish a new legal rule.[177] This is what happened in the *Riggs* case: the principle that no man may benefit from his wrong established a rule prohibiting a murderer from inheriting under his victim's will. Indeed, legal rules embody legal principles and the principle, or set of principles, thereby serve to justify the existence of the legal rule.[178] For Dworkin, the application of the legal principle is justified by its moral appeal.[179] Moreover, a principle, or set of principles, can lead to legal rules being changed by the judge.[180] The principles of the legal system are, according to Dworkin, innumerable and constantly changing and they form part of the pre-existing legal order.[181] As a result, Dworkin's position is that, in hard cases, judges are not making new law (a view he attributes to positivists like Hart). Instead, they are merely finding pre-existing law, in the form of legal principles, to resolve the legal dispute.[182]

Dworkin also emphasises the distinction between principles and policies. Judges must appeal to arguments of principle, not to arguments of policy.[183] Indeed, his theory of integrity, which

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[173] *Ibid,* p.40
[174] *Ibid*, p.42.
[175] *Ibid*, p.43.
[176] *Ibid*, p.41
[177] *Ibid*, p.45
[178] Simmonds, N, *Central Issues in Jurisprudence* (Sweet & Maxwell, 2018) p.206.
[179] Dworkin, R, *Law's Empire* (Hart Publishing, 1998) p.206.
[180] Dworkin, n.164, p54
[181] *Ibid*, p.62
[182] *Ibid*, p.62.
[183] *Ibid*, p.429

will be outlined in more detail shortly, and which he develops in his later work,[184] maintains that arguments of principles, which are based on individual rights, are the correct focus for the judiciary. Wider, policy-based goals are the province of the legislature.[185] As Davies has demonstrated, Dworkin's theory of rights includes scope for both absolute and qualified rights (most labour rights belonging to the latter category) and labour rights can potentially be subsumed under his theory of rights.[186]

This distinction between legal rules and principles is well-exemplified in the *Riggs* case itself. As Simmonds has astutely observed, a Hartian positivist, who focuses on legal rules rather than legal principles, can only view the *Riggs* case in two possible ways: either the case was wrongly decided (because the literal application of the relevant rules was ignored by the court) or that the case was correctly decided because the judge has the power to disregard rules when he disagrees with them.[187] The first viewpoint is obviously flawed: the court's decision in *Riggs* prevented a murderer from benefitting from the will. The second viewpoint is also unacceptable as it gives judges far too much power: the necessary implication of the second viewpoint is the undemocratic conclusion that unelected judges can disregard legal rules according to their own whims and preferences. By contrast, the use of weighted principles, which can be used contextually by the judge, allows the judge ample flexibility to reach the correct outcome in cases whilst also constraining her discretion. This idea of constraint requires further unpacking with reference to Dworkin's later writing.

In *Law's Empire*, Dworkin develops his theory of "law-as-integrity." Dworkin's theory of integrity requires judges to identify rights, and corresponding duties, as if they were adopted by the community, to express a "coherent conception of justice and freedom."[188] Guest summarises this theory of integrity neatly:

"...the Dworkinian judge must look for an overall theory of the legal order as a whole, in the sense of an ordered set of principles and values under which the great bulk of the established statutes, cases and doctrines could be subsumed. The construction of such a theory demands attention to criteria of "fit" and "appeal": one must find an account of the law that is an adequate "fit," and that presents the law in its most morally appealing light."[189]

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[184] See n.179.
[185] *Ibid*, p.244
[186] Davies, A, n45, pp52 – 4.
[187] Simmonds, N.E, *Central Issues in Jurisprudence* (Thomson Reuter, 2018) pp.203 - 4.
[188] Dworkin, n.179, p.225.
[189] Guest, S, *Ronald Dworkin* (Stanford University Press, 2013) p.231

As previously described, the judge who follows Dworkin's theory of integrity will find the most morally attractive principle, or set of principles, to help decide the case. That principle will also be one that best fits the legal system; one that has been established in past decisions and can be selected to assist the judge in reaching a decision which coheres with the legal system.[190] Indeed, coherence is central to Dworkin's theory of integrity and acts as a constraining factor on the judge's discretion. Under Dworkin's theory, the judge is not permitted an untrammelled level of legal discretion, allowing her to invoke extra-legal considerations to fill apparent gaps in the law, Instead, the judge is bound to adopt the most morally attractive legal principles, which cohere with the overall system of law, to help resolve the legal dispute. In this way, Dworkin's concepts of principle and coherence act as constraining factors on the judge. However, whilst discretion is constrained, Dworkin's theory also allows the judge a reasonable level of flexibility in her search for the principles which integrity demands.

Indeed, it is the wide-ranging, potentially innumerable and contextual nature of legal principles which helps foster judicial flexibility. This flexibility proves instrumental to the purposive approach to labour law advocated in this thesis. As previously described, principles can be applied by the judge in a contextual manner, depending on the circumstances of the case at hand, because they have relative weight. This weight allows the judge to reach an outcome which accords with the purpose(s) of the legal text under consideration. Greater weight can be given to a legal principle where to do so would further the purposes of the law under consideration. Conversely, a principle can be attributed lesser weight where that is necessary to comply with the purposes of the law. Indeed, as was demonstrated in the *Riggs* case, legal principles can be used by the judge to avoid an unduly literalistic interpretation of the legal text. In *Riggs,* one of the main purposes of the rules relating to inheritance, namely the individual's right to make an autonomous choice regarding the beneficiaries of her assets upon her death, would have been frustrated by a literal interpretation. The principle endorsed by the court avoided this scenario. Moreover, as we shall come on to see in Chapter 3, *Riggs* is not unique in this respect. For instance, in the *Autoclenz* case analysis, it will be shown that the weighing of legal principles helped the Supreme Court to reach its conclusion.

Given their desirable balance between flexibility and constraint, the use of Dworkinian principles constitute an additional component to the purposive approach which is being advocated in this thesis: (7) The use of principles, which have contextual weight can be used

[190] Christodoulidis E, Goldini M, Veitch S, *Jurisprudence: Themes and Concepts* (Routledge 2018) p.190.

to assist the judge in the purposive approach to legal interpretation. It will be necessary to return to Dworkin's theories of adjudication in relation to the *Gilham* case analysis in Chapter 3 when the concept of dynamic legal interpretation is analysed. In the meantime, the practical application of Dworkinian principles, in a purposive context, will be exemplified in the *Autoclenz* case analysis.

Chapter 3 – Purposive interpretation in the UK Supreme Court

This chapter will demonstrate how the components of the recommended purposive model of interpretation have been adopted by the UK Supreme Court in hard legal cases. The purposive model will be shown to assist judges to reach decisions which conferred the appropriate remedy to each claimant whilst also being of systemic benefit to UK labour law. The case analyses show how the purposive approach has sufficient malleability to be applied to common law, statutory and contractual interpretation. In addition, this chapter will demonstrate how the purposive approach can also be employed across a wide range of legal sources such as the common law, the ECHR and other international treaties. This gives some hope that the purposive approach can be used, in a post-Brexit UK, to mitigate the adverse effects of potential deregulation and further the main goals of labour law.

3.1- Autoclenz - a purposive approach to contractual interpretation

3.1.1 - Background facts

Autoclenz, the appellant, provided car valeting services. The 20 respondents (the "claimants" who initiated Employment Tribunal claims) were car valets for the appellant. The valets lodged Employment Tribunal claims for statutory paid annual leave, under Regulation 2(1) of the Working Time Regulations 1998 (WTR) and payments in accordance with the National Minimum Wage, under Regulation 2(1) of the National Minimum Wage Regulations 1999 (NMWR).[191] These claims were predicated on the basis that the claimants were "workers" as defined by the WTR and NMWR. Limb (a) of Regulation 2(1) applies to employees; limb (b) applies to workers providing services pursuant to a 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

[191] *Autoclenz (SC),* n.21, paragraphs 1 and 3.

of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

The appellant provided contractual agreements between the appellants and the valets to the Employment Tribunal.[192] These documents tried to show that the valets were self-employed.[193] The employer's position was that the valets were not entitled to the minimum wage and paid holidays because they were not employees or workers as defined by the WTR or the NMWR – they were self-employed. The Tribunal held that the valets fell within both limbs of the definition of "worker" in the WTR and NMWR.[194] After a series of unsuccessful appeals to the Employment Appeals Tribunal[195] (EAT) and Court of Appeal,[196] Autoclenz appealed to the Supreme Court, maintaining its position that the claimants were not entitled to these payments as they were self-employed independent contractors.

3.1.2: Legal issues for the Supreme Court

The Supreme Court had to determine the employment status of the valets. In doing so, one of the main questions for the Court was that it had to choose between two competing traditions of contractual interpretation.

One tradition, rooted in general commercial principles, was that the court could only look beyond the terms of the contract if the contract was a "sham". This "sham test" was a strict test, laid down in the commercial context by the Court of Appeal in the case of *Snook* v *London and West Riding Investments*[197] and arguably endorsed in the field of employment law[198] by the Court of Appeal in the case of *Consistent Group Limited* v *Kalwak and others*.[199] The sham test requires that both parties to the contract are misrepresenting the contractual relationship between them. There must be clear evidence of mutual deception.[200]

The other tradition, enunciated by the Court of Appeal in *Firthglow Limited (t/a Protectacoat)* v *Szilagyi*,[201] placed more emphasis on the power imbalance which is inherent in the

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[192] *Ibid*, paragraph 4.
[193] *Ibid,* paragraph 6.
[194] *Ibid,* paragraph 3.
[195] [2008] 6 WLUK 48.
[196] [2009] EWCA Civ 1046.
[197] [1967] 1 WLUK 724 (CA (Civ Div))
[198] Editorial, *Written terms that do not reflect true agreement may be disregarded: Autoclenz v Belcher and ors: Supreme Court*, (2011) IDS Emp L Brief, 934, pp9-11, at p9.
[199] [2008] EWCA Civ 430
[200] *Snook*, p.802.
[201] [2009] EWCA Civ 98.

employment relationship.[202] Given this power imbalance, the *Firthglow* decision states that the courts should be willing to look beyond the written terms of the contract, in situations which are broader than a suspected sham, to get to the commercial reality of the working relationship.[203]

In *Autoclenz*, there was a disconnect between the terms of the contract (which pointed towards self-employment status) and the working practices "on the ground" (which suggested that the valets were workers).

Consequently, the challenges for the Supreme Court were which line of precedent it should adopt; and how to compare, and weigh, the provisions in the contractual documents against the reality of the working relationships between Autoclenz and the valets.

