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Employment Status and Human Rights: An Emerging Approach

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The question of who falls within the 'personal scope' of employment law is of fundamental importance to the field but remains highly contested. This article makes a novel contribution by examining the implications of human rights in this context and advocating a fundamental shift in the courts' approach to personal scope. It suggests that where employment legislation functions to protect human rights the scope of these statutes should, at the level of normative principle, be construed inclusively with any exclusions needing to be justified. The article then argues that the effect of the Human Rights Act 1998 is to introduce a new human rights approach to employment status into English law which closely reflects this proposal. It sets out the frameworks that domestic courts should apply, and critically assesses a line of recent cases which illustrate the emergence and significance of this human rights approach to personal scope.

INTRODUCTION

The 'personal scope' of employment law refers to the class of working relationships and arrangements that fall within the legal category of employment, and therefore attract statutory rights and protections.[1] Despite having 'challenged legal minds for over a century',[2] the personal scope of employment law remains among 'the most contentious and crucial questions in the field'.[3] Recent litigation and debates regarding the employment status of those working in the gig-economy have dominated scholarly attention and news headlines, but are merely a symptom of deeper tensions and longstanding trends.[4]

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1 This is sometimes also known as the 'relational scope' of employment law, and the two terms are used interchangeably here.
2 Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 OJLS 353, 369.
3 Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 OJLS 543, 543.
4 See Collins, n 2 above; Judy Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44 *Osgoode Hall Law Journal* 609.

In English law, the personal scope of employment law is defined via the concepts of 'employee' and 'worker' status.[5] Workplace rights and standards such as the minimum wage, holiday pay, maternity and parental leave, protections of trade union membership and collective action, as well as against unfair dismissal and discrimination, accrue only to those who can demonstrate the requisite employment status. The law on employee and worker status therefore serves a crucial function as the primary gateway to statutory employment rights and determinant of employment law's coverage. The prevailing view, however, is that courts have struggled to apply the concepts of employee and worker in a manner that has kept pace with developments in the labour market. This has resulted in 'the exclusion of workers in non-traditional work arrangements who are in fact in need of protection',[6] and is a central cause of what Davidov describes as the ongoing 'coverage crisis' in employment law.[7] The 'purposive approach' to employment status developed by the Supreme Court in *Uber BV* v *Aslam* (*Uber*) may be of some help in this regard,[8] but as yet its impact remains highly uncertain. In addition, prominent voices have suggested that courts have little capacity to reshape the coverage of employment law in response to changes in the organisation of work, and that parliamentary intervention is needed.[9] But there is little prospect of meaningful reform to employment status in the offing,[10] making it vital to consider non-legislative responses to the question of personal scope.

Against this backdrop this article examines the implications of human rights for the question of personal scope. It advocates a fundamental shift in the courts' approach to determining employment status and identifies the emergence of a new human rights approach to personal scope in English law which has so far been largely overlooked. Although it is now common to adopt a human rights perspective on employment law,[11] the significance of human rights for employment status is yet to be adequately considered. Some scholars have raised the possibility that the influence of human rights on employment law

5 See, for example, Employment Rights Act 1996 (ERA 1996), s 230.

6 Davidov, n 3 above, 549. See also Sandra Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 ILJ; Jeremias Prassl and Einat Albin, 'Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion' in Mark Freedland and others (eds), *The Contract of Employment* (Oxford: OUP, 2016).

7 Davidov, *ibid*.

8 *Uber BV* v *Aslam* [2021] UKSC 5; Alan Bogg and Michael Ford, 'Between Statute and Contract: Who Is a Worker?' (2019) 135 LQR 347; Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 LQR 392; Joe Atkinson and Hitesh Dhorajiwala, 'The Future of Employment: Purposive Interpretation and the Role of Contract after Uber' (2022) 85 MLR 787.

9 See Patrick Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 OJLS 869; Underhill LJ's dissenting judgment in *Aslam* v *Uber* [2018] EWCA Civ 2748.

10 See Department for Business, Energy & Industrial Strategy, 'Good Work Plan' (2018) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf [https://perma.cc/KN9X-946U].

11 See for example Keith Ewing, 'The Human Rights Act and Labour Law' (1998) 27 ILJ 275; Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart, 2010); Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011); Virginia Mantouvalou, 'Are Labour Rights Human Rights' (2012) 3 Eur Lab LJ 151; Einat Albin, 'Introduction: Precarious Work and Human Rights' (2012) 34 Comp Lab L & Pol'y J 1.

should lead to an expansion in its protective scope.[12] But there has been little assessment of whether human rights should, or do, have this effect either at the level of normative principle or as a matter of law. This article is the first to fully address these important questions. I argue that human rights should exert substantial influence over the construction of employment status and set out, for the first time, the distinctive approach to personal scope required by the Human Rights Act 1998 (HRA 1998). The emergence of this human rights approach represents a dramatic shift in the courts' enquiry with potentially far-reaching consequences for the boundaries of employment status.

The first part of the article provides some necessary context on the question of personal scope and the courts' current approach to determining employment status. The second part explores the implications of human rights for the definition of employment status at the level of normative theory. I advance an interpretive principle whereby the personal scope of employment statutes should be construed inclusively in the extensive range of cases where the legislation secures human rights. Part three then considers the implications of human rights for employment status as a matter of English law, focussing on the HRA 1998. I argue that the HRA 1998 requires an approach to employment status that is closely aligned to the normative principle proposed in part two. The state's positive obligations to protect Convention rights and the Article 14 right to non-discrimination both require that domestic courts seek to include claimants within the definitions of employee and worker status where Convention rights are at stake. A series of recent cases are also identified and discussed, which signal the arrival and significance of this proposed human rights approach to personal scope.

Before proceeding along these lines, it is worth noting that while the focus here is on the implications of human rights for the personal scope of employment legislation, much of the argument applies to other types of rules limiting the coverage of these statutes. The HRA 1998 might therefore also be used in similar ways to challenge procedural rules that restrict access to statutory employment rights such as limitation periods,[13] or employment tribunal fees.[14]

THE QUESTION OF PERSONAL SCOPE

An individual's entitlement to statutory employment rights in English law depends on whether they can demonstrate their working arrangements fall within the boundaries of 'employee' or 'worker' status.[15] If not they are classed as self-employed and excluded from these statutory protections. While always crucial

12 Virginia Mantouvalou and Hugh Collins, 'Human Rights and the Contract for Employment' in Freedland and others (eds), n 6 above; Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2017) 46 ILJ 185; Philippa Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47 ILJ 504.

13 For example, Employment Rights Act 1996 (ERA 1996), s 108 and s 111.

14 See the now defunct Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013.

15 In this article 'worker' status is used to refer to the extended definition of employment sometimes known as 'limb-b worker' status, contained in ERA 1996, s 230(3)(b).

for employment lawyers, the definition of these categories has taken on renewed urgency in recent years. The decline in collective bargaining and increased emphasis on individual legal rights at work means employment law can now much more readily be characterised as a series of statutory protections for those within the category of employment, thus heightening the importance of how this class is defined. In addition, fragmentation and fissuring of workplaces has led to courts repeatedly having to decide whether new working arrangements amount to employment.[16] The 'rapidly increasing prevalence' of atypical forms of work in the UK,[17] such as agency work, zero-hours contracts and on-demand work performed via online platforms challenges the traditional boundaries of employment law, and courts have struggled to apply the concepts of employee and worker status to these relationships.[18]

There is a weighty body of case law and scholarship on the correct approach to determining employment status. At heart, however, the issue is one of rights allocation: who is, or should be, entitled to which statutory employment rights and protections? This question is answered both by parliament, through the creation of employee and worker status and the allocation of statutory rights to each group, and the courts, who must construct and give meaning to these two categories. But in practice it is largely the courts who delineate the personal scope of employment law because the statutory definitions of employee and worker leave them with considerable work to do in giving substance to these concepts. Employees are defined as those working under a contract of employment, which in turn is defined by reference to the common law category of a contract of service.[19] The boundaries of employee status are therefore determined by the courts' case law on this class of contracts. Worker status is defined, in domestic law at least,[20] as also encompassing individuals contracting to perform work personally for another who are not carrying out a business undertaking.[21] Although this definition has greater substantive content than employee status courts must still determine what is meant by personal performance and carrying out a business enterprise.

In exercising their 'broad discretion' over the construction of employment status,[22] courts are necessarily confronted with difficult choices regarding who is entitled to statutory protections. This is in part a question of 'basic corrective justice'; namely 'whether this putative "employer" owes a duty to this

16 On this phenomenon see Fudge, n 4 above; David Weil, *The Fissured Workplace* (Cambridge, MA: Harvard University Press, 2014); Collins, n 2 above.

17 Jeremias Prassl, 'Who Is a Worker?' (2017) 133 LQR 366, 366.

18 Davidov, n 3 above, 549.

19 Employment Rights Act 1996, s 230(1) and (2).

20 The EU worker concept may include individuals who are classed as self-employed in domestic law, Case C-256/01*Allonby* v *Accrington & Rossendale College* ECLI:EU:C:2004:18 at [71]. See Nicola Countouris, 'The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope' (2018) 47 ILJ 192.

21 ERA 1996, s 230(3)(b). An extended concept of employment, encompassing those contracting 'personally to do work', is also adopted by the Equality Act 2010 s 83. However, this has been interpreted as having broadly the same meaning as worker status, *Jivraj* v *Hashwani* [2011] UKSC 40.

