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The Fissured Worker: Personal Service Companies and Employment Rights

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ABSTRACT

A personal service company (PSC) is a form of intermediary with separate legal personality used as a vehicle to provide the labour of the individual who controls the PSC. The rapid growth of PSCs in recent years, and their potential to disguise employment status for tax purposes, have been the subject of much policy and legislation. But their detrimental effect on the employment rights, both individual and collective, has almost been ignored. Evidence shows that PSCs continue to increase at a faster rate than employment, are colonising sectors of the labour market characterised by dependent labour and are often imposed to avoid the duties owed to workers or employees. In this article, I analyse how the existing law might provide a means of protecting the labour rights of individuals who are engaged via PSCs, examining the statutory provisions specific to some legal rights and more general doctrines based on shams, labels and piercing the corporate veil. Although the law provides some protection in some circumstances, PSCs retain their allure as a means of avoiding employment rights. I discuss potential legislative solutions to this problem, which highlights the interaction of tax and employment law and the difficulties caused by relying on the bilateral contract as the keystone of labour rights.

1. INTRODUCTION

A personal service company (PSC) is a limited liability company typically controlled by an individual, the principal function of which is to provide the individual's services to a third party, often referred to as the client or hirer. As well as enabling the individual to benefit from limited liability,

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the arrangement gives rise to potential savings in tax and National Insurance contributions (NICs). While there are no exact statistical data on the number of PSCs, the latest estimate from HM Revenue & Customs (HMRC) is that more than 250,000 individuals provide services through the intermediary of their own company[1] and other sources support a continuing increase. Once principally confined to consultants and those running what might appear to be genuine businesses, in recent years PSCs have spread into a wide range of jobs traditionally performed by wage labour in both the private and public sectors, including low-paid occupations.

Over the past two decades, the depressive effect of PSCs on fiscal receipts has increasingly come under the official spotlight. The higher than anticipated increase in their use, greater than the growth in employment, led the Office for Budget Responsibility (OBR) to estimate a loss of £3.5 billion in overall tax and NIC receipts by 2021–22 as more employees shift to being owner managers.[2] Recent consultations, policies and legislation have sought, with limited success, to address this issue, beginning with the legislation named after the number of the 'most famous Inland Revenue press release ever published',[3] IR35.[4] That legislation treats an individual who contracts with a client by means of a PSC as an employee for tax purposes where the relationship with the client would amount to employment but for the existence of the PSC: the novel device of the so-called 'hypothetical contract'.[5] Despite that legislation, however, PSCs have continued to multiply. The problem was highlighted by practices at the BBC. In 2012, more than 10 years after the IR35 legislation was first introduced, it engaged approximately 25,000 workers (about half its workforce) off-payroll, often by means of PSCs, including for long-term positions closely resembling

[1]HMRC, *Intermediaries Legislation (IR35): Discussion Document* (17 July 2015), 4, https://www.gov.uk/government/consultations/intermediaries-legislation-ir35-discussion-document (date last accessed 7 August 2019).

[2]See, for example, OBR, *Economic and Fiscal Outlook*, *November 2016* (Cm 9346), 114, 119, 121–3, https://cdn.obr.uk/Nov2016EFO.pdf (date last accessed 16 September 2019) and OBR, *Economic and Fiscal Outlook, March 2018* (Cm 9572), 109, https://cdn.obr.uk/EFO-MaRch_2018.pdf (date last accessed 16 September 2019).

[3]J Freedman, 'Personal Service Companies—"The Wrong Kind of Enterprise"' (2001) *British Tax Review* 1.

[4]See circular IR35, *Countering Avoidance in the Provision of Personal Services* (9 March 1999), http://webarchive.nationalarchives.gov.uk/20100407195838tf_/http://www.hm-treasury.gov.uk/bud99_pr_personal_services.htm (date last accessed 16 September 2019).

[5]See now ss 48–61 Income Tax (Earnings and Pensions) Act 2003 (ITEPA).

ordinary employees.[6] The glare of publicity and changes in legislation may have prompted some reduction in the use of PSCs at the BBC,[7] but in the wider labour market, as we shall see, the growth of PSCs has been undiminished.