3.1.3: Summary of decision

The Supreme Court unanimously rejected the appeal.[204] Lord Clarke gave the only substantive judgement. He begins his analysis by stating that a purely literal reading of the contracts strongly suggests that they reflect a client / self-employment relationship.[205] Lord Clarke also recognises the importance of the legal principle, under the general law of contract, that the express terms of the agreement are predominant.[206] However, he then feels the need to look at several cases, within the field of labour law and in other areas of the law, which take a different approach to contractual interpretation.[207] This brings Lord Clarke on to consider, with approval, the purposive approach taken by the Court of Appeal in the tenancy case of *Bankway Properties Limited* v *Pensfold Dunsford.*[208] In this case, the Court of Appeal prevented a landlord from circumventing his obligations towards his tenant, under the Housing Act 1998 (1988 Act), by imposing an exorbitant rental increase on the tenant. Arden LJ (as she then was) adopted a purposive approach to the issues, holding that the landlord's aim, when imposing the increase, was to evict the tenant and thereby contract out of the 1988 Act. This act of evasion ran contrary to the purposes of the Housing Act 1988, designed to confer protections on tenants, and was therefore impermissible.[209] So, in *Bankway*, the protective purposes of the statute overrode the contractual wording. The statutory protections also took precedence over contractual terms in

[202] *Ibid,* paragraphs 51 – 8.
[203] *Ibid,* paragraphs 54 – 6.
[204] *Autoclenz,* n.21, paragraph 39.
[205] *Ibid,* paragraph 10.
[206] *Ibid*, paragraph 20.
[207] *Ibid*, paragraphs 22 and 23.
[208] [2001] EWCA Civ 528.
[209] *Ibid*, paragraphs 49, 52.

the landlord and tenant case, *Street* v *Mountford*,[210] which Lord Clarke also refers to with approval.[211] Lord Clarke cites these cases as evidence that it is both necessary and legitimate for the judiciary to take an approach in certain cases, particularly those involving artificial contractual terms, which prioritises the broader purposive protections of the statute over the contractual terms.[212]

Lord Clarke also recognises that the employment contract differs from general commercial contracts and so they may require different interpretative approaches.[213] He was prepared to take a purposive interpretation to the issue of employment status to discern what the actual relationship of the parties was like on a day-to-day basis. Lord Clarke's Opinion takes on a clear direction towards the conclusion that the contractual documents between Autoclenz and the valets did not represent the actual working arrangements. The "real-life" situation must be looked at.[214] The emphasis towards practicalities is extended when Lord Clarke shares the concern of Elias J in *Kalwak*:

"The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship."[215]

Lord Clarke goes on to opine that the sham approach taken in *Snook* could not be transposed to the employment situation as it was "too narrow."[216] By this stage in the judgement, Lord Clarke has considered the "sham" principle and decided that it did not have sufficient weight, in the context of labour law cases, to guide his Opinion. Instead, the correct approach was to broaden the analysis and ask what "was the true agreement between the parties?"[217] In the labour law context, this was the approach taken by Elias J in *Kalwak*[218] and by the Court of Appeal in the *Szilagyi* case.[219] It was also the approach of Aikens LJ in the Court of Appeal in the present case.[220] So, Lord Clarke can be seen to be widening the circumstances in which a purposive approach to contractual interpretation can be taken - there does not need to be

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[210] (1989) AC 800
[211] *Autoclenz (SC)* n.21, paragraph 23.
[212] *Ibid*, paragraph 23
[213] *Ibid*, paragraphs 34 and 35.
[214] *Ibid*, paragraphs 24 and 25.
[215] *Kalwak*, n.199, paragraphs 57 – 59.
[216] *Autoclenz (SC),* n.21, paragraph 28.
[217] *Ibid*, paragraph 29.
[218] N.199, paragraph 25.
[219] n.201, Paragraph 30.
[220] N.196, paragraph 89.

suspicion of an actual "sham" arrangement, under the *Snook* principle, before the court can look beyond the written terms of the contract.

Lord Clarke then explicitly acknowledges that the employer will often be in a stronger bargaining position than the employee.[221] Consequently, the actual practice of the parties may differ from the contractual terms agreed by the parties:

"So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."[222]

Accordingly, Lord Clarke held that the Employment Tribunal was entitled to hold that the valets were working under contracts of employment under limb (a) of Regulations 2(1) of the WTR and NMWR. It was also observed, *obiter*, that if the court was required to consider the position under limb (b), Lord Clarke would have also held that the valets were workers within limb (b).[223]

3.1.4 Analysis of the decision

Autoclenz was a seminal case. The Supreme Court gave explicit recognition to one of the main challenges in modern labour law: that employers try to evade their contractual obligations to their workers, typically by using legal advisers. Lord Clarke also acknowledged the power disparity in the employment relationship and the subordination and vulnerability that can flow from this disparity. In the *Autoclenz* case, the employer utilised its greater bargaining power to impose artificial contractual terms on the workers. The workers were then subject to the control of Autoclenz on a day-to-day basis, a further aspect of subordination, but unable to enjoy certain benefits associated with the employment relationship. This combination of inequality in bargaining power, coupled with the workers' subordination, highlights the high level of vulnerability which the worker can be subjected to.

It is suggested that Lord Clarke made the correct decision when he disapplied the *Snook* "sham" principle in this case. The requirement that both parties must misrepresent the employment relationship is inappropriate in a labour law context given the one-sided inequality of

[221] *Autoclenz (SC)* paragraph 35.
[222] *Ibid*, paragraph 35.
[223] *Ibid*, paragraph 39.

bargaining power which infuses the creation of contractual documentation and the employment relationship itself. As described earlier in this thesis, the creation of contractual terms, which do not reflect the reality of the commercial practice, is more likely to be a one-sided affair in a labour law context: the employer issues the contract; the worker must then sign it if she wants the job.

Indeed, it is notable that Lord Clarke weighed legal principles to resolve this case. The employer based its case on a combination of legal principles. As previously mentioned, the "sham" principle was relied upon, but this was given little weight by the court due to its inappropriate application to labour law cases. In addition, the principle of "freedom of contract" was argued for by the employer, but it was, again, given little to no weight as the contracts themselves did not reflect commercial reality. Furthermore, the principle that the "express terms of the contract are predominant" put forward by the employer was again given no weight because the express terms did not reflect the true nature of the relationship between Autoclenz and the valets. It was the "reality of what was agreed by the parties," based principally on the importance attached to the principle of inequality of bargaining power, which took prominence in this case. So, in *Autoclenz*, the case is resolved by weighing competing legal principles. The contextual weight of these principles fosters the judicial creativity which the purposive approach requires. The sham principle is a good example of this: whilst it is given little to no weight in the employment relationship in *Autoclenz*, it may be given far more weight in another case involving commercial contracts, such as one between two relatively even-sized SME businesses which have approximate bargaining power and which have colluded to misrepresent contractual terms between them.[224] As a result, the contextual use of legal principles, which involves assigning a weight to principles based on their moral appeal in the individual circumstances of a case, facilitates the individuated mode of judicial reasoning, described in the Introduction, which may need to be contextualised in relation to the area of the law being adjudicated, whilst also ensuring that the decision coheres with the broader legal system.

In addition, Lord Clarke's reliance on the *Bankway* and *Street* v *Mountford* cases is highly significant as it indicates a judicial willingness on his part to adopt a broad, purposive approach which places the protective purposes of the statute at the foreground of the judicial reasoning process. Indeed, he is approving the use of a broad interpretation to legislation, where this is necessary to achieve the statute's purposes, in cases where the statutory protections conflict with artificial contractual wording. His reliance on these cases becomes even more relevant in

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[224] See n.216

the analysis of *Uber* in Chapter 4 as it suggests that *Autoclenz* should be given a "statutory" rather than "contractual" interpretation.[225]

Another important aspect of the *Autoclenz* decision is that it involved the purposive interpretation of case-law which did not derive from EU law. Indeed, the decision is based squarely within the four corners of common law precedents. The case is therefore a good example of how a purposive approach, using non-EU-derived legal sources, could assist the judiciary when adjudicating labour law disputes in a post-Brexit UK.

Consequently, it is suggested that the purposive approach advocated in this thesis allowed the Supreme Court to reach a decision which reflected the reality of the situation. Clearly. the contractual documents did not reflect the true reality of the working relationship. The evidence accepted by the Employment Tribunal pointed strongly to the conclusion that the express terms of the contract were artificial: they had been created to evade the employer's obligations under the employment relationship. The valets were not operating independent businesses. Instead, they were workers who were subjected to a high degree of control by Autoclenz. As a result, it was essential, in *Autoclenz*, that the protective provisions of the WTR and NMWR take precedence over the artificial wording in the contracts. This allowed the valets to obtain the statutory benefits to which they were entitled. It is also noteworthy that Lord Clarke astutely observed that the literal approach to contractual interpretation was incapable of redressing this power imbalance. A literal interpretation of the contracts would have led to the conclusion that the valets were self-employed contractors.

Bogg has commented that the purposive approach laid down by Lord Clarke in *Autoclenz* amounts to "a presumption in favour of worker or employee status which can only be rebutted by clear evidence to the contrary."[226] This thesis takes the view that Bogg's suggestion of a general rule is correct. Indeed, Lord Clarke was advocating a general use of the purposive approach to interpretation in these types of labour law cases. This view is taken because, as shown above, Lord Clarke directly links his use of the purposive approach with the inherent power imbalance in the employment relationship and with reference to cases such as *Bankway*, which adopted a broad purposive approach. He clearly recognises that the power imbalance in the employment relationship was not unique to the *Autoclenz* case but a general, and predominant, feature of the employment relationship. The link between the use of the purposive approach, and the power imbalance in the employment relationship, is therefore better viewed

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[225] These terms will be fleshed out and contextualised in Chapter 4.
[226] Bogg, n.157 at p.343.

as a general normative template laid down by Lord Clarke for such cases, rather than a tailored solution to one individual case. This level of generality supports Bogg's interpretation. In addition, this rebuttable presumption also brings the personal scope of labour law more into line with its purposes. The conferral of rights to an intermediate category of workers, under legislation such as the NMWA and the WTR, reflects the inclusive approach of the legislature. Indeed, fundamental social rights are being extended to an intermediate category who fall somewhere between employees and independent contractors. This inclusivity is well represented by Bogg's rebuttable presumption as it confers these rights, at least on a *prima facie* level, to a broad range of intermediate workers. The presumption also provides the law with a mechanism to counteract the evasive tactics of those employers who insist on boilerplate contracts, which misrepresent the real working arrangements to avoid their obligations under the employment relationship, and which are generally non-negotiable. It has a counteractive effect because it imposes a reverse burden on the employer to provide clear evidence that the individual is genuinely self-employed. Consequently, it is suggested that Bogg's presumption is both a sensible and a desirable interpretation of the *Autoclenz* decision.

As a result, an eighth component, specifically contextualised to employment status, should be added to the definition of purposive judicial interpretation advocated in this thesis: (8) that there should be a presumption in favour of worker or employee status which can only be rebutted by clear evidence to the contrary.

Consequently, *Autoclenz* demonstrates the value of the purposive approach to labour law. It also substantiates the importance of several of the components in the purposive model that have been built in this thesis. Perhaps the most important component of the model is the inherent power disparity in the employment relationship. After all, redressing this disparity is the central goal of labour law. *Autoclenz* was also important because it recognised the importance of this power imbalance. On that note, it is encouraging to see that the Supreme Court has since built on this aspect of the reasoning in the *Autoclenz* case. This brings the thesis on to an analysis of the *Unison* case.

3.2 Unison – redressing the power imbalance via a purposive approach

3.2.1 Background facts

UNISON brought judicial review proceedings against the Employment Tribunals and the Employment Appeal Tribunal Fees Order ("the Fees Order"). The Fees Order, giving the Lord Chancellor the power to introduce Employment Tribunal Fees, was secondary legislation which derived from section 42(1) of the Tribunals, Courts and Enforcement Act 2007 (the 2007

Act). Prior to the introduction of the Fees Order, a Claimant could proceed with an Employment Tribunal claim, or an appeal to the Employment Appeals Tribunal, without paying a fee. UNISON challenged the Fees Order on several grounds. The ground that proved most crucial to the decision was that the fees imposed restricted access to justice under English and European law.[227]

3.2.2 - Redressing the power imbalance

Lord Reed gave the leading judgement, with unanimous agreement from the other judges. He starts his speech by recognising that there is an inherent power imbalance between employer and employee; the former generally having more power than the latter.[228] He then explains that it has been necessary for Parliament to confer rights upon employees to mitigate the effects of this imbalance. He emphasises, at this early point in his judgement, that, for these rights to have substance, they must be enforceable in practice.[229] However, Lord Reed is conscious that the ET fees were having a deterrent effect on prospective claimants – there had been a 66 – 70 percent[230] reduction in ET claims since the ET fees had been introduced. This was resulting in "systemic"[231] problems for labour law – claimants were increasingly unable, or unwilling, to enforce their labour rights.