22 Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: OUP, 2016) 115.

putative "worker"'.[23] But broader considerations and values are also at stake. The personal scope of employment law is a matter of distributive justice, as it determines who benefits from legal entitlements and can call upon the resources of the state to enforce these claims, in the form of the legal system.[24] Employment standards make a valuable contribution to the common good,[25] and considerations of public policy arise when determining their scope of application,[26] just as they do when determining the extent of common law duties of care. As with many instances of legal interpretation in hard cases therefore, courts cannot avoid 'contestable value judgments' when determining the personal scope of employment legislation.[27]

The task of giving substance to employee and worker status is further complicated by the fact that there are no naturally existing categories captured by these terms.[28] Unlike 'natural kind' concepts which pick out 'things that have a fixed identity in nature',[29] employee and worker status lack any fixed 'extension' that they correspond to in the real world.[30] They are instead instances of the class of terms, as described by Hart, that 'do not have the straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition'.[31] The courts' usual starting point when interpreting legislation, that the text should be taken to bear its ordinary meaning,[32] therefore provides little assistance in this context. What Lord Wedderburn called the 'elephant test' for identifying employment, meaning 'an animal too difficult to define, but easy to recognise when you see it',[33] is similarly unhelpful. While there may be a *social* understanding of employment, Rogers rightly points out that it is an 'error of transposition' to think that the *legal* concept of employment status necessarily tracks this.[34]

Without straying too deep into jurisprudential waters,[35] it follows that when determining the relational scope of employment law courts are involved in a normative rather than merely descriptive endeavour.[36] As Freedland says, they

23 Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 7, 25.
24 John Gardner, 'What Is Tort Law for? Part 2. The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford: OUP, 2013).
25 As recognised in *R (Unison)* v *Lord Chancellor* [2017] UKSC 51.
26 Collins, n 2 above, 377.
27 Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 Harv L & Pol'y Rev 479, 496.
28 Katie Bales, Alan Bogg, and Tonia Novitz, '"Voice" and "Choice" in Modern Working Practices: Problems with the Taylor Review' (2018) 47 ILJ 46, 60.
29 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press 2011) 159.
30 Hilary Putnam, *Philosophical Papers: Volume 2, Mind, Language and Reality* (Cambridge: CUP, 1975) 269.
31 H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: OUP, 1983) 23.
32 *R* v *Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2000] UKHL 61.
33 Kenneth William Wedderburn, *The Worker and the Law* (London: Penguin, 3rd ed, 1986) 116.
34 Rogers, n 27 above, 498-499; Pierre Schlag, 'How to Do Things with Hohfeld' (2014) 78 Law & Contemp Probs 185, 192-198.
35 On interpretive and natural kind concepts see Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 OJLS 1.
36 Bales, Bogg, and Novitz, n 28 above.

are engaging in 'an active process of assignment of workers' rights rather than a purely passive recognition of where they are supposedly naturally located'.[37]

Given these difficulties, how have the courts' approached the task of defining the personal scope of employment law? While a detailed exposition is unnecessary for present purposes,[38] an overview will help in understanding the impact of human rights in this context. In addition to the existence of a valid contract, the courts' conventional approach to identifying contracts of employment is that they involve a wage-work bargain between the parties, a degree of employer control over the conditions and manner of performance, and no contractual terms inconsistent with their status as employee.[39] An overarching or 'umbrella' contract of employment also depends on continuing mutual obligations to offer and perform work.[40] Without these ongoing obligations an individual will lack employee status during periods away from work, so struggle to claim rights with minimum qualifying periods of employment.[41] Other key indicia include an individuals' level of integration into the employing entity,[42] and the extent to which they are in business on their own account.[43] There is, however, no precise formula for the application of these various factors.

The impact of the recent Supreme Court decision in *Uber*[44] on employee status is currently uncertain. It may well be significant, however, as following *Uber* a purposive approach must be adopted to both employee and worker status.[45] The 'ultimate question' being 'whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction'.[46] The class of 'contracts of service' must therefore now be defined in a manner that achieves the underlying purpose of employment statutes, identified by the Supreme Court as being the protection of individuals working in 'subordinate and dependent' positions.[47] Furthermore, when applying this purposive approach courts should look to the reality of the parties' relationship rather than their written agreement.[48] The extent to which these principles disrupt the boundaries of employee status remains to be seen.

37 Mark Freedland, 'The Segmentation of Workers' Rights and the Legal Analysis of Personal Work Relations: Defining a Problem' (2015) 36 Comp Lab L & Pol'y J 241, 244.
38 For a comprehensive treatment see Simon Deakin and others, *Deakin and Morris' Labour Law* (Oxford: Hart, 7th ed, 2021) ch 2.
39 *Ready Mixed Concrete Ltd* v *Minister of Pensions* [1968] 2 QB 497; A.C.L. Davies, *Perspectives on Labour Law* (Cambridge: CUP, 2nd ed, 2009) ch 5.
40 *O'Kelly* v *Trusthouse Forte* [1984] QB 90 (CA); Nicola Countouris, 'Mutuality of Obligation' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015).
41 *McMeechan* v *Secretary of State for Employment* [1997] ICR 549. For discussion see A.C.L. Davies, 'The Contract for Intermittent Employment' (2007) 36 ILJ 102.
42 *Stevenson, Jordan & Harrison Ltd* v *MacDonald & Evans* [1952] 1 TLR 101.
43 *Market Investigations Ltd* v *Minister for Social Security* [1969] 2 QB 173; *Stringfellows* v *Quashie* [2012] EWCA Civ 1735 (CA).
44 *Uber* n 8 above.
45 *ibid* at [69]-[71]; Bogg and Ford, 'The Death of Contract in Determining Employment Status' n 8 above, 395; Atkinson and Dhorajiwala, n 8 above.
46 *Uber ibid* at [70], citing *Collector of Stamp Revenue* v *Arrowtown* [2003] HKFCA 46 at [35].
47 *Uber ibid* at [71], citing *Byrne Bros (Formwork) Ltd* v *Baird* [2002] ICR 667 (EAT) at [17].
48 *Uber ibid* at [76].

Many core employment rights have now been extended to the intermediate category of 'worker' status.[49] In addition to including those with contracts of employment, workers are defined, with some slight variation,[50] as individuals contracting to 'perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.[51] The three key requirements for worker status are therefore: a contract to perform work or services, an undertaking of personal performance, and that the other party to the contract is not a client or customer of the individual.[52] Following the Supreme Court decision in *Uber* a purposive approach must be adopted when applying each of these three elements, which therefore need to be interpreted in a manner that achieves the legislation's underlying goal of protecting individuals working in positions of subordination and dependency.[53] Again it is the reality of the relationship that matters and should be taken as the starting point for the courts' analysis, rather than how it is depicted in any written documentation.

Importantly, claimants bear the burden of proving they have the requisite employment status,[54] and the courts' approach to personal scope has resulted in many atypical workers failing to overcome this threshold and therefore being denied statutory employment rights. Agency workers, for instance, have no contract with the end-user company so are not ordinarily employed by them,[55] but may also struggle to show they are employed by the agency.[56] Casual workers, including those on zero-hour contracts, have been excluded from employee status due to an absence of ongoing obligations to perform work.[57] Others are denied statutory protections because their contracts contain substitution rights that are deemed incompatible with the requirement of personal performance.[58] It may be that the purposive approach developed in *Uber* will eventually extend statutory employment rights to previously excluded groups such as these. Irrespective of whether this possibility materialises, however, the remainder of this article argues that human rights have significant implications for the

49 See for example ERA 1996, s 230; National Minimum Wage Act 1998, s 54; Working Time Regulations 1998, reg 2; Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), s 296(1). Rights not extended to limb-b workers include those to unfair dismissal, redundancy payments, and maternity and parental leave.

50 Compare TULRCA 1992, s 296; ERA 1996, s 230(2).

51 ERA 1996, s 230(3)(b)

52 *Uber* n 8 above at [41].

53 *ibid*. Lack of control over the conditions and performance of one's work is a key proxy for this subordination and dependency.

54 The exception being the Minimum Wage Act 1998, s 28.

55 *James* v *Greenwich LBC* [2008] EWCA Civ 25; *Smith* v *Carillion (JM) Ltd* [2015] EWCA Civ 209.

56 *Dacas* v *Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217. Agency workers may however be protected by specific statutory provisions, see Equality Act 2010, s 41; National Minimum Wage Act 1998, s 34.

57 *O'Kelly* v *Trusthouse Forte* n 40 above; *Secretary of State for Justice* v *Windle* [2016] EWCA Civ 459; Joe Atkinson, 'Zero-Hours Contracts and English Employment Law: Developments and Possibilities' (2022) 13 *European Labour Law Journal* 347.

58 See recently *Independent Workers Union of Great Britain* v *The Central Arbitration Committee* [2021] EWCA Civ 952.

law on personal scope at both the level of normative principle and English law.

THE RELEVANCE AND EFFECT OF HUMAN RIGHTS

The implications of human rights for the personal scope of employment law remains an underexplored issue. Some scholars have rightly identified a tension between the universal nature of human rights and the more restrictive scope of employment law,[59] while others have claimed that their influence should lead to a wider personal scope for specific employment law frameworks.[60] Collins and Mantouvalou briefly consider this in their discussion of human rights and the contract of employment, and suggest that the 'scope of application of employment laws should be presumed to be universal' where the protections are underpinned by human rights with any exclusions needing to be justified as proportionate.[61] But there has been little sustained analysis of whether, or why, human rights should in fact have this effect. This section considers the normative implications of human rights for the personal scope of employment law in more depth and argues there are good reasons for thinking that human rights should lead to an inclusive definition of employment status.

An initial question that might be asked regarding the implications of human rights for employment status is why human rights are even relevant in this context. Human rights are generally understood as applying 'vertically', between the state and individuals whereas employment law regulates 'horizontal' relationships between private actors.[62] There is, however, a growing consensus that human rights are relevant in horizontal relationships, primarily due to the positive obligations of states to protect and secure human rights.[63] States have duties to establish policies and legal frameworks that enable people to exercise and enjoy their human rights free from infringements by third parties.[64]

59 Sandra Fredman, 'Equality Law: Labour Law or Autonomous Field' in Bogg and others (eds), n 40 above; Collins, n 11 above, 142; Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theoretical Inquiries in Law* 719, 730.

60 Fredman, *ibid*; Collins, n 12 above; De Stefano, n 12 above.

61 Mantouvalou and Collins, n 12 above, 198-200.

62 Mundlak, n 59 above, 730; Kevin Kolben, 'Labor Rights as Human Rights' (2009) 50 Va J Int'l L 449, 470. While not how human rights are conceived in many *philosophical* accounts, this state-centric view remains the dominant approach in human rights *law*, see for example James Griffin, *On Human Rights* (Oxford: OUP, 2008); John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1.

63 Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: Princeton University Press, 1996) 52; Sandra Fredman, *Human Rights Transformed* (Oxford: OUP, 2008) 69-83; Ida Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 HRLR 81. There is also growing recognition that non-state actors have direct responsibility for human rights, as reflected in the *UN Guiding Principles on Business and Human Rights* (New York, NY and Geneva: United Nations, 2011). On the application of human rights duties within private relationships see Jean Thomas, *Public Rights, Private Relations* (Oxford: OUP, 2015); Hanoch Dagan and Avihay Dorfman, 'Interpersonal Human Rights' (2018) 51 *Cornell International Law Journal* 361.