To date policy makers have paid almost no attention to another issue: that a PSC is a potential means of circumventing statutory employment rights where its existence disguises what would otherwise be a relationship in which the individual is a worker or employee of the client. The Office for Tax Simplification (OTS) briefly referred to PSCs in its report on employment status, and saw 'some attraction' in 'looking through' the corporate veil when it came to employment status.[8] But the issue was ignored by the recent Taylor Review, even though that report recommended aligning the tax and employment status tests, taxing the renamed 'dependent contractors' as employees and adjusting the NICs paid by the employed and self-employed closer to parity.[9] The matter finally surfaced as a potential legislative topic in the consultation on employment status, published jointly by HM Treasury, HMRC and the Department for Business, Energy and Industrial Strategy (BEIS) in response to the Taylor review, which sought views on whether the 'deemed' contract of employment in tax law should extend to employment rights legislation.[10] The Government's latest word is that it will publish 'detailed proposals' on the alignment of employment status for tax and employment purposes, without yet descending into specifics.[11]

[6] See the evidence to House of Commons Public Accounts Committee, *Off-payroll Arrangements in the Public Sector* (Stationery Office, 5 October 2012), 8, Ev 3–4, Q21–Q28, https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/532/532.pdf (date last accessed 16 September 2019).

[7] For the history, see National Audit Office, *Investigation into the BBC's Engagement with Personal Service Companies* (15 November 2018), https://www.nao.org.uk/wp-content/uploads/2018/11/Investigation-into-the-BBCs-engagement-with-personal-service-companies.pdf (date last accessed 16 September 2019).

[8] OTS, *Employment Status Report* (March 2015), 91–3, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/537432/OTS_Employment_Status_report_March_2016_u.pdf (date last accessed 16 September 2019).

[9] M. Taylor, G. Marsh, G. Nicol and P. Broadbent, *Good Work: The Taylor Review of Modern Working Practices* (July 2017), 38, 68–72, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf (date last accessed 16 September 2019).

[10] *Employment Status Consultation* (February 2018), 46–7, https://www.gov.uk/government/consultations/employment-status (date last accessed 16 September 2019).

[11] HM Government, *Good Work Plan* (December 2018), 28–9, https://www.gov.uk/government/publications/good-work-plan (date last accessed 16 September 2019).

The legal issue, in a nutshell, is the following. The various legislative definitions of 'employee' and 'worker', the keystone of statutory rights, almost invariably require the existence of a contract between an 'individual' and the putative employer. The judgment of the House of Lords in *Salomon v A Salomon and Co Ltd*, usually cited as the source of the doctrine of separate corporate personality, itself concerned what was in effect a one-man company.[12] The 'logical consequence' of *Salomon*, according to *Lee v Lee's Air Farming Ltd*, is that an individual can enter into a contract of employment with her own PSC and issue orders *qua* agent of the PSC that he or she must obey *qua* its employee.[13] Thus, in a paradigmatic PCS arrangement, a contract exists between the client undertaking and the PSC, but the PSC itself is not an 'individual' and therefore cannot be a worker or employee. Nor is the individual providing labour an employee or worker of the client owing to the absence of any contract between them. Even if the individual is categorised as a worker or employee of the PSC, suing oneself is rarely a fruitful exercise unless it is done to activate a state-guaranteed fund in corporate insolvency.

The result is that the undertaking which decides whether to engage an individual, provides work and pay, determines working conditions and exercises the effective power of discipline and termination of work may escape from the legal duties designed to protect workers. In contrast to legal or normative conceptions of the 'employer' based on identifying the body which exercises factual functions such as the co-ordination of work or bureaucratic control, the 'logic' of *Salomon* gives priority to the legal form (or fiction) of two contracts exclusively with an autonomous PSC: one with the individual, another with the client undertaking.[14] The matter bears some similarity to the difficulty agency workers have in showing they are workers or employees of the user undertaking for which they work;[15] but there are no specific statutory provisions aimed at workers engaged via PSCs equivalent to the legislation according agency workers a degree of equal treatment within the user undertaking, the Agency Workers Regulations 2010 (AWR).[16] Unless some legal key can be found to unlock the effect of the *Salomon* doctrine, the door to labour rights will be permanently shut.

[12] [1897] AC 22. Mr Salomon owned 20,001 of the 20,007 shares; the six remaining shares were held one each by his wife, daughter and four sons.

[13] [1961] AC 12.

[14] See S. Deakin, 'The Changing Concept of the "Employer" in Labour Law' (2001) 30 ILJ 72; J. Prassl, *The Concept of the Employer* (Oxford: OUP, 2014) chs 5–6.