So, Lord Reed is taking a purposive approach, articulating the main purpose of labour law at an early point in his speech: to redress the power imbalance in the employment relationship. The rest of his judgement is crafted to ensure that the system of labour law meets this purpose, or goal. To do this, Lord Reed constructs a universal right of access to justice by articulating a refined judicial conception of the rule of law.[232] By constructing a universal right of access to justice, and new judicial exposition of the rule of law, Lord Reed is also invoking a more general purpose of the judiciary: to constrain the actions of the Executive. Indeed, Lord Reed reaches a fundamental cornerstone of his judgement; when he states that the "constitutional right of access to the courts is inherent in the rule of law."[233] Lord Reed goes on to state that a fundamental requirement of the rule of law is that the courts can constrain the unlawful actions

[227] *Unison (SC),* paragraph 3.
[228] *Ibid*, paragraph 6.
[229] *Ibid*, paragraph 6.
[230] Depending on the statistical source used – *ibid*, paragraph 39.
[231] *Ibid*, paragraph 95
[232] Ford, M, *Employment Tribunal Fees and the Rule of Law: R (UNISON) v Lord Chancellor in the Supreme Court* 2018 I.L.J. 47(1), 1-45, at p.28.
[233] *Ibid*, paragraph 66.

of the Executive.[234] In order to fulfil this purpose, it is necessary for everyone to have access to the courts otherwise "laws are liable to become a dead letter."[235]

Crucially, Lord Reed develops his conception of the rule of law to further the enforcement of labour rights. He emphasises that the rights conferred must be effectively enforced by sanctions, and that it is necessary for people to be able to access courts because people, and businesses, need to be aware that they have rights and obligations, and can enforce their rights when necessary.[236] So, Lord Reed is explicating a model which has practical application in the real world – it is not sufficient to say that a person has a labour "right," because some legal rule says that is the case. For the right to be a valid right, Lord Reed stresses that it must also be realisable, enforceable and backed by sanctions.

3.2.3 - Brexit and common law constitutional rights

Unison is relevant for the purposes of this thesis because it builds on the Supreme Court's reasoning in *Autoclenz*, specifically the need to ameliorate the power imbalance in the employment relationship. It is also relevant given that Lord Reed was able to make extensive use of the English common law, and a body of case-law which supported the common law constitutional right of access to justice, as part of his purposive approach. Indeed, Lord Reed's judgement traces the right of access to justice back to the Magna Carta of 1215 and the institutional writings of Coke and Blackstone.[237] Having reviewed the earliest expressions of the right of access to justice in English law, Lord Reed then continues to make use of modern common law precedent to construct his conceptions of the rule of the law and the right of access to justice.[238] The common law, rather than the ECHR or EU law, is the bedrock of his judgement. EU law is considered, as is the jurisprudence of the ECtHR, but they are dealt with briefly by Lord Reed to show that the principles underlying European authorities in this area support the English common law principles.[239]

So, Lord Reed's judgement highlights how effective a purposive approach towards the common law can be when it comes to the protection of constitutional rights and freedoms. In *Unison*, we also see a good example of how the judiciary can exercise their powers to ensure that the State has appropriate legal mechanisms in place to protect workers' rights. The protection, and development, of common law constitutional rights will become increasingly

[234] *Ibid*, paragraph 68.
[235] *Ibid*, paragraph 68.
[236] *Ibid*, paragraph 71.
[237] *Ibid*, paragraphs 74 and 75.
[238] *Ibid,* paragraphs 76 – 85.
[239] *Ibid,* paragraph 117.

important in a post-Brexit UK, particularly if the Government imposes deregulatory measures in relation to pre-existing EU law.

Lord Reed's purposive use of the common law allowed him to stress the fundamental importance of the traditional paradigmatic labour law goal of redressing the power imbalance in the employment relationship. This opened an argumentative pathway for Lord Reed to hold that labour laws must be accessible and enforceable in order to achieve this goal. In addition, his judgement laid some grounding for the Supreme Court to assert itself as a court of Constitutional jurisdiction.

As described earlier in this thesis, dynamic legal interpretation is a key component of the purposive model advocated. This method of interpretation will be explored in fuller detail with reference to Dworkin's writing and the Supreme Court's decision in *Gilham*.

3.3- Dynamic legal interpretation - statutory interpretation

3.3.1 - Dynamic legal interpretation - the statutory context

As Barak has noted, "purposive interpretation...is also based on dynamic interpretation. Dynamic interpretation addresses the problem of time..."[240] By referring to the problem of "time" Barak means that the dynamic approach to interpretation avoids "freezing" the statute's meaning at the point of its enactment.[241] By contrast, the dynamic approach recognises that the meaning of a legal text, typically a statute, will alter with time.[242] Barak makes a valid point here. There are a wide range of socio-economic factors which can lead to rapid changes in society, such as technological advances and the effects of globalisation. Labour laws must adopt a flexible and dynamic approach to keep pace with such changes.

Dworkin also recognised that dynamic interpretation was necessary[243] His imaginary judge, Hercules adopts a method of dynamic interpretation:

"Hercules method...rejects the assumption of a canonical moment at which a statute is born and has all and only the meaning it will ever have. Hercules interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the story the best he can of this continuing story, and his interpretation therefore changes as the story develops."[244]

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[240] Barak, n.104, pp.287 - 8
[241] *Ibid*, p.287.
[242] *Ibid*, p.292
[243] Dworkin, n.179, pp.348 - 9.
[244] *Ibid*, p.348 (Quoted from Barak, n.104, p.293).

It is suggested that Dworkin's conception of dynamic interpretation, which is compatible with Barak's, is a fundamental component for the theory of statutory interpretation advocated in this thesis. The next case analysis from the Supreme Court, the *Gilham* case, shows the utility of dynamic interpretation in a hard case. It also addresses the interaction between the judge's requirement to respect the purpose of a statute whilst meeting the UK's international human rights obligations.

3.4 - Gilham - case law example of dynamic interpretation

3.4.1 Background facts

The claimant was a district court judge who was appointed to judicial office by the Lord Chancellor on 6 February 2006.[245] She sat at Warrington County Court. Cost-cutting measures around 2010 – 2011, where local courts were closed and their cases transferred to Warrington, resulted in an increased volume of cases being heard at the Warrington Couty Court.[246] The claimant complained to local leadership judges and senior members of Her Majesty's Courts and Tribunal Services about the increased workload which had been placed on the district judges, together with concerns related to administrative failures and a lack of appropriate court room accommodation for the increased volume of cases.[247] She later formalised these concerns with a grievance in 2011.[248] She later lodged several Employment Tribunal, including a claim of "detriments" which she experienced as a result of her making protected disclosures ("whistleblowing").[249] The whistleblowing claim was brought under section 47B (1) of the Employment Rights Act 1996 ("the 1996 Act") which states that a worker has the right "not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure." The claimant contended that her complaints, relating to increased workload and administrative deficiencies, were "protected disclosures" under section 43A of the 1996 Act.[250] She also claimed that she was subjected to a course of detriments as a result of her protected disclosures, including being bullied, ignored and undermined by her judicial and lay colleagues.[251] In addition, she complained of further detriments, consisting of delays in investigating her grievance and her concerns being ultimately dismissed as a "personal working style choice."[252] The claimant claimed that this

[245] *Gilham (SC)* paragraph 4.
[246] *Ibid,* paragraph 5.
[247] *Ibid*, paragraph 5
[248] *Ibid*, paragraph 5.
[249] *Ibid*, paragraph 8.
[250] *Ibid*, paragraph 6.
[251] *Ibid*, paragraph 7.
[252] *Ibid*, paragraph 7.

course of detriments caused a decline in her mental health and she had to take time off work as a result.[253]

The claimant claimed at the Employment Tribunal that she had jurisdiction to bring a whistleblowing claim under Part IVA of the 1996 Act because she was a worker under section 230(3)(b) of the 1996 Act.[254] However, Counsel for the Ministry of Justice submitted that the whistleblowing claim could not continue. The reason given by Counsel was that, whilst workers had whistleblowing protections, the claimant was a judge and therefore an office holder who could not claim these protections under domestic law.[255] The Employment Tribunal held, at a preliminary hearing, that the claimant was not a "worker" under section 230(3)(b) of the 1996 Act and so could not claim whistleblowing protections under Part IVA of the 1996 Act.[256] After a series of unsuccessful appeals to the EAT and the Court of Appeal on this point, the claimant appealed to the Supreme Court.

3.4.3: Legal issues for the Supreme Court

The Supreme Court had to address three questions in the present case: (1) Was the claimant a "worker" within the meaning of section 230(3)(b) of the 1996 Act?[257] (2) Was the claimant a Crown employee under section 191 of the 1996 Act (this was raised for the first time by the claimant in her appeal to the Supreme Court)?[258] (3) In the event that the answers to questions (1) and (2) were "no," was the claimant's exclusion from the whistleblowing provisions in the 1996 Act a breach of her rights under Article 10 ECHR or under Article 14 ECHR read in conjunction with Article 10?[259] If her Convention rights were breached, the claimant asserted that either section 230(3)(b) or section 191 of the 1996 Acts should be interpreted to bring her within the whistleblowing protections of Part IVA of the 1996 Act.

3.4.4: Summary of Judgement

Lady Hale gave the only substantive Opinion in this case and the other judges agreed unanimously with her Opinion. She held that the claimant was not a worker under section 230(3)(b) of the 1996 Act ("finding 1")[260] that the claimant was not in Crown employment under section 191 of the 1996 Act ("finding 2")[261] and that findings 1 and 2 meant that the

[253] *Ibid*, paragraph 7.
[254] *Ibid*, paragraph 8.
[255] *Ibid*, paragraph 10.
[256] *Ibid*, paragraph 10.
[257] *Ibid*, paragraph 12
[258] *Ibid*, paragraph 22.
[259] *Ibid*, paragraphs 26 – 8.
[260] *Ibid,* paragraph 21.
[261] *Ibid*, paragraph 24

claimant could not claim the equivalent whistleblowing protections, under Part IVA of the 1996 Act, that employees and workers enjoyed.[262] The facts of the claimant's case fell within Article 10 ECHR, in relation to the right of freedom of expression, as she had been unable to make protected disclosures.[263] Given that the claimant could not claim equivalent protections as employees and workers under the whistleblowing provisions in part IVA of the 1996 Act, she had been treated less favourably than employees and workers who wished to make responsible protected disclosures within the workplace.[264] In addition, the claimant had not been protected from the "detriments" arising from making such protected disclosures and she had also been denied a remedy before an Employment Tribunal for these detriments.[265] Employees and workers in the claimant's circumstances were entitled to such protections and rights and these disparities in treatment amounted to a violation of Article 10, read together with Article 14.[266] Being a judge was a "status" under Article 14 and so the claimant could claim protection under Article 14 in relation to her right to freedom of expression under Article 10.[267] As a result, Lady Hale held that the 1996 Act should be read to extend whistleblowing protection to the claimant ("finding 3")[268].

The most powerful invocation of the purposive approach in *Gilham* related to the remedy granted to the claimant. Indeed, Lady Hale saw the question of remedy as "the most difficult question in this case."[269] The difficulty was that judges, as officeholders, could not, on the face of it, qualify for protection under sections 191 or 230 of the 1996 Act. However, that left the claimant without a remedy in circumstances where she had clearly been treated less favourably than employees or workers. In addition, despite her status as a district judge, the facts established by the Employment Tribunal demonstrated that the claimant had clearly been placed in a vulnerable situation in the workplace, had suffered detriments as a result, but had no legal remedy available to her. The position was further complicated because neither Parliament nor the Executive had applied its mind to the question as to whether judges should be granted whistleblowing protections. Despite these difficulties, Lady Hale invokes a highly creative method of legal reasoning by invoking a purposive approach which flowed from the House of Lords' decision in the *Ghaidan* case.