64 Fredman, *ibid*; Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Dordrecht: Springer, 2014).

In other words, to give horizontal effect to human rights. The human right to freedom from torture, for example, not only requires that states refrain from acts of torture but also that they introduce and enforce laws protecting people from being subjected to this form of mistreatment by third parties. The same is true for other human rights such as privacy and freedom of expression.

The relevance of human rights for the personal scope of employment law becomes clearer when considered in light of these positive duties to protect and secure human rights against third party infringements. Many, indeed most, employment statutes safeguard workers' human rights against employer interferences and are an important means by which the state fulfils its protective obligations. Perhaps most obviously statutory frameworks governing trade union membership and collective action secure the right to freedom of association,[65] the law of dismissal provides some protection of workers human rights,[66] and discrimination law helps secure equal enjoyment of one's rights at work.[67] But there are further less obvious examples of employment statutes protecting human rights. Whistleblowing law protects aspects of workers' freedom of expression;[68] legislation restricting employers' access and use of personal data safeguards worker privacy;[69] and regulations of working time and parental leave protect the right to family life.[70] Additionally, health and safety law protects the rights to life and bodily integrity,[71] legislation on modern slavery secures the right to freedom from forced labour,[72] and workers' property rights are protected via legislation on occupational pensions, wage theft, and the minimum wage.[73]

Much of employment law can therefore be understood as protecting workers' human rights. In the absence of any single comprehensive framework,

65 TULRCA 1992; *Demir and Baykara* v *Turkey* Application No 34503/97, Merits and Just Satisfaction, 12 November 2008 (*Demir*); *Danilenkov* v *Russia* Application No 67336/01, Merits and Just Satisfaction, 30 July 2009.

66 Employment Rights Act 1996, Part X; *Denisov* v *Ukraine* Application No 76639/11, Merits and Just Satisfaction, 25 September 2018; Hugh Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal' (2021) 50 ILJ 36. On the deficiencies of this protection see Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912; Collins, n 12 above.

67 Equality Act 2010; *Eweida* v *UK* Application No 48420/10 and others, Merits and Just Satisfaction, 15 January 2013.

68 Public Interest Disclosure Act 1998; *Heinisch* v *Germany* Application No 28274/08, Merits and Just Satisfaction, 21 July 2011; *Guja* v *Moldova* Application No 14277/04, Merits and Just Satisfaction, 12 February 2008.

69 Data Protection Act 2018; Investigatory Powers Act 2016; *Barbulescu* v *Romania* Application No 61496/08, Merits and Just Satisfaction, 12 January 2016.

70 The Working Time Regulations 1998; *Konstantin Markin* v *Russia* Application No 30078/06, Merits and Just Satisfaction, 22 March 2012.

71 Health and Safety at Work etc Act 1974; *Brincat* v *Malta* Application Nos 60908/11 and others, Merits and Just Satisfaction, 24 July 2014.

72 Modern Slavery Act 2015; *Siliadin* v *France* Application No 73316/01, Merits and Just Satisfaction, 26 July 2005; *CN* v *UK* Application No 4239/08, Merits and Just Satisfaction, 13 November 2012.

73 Pensions Act 2008; Employment Rights Act, s 13; National Minimum Wage Act 1998; *Baczúr* v *Hungary* Application No 8263/15, Merits and Just Satisfaction, 7 March 2017; *Paulet* v *UK* Application No 6219/08, Merits and Just Satisfaction, 13 May 2014. See Tonia Novitz, 'Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions?' (2012) 41 ILJ 136.

employment law legislation forms a 'patchwork quilt' of protections that 'safeguard human rights at work … in a piecemeal and uncoordinated manner'.[74] Despite not being how they are commonly understood these statutes must be regarded as legislative protections of human rights, or 'legislated human rights',[75] which specify the concrete content of more abstract human rights in the context of the workplace.

What does it mean for the question of personal scope if, as argued here, most employment law statutes function as context-specific protections of human rights? To help understand the normative implications of this, a general principle is proposed whereby the nature of human rights as equally held entitlements means that legislative protections of these rights should be defined and construed inclusively. Accordingly, where employment legislation secures human rights the starting point should be that these protections apply universally and provide equal protection to all.

Although the normative implications of human rights for employment law will vary depending on the theoretical conception of human rights adopted,[76] it is a common core characteristic of such theories that human rights are equally held entitlements. For some it is axiomatic that human rights are held universally and equally by all. Donnelly, for instance, thinks this is 'implied by the very idea of human rights' as entitlements held simply by virtue of one's humanity.[77] Universality in this sense is not a feature of every philosophical theory of human rights,[78] but even those theories which do not regard human rights as universally held by all nonetheless view them as being *equally held* by everyone who is a right-holder. This egalitarian nature of human rights is also reflected in international human rights law, which asserts all humans are 'equal in dignity and rights'[79] and that human rights are 'equal rights'.[80] The entitlement to equal enjoyment of one's rights is central to human rights law,[81] and the state's human rights duties are owed equally to all within their jurisdiction without distinction.[82] As rights which protect and constitute our

74 Joe Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48 ILJ 515, 517.

75 Grégoire Webber and others (eds), *Legislated Rights Securing Human Rights through Legislation* (Cambridge: CUP, 2018).

76 Joe Atkinson, 'Human Rights as Foundations for Labour Law' in Hugh Collins, Virginia Mantouvalou and Gillian Lester (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018).

77 Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 282.

78 For example, some conceptions view them as not being held by humans who lack the capacity for agency or autonomous activity, see Griffin, n 62 above

79 Universal Declaration of Human Rights 1948 (UDHR), Art 1.

80 International Covenant of Economic, Social and Cultural Rights 1966 (ICESCR), Art 3; International Covenant on Civil and Political Rights 1966 (ICCPR), Art 3.

81 See for example European Convention of Human Rights 1968 (ECHR), Art 14; UDHR, Art 7; ICCPR, Art 26; EU Charter of Fundamental Rights and Freedoms.

82 ICCPR, Art 2; ICESCR, Art 2; ECHR, Art 1. cf the rights contained in Articles 27, 28, 30, 31 of the EU Charter of Fundamental Rights, which are said to be held only by 'workers'. The meaning of 'worker' is left undefined by the Charter however, so under the interpretative principle advanced here the scope of these rights should be interpreted inclusively to reflect the egalitarian nature of human rights. On the sometimes ambivalent treatment of human rights as universal by international law see Samantha Besson, 'The Holders of Human Rights: The Bright

equal moral status,[83] human rights are inherently egalitarian norms that we are equally entitled to have respected and protected.

It follows from human rights being equal rights that any differential treatment or unequal protection of these rights is suspect and stands in need of justification. As states must secure the human rights of everyone within their jurisdiction equally the default position should be that legislated protections of these rights are equally applicable and available to all. It would clearly be illegitimate, for instance, if protections of the rights not to be tortured or enslaved only applied to some groups or individuals in a society and others were excluded. Restrictions on the protective scope of other legislated human rights, such as frameworks protecting freedom of expression, association, or private and family life, would be similarly suspect. Hence the normative principle proposed here: that all else being equal the protective scope of legislated human rights should be defined inclusively, with these statutory protections of human rights being enjoyed by all. This principle provides guidance both for parliament when introducing legislation and the courts when interpreting these statutes.[84]

The claim that the protection provided by legislated human rights should *ceteris paribus* be equally available to all does not mean that differential protection of human rights is always illegitimate. Although this may initially seem to follow from the egalitarian nature of human rights there can be sound reasons that justify disparate statutory protections of human rights. For instance, the heightened vulnerability of some groups, such as children or persecuted minorities, can sometimes justify legislative protections of their human rights over and above those applicable to the general population.[85] Less frequently, and more controversially, there may also be legitimate grounds for excluding certain groups from otherwise generally applicable human rights protections, such as excluding some prisoners from frameworks securing the right to vote.[86]

More broadly, legislated human rights often protect rights in specific social contexts and in such cases it may be legitimate for these frameworks to only protect individuals in the relevant social conditions. The right to property provides a good illustration of this. Generally applicable protections of property against theft and damage are supplemented by legislation tailored for specific contexts, such as statutes protecting the property rights of shareholders or leaseholders. The protective scope of these latter frameworks can justifiably be restricted to those in the relevant social condition; namely, those who own shares or are leaseholders. Individuals outside these groups are simply not in the relevant circumstances and therefore have no need for the protection offered. Crucially, however, where legislation secures human rights in a particular social context the rules defining the scope of these frameworks must track legitimate

Side of Human Rights?' in Thom Brooks (ed), *The Oxford Handbook of Global Justice* (Oxford: OUP, 2020).

83 Tasioulas, n 62 above, 9; Besson, *ibid*.

84 Subject of course to the limits of legitimate statutory interpretation.

85 As recognised in *Z* v *UK* Application No 29392/95, Merits and Just Satisfaction, 10 May 2001 at [73].

86 *Hirst* v *UK (No 2)* Application No 74025/01, Merits and Just Satisfaction, 30 March 2004; *Scoppola* v *Italy (No 3)* Application No 126/05, Merits and Just Satisfaction, 22 May 2015; *Shindler* v *United Kingdom* Application No 19840/09, Merits and Just Satisfaction, 7 May 2013.

underlying reasons that justify the differential protection of human rights. Returning to the right to property, the rules defining 'shareholder' or 'leaseholder' require close scrutiny because they exclude others from legal protections of this right. While restrictions on the protective scope of legislated human rights may sometimes be legitimate, the starting point remains that any such exclusionary rules or boundaries are suspect and stand in need of justification.

It follows from the above argument that where employment legislation protects human rights the boundaries of employment status should be defined and construed inclusively. Any rules or principles that exclude claimants from the categories of employee or worker are illegitimate unless they can be justified. At the normative level, therefore, human rights demand an approach to personal scope that is starkly at odds with the courts' current orthodoxy. Rather than the onus being on claimants to prove their status as an employee or worker, the default should be that they benefit from statutory protections of human rights unless, and until, any exclusionary rules denying their application are justified. In short, a human rights approach to personal scope would involve a presumption in favour of employment status where employment legislation safeguards workers' human rights.