[15] See J. Prassl, *The Concept of the Employer*, n. 14, ch 2.

[16] SI 2010/93.

It appears to be no secret that exclusion from employment rights is often a central reason why employing clients or agencies insist on individuals working for them by means of a PSC. For example, in its evidence to the House of Lords Select Committee (SC) on PSCs, Amey plc explained:[17]

> if we need someone for three months or six months and we give them an employment contract, that raises a whole host of issues that are disproportionate to the intended length of the relationship and can include equality of employment rights…

Thus a private or public undertaking abrogates to itself the power to decide whether the rights which Parliament has conferred on all workers, including those which apply from the first day of employment, meet its own calibration of proportionality. Workers' capacity to resist such a strategy is typically undermined by inequality of bargaining power, and the lower tax and higher take-home pay they receive from employment via a PSC reduce their economic incentives to do so. The potential exclusionary effect of PSCs even extends to collective rights because individuals engaged through a PSC may well be barred access *in limine* to the statutory recognition procedure, and any collective industrial action may be unlawful.

Much has already been written about the fragmentation of the traditional employment relationship within a vertically integrated firm.[18] But the unique form of legal fracture caused by PSCs has, curiously, received little attention—all the more surprising given their rapid extension over the past two decades and their potential to colonise new areas. Because the fissuring of the worker via a PSC is purely a legal construct, it is just as compatible with 'traditional' employment, of individuals working set hours for fixed pay within a single hierarchical undertaking, as with new forms of 'gig' economy work, sub-contracting or the provision of labour via agencies or other intermediaries. Nor is there any effect on the economies of scale said to arise from organisation within firms so long as businesses simply engage workers via PSCs on standard terms, and any difference in transactional

[17] House of Lords Select Committee on PSCs, *Report of Session 2013–14, Personal Service Companies* (Stationery Office, 7 April 2014), 23, https://publications.parliament.uk/pa/ld201314/ldselect/ldpersonal/160/160.pdf (date last accessed 16 September 2019; henceforth 'SC Report').

[18] See the seminal H. Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *OJLS* 353; D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve it* (Cambridge, MA: Harvard UP, 2014).

costs is likely to be minimal or zero.[19] Thus, a PSC arrangement entails no disadvantage to the user undertaking compared with 'standard' direct employment in relation to matters such as co-ordination of work, duties on the individual to act in the interests of the undertaking or powers of discipline.

The potential of PSCs to split the juridical subject but permit the retention of control over physical labour means they represent a fundamental legal challenge to statutory employment rights, individual and collective, across all sectors. If, as the Taylor Review proposes, the Government legislates to make it harder to use written substitution clauses as a means of avoiding employee or worker status and blocks off other means of escape, the incentives to use PSCs will only increase. The contractual terms considered by the Court of Appeal in *Uber v Aslam*, for instance, already envisaged drivers providing their services via a PSC, referred to as a Transportation Company.[20] While this did not in fact take place (for reasons which are not clear), it was presumably intended as another convenient means of severing statutory rights at the root. The evidence, considered in section 2, of employment agencies turning to PSCs in the wake of the legislation giving rights to agency workers demonstrates how plugging a leak in one part of the system can increase pressure and force open cracks elsewhere. Typically lacking collective forms of resistance, precarious workers such as agency workers are especially vulnerable to the imposition of PSCs.

In this article, I will examine the use of PSCs and their effects on employment rights. In section 2, I look at the tax treatment of PSCs and empirical evidence on their form and expansion, drawing on some concrete examples. I discuss how policies in this area have been dominated by two competing goals—concerns that PSCs unfairly reduce tax liabilities, on the one hand, and ideologies celebrating the expansion of small businesses and individuals' right to choose how they work, on the other hand—while ignoring the effect on employment protections. In section 3, I examine the problems with the existing law as it applies to PSCs. I consider the specific legal provisions and principles that might be used to see around PSCs in particular contexts, both individual and collective, as well as examining the scope for relying on more general arguments based on shams, labels or piercing the corporate

[19] Cf. A. Adams, J. Freedman and J. Prassl, 'Rethinking Legal Taxonomies for the Gig Economy' (2018) 34(3) *Oxford Review of Economic Policy* 475, 479; Z. Adams and S. Deakin 'Institutional Solutions to Precariousness and Inequality in Labour Markets' (2014) 52(4) *British Journal of Industrial Relations* 779.