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[262] *Ibid*, paragraph 30.
[263] *Ibid*, paragraph 29.
[264] *Ibid*, paragraph 30.
[265] *Ibid*, paragraph 30.
[266] *Ibid,* paragraph 37.
[267] *Ibid*, paragraph 32.
[268] *Ibid,* paragraph 37.
[269] *Ibid*, paragraph 38

The House of Lords held in *Ghaidan* that section 3 HRA allows the judiciary significant interpretative leeway when determining whether domestic legislation could be read and given effect in a way that is compatible with ECHR rights.[270] The invocation of the *Ghaidan* test therefore allows Lady Hale a wide margin of discretion in her search for a remedy for the claimant. As Lady Hale recognises "In *Ghaidan* v *Godin-Mendoza* it was also established that what is "possible" goes well beyond the normal canons of literal and purposive statutory construction."[271] It is suggested that, whilst Lady Hale correctly identifies the departure from a literal canon of construction, the *Ghaidan* approach is a purposive approach and this point will be expanded upon shortly.

In the meantime, Lady Hale also quotes, with approval, Lord Nicholls' statement in the *Ghaidan* case that it was necessary, in the interpretation of section 3 HRA, for courts to recognise the "unusual and far-reaching character" of the interpretative obligations.[272] She also quotes, with approval, Lord Rodger's test in *Ghaidan* that the interpretation of the domestic statute should "go with the grain of the legislation."[273]

Consequently, Lady Hale goes on to hold that the interpretative obligation laid down by *Ghaidan* results in the conclusion that "(Part IVA of) the Employment Rights Act 1996 should be read and given effect so as to extend its whistleblowing protection to the holders of judicial office."[274]

Clearly, the *Ghaidan* test involves a marked departure from the traditional literal canon of construction. Indeed, Lord Nicholls stated in *Ghaidan* that the court can legitimately depart from the plain meaning of a statute to give effect to Convention-compliant interpretation:

"From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section

[270] [2004] UKHL 30, at p.30.
[271] *Gilham (SC)* paragraph 39.
[272] *Ibid*, paragraph 30.
[273] *Ibid*, paragraph 121.
[274] *Gilham (SC)* paragraph 44.

3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation."[275]

However, Lord Nicholls then goes on to qualify this statement by saying that there must be some parameters within which the court should operate in its interpretative latitude:

"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying *thrust* of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation (my emphasis)"[276]

3.4.4 Analysis of the judgement

This metaphor of "going with the grain" of the legislation seems to mean that, where one of those meanings, in the range of possible meanings, is a possible interpretation of the statutory wording, and the interpretation is also in broad compliance with the purpose, or "thrust," of the legislation, then section 3 requires that the wording should be given that meaning if that is necessary to make the legislation Convention-compliant. So, this approach gives judges a wide margin of discretion when deciding whether it is possible to construe the legislation in accordance with the ECHR. Consequently, the *Ghaidan* approach permits an interpretation of legislation to comply with the ECHR when it is *possible* to do so. However, the interpretation must still go with the "thrust" of the legislation. Given this requirement of "thrust," it is clearly a purposive approach to statutory interpretation. Indeed, it resembles Barak's requirement (when he endorses this approach) that the interpretation of the statute be in accordance with the purpose and within the "semantic boundaries" of the text.[277] It is also reflective of this thesis' broader approach to statutory interpretation which, as outlined earlier in this chapter, seeks to identify the meaning, within a range of possible meanings, which best expresses the purpose of the statute and the underlying legal system. The purposive nature of the *Ghaidan* test also allows the judiciary to take a dynamic approach to legal interpretation, as endorsed by Dworkin, when it comes to statutory interpretation. As has already been argued, this is a crucial

[275] *Ghaidan*, paragraph 32.
[276] *Ibid,* paragraph 32
[277] See n.117

component of the purposive approach to labour law as it gives the law a chance to keep pace with rapidly changing societal developments.

As will be very clear by this stage, a major contention of this thesis is that the employment relationship is imbued with an inherent power imbalance. As the *Gilham* case shows, this power imbalance can manifest itself in circumstances which extend beyond the employment relationship to officeholders. A district judge (despite the considerable protections available to an individual in that office) was left in an extremely vulnerable position in the workplace and this had a damaging impact on her health, yet she had no apparent legal remedy. Moreover, as Lady Hale recognised, a literal interpretation of the relevant legislation would have denied Ms Gilham such a remedy. Indeed, if the literal approach was adopted, the law would have treated Ms Gilham less favourably than workers or employees in the same situation. As a result, Lady Hale invoked a Dworkinian approach to statutory interpretation, a dynamic mode of interpretation, as reflected in the *Ghaidan* principle, to provide a legal remedy to Ms Gilham. This was an appropriate approach for Lady Hale to take: Parliament had conferred a broad discretion on judges to interpret national legislation to make it compliant with the Convention. Lady Hale therefore exercised her discretion in accordance with her constitutional mandate and, in doing so, was able to ensure that the legal system conferred a remedy to which the claimant was entitled. In addition, there may be wider ramifications of the *Gilham* judgement. The purposive approach adopted in the *Gilham* case may have opened a whole new sphere of employment rights. As Bowers and Lewis have pointed out, there are other non-contractual workers and prospective workers, who will generally be in a more vulnerable situation than judicial officeholders, who may be able to benefit from the approach taken in *Gilham*.[278] So, once again, the flexibility of the purposive approach might also have the effect of promoting wider benefits beyond the immediate case (as it did in *Unison*) to the entire system of labour law.

It is hoped that the purposive approach in *Ghaidan* can be put to good use by the judiciary in a post-Brexit UK. Even if the Conservative Government reduces workers' (EU derived) rights after Brexit, the hope is that judges will make increased reference to the *Ghaidan* approach in order to secure rights-based outcomes in labour law cases which resonate with the principles and jurisprudence of the ECHR. However, the ECHR is obviously not the only international instrument, which the UK is party to, which regulates labour rights. There are a broad range of international conventions which could prove useful in a post-Brexit UK. The last case study,

[278] Bowers, J, Lewis, J, *Judges, human rights and worker status: Gilham v Ministry of Justice* 2020 I.L.J. 49(1), 135 – 58, at p.140.

Hounga, shows how the Supreme Court has been willing to refer to a broader range of international instruments in labour law disputes. *Hounga* also shows how a dynamic and flexible approach can, when subsumed within a purposive perspective, be applied to the interpretation of the common law to achieve the correct outcome in a hard case. However, before moving on to analyse the *Hounga* case, it is necessary to return to the theories of Barak and Dworkin.

3.5 - Dynamic / flexible legal interpretation – common law interpretation

3.5.1 - Judges in partnership with the legislature

Balmer has noted additional similarities (other than those mentioned in this thesis) between Dworkin's and Barak's models of adjudication.[279] The most relevant similarity, for present purposes, is that Barak, like Dworkin, "sees the judge in the "creative" role of a "partner" with the legislature, interpreting statutes in light of changing circumstances to demonstrate the community's commitment to political morality."[280] This thesis has already highlighted the similarities of Barak and Dworkin's approach to dynamic statutory interpretation. This concept of a judicial "partnership" with the legislature is related to dynamic interpretation because both take account of changing societal circumstances. This is a necessary component of the purposive approach to labour law that is being advocated in this thesis.

It is suggested that the broader theme arising from Barak and Dworkin's theories, of taking societal changes into account when interpreting the law, can, and should, be extended to common law interpretation as part of a broader purposive approach. Judges should interpret the common law to reflect such changes. Indeed, they must do this in the context of labour law, or the law will fall even further behind the constantly changing nature of working patterns. To recap on the contextual purposive approach, in its relation to common law interpretation, it sometimes requires that the judge must apply a precedent, rule or principle which is not the most obvious one to apply to the circumstances of the case. It must, of course, be relevant and cohere with the broader legal system, but it need not be the most obvious, or apparent, choice. Why should this be so? This will often take place where there is a clash between separate, competing purposes in the laws which intersect in legal cases. What must the judge do in such cases of conflict? It will be necessary for the judge to resort back to the contextual use of weighted legal principles, which underly the precedents (or rules), to resolve the conflict. She must pick the most morally attractive principle, or set of principles, to resolve the case, even

[279] Balmer, T.A, *Book Review: What's a Judge to Do? Aharon Barak, Purposive Interpretation in Law*, (2006) 18 Yale JL & Human 139, p.145.
[280] *Ibid*, p.145

when such principles are not the most obvious ones. This is necessary because the purpose of the law has, as a result of changes in society, trumped the purpose of what appears to be the most obvious precedent or rule. This is what happened in the *Hounga* case which will now be analysed.

3.6 Hounga - case law example of flexible legal interpretation

3.6.1 - Background facts

Miss Hounga, (hereinafter referred to as "the claimant," as was her status at the Employment Tribunal), was a Nigerian national with learning difficulties.[281] When she was aged around 14, Mrs Allen, the respondent (to the Employment Tribunal proceedings), offered the claimant a job at her home in England.[282] She told the claimant that she would be paid £50 per week and receive education in England if she lived in the respondent's home and looked after her children.[283] The claimant agreed to these terms.[284] The respondent and certain members of her family arranged for a false identity for the claimant.[285] They also arranged an affidavit for the claimant to swear by which stated that she was 20 years old and that her surname was that of the respondent's mother.[286] As a result of these misrepresentations, the claimant obtained a Nigerian passport with the false name and age.[287] The respondent, and her family, took the claimant to the British High Commission in Lagos and produced a document stating that the respondent's mother was the claimant's grandmother and that she had invited her to stay at her home in England.[288] Consequently, the claimant was granted permission to travel to England.[289] The claimant told the authorities at Heathrow Airport that she was visiting England to visit her grandmother and she thereby obtained a six-month visitor' VISA.[290]

The claimant started work at the respondent's home in January 2007.[291] She worked as an *au pair* of sorts, looking after the respondent's children and doing housework.[292] The claimant's liberty was restricted to a significant extent by the respondent; she could only go out with the family home under the respondent's supervision.[293] The respondent reneged on her

[281] *Hounga (SC)* paragraph 8.
[282] *Ibid,* paragraph 2.
[283] *Ibid,* paragraph 9.
[284] *Ibid*, paragraph 9.
[285] *Ibid,* paragraph 10.
[286] *Ibid,* paragraph 10.
[287] *Ibid,* paragraph 10.
[288] *Ibid,* paragraph 10.
[289] *Ibid*, paragraph 10.
[290] *Ibid,* paragraph 10.
[291] *Ibid,* paragraph 12.
[292] *Ibid*, paragraph 12.
[293] *Ibid,* paragraph 12.

commitments to the claimant: she did not pay her any wages, nor did she provide educational opportunities for the claimant.[294] The claimant also described a prolonged period of physical and emotional abuse by the respondent. She claimed that the respondent physically assaulted her on a regular basis and made various threats against her.[295] One persistent threat made by the respondent to the claimant was that, if she left the respondent's home, she would be sent to prison as her stay in the UK was illegal.[296] On 17 July 2008, the respondent physically assaulted the claimant, ejected her from her home and threw water over her.[297] The claimant slept overnight in the respondent's garden and was thereafter taken into the care of social services.[298]

3.6.2 Appellate history

The claimant lodged Employment Tribunal claims against the respondent for unfair dismissal, breach of contract, unpaid wages, unpaid holiday pay and race discrimination.[299] The Tribunal accepted the claimant's race discrimination claim, and she was awarded £6,187 for "injury to feelings."[300] The other claims were dismissed by the Tribunal, on the grounds that the claimant's contract was tainted with illegality and due to non-compliance with the statutory grievance procedures in force at that time under section 4 of the Employment Act 2002.[301] The respondent appealed to the EAT which upheld the claimant's race discrimination claim.[302] On further appeal, the Court of Appeal held that the discrimination claims could not succeed because the discriminatory treatment complained of was inextricably linked with her own illegal action and, if the court was to accept her discrimination claim, it would be tantamount to condoning the illegality.[303] The court was not prepared to do that.[304] The claimant appealed the Court of Appeal's decision to the Supreme Court. The basis for her appeal was that the respondent had, by dismissing her from her employment on 17 July 2008, discriminated against her on racial grounds, specifically on the grounds of her nationality.