Adopting this proposed human rights approach to personal scope would therefore represent a dramatic change in the law. A 2015 government review described a legal presumption in favour of employment status as a 'game changer',[87] and a general presumption of this kind was recommended by the Taylor Review but not taken up by the Government.[88] By lowering the initial barrier of proving employment status, a human rights approach would make it easier for individuals to access statutory employment rights. It would be particularly valuable for atypical workers and other groups currently excluded from statutory employment rights, as where employment legislation secures human rights the courts would have to seek to interpret them as falling within the protective scope of employment law unless their exclusion was found to be justified.

But although adopting a human rights approach to personal scope would be of huge significance it would not necessarily lead to a radical expansion of the concepts of employee and worker. While the starting point would be that the personal scope of employment law must be defined and interpreted inclusively where human rights are at stake, the context-specific nature of these legislated human rights means that some boundaries and exclusionary rules will be necessary and legitimate. For instance, exclusionary tests or rules delineating employment status might plausibly be justified on the basis that they pick out individuals who are vulnerable to certain types of human rights infringement

87 Department for Business Innovation and Skills, *Employment Status Review* (London: DBIS, 2015) 44.

88 Matthew Taylor, 'Good Work; The Taylor Review of Modern Working Practices' (Department for Business, Energy & Industrial Strategy, 2017) 62 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf [https://perma.cc/N9JF-2N2F]. See also similar suggestions in Collins, n 2 above, 379; Alan L. Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328, 343.

and only exclude those whose do not suffer the relevant vulnerability. It is therefore premature to conclude that where employment law protects universal human rights its 'personal scope should be similarly universal'.[89]

In sum, the argument here provides support for the view that there should be a presumption in favour of employment status where legislation protects human rights, with 'strict scrutiny' of any exclusions.[90] This would apply to the majority of employment statutes that function to protect human rights. A human rights approach to personal scope would therefore appear to depart considerably from the orthodox legal position. As argued below, however, the effect of the Human Rights Act 1998 is in fact to introduce something closely akin to this approach into English law.

PERSONAL SCOPE AND THE HUMAN RIGHTS ACT 1998

Having explored the implications of human rights for the relational scope of employment law at the level of normative principle, the following sections examine impact of human rights on employment status under English law. The analysis focusses on the Human Rights Act 1998 and the European Convention on Human Rights (ECHR or Convention), as these frameworks provide the clearest route for human rights to influence employment status.[91] I argue that where employment legislation protects Convention rights the HRA 1998 requires an inclusive approach be adopted to personal scope which is closely aligned to the interpretive principle proposed above. This follows from both the positive obligations imposed by the ECHR and the Article 14 right to non-discrimination. The human rights approach to personal scope advanced here represents a paradigm shift in the courts' enquiry with the potential to radically alter the boundaries of employment law, which should be applied more widely wherever employment legislation protects Convention rights. Before developing this argument, however, it worth clarifying how the HRA 1998 can impact the law on personal scope.

Although the HRA 1998 does not create a direct cause of action between private parties, sections 3 and 6 of the Act mean the construction and interpretation of employment status must be consistent with Convention rights. Section 3 requires courts and tribunals give effect to legislation in a manner compatible with Convention rights 'so far as it is possible to do so'.[92] To achieve this courts may depart from the statute's natural meaning or that

89 Collins, n 12 above, 509.

90 Mantouvalou and Collins, n 12 above, 199.

91 It is also possible that fundamental rights protections in the common law or retained EU law may also influence the personal scope of employment law, see Alan Bogg, 'The Common Law Constitution at Work: *R (on the Application of Unison)* v *Lord Chancellor*' (2018) 81 MLR 509; Countouris, n 20 above. The EU Charter was said to support an inclusive interpretation of employment status in *IWGB* v *SoS for DWP* [2020] EWHC 3050 (Admin) at [82].

92 HRA 1998, s 3. Where it is not possible to interpret legislation compatibly with the Convention higher courts, but not Employment Tribunals, may issue a declaration of incompatibility under HRA 1998, s 4.

intended by parliament,[93] or by reading words in and out of the text,[94] but interpretations cannot go 'against the grain' of the statute or be inconsistent with its 'fundamental features'.[95] In *X* v *Y* the Court of Appeal accepted the interpretive duty imposed by section 3 meant employment legislation must be interpreted in line with Convention rights, even in litigation involving private parties.[96] This necessarily includes when courts are interpreting and applying the statutory definitions of employee and worker.

In addition, judicial decisions relating to personal scope must be consistent with Convention rights because section 6 of the HRA 1998 makes it unlawful for courts and tribunals to act incompatibly with these rights. The strength of the indirect horizontal effect created by section 6 is disputed,[97] but even under more modest interpretations courts must adapt existing actions and develop the common law incrementally to protect Convention rights.[98] It is therefore capable of influencing the courts' interpretation of employee and worker status.

EMPLOYMENT STATUS AND POSITIVE OBLIGATIONS

The first avenue by which the HRA 1998 introduces a human rights approach to employment status into English law is through the ECtHR's jurisprudence on positive obligations. When determining the content of Convention rights courts must 'take into account' of ECtHR decisions,[99] and will ordinarily follow and 'keep pace' with its evolving case law.[100] Crucially for present purposes, this means the law governing employment status must be compatible with the ECtHR's jurisprudence on positive obligations.

93 *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30; *R* v *A (No 2)* [2001] UKHL 25.

94 *R (GC)* v *Commissioner of Police of the Met* [2011] UKSC 21; *Principle Reporter* v *K* [2010] UKSC 56.

95 *R* v *A (No 2)* n 93; *R (Anderson)* v *SoS Home Department* [2002] UKHL 46; *Re S (care order)* [2002] UKHL 10. On the limits of legitimate interpretation under HRA, s 3 see Danny Nicol, 'Statutory Interpretation and Human Rights after "Anderson"' [2004] *Public Law* 274; Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 OJLS 259; Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 OJLS 179; T.R.S. Allan, 'Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective' (2006) 59 *Current Legal Problems* 27.

96 *X* v *Y* [2004] EWCA Civ 662.

97 Seven potential models of indirect horizontal effect are identified in Alison Young, 'Mapping Horizontal Effect' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: CUP, 2011).

98 See Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 MLR 878; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *Public Law* 423.

99 HRA 1998, s 2.

100 *R (Alconbury)* v *SoS for Environment, Transport and the Regions* [2001] UKHL 23 at [26]; *R (on the application of Ullah)* v *Special Adjudicator* [2004] UKHL 26 at [20]. Courts will, however, depart from the ECtHR's position in some limited circumstances, see *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; *Ambrose* v *Harris* [2011] UKSC 43; *R* v *Horncastle & Others* [2009] UKSC 14; Brenda Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 HRLR 65.

The ECHR imposes duties on Member States to protect Convention rights from horizontal infringements,[101] and this includes protecting workers' Convention rights against employers. The ECtHR has repeatedly found that States must safeguard Convention rights at work in cases involving the right to freedom from slavery and forced labour,[102] privacy and family life,[103] a fair trial,[104] as well as freedom of expression,[105] religion and belief,[106] and association.[107] As Mantouvalou argues, these decisions make clear that domestic law must not permit employer interferences with workers' Convention rights except for 'legitimate reasons, and in a manner proportionate to the aim pursued'.[108]

States must therefore establish domestic legal frameworks that safeguard workers' Convention rights against employer infringements. While they are generally free to choose how to achieve this,[109] any measure adopted must adequately protect Convention rights,[110] and ensure they are 'practical and effective, not theoretical and illusory'.[111] Specifically, domestic protections of Convention rights must be capable of being 'regarded as striking a fair balance' between the competing rights and interests at stake.[112]

Employment statutes that protect Convention rights, and thus contribute to fulfilling these positive duties, must therefore be effective in doing so and strike a fair balance between competing rights and interests. In assessing whether domestic employment law adequately protects Convention rights the 'applicable

101 See generally Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (Cambridge: Intersentia, 2016).

102 *Siliadin* v *France* n 72 above; *CN* v *UK* n 72 above.

103 *Smith and Grady* v *UK* Application Nos 33985/96 and 33986/96, Merits, 27 September 1999; *Schüth* v *Germany* Application No 1620/03, Merits, 23 September 2010; *Barbulescu* v *Romania* n 69 above.

104 For discussion see Astrid Sanders, 'Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?' (2013) 33 OJLS 791.

105 *Vogt* v *Germany* Application No 17851/91, Merits, 26 September 1995; *Rommelfanger* v *Germany* Application No 1224/86, Decision, 6 September 1989; *Kara* v *UK* Application No 36528/97, Decision, 22 October 1998; *Heinisch* v *Germany* n 68 above.

106 *Eweida* v *UK* n 67 above.

107 *Redfearn* v *UK* Application No 47335/06, Merits and Just Satisfaction, 6 November 2012; *Wilson* v *UK* Application No 30668/96 and others, Merits and Just Satisfaction, 2 July 2002; *Demir* n 65 above.

108 Virginia Mantouvalou, 'The Human Rights Act and Labour Law at 20' in Alan Bogg, Alison Young, and Jacob Rowbottom (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Oxford: Hart, 2020) 61. cf weak protection in *Pay* v *UK* Application No 32792/05, Decision, 16 September 2008; *Madsen* v *Denmark* Application No 58341/00, Decision, 7 November 2002; *Palomo Sanchez* v *Spain* Application No 28955/06 and others, Merits and Just Satisfaction, 12 September 2011.

109 *Swedish Engine Drivers' Union* v *Sweden* Application No 5614/72, Merits, 6 February 1976 at [50]. However, specific protective mechanisms may be required in some cases, see *Redfearn* v *UK* n 107 above, at [57]; *Siliadin* v *France*, n 72 above.

110 *Sindicatul 'Păstorul cel Bun'* v *Romania* Application No 2330/09, Merits and Just Satisfaction, 9 July 2013 (*Păstorul cel Bun*) at [132].

111 *Scoppola* v *Italy (No 2)* Application No 10249/03, Merits and Just Satisfaction, 17 September 2009 at [104]; *Airey* v *Ireland* Application No 6289/73, Merits, 9 October 1979 at [24].