[20] [2019] ICR 845, para. 15, citing the employment tribunal ([2017] IRLR 4) at paras. 37–38.

veil. In the final section, I discuss possible legislative responses to the issue, which is part of wider debates about the proper scope of labour law, the interaction of the tax and employment law systems, and use and abuse of corporate personality.[21]

2. THE USE OF PSCs IN PRACTICE

A. PSCs and Tax

There is no legal definition of PSC. The typical arrangement involves an individual incorporating a limited liability private company of which he or she is the director and the principal or sole shareholder. Sometimes family members or others are made shareholders or officers. The PSC exists in order to provide the labour of the individual to a third-party client or several clients. In the most straightforward arrangement, a contract is entered into between the client and the PSC under which the PSC undertakes to provide the services of the individual and the client agrees to pay fees to the PSC. It is not unusual that other legal intermediaries, such as an agency, add to the links in the contractual chain between the individual and the undertaking for which he or she ultimately works. Within this legal form, PSCs encompass a wide spectrum of factual relationships, ranging from those formed as vehicles for genuine business undertakings seeking to expand to those where the individual would, but for the PSC, be a worker or employee of the client in accordance with the legal tests. Disguised employment is the focus of this article, but the diversity of PSC arrangements can make them an elusive target for legislation.

The tri-partite (or multi-partite) contractual nexus involved in a PSC engagement permits the allocation of payments for labour in a variety of ways, often as a means of minimising the tax or NIC liabilities of the individual or client.[22] The fees channelled to the PSC may go towards the payment of salary to the individual director whose services are provided. Assuming he or

[21] See OTS, *Employment Status Report*, n.8, and the valuable discussion by Adams et al., 'Rethinking Legal Taxonomies', n.19.

[22] For an excellent summary, see A. Seely, *Personal Service Companies & IR35*, 6–10 (House of Commons Briefing Paper No. 5976, 21 August 2019), https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05976 (date last accessed 16 September 2019). See too S. Adam, H. Miller and T. Pope, 'Tax, Legal Form and the Gig Economy' in C. Emmerson, P. Johnson and R. Joyce (eds), *IFS Green Budget 2017*, https://www.ifs.org.uk/green-budget/2017 (date last accessed 10 August 2019).

she has a contract of employment with the PSC—which is not inevitable[23]—income tax and NICs are deducted under PAYE, but the level of salary can be fixed to fall beneath the minimum tax or NIC thresholds. In addition, fees may be allocated to the payment of salary to a family member employed by the PSC; the payment of dividends to the individual shareholder(s) taxed at corporation tax rates; or the payment of tax-deductible expenses incurred by the PCS. Another possibility is to retain profits within the company and realise them later as capital gains.[24] This flexibility in income allocation is not available to directly employed employees, whose remuneration is subject to compulsory deductions of income tax and Class 1 NICs under the PAYE regulations and who are subject to strict rules on what are deductible expenses.[25]

There are potential advantages, too, for the client. It simply pays the gross fee to the PSC and does not need to make deductions under the PAYE regulations.[26] Nor is it liable to pay class one secondary NICs, of 13.8% of earnings above the relevant threshold.[27] Engagement through a PSC also eliminates the risk that the client will be liable to repay tax and NICs, together with interest and penalties, in the event a directly engaged individual is wrongly classified as self-employed because liability for tax attaches to the PSC alone (though the position has now been changed in relation to public authorities and will change for private sector businesses: see below).

The total savings in in tax is considerable. According to the Government, about £6,000 less is paid under a PSC arrangement as compared with direct employment on a total income of £50,000;[28] Adam et al. give a

[23] See the cases on directors discussed in the section on discrimination law below, and the OTS, *Small Business Tax Review* (May 2011), 65, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/199183/05_ots_small_business_interim_report.pdf (date last accessed 10 September 2019).

[24] See helpful summary of Adam et al., 'Tax, Legal Form and the Gig Economy', n.22, 214–7.

[25] ITEPA Part 11 and the Income Tax (Pay as You Earn) Regulations 2003, SI 2003/2682, as amended. On deductible expenses for employees, see s 336 ITEPA. Travel expenses are now subject to detailed rules designed to counter avoidance by intermediaries, including PSCs: see s 339A ITEPA and, for the background, Seeley, *Personal Service Companies*, n.22, 43–61.