3.6.3 - Summary of the judgement

The legal principle *ex turpi causa non oritur actio*, commonly known as "the illegality defence," prevents the pursuit of a civil claim if the claim arises from the illegal conduct of the

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[294] *Ibid,* paragraph 13.
[295] *Ibid,* paragraph 14.
[296] *Ibid*, paragraph 14
[297] *Ibid*, paragraph 15.
[298] *Ibid,* paragraph 15.
[299] *Ibid*, paragraph 16.
[300] *Ibid*, paragraph 4.
[301] *Ibid,* paragraph 17.
[302] *Allen* v *Hounga* [2011] 3 WLUK 958, paragraph 48.
[303] [2012] EWCA Civ 609, at paragraph 61.
[304] *Ibid,* paragraph 61.

claimant.[305] In the context of labour law, the illegality defence generally operates to bar claims which are based on an illegal contract of employment - so a claim for unfair dismissal cannot be based on an illegal contract of employment.[306] However, discrimination claims are not contractual claims; they are statutory torts.[307] Consequently, there was scope for the claimant to argue that torts were not barred by the illegality of the contract of employment. The *Hounga* therefore case posed the following question: could an employee claim for race discrimination, stemming from her dismissal, even though her employment arose from her own illegal actions?

This was a classic hard case for the Supreme Court. Prior to *Hounga*, the law was not clear on when the illegality defence would defeat a statutory tort claim. As Lord Wilson, who gave the leading speech for the majority, put it: "...although it has...become established that the (illegality) defence will sometimes defeat an action in tort, the circumstances in which it will do so have never been fully settled."[308] Whilst the law was not "fully settled," the precedent cases that did exist outlined two judicial tests, formulated by the Court of Appeal and the House of Lords, which related to the illegality defence. They were the "reliance"[309] and the "inextricable link"[310] tests. Under the reliance test, the claimant's claim could not proceed if it relied on her illegal actions.[311] The inextricable link test states that the claimant cannot pursue a claim if it is inextricably linked with her illegal actions.[312] The House of Lords had confirmed in a previous decision that the reliance test was the correct one to use when considering the illegality defence.[313] In addition, the Court of Appeal had repeatedly confirmed that the "inextricable link" test, which overlapped with the reliance test, should also be used in the context of the illegality defence.[314] So, these two tests seemed to be the obvious ones for Lord Wilson to apply in this case.

However, Lord Wilson refused to apply either of these tests.[315] He reasoned that, given the inherent power imbalance in the relationship between the claimant and the respondent, the illegal acts of the claimant served no more than a "context" within an abusive and highly

[305] *Holman* v *Johnson* (1775) 1 Cowp. 341; 98 E.R. 1120.
[306] *Enfield Technical Services Limited* v. *Payne* [2008] EWCA 393.
[307] Equality Act 2010, sections 124(6) and 119(2)(a).
[308] *Hounga (SC)*, paragraph 25.
[309] *Tinsley* v *Milligan* [1994] 1 AC 340.
[310] *Cross* v *Kirkby* The Times, 5 April 2000, [2000] CA Transcript No 321; *Hall* v *Woolston Hall Leisure Limited* [2000] EWCA Civ 170; *Vakante* v *Governing Body of Addey and Stanhope School* (No 2) (2004) [2004] EWCA Civ 1065.
[311] See n.309.
[312] See n.310.
[313] See n.309.
[314] See n.310
[315] *Hounga (SC)* paragraphs 29 and 39.

controlling relationship.[316] He then goes on to describe how the illegality defence "rests on the foundation of public policy."[317] Consequently, he poses the following question:

"So, it is necessary first to ask, "What is the aspect of public policy which founds the defence?" and second, to ask "But is there another aspect of public policy to which application of the defence would run counter?"[318]

Immediately after introducing the public policy test, he refers to the Canadian Supreme Court case of *Hall* v *Herbert* [1993] 2 SCR 159. He quotes the words of Lachlin, J at p.169 in this case, in relation to the power to bar tort claims based on the illegality defence, with approval:

"The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. The concern is in issue where a damage(s) award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refused to give by its right hand when it takes away by its left hand."[319]

Lord Wilson then goes on to examine the UK's international obligations. He refers to the United Nations ("UN") Protocol to Prevent, Suppress and Punish Trafficking in Persons ("the Palermo Protocol") which was ratified by the UK on 9 February 2006. Having reviewed the terms of the Palermo Protocol, he then states that "it is hard to resist the conclusion that Mrs Allen was guilty of trafficking within the meaning of the definition in the Palermo Protocol."[320] He also correctly states that, even if the claimant was not, technically, a victim of trafficking, she was a victim of forced labour under Article 4 ECHR.[321]

Lord Wilson then conducts a review of the UK's international obligations in relation to the prohibition on human trafficking. He refers to the Council of Europe Convention on Action Against Trafficking in Human Beings CETS No 197 ("the Anti-Trafficking Convention"). The UK became obliged to follow the Anti-Trafficking Convention, under international law, on 1 April 2009. The Anti-Trafficking Convention duplicates the definition of trafficking from the Palermo Protocol. Lord Wilson quotes Article 15 of the Anti-Trafficking Convention:

[316] *Ibid,* paragraph 39.
[317] *Ibid,* paragraph 41.
[318] *Ibid,* paragraph 41.
[319] *Ibid*, paragraph 42.
[320] *Ibid*, paragraph 48.
[321] *Ibid*, paragraphs 50 and 51.

"Each party shall provide, in its internal law, for the right of victims to compensation from the perpetrators."

He then goes on to state that:

"It is too technical an approach to an international instrument to contend that paragraph 3 relates to compensation only for the trafficking and not for related acts of discrimination. In my view it would be a breach of the UK's international obligations under the Convention for its law to cause Ms Hounga's complaint to be defeated by the defence of illegality."[322]

Lord Wilson concludes his judgement by stating that:

"...the decision of the Court of Appeal to uphold Mrs Allen's defence of illegality to her complaint runs strikingly counter to the prominent strain of current public policy against trafficking and in favour of the protection of its victims. The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront; and Miss Hounga's appeal should be allowed."[323]

3.6.4 - Analysis of the judgement

Despite his references to "public policy", what Lord Wilson is doing in the *Hounga* case is weighing the purposes of the illegality defence against the purposes of the anti-trafficking provisions. Indeed, he looked at the purpose of the illegality principle and decided that it would not be met by refusing the claim given the extreme power imbalance in the employment relationship and the fact that the claimant's illegality was minor when compared with the respondent's actions. He did this by referring to a legal principle, "the integrity of the legal system," to show that the purposes of the illegality defence were not met in this case. Indeed, Lord Wilson viewed this principle as requiring that the law should not, and should not be seen to, condone acts of illegality when to do so would compromise the integrity of the legal system. However, he does not appear to view the claimant's criminal conduct as sufficiently serious to undermine the integrity of the legal system. By referring to her conduct as being within the "context" of the factual matrix of the claim, he suggests that there are more serious issues to consider than the claimant's acts of illegality. Those serious issues are the fact that the claimant is likely a victim of human trafficking and / or forced labour.

As a result, there is a conflict of purposes which Lord Wilson had to weigh. He did weigh them, and the purpose of the illegality defence was "trumped" by the fact that the claimant had been

[322] *Ibid*, paragraph 49.
[323] *Ibid*, paragraph 51.

a victim of human trafficking and / or forced labour. As Lord Wilson observed, the prohibition of these practices had become an increasingly pressing concern for the international community in recent years and this concern overrode any minor concerns about the claimant's role in the illegality of the contract.[324] By weighing the purposes of the laws, Lord Wilson also, by necessity, weighed the relevant legal principles in *Hounga*. At the level of principles, the "integrity of the legal system" is a principle which, for Lord Wilson, clearly outweighed the "reliance" and "inextricably linked" principles. Indeed, this weighing of principles gave Lord Wilson the necessary argumentative pathway to allow the prohibition of trafficking to take a more prominent role in the determination of the decision than the illegality defence. In this regard, Lord Wilson's reasoning is also supported by the Dworkinian theory of integrity which demands that principles may, over time, be developed to reflect the changing standards of the community at large:

"Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation. An institution that accepts that ideal will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole."[325]

Indeed, the re-casting of principles was likely to have been seen by Lord Wilson as necessary given the community's (national and international) strong emphasis on the prohibition of human trafficking and forced labour.[326] It was therefore necessary for Lord Wilson to depart from the most obvious precedents in this case – if he had applied them, a literal application of the illegality defence would probably have barred the claimant's claim.

There are strong elements of purposive reasoning throughout Lord Wilson's judgement. He departed from the most obvious line of precedents, as referred to in the contextual purposive approach advocated by this thesis, to prevent the technical application of the illegality defence. In addition, he took a broader view of the factual circumstances than the Court of Appeal and correctly viewed the claimant's acts of illegality within the context of an abusive and exploitative relationship which had a gross power imbalance. That broader position was supported by the facts of the case, as outlined above. As described, he also balanced competing purposes during his judgement. Lord Wilson also adopts a purposive approach to the claimant's

[324] *Ibid*, paragraph 51.
[325] Dworkin, n.179, p.219.
[326] In this respect, it is notable that *Hounga* was decided at the same time as the Modern Slavery Bill was being debated in Parliament.

remedy: he states that, even though Article 15 of the Anti-Trafficking Convention makes no explicit reference to compensation from acts of discrimination arising from trafficking, it would be unduly technical to deny the claimant a remedy based on the literal wording of Article 15.

Consequently, the flexibility of the purposive approach to judicial interpretation advocated in this thesis, which aligns with Dworkin's requirement that the judge can depart from a strict line of precedent and resort to more fundamental legal principles when societal circumstances dictate, ensured that the claimant received an appropriate legal remedy for the discrimination which she was subjected to whilst also adhering to the community's pressing commitment to outlaw human trafficking.

Hounga is also relevant because it involves the purposive application of non-EU-derived legal sources. Indeed, the case demonstrates that there will still be a vast array of legal tools open to the judiciary, which do not derive from EU law, after 31 December 2020. Lord Wilson's decision makes ample reference to the UN-derived Palermo Protocol which was ratified by the UK on 9 February 2006. He also refers to the Council of Europe's "Anti-Trafficking Convention" in some detail. He also referred to Article 4 ECHR when he decided that, even if Ms Hounga was not a victim of trafficking, she was certainly a victim of forced labour.[327] The UK will continue to be a member of the UN after Brexit has taken place. It will also remain a member of the Council of Europe. This is significant because the Anti-Trafficking Convention and the ECHR are derived from the Council of Europe, not from EU law. The Palermo Protocol is derived from the UN. Another important point, raised by Lord Hughes in *Hounga*, is that English courts are obliged to interpret open questions in the common law in accordance with the UK's international obligations, even when the UK is not a party to the international instrument being relied upon. This leaves greater room for interpretative leeway when one considers the broad range of treaties which the UK is not party to. It should therefore be a reminder to judges that these international instruments can be directly applied, in a purposive manner, to labour law cases to potentially mitigate the adverse effects of labour law deregulation.

3.7 - Conclusion

The model now has 8 components and is complete. The application of these components has been demonstrated in labour law decisions of the Supreme Court. To reinforce the utility of the purposive model to UK labour law, the final challenge of the thesis is to demonstrate how the model can be applied by the judge in a *prospective* fashion to a case which has not been decided

[327] *Hounga (SC)* paragraph 50.

at the time of writing. The case that has been chosen is the pending UK Supreme Court decision in *Uber*. This case has been chosen because it is a hard case, involving many of the challenges which labour law faces today, and due to its potentially profound implications both for the "gig" economy and UK labour law.

Chapter 4 – purposive interpretation – Uber v Aslam

4.1 Background facts

Several London-based Uber drivers lodged ET claims, under the Employment Rights Act 1996 (1996 Act), read with the National Minimum Wage Act 1998 (NMWA) and associated regulations, for national minimum wage payments and paid annual leave under the WTR. The drivers brought the claims on the basis that they were "workers" under s.230(3)(b) of the 1996 Act, section 54(3)(b) of the NMWA and Regulation 2(1) of the WTR.[328] Uber's defence was that the drivers were self-employed independent contractors and therefore not entitled to these payments.[329] This analysis will focus on the "employment status" aspect of the Court of Appeal's judgement as this is most relevant to the scope of the enquiry.