112 *Hatton* v *UK* Application No 36022/97, Merits and Just Satisfaction, 8 July 2003 at [123].

principles are broadly similar' to cases involving negative obligations,[113] and in recent cases the ECtHR has used proportionality analysis to assess the balance struck by Member States.[114] Following this, a failure to protect Convention rights at work will breach the ECHR unless it is in pursuit of a legitimate aim and strikes a proportionate balance between the 'competing interests of the individual and the community as a whole'.[115]

Member State's positive obligations are owed to everyone within their jurisdiction without preconditions or status requirement. The duty to introduce legal frameworks protecting Convention rights from horizontal interferences therefore applies irrespective of an individual's employment status or the nature of their working relationship.[116] The expansive scope of these protective duties is in stark contrast with, and calls into question, the restrictive scope of domestic employment legislation securing Convention rights.

The exception to this unconditional nature of States' positive obligations under the ECHR appears to be the rights to bargain collectively and go on strike protected by Article 11. In *Sindicatul 'Păstorul cel Bun'* v *Romania* (*Păstorul cel Bun*) the ECtHR found that duties to secure these rights only arose where the claimant was in an 'employment relationship',[117] with the existence of such relationships to be determined by reference to ILO Recommendation 198 on the Employment Relationship (R198).[118] On this view, the collective labour rights protected under Article 11 are discrete from other aspects of freedom of association, rather than being 'essentially part of or continuous with' the general right.[119] A discrete understanding of freedom of association substantially limits the potential for human rights to influence the personal scope of legislation governing trade unions and collective action, as only those in an 'employment relationship' could then argue that the state's positive obligations mean they must be covered by these statutes. Although this limitation would only apply where employment legislation protects Article 11 its significance should not be understated given the central importance of these issues to the field.

However, the scope of positive obligations under Article 11 need not, and should not, be interpreted in this narrow manner. In decisions other than *Sindicatul 'Păstorul cel Bun'* v *Romania*[120] the ECtHR has treated the rights to join trade unions and act collectively under Article 11 as being held by the self-employed and employers rather than exclusively by those in employment

113 *Demir* n 65 above at [111].
114 *'Păstorul cel Bun'* n 110 above at [150]; *Barbulescu* v *Romania* n 69 above. See also, Judge Pinto's concurring judgment emphasising proportionality is the appropriate standard for assessing the balance struck by Member State policies in *Konstantin Markin* v *Russia* n 70 above at [56]-[57].
115 *Păstorul cel Bun ibid* at [132].
116 For example *Halford* v *UK* Application No 20605/92, Merits and Just Satisfaction, 25 June 1997; *Siliadin* v *France* n 72 above; *Redfearn* v *UK* n 107 above; *Barbulescu* v *Romania* n 69 above.
117 *Păstorul cel Bun* n 110 above.
118 *ibid* at [142]-[148]. ILO, *R198 - Employment Relationship Recommendation* (2006).
119 Mark Freedland and Nicola Kountouris, 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) 46 ILJ 52, 70; Joe Atkinson and Hitesh Dhorajiwala, '*IWGB v RooFoods*: Status, Rights and Substitution' (2019) 48 ILJ 278, 284.
120 n 110 above.

relationships.[121] The continuous understanding of Article 11 is reflected in the ECtHR's statement that 'the right to form and join trade unions in that provision is an aspect of the wider right to freedom of association, rather than a separate right'.[122] It is also supported by ILO materials, which inform the interpretation of Article 11 under the ECtHR's 'integrated approach'.[123] These sources emphasise that the collective rights protected by freedom of association must be enjoyed by all 'without distinction',[124] and extend to the self-employed rather than being conditional on an employment relationship.[125] Finally, adopting the continuous interpretation of Article 11 is preferable because it accords with the nature of human rights as held equally by all, and avoids the need to draw difficult and artificial distinctions between aspects of freedom of association which are enjoyed by all and those only held by some.[126]

To date domestic courts have generally, although not always,[127] followed the approach to Article 11 adopted in *Păstorul cel Bun*.[128] Given the argument above, it is hoped that the Supreme Court will take the opportunity in the upcoming appeal in *R (on the application of the IWGB)* v *CAC and Roofoods Ltd t/a Deliveroo*[129] to endorse the continuous interpretation of freedom of association. Even on the discrete interpretation of collective labour rights under Article 11, however, there remains some difference between the scope of the state's positive duties and the narrower protection of these rights in English law.

The ECtHR's use of R198 to define 'employment relationship' for the purpose of Article 11 means this category is independent from and more inclusive than English law categories of employment status.[130] For instance, in *Păstorul cel Bun* itself the ECtHR found the church officials were in an employment relationship for the purposes of Article 11, whereas domestic case law denies

121 *Ólafsson* v *Iceland* Application No 20161/06, Merits and Just Satisfaction, 27 April 2010 at [75]; *Manole* v *Romania* Application No 46551/06, Merits, 16 June 2015 at [70]–[75].

122 *Sigurdur Sigurjónsson* v *Iceland* Application No 16130/90, Merits and Just Satisfaction, 30 June 1993 at [32].

123 Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRLR 529.

124 ILO Convention 87 (1948), Art 2, cited in *Păstorul cel Bun* n 110 above at [142].

125 ILO General Survey (2012) at [209]; Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) at [254]; ILO Committee on Freedom of Association (2012) Report No 363, Case 2602 at [461]; ILO Committee on Freedom of Association (2012) Report No 363, Case 2888 at [1084]; ILO Recommendation 204 (2015). See Freedland and Kountouris, n 119 above, 64-67.

126 Atkinson and Dhorajiwala, n 119 above, 284. These difficulties are illustrated in the recent *Deliveroo* decision, where the discrete interpretation of Article 11 led the Court of Appeal to the awkward view that preventing self-employed individuals from forming and joining a trade union could interfere with their 'general' freedom of association despite them lacking any right under Article 11 to 'associate *as a trade union*', *R (on the application of the IWGB)* v *CAC and Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952 (*Deliveroo*) at [51].

127 The Court of Appeal did not think it necessary to enquire into the existence of an employment relationship when finding the state had a positive obligation to secure the collective rights protected under Article 11 in *Vining* v *London Borough of Wandsworth* [2017] EWCA Civ 1092 (*Vining*).

128 *National Union of Professional Foster Carers (NUPFC)* v *The Certification Officer* [2021] EWCA Civ 548 (*NUPFC*); *Deliveroo* n 126 above.

129 *Deliveroo ibid*.

130 Atkinson and Dhorajiwala n 119 above, 284-285. The extent to which the purposive approach developed in *Uber* closes this gap remains to be seen.

any employment status.[131] *National Union of Professional Foster Carers (NUPFC)* v *The Certification Officer* (*NUPFC*) similarly demonstrates a gap may exist between the two where there is no contractual relationship between the parties.[132] On either view of Article 11, therefore, the ECHR imposes duties on the state to secure the collective labour rights of individuals who fall outside of domestic employment status, albeit to a much lesser extent under the discrete interpretation of the right.

What then is the impact of the state's positive obligations for the personal scope of employment law? Their significance flows from the fact that domestic law protections of Convention rights must strike a fair balance in their *scope of application* as well as their *substantive content*. A state that introduces strong legal protections of Convention rights will nevertheless breach their positive duties if there is inadequate access to these frameworks.[133] The personal scope of employment legislation protecting Convention rights must therefore strike a fair balance between competing rights and interests to avoid violating the ECHR.[134]

Redfearn v *UK* provides a good illustration of this.[135] In that case, a bus driver dismissed for his association with the British National Party could not claim unfair dismissal because he lacked the required period of continuous service. The ECtHR found this exclusion from the protection of freedom of association provided by the law of unfair dismissal breached the UK's obligation to secure Article 11. Collins and Mantouvalou rightly point out that although *Redfearn* concerned Article 11 the reasoning applies to all Convention rights the state has duties to protect.[136] Similarly, while the relevant exclusionary rule in *Redfearn* was the qualifying period for unfair dismissal claims the reasoning applies equally to all rules preventing access to protections of Convention rights at work, including the tests and principles used to determine personal scope. Exclusions from employment status are therefore incompatible with the ECHR if they fail to strike a fair balance between competing rights and interests.

Following this, I suggest that the HRA 1998 and ECtHR's jurisprudence on positive obligations requires domestic courts apply the following framework when determining employment status:

(1) Is the claimant within the personal scope of the statute under the standard approach to determining employment status? If so, there is no need to consider the HRA.
(2) Does the employment statute protect a Convention right the state has a positive obligation to secure?[137] If not, the HRA is not relevant.

131 *Sharpe* v *Worcester Diocesan Board of Finance* [2015] EWCA Civ 399.
132 *NUPFC* n 128 above. Volunteers and office holders are other likely examples of this.
133 As in *Opuz* v *Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009.
134 This is also implicit in the reasoning of *Unite the Union* v *UK* Application no 65397/13, Admissibility, 26 May 2016 at [65].
135 *Redfearn* v *UK* n 107 above.
136 Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76 MLR 909.
137 In cases involving the rights to bargain collectively and go on strike under Article 11 this stage may involve determining whether the claimant is in an 'employment relationship' in the broad

(3) Does the failure to protect the claimant's Convention right (their exclusion from employment status) strike a fair balance between the competing rights and interests at stake? If not, the court must seek to interpret the legislation as protecting the claimant.
(4) Is it possible under section 3 of the HRA to read the legislation as including the claimant within its personal scope? If not the court (but not a tribunal) may make declaration of incompatibility.

The effects of this new human rights approach are significant and far-reaching. It represents a dramatic shift in the courts' enquiry, with the onus no longer being solely on claimants to prove they have the requisite employment status and the courts instead asking if their exclusion can be justified. While not amounting to a strict legal presumption in favour of employment status, this framework nevertheless requires courts to interpret the concepts of employee and worker inclusively and brings English law more closely into alignment with the normative principles outlined in part two above.

This approach makes it easier for claimants to be brought within the personal scope of employment law. The starting point for determining employment status where Convention rights are at stake is that employment legislation must be interpreted as protecting atypical workers and other previously excluded groups of claimants unless the denial of employment status can be justified. This new inclusionary approach must be applied wherever employment legislation protects Convention rights, so has the potential to impact the personal scope of most employment law statutes.[138]

A further likely consequence of this framework is at least some degree of fragmentation of personal scope. As the HRA 1998 only demands an inclusive approach where employment legislation protects Convention rights this may well lead to the protective scope of these statutes being interpreted more broadly than legislation not securing Convention rights.[139] Fragmentation could also occur *between* employment statutes protecting Convention rights, as an exclusionary rule might potentially be justified in some contexts but not others.[140] The creation of a two-tier system of employment law has been raised as a potential downside of aligning the field with human rights,[141] but is inevitable here given that the HRA only has indirect horizontal effect where Convention rights are at stake.

sense used by the ECtHR, such that the state's obligation to protect these rights is engaged. This will not be necessary, however, if the 'continuous' interpretation of Article 11 is adopted as advocated above.