[26] The position is more complicated where an agency is involved: see ss 44–47 ITEPA (note that so long as the worker is subject to taxation of employment income under the IR35 provisions, the agency is not treated as the employer: see s 44(2)(b) ITEPA).

[27] See Part 1 of the Social Security Contributions and Benefits Act 1992 and the summary discussion by the OTS, *Employment Status Report*, n.8, 99–100.

[28] HMRC, HM Treasury, *Off-payroll Working in the Private Sector* (18 May 2018), 9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708544/Off-payroll_working_in_the_private_sector_-_consultation_document.pdf (date last accessed 9 August 2019).

conservative figure of a saving of more than £4,000 per annum on an income of £40,000 for 2016–17, explain there are other potential tax advantages of incorporation and show how the difference has persisted at all income levels and across time since 1999.[29] The first attempt to address the resulting fiscal losses was the IR35 legislation. As the press release explained, the legislation was intended to remove the tax advantages of operating a PSC in circumstances where the individual would, but for the PSC, be an employee of the client.[30] It is now found in sections 48–61 of ITEPA (as amended). The central provision is section 49 which applies where an individual (called 'the worker') (a) personally performs, or is under an obligation personally to perform, services for a client, (b) the services are provided through an intermediary (for present purposes the PSC), and the following applies:

> the circumstances are such that—
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as anemployee[31] of the client or the holder of an office of the client, or
> (ii) the worker is an office-holder who holds that office under the client and the services relate to the office.

In relation to the 'circumstances', the written terms are merely one factor to consider.[32] When section 49 applies, payments or benefits from the PSC are deemed to be earnings from employment with the PSC, which should then make deductions under PAYE.[33]

The provision thus focuses on a 'hypothetical contract', the term coined by Park J in *Usetech v HM Inspector of Taxes*.[34] Constructing the terms to which the parties would have agreed, based on the factual arrangements and their interaction with the express terms of often more than one contract, and then ascertaining whether those notional terms would amount to a contract of employment (itself no easy question), may require a wet towel and a quiet room.[35] Adding to the complexity, the parallel provisions

[29] 'Tax, Legal Form and the Gig Economy', n.22, 216–20.
[30] IR35, n.4, leading to the Finance Act 2000, s 61 and Sched 12.
[31] 'Employee' is defined in s 4 ITEPA by reference to the common law contract of service or apprenticeship or employment in Crown service.
[32] ITEPA s 49(4).
[33] ITEPA ss 50, 54–6.
[34] [2004] EWHC 2248 (Ch) [9].
[35] See e.g. *Synaptek v Young* [2003] ICR 1149 [11].

in relation to NICs also focus on a hypothetical contract yet, for obscure reasons, adopt slightly different wording.[36]

The fundamental feature of IR35, however, was to give priority to legal form by treating the PSC as the putative employer for tax purposes. It took no steps to extend legal responsibility to the entity exercising factual functions typical of employment, such as co-ordination or control, in respect of the individual. Nor did it reduce the incentives on the employer/client to engage an individual by means of a PSC so as, for example, to reduce its NICs. Finally, the model adopted exacerbated HMRC's difficulties of enforcement because action had to be taken against each individual PSC, which might not be able to meet tax liabilities, rather than against a single agency or client engaging many individuals.[37]

The predictable problems with the effectiveness of the legislative model led the Government to take steps to improve the operation of IR35, initially in the public sector. As a result of the Finance Act 2017, instead of the PSC being treated as the employer under IR35, the public authority client makes a determination of status under the hypothetical contract and tax is paid under PAYE by it or the agency which contracts with the PSC.[38] The same dual-track model operates in relation to NICs.[39] Considering the reform a success and estimating that 'endemic' non-compliance in the private sector cost £700 million in 2017/18 rising to a projected £1.2 billion in 2022/23,[40] the Government announced in the October 2018 Budget that it would extend similar rules to private businesses from April 2020.[41] Though the rules, set out in draft

[36] See the Social Security Contributions (Intermediary) Regulations 2000, SI 2000/727, especially regulation 6 and the discussion in *Dragonfly Consultancy v HMRC* [2008] EWHC 2113 (Ch), [13]-[19] (cf. *Usetech*, n.34, [35]).