Uber comprises multiple corporate entities. UL Limited (ULL), based in London, holds the company's private hire license.[330] UBV, a Dutch company, is the parent company of ULL and owns intellectual property rights in the app.[331] Uber's position is that its drivers are self-employed businesses and that ULL acts as an agent for the drivers by allowing passengers to book fares using its app technology.[332] Accordingly, Uber's position is that ULL acts as a technology provider and does not provide transportation services: transportation services are provided by the drivers under contracts between the drivers and passengers.[333] As a result, all written contracts were between the drivers and UBV for the use of the app, not with ULL.

Drivers own their own vehicles, but these vehicles must conform with specific requirements laid down by Uber.[334] They are deemed available to work when they log onto the app.[335] Potential passengers use the app to book fares. The app then tracks the closest available driver

[328] The definition of "worker" is the same in all three statutory provisions
[329] Uber (SC) n.22, paragraph 7.
[330] *Ibid*, paragraph 4.
[331] *Ibid*, paragraph 3.
[332] *Ibid*, paragraph 13.
[333] *Ibid*, paragraph 13
[334] *Ibid*, paragraph 38.
[335] *Ibid*, paragraph 12.

to the potential passenger and offers her the opportunity to accept the trip.[336] The driver has ten seconds to accept the trip. If there is no acceptance within that timeframe, the app will automatically track another driver.[337] A driver's failure to accept bookings can result in her being suspended or blocked from using the app, thereby depriving her of the ability to work.[338] When a driver accepts a booking, the app will generate a route for the journey; the driver is expected to adhere to this route unless the passenger expresses preference for an alternative route.[339] Uber calculates the fare for the trip and takes an approximate 20 percent charge from each fare.[340] UBV then generates an "invoice" for the passenger but the passenger does not receive it.[341]

The drivers' relationship with UBV was set out in a complex and convoluted series of contractual documents. The 2013 contracts, titled "Partner Agreements" denied that Uber was a transportation provider.[342] These documents attempted to place an intermediary between Uber and the driver – the "Partner" - who was responsible for the transportation services and fully liable for the acts or omissions of the driver, and the "Driver" who was defined separately.[343] Of course, the Partner and the Driver were the same person in virtually every case.[344] The passenger was designated as the "Customer."[345] The 2013 terms stipulated that the contract for transportation services was between the Partner and the Customer.[346] In addition, the 2013 terms obliged the driver to comply with the quality standards set by Uber, and failure to adhere to these standards could result in the driver's termination by Uber.[347] They also entitled Uber to deduct charges for each fare from the driver,[348] set down quality standards for the vehicles the drivers used,[349] terminate the driver's use of the app in the event of customer complaints and constantly monitor the driver's activities.[350]

The 2013 terms were replaced with new terms in 2015. Uber did not consult with the drivers regarding the content of the new terms. They were sent to the drivers via the app and had to be

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[336] *Ibid*, paragraph 12.
[337] *Ibid*, paragraph 12.
[338] *Ibid*, paragraph 21.
[339] *Ibid*, paragraph 12.
[340] *Ibid*, paragraph 94.
[341] *Ibid*, paragraph 12.
[342] *Ibid*, paragraph 14
[343] *Ibid*, paragraph 13
[344] *Ibid*, paragraph 34.
[345] *Ibid*, paragraph 14.
[346] *Ibid*, paragraph 14.
[347] *Ibid*, paragraph 14
[348] *Ibid*, paragraph 14.
[349] *Ibid*, paragraph 14
[350] *Ibid*, paragraph 14

accepted before the drivers could continue to work for Uber.[351] The 2015 terms kept the essential Uber model, described above, intact but re-labelled the parties to various contracts. The "Partner" was designated as the "Customer" and the "Customer" became the "User." The "Customer" then became the intermediary for the "Driver" despite them being one-and-the-same person and this agreement had to be sent to Uber.[352] The "Customer" (driver) had to then accept sole responsibility for the acts and omissions of its "Driver."[353] The addendum agreement then re-defines the "Customer" as the "Transportation Provider" and requires the Transportation Provider (driver) to enter a contract with the "Driver" regarding the terms of Uber's services.[354]

The 2015 terms did not contain any contractual relationships between the driver and ULL; terms being "agreed" between the driver and UBV.[355] They also required the driver to agree that Uber was not a transportation provider in any capacity whatsoever.[356] In addition, the 2015 terms outlined a performance management procedure whereby Uber would notify the Customer (driver) if the driver's "Minimum Average Rating" (passengers can rate their driver experience on the app) falls below a certain average score. The driver then has a limited time-period to improve his average score, failing which he will be deactivated from the Uber app (and therefore unable to continue working for Uber).[357] The terms did not allow the Customer / Transportation Provider / driver to send a substitute driver.[358] Uber also required the driver to accept 80% of bookings (or risk being deactivated from the app),[359] conducted interviews to assess the suitability of prospective drivers,[360] specified the make and model of cars the drivers had to use[361] and prohibited the drivers from exchanging contact details with passengers.[362]

The ET held, *inter alia*, that the drivers were employed by ULL as "workers" under section 230(3)(b) of the 1996 Act.[363] Uber's appeal to the EAT was rejected. The EAT refused Uber's attempt to "leapfrog" an application to the Supreme Court but granted its appeal to the Court of Appeal.[364]

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[351] *Ibid*, paragraph 15.
[352] *Ibid*, paragraph 15
[353] *Ibid*, paragraph 15.
[354] *Ibid*, paragraph 15
[355] *Ibid*, paragraph 15.
[356] *Ibid*, paragraph 15
[357] *Ibid*, paragraph 15.
[358] *Ibid*, paragraph 17
[359] *Ibid*, paragraph 21
[360] *Ibid*, paragraph 18
[361] *Ibid*, paragraph 19
[362] *Ibid*, paragraph 23
[363] *Ibid*, paragraph 10
[364] *Ibid*, paragraph 37

4.2 - Court of Appeal – the majority decision

The basis for Uber's ground of appeal, in relation to the employment status aspect of the case, continued to be that the drivers were self-employed businesses, not workers. The Court of Appeal, by a 2:1 majority (Bean LJ, Sir Terence Etherton MR, Underhill LJ dissenting) dismissed the appeal, holding, *inter alia*, that ULL employed the drivers as workers under section 230(3)(b) of the 1996 Act.[365] The majority's position was based primarily on the facts that only ULL (i) could accept or decline bookings for drivers, (ii) interviewed and recruited the drivers; (iii) exercised a high degree of control over the drivers via the threat of deactivation of the app unless the driver adhered to Uber's stringent requirements; (iv) retained the passenger's personal details and did not allow those details to be released to the driver; (v) fixed the fare and the driver could not subsequently negotiate a higher amount; (vi) specified the make and model of cars that drivers could use; (vii) subjected its drivers to a system of performance management; (viii) dealt with refunds to passengers without needing to consult with the driver; (ix) handled complaints about the drivers; and (x) reserved the power to unilaterally amend the driver's terms and conditions.[366]

Unsurprisingly, the majority viewed the contractual arrangements between the parties, as described above, as involving a high level of artificiality and went on to outline several "fictions" in the contracts.[367] In particular, the majority found that the relative absence of ULL from the contracts was dubious given its high degree of control over the drivers.[368] They also found that there could be no contract between the driver and the passenger before pickup because fundamental components of the contract, such as the fare and the destination, were unknown to the driver.[369] In addition, the insertion of an intermediary, the Partner (2013) or Customer (2015), was seen by the majority as an artificial construct given that the driver and Partner / Customer were almost always the same person.[370] They also observed that ULL was the resident company in London which had to fulfil the statutory requirement of being a "fit and proper person" to hold a private hire license in London.[371] For ULL to be doing so whilst simultaneously claiming to be an affiliate of UBV which licensed thousands of separate

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[365] *Ibid*, paragraphs 97 and 98.
[366] *Ibid*, paragraph 96.
[367] *Ibid*, paragraph 90
[368] *Ibid*, paragraph 91.
[369] *Ibid*, paragraphs 76 and 77.
[370] *Ibid*, paragraph 90.
[371] *Ibid*, paragraph 88

businesses "contributes to the air of contrivance and artificiality which pervades Uber's case."[372]

The majority also considered the application of *Autoclenz* to the circumstances of the case. They noted Lord Clarke's recommendation in *Autoclenz* for courts to be "realistic and worldly wise" when determining whether contractual terms accurately depicted the reality of the working relationship between the parties.[373] Accordingly, the majority viewed *Autoclenz* as allowing the Court:

"to disregard the terms of any contract created by the employer in so far as it seeks to characterise the relationship between the employer and the individuals who provide it with services (whether employees or workers) in a particular artificial way. Otherwise, employers would simply be able to evade the consequences of *Autoclenz* by the creation of more elaborate contrivances involving third parties."[374]

The majority also stated that such artificiality could be readily identified by the "reasonable person" who will be able to assess the reality, or otherwise, of the working relationship between Uber and its drivers, despite the existence of convoluted and confusing contractual terms.[375] They stressed that, whilst the worker's signature was a relevant factor to consider when determining employment status, it was not a determinative factor given the inequality of bargaining power in the employment relationship, coupled with the increasing use of drafting techniques by employers, and their advisors, which sought to evade the employer's obligations under the employment relationship.[376]

This thesis agrees with the majority's conclusions which sit well with the purposive approach advocated in this thesis. The reported factual background of the case clearly reveals that ULL exercised a high degree of control over the drivers. The most prominent examples of control were the performance management procedures, the persistent threat of deactivation from the app, fixing passenger fares and specifying the vehicles which the drivers could use. These elements of control militate against a finding that the workers were self-employed independent contractors.[377] Moreover, the majority's decision astutely observed that Uber's case was infused with fictions. The insertion of intermediary terms, the Partner and the Customer, was particularly problematic for Uber as they created a counterintuitive, unrealistic depiction of the

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[372] *Ibid*, paragraph 88
[373] *Ibid*, paragraph 49.
[374] *Ibid*, paragraph 54.
[375] *Ibid*, paragraph 105
[376] *Ibid*, paragraph 73
[377] *Byrne Brothers Limited v Baird* [2002] ICR 667.

real working arrangements. As will be argued below, the majority took the necessary measure of taking a purposive approach to the circumstances, as advocated in this thesis, recognising that the protective purposes of the statute had to prevail over the contractual wording.

4.3 The minority view

Underhill LJ's Opinion stated that *Autoclenz* could not be applied to the facts in *Uber*.[378] Indeed, he viewed *Autoclenz* as allowing a departure from the contractual wording only when the working arrangements on the ground did not reflect the content of the contractual terms.[379] This was highly relevant for Underhill LJ as he identified a general congruence between the contractual wording and the reality of the working relationship in *Uber*.[380] Moreover, he failed to see any artificiality in the contractual documents described above: they reflected a mini-cab model of operation that had been operating in London for decades.

Given the congruence between the contractual terms and the reality of the working relationship, Underhill LJ's position was that the court could not depart from the contractual wording.[381] Indeed, he interpreted the contractual wording in a strict, literal fashion and held that the drivers were self-employed.[382] He recognised that the employment relationship was infused with an inequality of bargaining power, which often leads to disadvantageous contractual terms for workers, but stated that that fact did not allow the court to re-write the contracts.[383] Instead, he saw this as a policy matter more appropriate for the legislature to act upon than the judiciary.[384]

There are various problems with Underhill LJ's Opinion. His main mistake was to adopt an unduly narrow interpretation of the *Autoclenz* judgement. This will be revisited. In the meantime, there are some other obvious flaws in his reasoning which cannot be ignored. For instance, he maintained that the drivers were self-employed whilst also recognising that Uber interviews and recruits' drivers,[385] and whilst at the same time finding that Uber exercised a high degree of control over its drivers, including the imposition of performance management procedures and dictation of vehicle specifications to drivers.[386] In addition, he saw nothing artificial regarding Uber's practice of preparing an invoice to a passenger who never receives it.[387] Surprisingly, he does not, in contrast to the ET, the EAT and the majority of the Court of

[378] *Uber (SC)*, n.22, paragraph 120.
[379] *Ibid*, paragraph 120.
[380] *Ibid*, paragraph 120.
[381] *Ibid*, paragraph 145
[382] *Ibid*, paragraph 155
[383] *Ibid*, paragraph 147
[384] *Ibid*, paragraph 164
[385] *Ibid*, paragraph 138.
[386] *Ibid*, paragraph 138
[387] *Ibid*, paragraph 138.