138 As argued above, in addition to legislation relating to collective labour rights this includes health and safety law, whistleblowing and wage theft protections, maternity and parental rights, as well as claims for discrimination and unfair dismissal where Convention rights are engaged on the facts.

139 This will not be a cause of significant fragmentation in practice, however, as most employment statutes function to protect Convention rights.

140 As raised in *NUPFC* n 128 above.

141 Colin Fenwick and Tonia Novitz, 'The Application of Human Rights Discourse to Labour Relations: From Theory to Practice' in C. Fenwick and T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart, 2010) 24.

Another potential instance of fragmentation arises in the context of unfair dismissal. Although the HRA 1998 requires an inclusive interpretation of employee status where the dismissal threatens a Convention right the courts' standard approach continues to apply outside of these circumstances.[142] The personal scope of unfair dismissal law may therefore vary depending on the facts of the specific case. Office holders or zero-hours contractors might be classed as employees if a dismissal interferes with their right to expression or private life, for instance, but be classed as workers or self-employed if not. This initially seems more troubling than the risk of fragmentation between statutes because of the complexity it introduces to the law. However, it does not present a significant problem for the courts. Indeed, the protective scope of unfair dismissal law *already* varies depending on the facts of individual cases, as the two-year qualifying period does not apply in cases where a dismissal interferes with the right to associate with a political party or trade union,[143] hold political opinions,[144] express oneself by whistleblowing,[145] or is for an automatically unfair reason.[146] The level of substantive protection provided by unfair dismissal law also already varies depending on whether Convention rights are at stake; with heightened scrutiny and a stricter standard of reasonableness applying in these cases.[147]

Finally, without entering into the comparative merits of 'universal' and 'selective'[148] approaches to employment status, it is also worth highlighting that some fragmentation is also likely under a purposive approach because it is not clear that all employment legislation should be regarded as having the same purpose.[149] Even if 'the general purpose of [employment] statutes might be stated as protecting workers who need the relevant rights, it may well be that *different classes* of workers need these various legal protections.'[150] The potential fragmentation of employment status is therefore not sufficient to condemn the human rights approach. Moreover, while the framework proposed above might introduce some additional complexity it also provides a uniform approach for determining the scope of employment legislation safeguarding Convention rights. By doing this, and requiring courts consider how the exclusionary boundaries of these statutes can be justified, it will also bring a greater degree of clarity to this area of law.

142 For discussion of these circumstances see Hugh Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal' n 66 above. My thanks to the anonymous reviewer who raised this possibility.
143 ERA 1996, s 108(4); TULRCA 1992, s 154.
144 ERA 1996, s 108(4).
145 ERA 1996, s 103A.
146 ERA 1996, s 108(3).
147 *X* v *Y* (2004) ICR 1634; *Turner* v *East Midlands Trains Ltd* [2012] EWCA Civ 1470.
148 See Davidov, n 3 above.
149 Atkinson and Dhorajiwala, n 119 above, 281-282.
150 Atkinson and Dhorajiwala, n 8 above, 794.

The emerging human rights approach: positive obligations

The framework advanced above has been accepted and applied in a line of recent cases. To date these are relatively isolated decisions involving positive obligations under Article 11. But they signal the emergence of a new human rights approach to employment status in English law; one which should be adopted more widely in future and has the potential to reshape the boundaries of the field. The relevance of the HRA 1998 for personal scope was first recognised in *Pharmacists' Defence Association Union (PDAU)* v *Boots Management Services Ltd*, where Underhill LJ found that the rules determining access to the statutory trade union recognition framework fell within the scope of the state's positive obligation to protect Article 11, and indicated that he would have been willing to extend the protective scope of the legislation using section 3 of the HRA were this necessary to ensure adequate protection for Article 11.[151] However, the leading example of this emerging approach is *Vining and others* v *London Borough of Wandsworth*[152] (*Vining*), which involved parks police officers who were expressly excluded from the definitions of employee and worker for the purpose of collective consultation rights.[153]

In *Vining* the Court of Appeal found the right for workers to have their union consulted about potential redundancies was an 'essential element' of Article 11 which the UK had 'a positive obligation to secure the effective enjoyment of'.[154] Following this, the legislation governing consultation rights 'must strike a fair balance between the competing interests and any provision of that scheme which restricts its availability to particular classes of workers requires to be justified'.[155] As no justification for excluding the claimants from the statutory framework was offered this was found to violate Article 11. The Court went on to use section 3 of the HRA to read the legislation as including the park police, stating simply that the express statutory exclusion 'does not apply' to them.[156] This interpretation was thought not to go against the grain or fundamental features of the legislation, because the exclusionary rule was said to be aimed only at 'traditional' police forces.[157]

While *Vining* concerned an express statutory rule excluding a group of workers from employment status, the same approach applies more generally to all statutory and common law rules used to define personal scope. This is illustrated by the recent case of *National Union of Professional Foster Carers (NUPFC)* v *Certification Officer*,[158] where the Court of Appeal used the HRA 1998 to extend the scope of 'worker' status to foster carers who would ordinarily have been excluded because they lacked a contractual relationship with the council.

151 *Pharmacists' Defence Association Union (PDAU)* v *Boots Management Services Ltd* [2017] IRLR 355 at [33]-[55].
152 *Vining* n 127 above.
153 TULRCA 1992, s 280.
154 *Vining* n 127 above at [63]-[64].
155 *ibid* at [64].
156 *ibid* at [74].
157 *ibid* at [75].
158 *NUPFC* n 128 above.

Applying the ECtHR's broad definition of 'employment relationship' the Court of Appeal in *NUPFC* found the foster carers' collective rights under Article 11 were engaged.[159] They further concluded that the denial of employment status was unjustified and therefore violated Article 11 and so used section 3 of the HRA 1998 to bring the carers within the definition of worker status,[160] despite the absence of any contract to perform work as required by the legislation. In addressing the issue of justification, the Court failed to recognise that as the case involved positive obligations the appropriate question was whether the law struck a fair balance and instead approached it through Article 11(2). This makes little difference to their assessment that the exclusion was unjustified, however, as 'the applicable principles are broadly similar' in claims involving both positive and negative obligations.[161]

These cases demonstrate an emerging human rights approach to employment status with the potential to reshape the boundaries of personal scope along more inclusionary lines. The decisions to date have so far involved the collective labour rights under Article 11 but the proposed framework must be adopted wherever employment legislation protects Convention rights.[162] This new approach will particularly benefit those in atypical working arrangements: casual, zero-hours and platform workers, those engaged via personal service companies, and agency workers must now all be interpreted as having employee or worker status where legislation protects Convention rights unless their exclusion can be justified. As demonstrated by *NUPFC* and *Vining* respectively, it may also assist groups who would normally be denied employment status because they lack a contract, such as volunteers and unpaid interns, and claimants expressly excluded from employment protections such as prison or domestic workers.[163]

One decision that might be thought to show the limited impact of human rights on the law of personal scope is *Deliveroo*, where the Independent Workers Union of Great Britain (IWGB) unsuccessfully sought to rely on the HRA 1998 to bring their delivery rider members within the definition of 'worker' status for the purposes of trade union legislation.[164] It would, however, be a mistake to take the failure of human rights arguments in *Deliveroo* as representative of their potential because in that case the Court failed to correctly identify and apply the relevant principles.

In *Deliveroo* the Central Arbitration Committee (CAC) initially found that the delivery riders were not workers because they had a genuine and unfettered right of substitution, so lacked a contract to perform work personally as required by the legislation. This finding was judicially reviewed by IWGB who argued

159 *ibid* at [74]-[98].
160 *ibid* at [99]-[142].
161 *Demir* n 65 above at [111].
162 See the Court of Appeal in *Gilham* v *Ministry of Justice*, which recognised the state's positive obligations to secure Article 10 might require an expansive definition of worker status be adopted in whistleblowing legislation, *Gilham* v *Ministry of Justice* [2017] EWCA Civ 2220 at [81]-[90]. This aspect of the decision was not addressed in the appeal to the Supreme Court.
163 On the exclusion of these groups from labour law see Virginia Mantouvalou, 'Structural Injustice and the Human Rights of Workers' (2020) 73 *Current Legal Problems* 59.
164 *Deliveroo* n 126 above.

that section 3 of the HRA and the duty to protect Article 11 meant the riders should be classed as workers. While the Court of Appeal accepted the HRA might in principle require a more expansive definition of worker status they upheld the conclusion that was no breach of Article 11, because the riders' unfettered right to send a substitute meant they were not in an 'employment relationship' as required for Article 11 to be engaged.[165] The judicial review was therefore dismissed and is currently awaiting appeal before the Supreme Court.