[37] On this, see *Off-payroll Working in the Private* Sector, n.28, Ch 5. For criticisms of the low number of IR35 investigations and the resources allocated to them, see SC Report, n.17, Ch 6.

[38] ITEPA, ss 61K-61X, introduced by s 6 and Sched 1 of the Finance Act 2017.

[39] See Part 2 of the Social Security Contributions (Intermediary) Regulations, n.36.

[40] See the consultation, n.28, 5, 19.

[41] HM Treasury, *Budget 2018* (HC 1629), 42, https://www.gov.uk/government/publications/budget-2018-documents (date last accessed 21 February 2019); HMRC, HM Treasury, *Off-payroll Working in the Private Sector: Summary of Responses* (29 October 2018), 3, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752160/Off-payroll_working_in_the_private_sector_-_summary_of_responses.pdf (date last accessed 22 February 2019).

legislation,[42] will exclude small businesses, they have already met with fierce opposition.[43]

The history of the IR35 legislation exemplifies the Janus-faced attitude of governments to PSCs. Its purpose, as Robert Walker LJ explained in the unsuccessful judicial review challenging the legislation, was to ensure that individuals who ought to pay tax as employees did not use a corporate structure to reduce their liabilities.[44] The underlying principle was tax neutrality, meaning that tax ought not to influence the organisational structure adopted.[45] At the same time, however, the Government did not wish to be seen as discouraging 'genuine' entrepreneurial activity, of which self-incorporation was and is emblematic.[46] The tension between these aims has produced polices displaying a degree of incoherence. At times, for example, the Government adopted tax changes which undercut the principle of tax neutrality, such as the nil starting corporation tax on profits up to £10,000 which applied between 2002/03 and 2005/06.[47] In addition, while the treatment of the PSC as the employer came under strain in relation to fiscal receipts, outside the tax sphere the Government was content to ignore how PSCs may disguise what are in effect forms of wage labour. It thereby did nothing to discourage the use of PSCs as a device to avoid social rights, even at a time when the National Minimum Wage Act 1998 (NMWA) had only just been introduced.

The Government has continued to have blind spots when it comes to the justifications for PSCs. In the latest consultation on off-payroll working in the private sector, the Government justified the reforms on the basis it was 'not fair' that those who work in a similar way pay different taxes.[48] But fairness reaches

[42] See HMRC, *Off-payroll Working Rules from April 2020* (5 March 2019) and the draft amendments to ITEPA, both at https://www.gov.uk/government/publications/rules-for-off-payroll-working-from-april-2020 (date last accessed 10 September 2019).

[43] See *Financial Times*, 'Business Attacks Plans to Extend Tax Rules for Self Employed' (5 March 2019). https://www.ft.com/content/d40e2f90-3f5b-11e9-b896-fe36ec32aece (date last accessed 7 March 2019).

[44] *Professional Contractors Group v Commissioners of Inland Revenue* [2001] EWCA Civ 1945, [50].

[45] See A. Milanez and B. Bratta, 'Taxation and the Future of Work: How Tax Systems Influence Choice of Employment Form', *OECD Taxation Working Paper No. 41* (Paris: OECD, 2019). https://ideas.repec.org/p/oec/ctpaaa/41-en.html (date last accessed 24 October 2019).

[46] Freedman, 'Personal Service Companies', n.3.

[47] The tax and NIC changes since 2000 are summarised in Adam et al., n.22, 217–220 and, during the New Labour governments, in C. Crawford, 'Corporation Tax and Entrepreneurship' in R. Chote, C. Emmerson, D. Miles and J. Shaw (eds), *The IFS Green Budget: January 2008*, 244, https://www.ifs.org.uk/budgets/gb2008/08chap11.pdf (date last accessed 10 August 2019).

[48] *Off-payroll Working in the Private Sector: Summary of Responses*, n.41, 4.

its limits, it seems, where self-incorporation begins to trespass on employment rights. For in the next breath the Government confirmed its commitment to a 'flexible labour market' the rules of which 'do not stop anyone working through a company'.[49] Individuals who are as a matter of fact in an employment relationship accordingly remain 'free' to establish PSCs. The faltering steps taken by the tax legislation towards imposing liability on the undertaking exercising the factual functions characteristic of employment, exemplified by the recent reforms in the public and private sector, have no equivalent in relation to employment rights. Worse, by doing nothing to question the existence of a separate contracting legal person in the form of the PSC, the legislation which controlled the use of PSCs as a tax-saving device had the effect of implicitly *endorsing* their legitimate use for the 'flexible' allocation of labour rights.