Appeal, appear to see *anything* artificial in any of Uber's contractual arrangements and rebuts *all* the ET's initial findings in fact in this respect.[388] He justifies these findings by explaining that they resemble models used by other private hire providers whilst also conceding that he has not assessed whether the Uber model is, or ever has been, "on-all-fours" with other taxi models.[389]

4.4 - Main differences between the majority and minority opinions

Underhill LJ's Opinion stems from his rigid adherence to the sanctity of contract[390] whilst the majority took a broader purposive approach which focused on the protective purposes of the statute. This sharp distinction between the majority and minority has been well illustrated by Bogg and Ford.[391] As they correctly observe, whilst the majority and the minority both saw *Autoclenz* as requiring an inquiry into the true agreement between the contracting parties, this mandate drew them in different directions. For this reason, they designate Underhill LJ's strict contractual approach as "contractual *Autoclenz"* and the majority's broader approach as "statutory *Autoclenz*."[392] For Underhill LJ, *Autoclenz* was given a contractual interpretation because "the written terms provided the reality of the agreement, only to be disregarded when inconsistent with practice."[393] On the other hand, the majority, when interpreting the scope of *Autoclenz*, placed more emphasis on the factual arrangements and the protective purposes of the statute conferring employment status.[394] This was in line with a broader purposive approach that the authors recommended and which the courts have taken in a series of tax and landlord and tenancy cases.[395]

4.5 *Uber* in the Supreme Court

4.5.1 Summary of the parties' submissions to the Supreme Court

Uber's appeal to the Supreme Court, in relation to the employment status aspects of the appeal, remains that the drivers are self-employed businesses rather than workers. Uber's case is essentially a repetition of Underhill LJ's judgement in the Court of Appeal. Indeed, Counsel for Uber, Dinah Rose QC, summarised her submissions, at their outset, as an endorsement of Underhill LJ's judgement in the Court of Appeal. Consequently, she stressed in her

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[388] *Ibid*, paragraph 137
[389] *Ibid*, paragraph 133.
[390] "Fredman, S, and Du Toit, D, *One small step towards decent work: Uber v Aslam in the Court of Appeal* 2019 ILJ, 48(2), 260 – 77, at p.269.
[391] Bogg, A, Ford, M, *Between statute and contract: who is a worker?* 2019 LQR, 135(Jul), 347 – 53.
[392] *Ibid*, pp349 – 50.
[393] *Ibid*, p.349.
[394] *Ibid*, p.349.
[395] *Ibid*, p.350

submissions to the Supreme Court that the contractual wording must always be the starting point for the court when it is required to determine "limb b" status. She submitted that the contractual wording is the correct lens for the court to assess the true nature of the agreement between the parties. As a result, her overarching submission is, in its essence, based squarely on the sanctity of contract. In this respect, her submissions embrace the "contractual Autoclenz" model.

By contrast, Counsel for two of the drivers, James Galbraith-Martin QC, argued in favour of the "statutory Autoclenz" approach in his submissions. The thrust of his submissions was that the contractual documentation between Uber and the drivers did not capture the reality of the working arrangements. Accordingly, his position was that the court must determine employment status with the purpose of the relevant statutory provisions as the defining lens, not the labels characterised by the employer in contracts. His submissions stress the need for a purposive approach given the inequality of bargaining power in the employment relationship, which results in workers having little-to-no say in the (sometimes fictitious and evasive) contractual terms which are imposed upon them. Accordingly, he cites cases from landlord and tenancy law to support this proposition, including the purposive approach adopted by the House of Lords in *Street* v *Mountford*[396] which was, as outlined earlier in this thesis, endorsed by Lord Clarke in *Autoclenz*. Counsel for the other drivers, Gerald Segal QC, goes even further in his endorsement of the purposive approach and specifically refers to Bogg and Ford's approach which favours the statutory approach to *Autoclenz* over the contractual reading. Accordingly, he also explicitly agrees with the authors' recommendation for the Court to follow the purposive approach, adopted in other areas of the law, in order to decide the *Uber* case. Consequently, Segal refers, with approval, to the purposive approach taken by the Court of Appeal in the tenancy case of *Bankway* which was again approved by Lord Clarke in *Autoclenz*. He also refers to the tax case of *WT Ramsay* v *Inland Revenue Commissioners*[397] where the House of Lords adopted a purposive approach to nullify a convoluted and highly artificial tax avoidance scheme. Segal submits that the purposive approach adopted in cases such as these applies equally to the *Uber* case: the protective purposes of the statute conferring employment status should restrict the parties' freedom to contract where the contractual wording itself is artificial.

4.5.2 A Purposive Approach to *Uber*

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[396] See n.210

[397] [1982] AC 300

It would be disappointing if the Supreme Court preferred the "contractual *Autoclenz"* approach over the "statutory Autoclenz" approach. A predominant focus on the contractual wording ignores the fact that the creation of contractual terms and conditions in labour law is typically imbued with an inequality in bargaining power. This can allow employers to insert fictitious clauses into contracts, and the worker has no means to negotiate with the employer on such terms. Moreover, the incredibly strict emphasis on the contractual wording, argued for by Uber in their Supreme Court submissions, places an unduly onerous burden on claimants who wish to establish that they are workers under the relevant legislation. In this respect, it does not sit well with the inclusive purposes of the legislation which were described earlier in this thesis. It also makes it easier for employers, and their advisers, to evade their responsibilities towards their workers by continually re-wording, and re-contextualising, the contractual documents. In addition, there is an underlying strain in the logic of Underhill LJ's judgement which is encapsulated well by Fredman and Du Toit:

"By the same reasoning (as Underhill LJ used in *Uber*), it would seem, a shop assistant serving customers of the business where she works could be deemed to be entering into a private contract with each "direct beneficiary' whom she serves, without being a worker or employee of the business on which she is dependent and the services of which she is marketing as an "integral part' of its operation, if that is what her contract with the business says."

This strain is relevant because, as previously highlighted, Uber's submissions to the Supreme Court amount to an endorsement of Underhill LJ's approach.

It is suggested that the Supreme Court should follow the reasoning of the majority in the Court of Appeal. The majority took a broader, purposive approach to the case. They stressed the fundamental importance of the statutory wording conferring worker status and, as a result, they interpreted the contractual wording with the statute's protective and inclusive provisions at the forefront of their thinking. Staying with Bogg and Ford's terminology, for the sake of brevity and clarity, this thesis therefore takes the view that "statutory *Autoclenz*" was adopted by the majority and is a superior approach to "contractual *Autoclenz*." The statutory approach reflects the purposive approach advocated in this thesis. It does so by prioritising the protective provisions of the statute over the wording in the contract. In doing so, the statute's purpose is at the forefront of the judge's reasoning process, as it should be. Indeed, as described in section 2.5.3, the purpose of introducing the intermediate category of "worker" was to broaden the scope of certain employment rights to a wider category of individuals. As Bogg and Ford observe, it would be unfortunate if that purpose was to be frustrated by a series of "labyrinthine

written contracts."[398] In addition to complying with the purposes of the statute, the "statutory *Autoclenz"* approach also avoids the difficulties, outlined in section 2.5.3 and this chapter, which a strict adherence to contract necessarily entails.

Having taken a position on which approach the Supreme Court should adopt, this thesis will now go on to consider *how* the purposive model, built in this thesis, should be applied to the circumstances in *Uber*.

4.5.3 The purposive model applied to Uber

The model built in this thesis allows two separate argumentative pathways, focused on the purposive approach, which both reach the same finding: that the Uber drivers are workers. If the Supreme Court is to decide the issue of worker status in accordance with the purposive approach advocated in this thesis, and it is submitted that it should, then the first pathway for the Court would be to simply use Bogg's presumption of worker status and assess whether Uber can show clear evidence to the contrary. This is the simpler of the two pathways. The other pathway involves a combination of several of the model's components. Bogg's simpler approach will be considered first.

4.5.4. A presumption of worker status

Bogg's idea is not a novel proposition. Indeed, section 28(1) of the NMWA already contains a rebuttable presumption that an individual engaged in civil proceedings will be assumed to qualify for the national minimum wage unless clear evidence to the contrary can be shown by the employer. Bogg simply takes this idea one step further and applies it to other claims, such as those under the WTR, which workers are entitled to bring in ET proceedings. If the Supreme Court is to hold, in line with Bogg's argument, that *Autoclenz* created such a presumption, two questions would arise. Can Uber show clear evidence that the drivers are self-employed? If the answer to the first question is "yes" the next question becomes: how could Uber do this?

Uber's position is that the drivers are operating independent businesses and that the passengers are the driver's customers. If this argument is accepted by the Supreme Court, it would negate a finding of worker status. However, this argument is very unlikely to succeed. A contract of service is governed by general contract law, rather than by specific labour law principles. Consequently, Uber's first problem with this argument is that, on general contractual principles, there does not appear to be a contract between the drivers and the passengers. Uber's position, which seems illogical under general principles of contract law, is that there is a

[398] N.391, p.351.

contract between the driver and the passengers in circumstances where the driver does not know the destination of the passenger until she has picked up the passenger, does not know the identity of the passenger, cannot negotiate a higher fare with the passenger, cannot claw back any money from the passenger for damage that the passenger might cause to the vehicle, cannot exchange any contact details with the passenger and can have the fare unilaterally deducted by Uber, without consultation with the driver, in the event of a complaint by the passenger regarding the driver. Viewed in the round, the supposed "contract" between the drivers and passengers therefore lacks many of the fundamental features of a contract *per se*. Accordingly, the Supreme Court should hold, as a matter of general contractual principles, that there was not a contract between the drivers and passengers.

In addition, the facts, as established by the Employment Tribunal and referred to above, strongly point against the conclusion that the drivers were self-employed businesses. The facts evidence that ULL had a high degree of control over the drivers, as described earlier in this chapter, and that the drivers were integrated into Uber's business. This points towards worker, rather than self-employed, status.[399] They also strongly point towards the conclusion that the drivers were personally responsible to deliver services to Uber as there was no right of substitution in any of the contracts. These factors again indicate worker, rather than self-employment, status. In addition, the fundamental features of self-employment are missing in this case. There is no opportunity for drivers to increase the profitability of their activities: they are prohibited by Uber from negotiating higher fares with passengers and from exchanging contact details with them again (in the hope of repeat business without Uber acting as the referral source). In this respect, the drivers are completely dependent on Uber for the customer referrals they receive. They also cannot spread their economic risks across a broad spectrum of clients, as is the case with genuinely self-employed individuals. In essence, the drivers in Uber were economically dependent and subordinate to Uber. Again, this points away from self-employed status and towards worker status. Consequently, if the Supreme Court was to apply Bogg's presumption to determine *Uber*, and it is argued that it should, then it should arrive at the conclusion that the drivers were workers. This thesis will now go on to analyse the second argumentative pathway facilitated by the purposive model it has built.

4.5.5 The purposive model in action – *Uber*

The second argumentative pathway is based on a combination of several of the theoretical components in the purposive model built in this thesis, including the purposive approach,

[399] ***Pimlico Plumbers*** v ***Smith*** [2018] UKSC 29. *Cotswold Development Construction Limited* v *Williams* [2006] IRLR 181.

contextual purposive interpretation, a recognition of the inequality of bargaining power in the employment relationship and the use of weighted Dworkinian principles.