However, the Court of Appeal was, with respect, wrong to conclude the state had no positive obligations to secure the riders' right to join a union and bargain collectively. This is true even if the continuous interpretation of Article 11 is rejected in favour of the discrete approach in *Păstorul cel Bun*. While the Court rightly attempted to apply the ECtHR's concept of an 'employment relationship' as grounded in ILO Resolution 198, Alan Bogg identifies several problems with its reasoning. First, it is 'flatly inconsistent' with R198 to treat an obligation of personal service as determinative rather than merely one relevant indicator.[166] The Court also failed to consider the general conditions under which the riders worked, and particularly their position of subordination, which should frame the assessment of more specific indicators.[167] Nor did they adequately apply the 'primacy of fact' doctrine, which should have led them to take greater account of the fact most riders performed work personally regardless of whether they were contractually obliged to do so.[168]

The relevance of Underhill LJ's discussion of 'worker' status under EU law is also highly questionable given that this concept has not been expressly grounded in R198, and the lack of any reliance on it in the ECtHR's Article 11 case law.[169] Indeed, if there is to be any link between the two, the requirement to interpret the EU Charter consistently with the ECHR means that the ECtHR's interpretation of collective rights under Article 11 should guide the scope of EU worker status in this context rather than vice versa.[170]

Finally, the Court of Appeal departed from another important aspect of *Păstorul cel Bun*, namely the ECtHR's approach of asking whether the contra-indicators of an employment relationship were 'sufficient to remove the relationship' from the scope of Article 11.[171] Framing the enquiry in this way reflects the suggestion in R198 of a presumption of an employment relationship where some indicators are present.[172] Had this same approach been adopted in *Deliveroo* it would have been difficult to avoid the conclusion that the riders were in an employment relationship. The R198 'indicators of an employment relationship are overwhelmingly present' in the case,[173] and the primacy of facts

165 *ibid* at [77]; *R (IWGB)* v *CAC* [2018] EWHC 3342 (Admin).
166 Alan Bogg, 'Square Pegs in Round Holes? Collective Bargaining and the Self-Employed Collective Bargaining for the Self-Employed' (2021) 42 Comp Lab L & Pol'y J 409, 437.
167 *ibid*; ILO R198, para 12.
168 Atkinson and Dhorajiwala, n 119 above, 285; Bogg, n 166 above, 436-437.
169 *Deliveroo* n 126 above at [73].
170 Charter of Fundamental Rights of the European Union, Art 52.
171 *Păstorul cel Bun* n 110 above at [145]-[148].
172 ILO R198, para 11 (b).
173 Atkinson and Dhorajiwala, n 119 above, 285.

means the riders ought to be regarded as in an employment relationship for the purposes of Article 11 when performing work personally despite having the right to use a substitute. The Supreme Court should therefore overturn the Court of Appeal's findings on the scope of positive obligations in the upcoming appeal and go on to apply the subsequent stages of the framework advanced here.

Given these shortcomings, *Deliveroo* should not be seen as undermining the potential impact of human rights in this context. Furthermore, it is also relevant that the distinctive features of *Deliveroo* which complicate the HRA's application will rarely be present in other cases. An employment relationship is not needed outside of Article 11 cases, and workers will seldom have a genuine and unfettered right to use a substitute. However, the decision does highlight the key challenges that future applications of the human rights approach to personal scope will face. First, showing that employment legislation protects a Convention right and the state's positive obligations are engaged; second, scrutinising whether the exclusionary rules governing personal scope can be justified; and finally, successfully using section 3 of the HRA 1998 to interpret the concepts of employee and worker more inclusively. Of these, the question of justification is likely to be the most significant.

The need to find that a Convention right is at stake may be a stumbling block in some cases, particularly those involving Article 11 if the discrete interpretation of freedom of association is maintained. But while domestic courts have sometimes been slow to engage with human rights arguments in employment cases,[174] it will generally be clear where employment legislation protects a Convention right and the time has come to recognise that much of employment law functions to secure these rights. The question of whether personal scope can be interpreted more inclusively using section 3 of the HRA 1998 should also not present a significant hurdle in most cases. Despite obiter comments in *Deliveroo* expressing uncertainty over whether the riders could be interpreted as workers,[175] the courts have wide latitude to redraw the boundaries of personal scope as demonstrated in *Vining* and *NUPFC*. The statutory definitions of employee and worker leave room for expansive judicial constructions of these concepts, and inclusive interpretations of personal scope will generally 'go with the grain' of employment legislation because they support the statutes' underlying purpose of protecting vulnerable individuals working in subordinate and dependent positions.[176] Inclusive interpretations of employment status will also undoubtedly be 'possible' under section 3 of the HRA 1998 where they involve departing from tests or principles developed by the courts, such as the doctrine of mutual obligations, rather than those directly legislated by parliament.

The future impact of the human rights approach to employment status therefore largely turns on whether the current boundaries of 'employee' and 'worker' can be justified. The relevant principles here are similar to when determining if a state's interference with a Convention right is necessary in a

174 As in *Pay* v *UK* n 108 above; Virginia Mantouvalou and Hugh Collins, 'Private Life and Dismissal: *Pay v UK*' (2009) 38 ILJ 133.
175 *Deliveroo* n 126 above at [93].
176 *Uber* n 8 above; *R (Unison)* v *Lord Chancellor* n 25 above at [6].

democratic society.[177] A legitimate reason must be identified for failing to secure the claimants' right, and this must be assessed to ensure it is rationally connected to the claimant's exclusion and that a fair balance has been struck between competing rights and interests.[178] This enquiry must be undertaken separately for each exclusionary rule and individual piece of legislation,[179] and although a degree of deference is required towards the balance struck by parliament this should not be used as an excuse for failing to apply meaningful scrutiny.[180] It is not possible to consider here which existing exclusionary rules fail to strike this fair balance, as the goal of this article is instead to examine the prior question of the general approach to personal scope demanded by human rights. But under the human rights approach the current exclusions of atypical workers from the personal scope of employment law is suspect, and whether these denials of protection can be justified is an important topic for future research and litigation.

Irrespective of its eventual impacts, the emergence of this human rights approach is a highly significant development which aligns English law more closely with the normative principles discussed in above. Where employment legislation protects Convention rights the starting point when determining employment status must be to include claimants wherever possible, with any exclusions needing to be justified. In future the framework outlined here must be applied to the full range of employment statutes that secure Convention rights.

EMPLOYMENT STATUS AND ARTICLE 14

The second means by which the HRA 1998 introduces a human rights approach to personal scope is via Article 14, which requires states secure the enjoyment of Convention rights 'without discrimination on any ground'.[181] Where employment legislation secures Convention rights, excluding claimants from these protections will potentially violate Article 14, and courts must adopt an inclusive interpretation of employment status unless the exclusion is proportionate.

There are four stages to finding a violation of Article 14: 'First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking.'[182]

Although Article 14 only applies where a state's actions impact the equal enjoyment of another Convention right there is no need for there to have

177 *Demir* n 65 above at [111].
178 *'Păstorul cel Bun'* n 110 above at [150].
179 *NUPFC* n 128 above at [68]-[71].
180 Atkinson and Dhorajiwala, n 119 above 287-290.
181 ECHR, Art 14 (1).
182 *R (Stott)* v *Secretary of State for Justice* [2018] UKSC 59 at [8]; *Wandsworth LBC* v *Michalak* [2003] 1 WLR 617 at [20].

been a substantive violation of this further right.[183] Moreover, and crucially for present purposes, Article 14 prohibits discrimination in protections of Convention rights introduced by states even where the substantive level of protection extends beyond the minimum required under the ECHR.[184] Where employment legislation protects Convention rights therefore, the rules governing personal scope must not discriminate on the grounds of a protected status.

Following this, it is clear Article 14 may be violated if claimants are denied access to protections of Convention rights at work due to a status expressly listed in Article 14, such as sex, race, nationality or political opinion. In *Konstantin Markin* v *Russia*, for example, the ECtHR found that excluding male soldiers from entitlements to parental leave available to female soldiers amounted to discriminatory protection of the right to private and family life which could not be justified as proportionate and so violated Article 14.[185]

Less obviously, however, an individual's position in the labour market can itself amount to a protected status under Article 14. The category of 'other status' protected by Article 14 is 'not limited to characteristics which are innate or inherent',[186] and various factual descriptors and legal classifications have been included.[187] Most relevantly, the ECtHR has found that professional and occupational statuses are protected by Article 14, including rank or professional seniority,[188] and being a member of a particular profession.[189] A 'broad interpretation' of Article 14 is adopted by courts,[190] meaning 'the need to establish status as a separate requirement has diminished almost to vanishing point'.[191] As a result, having a particular type of working arrangement, whether being self-employed, an agency worker, zero-hours contractor, or live-in domestic worker, should be a protected status under Article 14.

183 *Belgian Linguistics case (No 2)* Application 1474/62 and others, Merits, 23 July 1968; *Abdulaziz, Cabales and Balkndali* v *UK* Application No 9214/80 and others, Merits and Just Satisfaction, 28 May 1985.

184 *Stec and Others* v *UK* Application Nos 65731/01, 65900/01, Merits, 12 April 2006.

185 *Konstantin Markin* v *Russia* (n 70).

186 Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 HRLR 273, 2772-279. On the ECtHR's approach see Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 HRLR 99.

187 Including marital status (*Re P* [2008] UKHL 38), type of tenancy and homelessness (*Larkos* v *Cyprus* Application No 29515/95, Merits and Just Satisfaction, 18 February 1999; *R (RJM)* v *SoS for Work and Pensions* [2008] UKHL 63), length of prison sentence (*Clift* v *UK* Application No 7205/05, Merits and Just Satisfaction, 13 July 2010), as well as statuses linked to immigration (*Hode and Abdi* v *UK* Application No 22341/09, Merits and Just Satisfaction, 6 November 2012) and health and mental capacity (*Kiyutin* v *Russia* Application No 2700/10, Merits and Just Satisfaction, 10 March 2011); *Alajos Kiss* v *Hungary* Application No 38832/06, Merits and Just Satisfaction, 20 May 2010).

188 *Engel and Others* v *Netherlands* Application no 5100/71 and others, Merits and Just Satisfaction, 8 June 1976.

189 *Graziani-Weiss* v *Austria* Application No 31950/06, Merits and Just Satisfaction, 18 October 2011; *Sidabras* v *Lithuania* Application Nos 55480/00 and 59330/00, Merits and Just Satisfaction, 27 July 2004; *Rainys and Gasparavicius* v *Lithuania* Applications Nos 70665/01 and others, Merits and Just Satisfaction, 7 April 2005.

190 *R (SHU)* v *Secretary of State for Health and Social Care* [2019] EWHC 3569 (Admin) at [85].

191 *Stevenson* v *Secretary of State for Work & Pensions* [2017] EWCA Civ 2123 at [41]. See also *Carter and another* v *Chief Constable of Essex Police and another* [2020] EWHC 77 QB at [50]-[57]; *R (Leighton)* v *Lord Chancellor* [2020] EWHC 336 (Admin) at [177]-[182].

If, as suggested, labour market statuses are protected under Article 14 excluding these groups from employment legislation falling within the ambit of Convention rights will violate the ECHR unless this 'can withstand scrutiny'.[192] There are two elements of this scrutiny. First, the claimant must be in a relevantly similar position to those they have been treated less favourably than (ie those protected by employment legislation), as without this it is impossible to make a meaningful comparison between them. The overarching question is whether there 'is such an obvious, relevant difference … that their situations cannot be regarded as analogous'.[193] Second, the differential protection must be 'necessary in a democratic society',[194] meaning that it is prescribed by law, pursues a legitimate aim, and that there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[195] A rational connection must exist between the discrimination and the aim pursued, with no less intrusive means available for achieving it.[196] Where exclusions of those with particular labour market statuses cannot be justified on this basis section 3 of the HRA requires courts to include them within the personal scope of the legislation so far as possible.