B. Related Forms of Intermediaries

PSCs are distinct from other forms of intermediaries through which individuals provide their labour. The triangular relationship which has received the most legislative, judicial and academic attention, of course, is the agency relationship, the effect of which on employment rights is well known. In recent years, however, a sometimes bewildering range of other intermediaries has emerged, highlighting how legal responses to one type of intermediary can soon appear anachronistic. One example is where individual workers are employed by 'umbrella' companies rather than by the undertaking(s) for which they work, in the past often used as a means of deducting travel expenses from salary of temporary workers but which can operate to the detriment of low-paid workers and which led to remedial legislative action.[50]

Another example is the use of managed service companies (MSCs), estimated to apply to 240,000 individuals in 2005/06[51] but which sharply declined following tax legislation introduced in 2007.[52] Like a PSC arrangement, the

[49] *Off-payroll Working in the Private Sector: Summary of Responses*, n.41, 4.

[50] See *Personal Service Companies*, n. 22, 42–60.

[51] See the consultation by HMRC, *Tackling Managed Service Companies* (December 2006), 13, https://webarchive.nationalarchives.gov.uk/20131003044600tf_/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&id=HMCE_PROD1_026427&propertyType=document&columns=1 (date last accessed 10 September 2019).

[52] See ss 61A-J ITEPA, introduced by the Finance Act 2007. The history is explained in A. Seely, *Managed Service Companies* (House of Commons Briefing Paper No. 4301, 13 June 2018), https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04301 (date last accessed 6 September 2019).

typical MSC scheme involves individuals who are both shareholders and workers of a company which agrees to provide their services to an agency or end client. An MSC, however, is defined so as to catch only those who are in the general business of promoting the use of companies, such as PSCs, to provide individuals' services.[53] The MSC is usually controlled by the scheme provider and not the individual worker, who is typically not a director.[54] Here, the legislation operates by deeming all the individual workers whose services are supplied to clients to be employed by the MSC for tax purposes[55] but, in common with IR35, it has no effect on employment rights. That this model appears to have successful in curbing the use of MSCs for tax purposes shows why it may not be prudent to adopt a single 'employer' responsible for both fiscal and employment liabilities. What works to achieve tax goals may not be effective in achieving the normative ends of employment legislation, and *vice versa*.

C. Empirical Examples of PSCs

Enforcement action by the Revenue in relation to the IR35 legislation has generated some case-law examples of how PSCs operate in practice. In *Ackroyd Media Limited v Commissioners for Revenue & Customs*,[56] Christa Ackroyd, a BBC television presenter, was engaged to work for the BBC under a seven-year contract with her PSC, drafted by the BBC in order to avoid PAYE and NIC liabilities, under which she was required to work at least 225 days a year in return for an annual 'fee' paid in equal monthly instalments.[57] Placing particular emphasis on the control exercised by the BBC, the length of the contract and its full-time nature, the First-Tier Tribunal (FTT) concluded that the hypothetical contract was one of employment.[58]

Illustrating the fact-specificity and uncertainty of the exercise, however, are two recent decisions involving celebrity BBC presenters in which the FTT found against the HMRC after a detailed examination of the facts.[59] Other IR35 cases illustrate what appears to be the common interposition of an agency

[53] See ITEPA, s 61B(1)(d) and *Christianuyi v HM Revenue and Customs* [2019] 3 All ER 178.
[54] See the consultation, n.51, [2.12]–[2.13].
[55] ITEPA ss 61D, 61G.
[56] [2018] UKFTT 0069 (TC).
[57] See the terms of the contract in the Appendix to *Ackroyd*.
[58] *Ackroyd*, n.56, [179].
[59] *Atholl Productions v HMRC* [2019] UKFTT 242 (Kaye Adams) and *Albatel Limited v HMRC* [2019] UKFTT 195 (Lorraine Kelly).

between the PSC and the ultimate client.[60] The engagement of the individual was often on standard terms, drawn up by the intermediary agent or client.[61] These often included substitution clauses, presumably included to support an argument that there was no employment relationship with anyone,[62] though the effect of the hypothetical contract was sometimes to override them.[63]