The purpose of the legislation should be considered first. The purpose of the national minimum wage, under NMWA, is to ensure a fair level of pay and to avoid exploitation of workers. The purpose of the right to paid time off, under the WTR, is to ensure that the worker can balance her work life with rest and recreational opportunities. Consequently, it is suggested that these legislative provisions have protective purposes: to help ameliorate the power imbalance in the employment relationship, by conferring basic employment protections, and to thereby assert the dignity of the worker. Indeed, these claims are based on basic social rights and Parliament legislated to give them a wider application when they introduced the "concept" of worker into UK labour law. So, the purposive approach requires the judge to interpret these provisions in line with their protective and inclusionary purposes.

This should lead the judge to engage on what this thesis has labelled contextual purposive interpretation which was outlined in section 2.5. Indeed, section 2.5.3 recommended the line of reasoning which the judge should adopt, in cases such as *Uber*, where there is a complex and convoluted series of contractual terms, at least some of which are artificial. It is suggested that at least some of the contractual terms in the *Uber* case were undoubtedly artificial. Perhaps the most prominent example was the introduction of a clearly fictitious intermediary - the Partner (2013) or the Customer (2015) - between the drivers and Uber. As highlighted earlier in this thesis, these are obviously one-and-the-same people. The statutory approach to *Autoclenz*, which is advocated in this thesis over the contractual approach, would allow the Supreme Court to elevate the protective purposes of the NMWA and WTR over the artificial contractual arrangements. Not only has the statutory approach been argued as being the better way of dealing with "evasive" employer tactics, but it is also clear that it is the approach which Lord Clarke had in mind when he handed down the Court's judgement in *Autoclenz*. Indeed, as previously mentioned, Lord Clarke referred to the *Street* v *Mountford* and *Bankway* cases, with approval, as being legitimate examples of when the court can prioritise the protective purposes of the statute over artificial, or fictitious, contractual wording. That is the very essence of the "statutory *Autoclenz"* model which Bogg and Ford recommend. It is, by this point in the thesis, also clear from the case-law which has been considered that the Uber drivers satisfied the statutory requirement of worker status: ULL exercised a high degree of control over the drivers, at points verging on micromanagement, the drivers were engaged in personal service with no chance to send a substitute, they had no chance to increase the profitability of their activities and were completely dependent on Uber for customer referrals. Consequently, they

were clearly workers under the relevant legislation irrespective of whether Bogg's presumption is applied. Given that they satisfy the legislative definition, they should be held by the Supreme Court to be workers regardless of the existence of patently artificial and evasive contractual terms which try to argue otherwise.

Aspects of Dworkin's theory of adjudication also come into play to support the worker finding. There is, like *Autoclenz*, a clash of principles in *Uber*. The most pronounced clash is between the principle of freedom of contract, argued for by Uber and sanctified by Underhill LJ in his dissent, and the reality of the situation; a reality which must be understood in the context of the principle that there is a stark inequality of bargaining power in the employment relationship. This inequality is clearly at play in the *Uber* case. By way of example, the drivers had to accept the 2015 terms, unquestioningly, before being allowed to work. Given this inequality of bargaining power, and the factors mentioned above, the principle of freedom of contract should be outweighed by the reality of the situation, contextualised by the inequality of bargaining power between Uber and its drivers. The principle of freedom of contract should be given little-to-no weight in this case because the contractual terms themselves were, at least in part, artificial. In addition, the drivers had no negotiating power in respect of these artificial contractual terms. These combined considerations render the principle of "freedom to contract" in the *Uber* case as no more than a sham arrangement which favoured Uber's interests.

If the Supreme Court goes on to hold that the drivers are workers, as it should, this finding will cohere with the broader legal system. Indeed, the statutory *Autoclenz* approach fits well with a line of tax cases, beginning with the *Ramsay* case referred to earlier in this Chapter, and with the decisions in *Street* v *Mountford*, *Bankway* and, most importantly, in the labour context, with *Autoclenz* itself.

Consequently, it is suggested that this second argumentative pathway is a good demonstration of how the purposive model built in this thesis can allow the judge to reach a decision which accords with the reality of the working arrangements which the drivers faced - they were workers, not self-employed independent contractors. If the Court adopts a purposive approach, it would therefore be allowing a vulnerable group of workers to re-assert their statutory rights, whilst also pointing UK labour law in a more purposive direction which can meet its challenges, and align with its underlying goals, in a more effective way than the traditional "plain-meaning" or literal approach allows.

Chapter 5 – conclusion

This Thesis has blended a mixture of pessimism and optimism. On the downside, it seems likely that the toxic mixture of Brexit and COVID-19, coupled with the Conservative Governments' enthusiasm to deregulate UK Labour Law, will lead to a repeal, or at least regressive amendments, of some EU-derived workers' rights in the UK. This is concerning because the EU has been an important source of progressive labour reforms in the UK over the last few decades, not to mention the fact that UK labour law has already been in a state of crisis for several decades. On the upside, the thesis illustrates how a reconceptualization of the judicial approach to labour law might help to mitigate these adverse effects if they come to pass. A purposive approach to judicial interpretation has been advocated to assist in this prospective exercise.

As this thesis has demonstrated, the purposive approach to labour law has been gathering pace at a judicial level, first in the House of Lords, and now in the UK Supreme Court, for several decades. This is highly significant: if there is going to be a more general shift towards a purposive approach in UK labour law cases, this will have to be spearheaded at the highest judicial level. It is hoped that this shift takes place, but it is hard to gauge at this stage whether it will come to pass. A finding by the Supreme Court in favour of the Uber drivers, based on a purposive approach, would certainly be a step forward.

The thesis has progressed on the basis that different areas of law will require their own, individuated judicial modes of reasoning. The purposive model of adjudication, advocated in this thesis, is specifically tailored to labour law disputes. Cases such as *Autoclenz* have been referred to, and analysed, in order to exemplify the contention that labour law requires a judicial approach which departs from the judiciary's approach in other commercial disputes. The principal reason for this differentiation is that labour law is a legal subset where there is generally a large gulf in the bargaining power, and more generally the power dynamics, between the contracting parties. A review of Kahn-Freund's work was conducted to illustrate how the traditional theoretical paradigm in labour law has been to try to ameliorate this power imbalance and thereby restore the dignity of the worker. The thesis has sought to highlight that this power imbalance is a very real one, involving a cycle of subordination and dependency, and that rapid changes to the workforce have had the effect of increasing many workers' subordination and vulnerability in the workplace, particularly in areas such as the gig economy and zero hours working. As a result, this thesis has maintained that the traditional paradigm of

labour law, to redress the power imbalance in the employment relationship, is more important now than ever. This goal is being recognised at the highest judicial level in the UK, as the *Autoclenz* and *Unison* case analyses demonstrate.

Two of the most prominent theories on purposive interpretation, those of Davidov and Barak, have been analysed and found lacking in several respects. This thesis has attempted, in building a new model of purposive interpretation, to rectify the defects identified in Barak and Davidov's theories. With respective to Barak's theory, it has been shown to be overambitious in trying to apply a purposive model across all areas of the law. It fails to take account of the need for individual modes of judicial reasoning in different areas of the law. In addition, Barak has placed undue emphasis on subjective legislative intention. The model built in this thesis rectifies these problems by tailoring the purposive model to one area of law and by re-focusing attention on the broader purposes of the statute, as opposed to subjective legislative intention. With regard to Davidov's theory, this thesis has shown how it fails to recognise that the problem of inequality of bargaining power is inextricably linked to the problems of workers' subordination and vulnerabilities. Whilst this thesis agrees with some of Davidov's theoretical components, it takes the view that his theory fails to show how the purposive approach can be applied to legal cases. The present thesis has utilised case studies, and the application of the advocated model to a pending Supreme Court decision, to demonstrate that the purposive approach is not just theoretically sound; it is also fit for use by judges in real labour law cases. Indeed, as the case analyses have shown, the purposive model advocated in this thesis offers a more dynamic and flexible means of judicial interpretation in labour law decisions than the traditional literal approach allows. This need for flexibility, and dynamism, is vital given the rapid socio-economic changes in UK society and the continually changing nature of the workforce. If a more flexible approach is not adopted by the UK judiciary in labour law cases, it is likely that labour laws will fall further behind societal developments. Purposive interpretation has also been defended from its main critics and justified with reference to case-law and jurisprudential theory. In doing so, a new model of purposive interpretation, specifically tailored to counteract the principal challenges of labour law, has been constructed to guide statutory, contractual and common law interpretation in labour law disputes.

The theory advocated in this thesis allows judges greater flexibility in the interpretation of statutes than the literal approach allows. It does so by acknowledging that language is indeterminate in its nature and that the judge must, as a result, choose an interpretation from within a range of semantic possibilities to best reflect the underlying purposes of the statutory provision, and the statute and legal system. The interpretation need not be the most obvious

interpretation; it is sufficient that it complies with the boundaries of semantic sensibility and that it generally fits within the broader legal system. This method of statutory interpretation is well exemplified in the *Gilham* case study. Similarly, in common law interpretation, the judge need not necessarily apply the most obvious rule or precedent to determine the issue: she must pick that which best complies with the purpose of the legal system. This may be done by weighing legal principles and selecting the most morally attractive principles which apply to the circumstances of the case at hand. These principles underlie the relevant legal rules and precedents, and their relative weight will determine which rule or precedent should apply to the case. Again, the precedent or rule selected must also cohere with the broader legal system, otherwise permissible judicial interpretation risks straying into the realm of impermissible judicial legislation, but it need not be the most obvious legal interpretation. The requirement to combine flexibility with the need for legal certainty is necessary because the common law is a living instrument which must move in tandem with societal changes. This need for flexibility is exemplified in the *Hounga* case study. The purposive approach to contractual interpretation, advocated in this thesis, recognises that the power imbalance in the employment relationship will often lead to situations where contractual documentation is artificially contrived to attempt to circumvent the employers' obligations under the employment relationship. The purposive model asks judges to be alive to such possibilities and look to a wide range of extrinsic evidence, including the actual practices of the contracting parries, to determine the real nature of what the parties agreed. This is well exhibited by the *Autoclenz* decision. In addition, the purposive model recognises that there will be situations where the judge must look to prioritise the protective purposes of the statute over the contrived wording of an artificial contract. This is the approach which this thesis recommends the Supreme Court should take in the pending *Uber* decision.

The use of Dworkinian principles by the judiciary is particularly helpful to the purposive approach. As demonstrated in several of the case analyses, the contextual nature of such principles, and their relative weight, allows the judge ample flexibility in her interpretative task. This flexibility allows the judge to reach a legal conclusion which best accords with the purposes of the legal text in question and to contextualise her mode of reasoning relative to the area of law being adjudicated. The requirement of Dworkinian coherence also assists in constraining the discretion of the judiciary lest the flexibility of the purposive approach leads them down the path of judicial legislation. In this respect, the Dworkinian approach helps to maintain the judiciary in an interpretative, rather than a legislative role. Dworkin's emphasis on dynamic statutory interpretation was also referred to, and exemplified in the *Gilham* case

analysis, in order to show its practical effectiveness to the purposive model advocated in this thesis.

The model of purposive interpretation, built in this thesis, has the potential to mitigate the adverse impact of potential deregulatory labour law measures in a post-Brexit UK. However, the pessimistic predictions outlined in this thesis, relating to labour law deregulation in a post-Brexit UK, may themselves not come to pass. It is hoped that will be the case. Regardless of how these political matters progress, this thesis maintains that the purposive approach which is advocated is the right approach for UK labour law to take in any event. It has been shown, throughout this thesis, to meet the main challenges and principal goals of labour law in a highly effective manner. Even if deregulation does not take place, the purposive approach remains the most promising way at present to fulfil labour law's most important goal: the amelioration of the power imbalance in the employment relationship and the consequent re-assertion of the dignity of the worker.

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