Given this, it is argued that courts must adopt the following framework when determining a claimants' employment status:

(1) Is the claimant excluded from the scope of the statute under the courts' general approach to employment status?
(2) Does the claim fall within the ambit of a Convention right, such that Article 14 is engaged? If either of these initial questions is answered in the negative, there is no need to consider the impact of Article 14.
(3) Is the differential treatment of the claimant's Convention rights, namely their exclusion from employment status, on the grounds of a protected status? This will necessarily be the case if, as argued here, an individual's classification as self-employed itself amounts to a protected status.
(4) Is the claimant in a sufficiently similar position to those who are protected by the legislation to make a meaningful comparison between them?
(5) Can the claimant's exclusion from employment status be justified as necessary in a democratic society? If so, the exclusion survives scrutiny and there is no need to adopt a more inclusive interpretation of personal scope.
(6) If the exclusion cannot be justified, is it possible under section 3 of the HRA to read the legislation as protecting the claimant? If not a declaration of incompatibility may be issued.

As with positive obligations, this framework has the effect of bringing English law broadly into line with the normative principles discussed above. Courts must endeavour to include claimants within the concepts of employee and

192 *R (Carson)* v *Secretary of State for Work and Pensions* [2005] UKHL 37 at [3] per Lord Nicholls.
193 *ibid*.
194 ECHR, Art 14(2).
195 ECHR, Art 14(2); *Belgian Linguistics (No 2)* n 183 above at [10]; *Religionsgemeinschaft der Zeugen Jehovas* v *Austria* Application No 40825/98, Merits and Just Satisfaction, 31 July 2008 at [87].
196 *R (Tigere)* v *Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 (SC) at [39] per Lady Hale; *Bank Mellat* v *HM Treasury (no 2)* [2013] UKSC 39.

worker status where employment legislation safeguards workers' Convention rights unless their exclusion is justified as proportionate.

The emerging human rights approach: Article 14

The impact of Article 14 on the personal scope of employment legislation is illustrated by the Supreme Court decision in *Gilham* v *Ministry of Justice*[197] (*Gilham*). In *Gilham* Article 14 was found to require judicial office holders be included within 'worker' status for the purposes of whistleblowing legislation, despite lacking a contractual relationship with their employer as required by the statute. The Court found that legal protections of whistleblowers fell within the ambit of freedom of expression and that the claimant's exclusion from these protections engaged Article 14 because their 'occupational classification' as a judicial office holder was 'clearly capable' of being a protected status.[198] No justification of this differential treatment was offered, so it was found to violate Article 14. The Court further concluded that section 3 of the HRA 1998 could be used to interpret the judge as having worker status because the requirement of a contract was not a 'fundamental feature' of the legislation.[199]

Three aspects of the Supreme Court's reasoning in *Gilham* are worth highlighting as they indicate the potential of Article 14 to further reshape the boundaries of personal scope. First, that the claimant's 'occupational classification' was clearly a protected status indicates that other labour market and work-related statuses should likewise be regarded as protected by Article 14. Although there was no examination of the ECtHR's case law in *Gilham*, this view is consistent with the Strasbourg position discussed above. It is also in line with other recent domestic decisions which have found that Article 14 protects the statuses of being a 'limb-b worker' outside the PAYE system,[200] and being a self-employed person who had taken maternity leave in the last three years.[201] Most significant in this respect is *R (Parkin)* v *Secretary of State for Work and Pensions*, which accepted that 'being self-employed is an "other status" for the purposes of article 14'.[202]

Second, it is also significant that the Supreme Court rejected the argument that only weak scrutiny should be applied at the justification stage. No legitimate aim was offered for the claimant's exclusion so the Court was saved from determining the 'test by which proportionality has to be judged'.[203] However, Lady Hale emphasised that the level of scrutiny could be stricter than simply asking whether the exclusion was manifestly without reasonable foundation because the question was one of employment policy rather than entitlement to

197 *Gilham* v *Ministry of Justice* [2019] UKSC 44.
198 *ibid* at [32].
199 *ibid* at [38]-[46].
200 *Adiatu* v *HM Treasury* [2020] EWHC 1554 (Admin) at [45]-[50].
201 *R (On the application of Motherhood Plan & Anor)* v *HM Treasury & Anor* [2021] EWHC 309 (Admin) at [53].
202 *R (Parkin)* v *Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin) at [93].
203 *Gilham* n 197 above at [37].

welfare benefits.[204] This seems correct. While a degree of deference is appropriate when considering the legislative balance struck by parliament this should not imply an absence of meaningful scrutiny, and there must still be an objective and reasonable justification for differences in the treatment of Convention rights.[205] In addition, courts are required to pay closer scrutiny to discrimination against vulnerable groups,[206] and this should include groups such as atypical workers who are vulnerable due to their position in the labour market. Finally, there is no need for deference where courts are scrutinising exclusionary rules or tests that they have developed themselves rather than being legislated by parliament.

Third, the reasoning in *Gilham* supports the view that courts have significant leeway to redraw the boundaries of employment status using section 3 of the HRA 1998. The decision makes clear there is no need to identify specific words that can be read in or out of the legislation to achieve this result. The focus was instead on whether the statutory framework would be workable in practice if office holders were included, and whether doing so would go against the grain of the legislation.[207] But as already argued, an interpretation of employment status that extends rights to those in need of protection is unlikely to go against the grain of the legislation because it furthers the employment statute's underlying purpose of protecting vulnerable individuals working in dependent and subordinate positions.[208]

These features of *Gilham* illustrate the potential significance of Article 14 for personal scope. Under this emerging human rights approach, employment legislation falling within the ambit of Convention rights must be interpreted as including claimants who would ordinarily be classed as self-employed unless, and until, their exclusion can be justified as proportionate.

One possible stumbling block for future claims of this type is the requirement that claimants excluded from employment status be in an analogous position to those protected. This was not a problem in *Gilham*, as the judge was self-evidently in a similar position to a conventional employee. But it may be more of an issue in other cases.[209] Someone running their own business, for instance, will likely struggle to persuade a court that they are in a sufficiently similar position to individuals classed as employed to enable a meaningful comparison. In many cases, however, those excluded from employment status are in fact in an analogous position to those protected as employees or workers. Barnard and Blackham point out that the self-employed 'often manifest many of the characteristics of employees – they may in practice be dependent, have inferior bargaining power and they risk exploitation.'[210] Those classed as employed and

204 *ibid* at [34].
205 *Re P* n 187 above.
206 *DH* v *Czech Republic* Application No 57325/00, Merits and Just Satisfaction, 13 November 2007 at [182]; *Kiyutin* v *Russia* n 187 above at [64]; Oddný Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' (2017) 4 *Oslo Law Review* 150.
207 *Gilham* n 197 above at [43].
208 *Uber* n 8 above.
209 See for example, *R (Parkin)* v *Secretary of State for Work and Pensions* n 202 above.
210 Catherine Barnard and Alysia Blackham, 'Discrimination and the Self-Employed: The Scope of Protection in an Interconnected Age' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Cambridge: Intersentia, 2017) 198.

self-employed are also often both performing work for another, and both groups are attempting to access legal protections of Convention rights in the context of their work.

In addition, the fact a claimant would normally be classed as self-employed is not grounds for concluding they are not in an analogous position to an employee or worker.[211] Some further reason is needed for why the claimants' circumstances are so fundamentally different that there is no need to justify differential treatment of their Convention rights. As it will frequently be difficult, or impossible, to identify any such reason courts are likely to focus on whether the denial of employment status is proportionate, rather than whether the claimant is in an analogous situation with those protected.[212]

The Article 14 framework set out above should now be adopted in the extensive range of employment cases that fall within the ambit of Convention rights. If it gains the wider recognition it deserves, this second strand of the UK's emerging human rights approach to personal scope has the potential to assist those currently excluded from the personal scope of employment law by shifting the burden away from claimants having to prove their status and on to those contracting for work who must now justify the denial of employment rights. This will particularly benefit those in atypical working arrangements, who must now be interpreted as being an employee or worker unless the denial of this status is shown to be proportionate. As with the approach grounded in positive obligations, this question of whether and how labour law's exclusionary boundaries can be justified will be the key battleground in future applications of the proposed framework.

CONCLUDING REMARKS

This article has argued that human rights have significant implications for the question of personal scope both as a matter of normative principle and under English law. It set out the distinctive frameworks for determining employment status that are required by the HRA 1998, which flow from the positive obligations imposed by the ECHR and the Article 14 right to non-discrimination, and considered the emergence of this human rights approach to personal scope in a series of recent cases. Under the HRA, courts and tribunals must adopt an inclusive interpretation of the concepts of employee and worker, with any exclusions needing to be justified as striking a fair and proportionate balance between competing rights and interests. The effect of the HRA is therefore to create a de facto interpretive presumption in favour of employment status where Convention rights are at stake.

The human rights approach to personal scope outlined here represents an important and far-reaching development. The eventual impact of this emerging approach will turn on its wider recognition and whether the existing rules

211 This would 'confuse the difference in treatment with the ground or reason for it', *Gilham* n 197 above at [31].

212 *R (Stott)* v *Secretary of State for Justice* n 182 above at [8].

and tests defining personal scope can be justified.[213] However, cases such as *Vining* and *Gilham* demonstrate it has the potential to reshape the boundaries of employment law. The arrival of this human rights approach to employment status is also significant because it brings the law more closely in line with the normative demands made by human rights in this context. Namely, that the nature of human rights as equally held rights means the starting point should be that everyone is equally entitled to legislative protections of these rights. This represents a paradigm shift in the courts' enquiry. Where employment legislation protects Convention rights any denial of employment status now stands in need of justification, including denials of status to atypical working arrangements such as zero-hours contractors, agency workers, volunteers and unpaid interns, and those performing work via online platforms or personal service companies. By requiring these groups be interpreted as having employee and worker status unless their exclusion is justified the HRA 1998 provides the courts with the means of responding, at least in part, to employment law's ongoing coverage crisis.

213 Something which must be assessed separately for each exclusion and statutory framework, as discussed in *NUPFC* n 128 above at [68]-[71].