While the IR35 cases demonstrate the ingenuity of contractual drafting to escape tax (and employment) duties, they are unlikely to be a representative sample because they tend to involve, unsurprisingly, appeals brought by individuals[64] who are well paid, who can afford legal representation, who want to show they are *not* employees, and for whom the legal game is worth the candle. They do not capture the range of sectors or jobs in which PSCs are now used. Evidence to the House of Lords SC showed that PSCs had spread far beyond their origin in work done by higher-paid consultants in areas such as information technology, oil and gas engineering and interim management roles. Now common in construction, teaching and entertainment, PCS arrangements extend to receptionists, officer workers, credit controllers, healthcare workers, telephonists, cleaners and those in the 'hospitality' sector, such as chambermaids, as well as public sector jobs including those working as social workers, within the NHS and for local authorities.[65] None of these figures in the reported cases, even though the hypothetical contract might well deem them employees for tax purposes.

Actual examples illustrate the use of PSCs on traditional vertically integrated, subordinate workers. To work for Ryanair, many pilots are obliged to provide their services via a PSC, set up for the pilot by accountancy firms specified by the agency used by Ryanair.[66] The PSC then enters into a contract with the agency, such as Brookfield Aviation, by which the PSC agrees to provide the services of the pilot, defined as the 'Company Representative', to the 'Hirer', meaning Ryanair. The PSC must ensure the pilot is available

[60] See the SC Report, n.17, 13 and e.g. *Synaptek*, n.35; *Usetech*, n.34; *Dragonfly*, n.36; *Alternative Book Company v Commissioners for Revenue & Customs* [2008] 5 WLUK 427; *Primary Path v Commissioners for Revenue & Customs* [2011] UKFTT 545 (TC): *MDCM v Commissioners for Revenue & Customs* [2018] UKFTT 0147 (TC); *Jensal Software v Commissioners for Revenue & Customs* [1018] UKFTT 0147 (TC).

[61] E.g. *Usetech*, n.34, [18]; *MDCM*, n.60, [10].

[62] So defeating the personal service requirement for both employment and worker status: see *Pimlico Plumbers v Smith* [2018] ICR 1511.

[63] *Synaptek*, n.35, [28]; *Usetech*, n.34, [19], [23], [48]; *Dragonfly*, n.36, [33]; *Alternative Book Company*, n.62, [107]–[110]; *MCDM*, n.62, [16], [36], [52]. Cf. *Jensal*, n.62, [3], [118]–[119].

[64] Strictly, the appellant is the PSC since it is the body assessed for tax.

[65] SC Report, n.17, 9–10, 38, 50.

[66] This section is based on information and documents provided by the pilots' union, BALPA.

to work 11 months a year, subject to some requests for time free of duties during the quieter period between November and February (not referred to as annual leave). Monthly fees are paid for flying time, for which pilots are rostered one week in advance. The pilot is subject to Ryanair's manuals, policies, training (which must be paid for by the PSC) and assessments. The contract may be terminated immediately should the PSC or pilot, among other reasons, fail to perform duties to the reasonable satisfaction of the agency or to maintain standards acceptable to Ryanair.

Many drivers who worked for the now defunct courier company, City Link, also provided their services via PSCs.[67] Though City Link had some directly employed drivers, a large group entered into a 'Sub Contractor Partnership Agreements' with City Link through the medium of PSCs. Under that contract, the PSC agreed to provide a 'Nominated Driver' and to ensure the driver complied with the terms of the contract, including ensuring that the driver attended the depot on agreed working days and complied with City Link's reasonable requests and its operating procedures. The PSC agreed to be responsible for tax, to provide the specified uniform and to provide services to agreed 'Service Levels', specifying targets for delivery times. In practical terms, the drivers worked in exactly the same way as directly employed drivers, just as did the Ryanair pilots; any differences in the effect of implied contractual terms relating to loyalty or trust and confidence can probably be confined to legal theory.

D. The Proliferation of PSCs in Recent Years

Nobody knows exactly how many individuals use PSCs and the empirical data are noisy. In 2013, HMRC's 'broad brush' evidence to the House of Lords SC was of around 200,000 PSCs based on a 'holistic approach' rather than published statistics.[68]

[67]This section is based on information and documents provided by the drivers' union, the RMT, and the Joint Report of the BEIS and Scottish Affairs Committees of Session 2014-15, *Impact of the Closure of City Link on Employment*, ch 4 https://publications.parliament.uk/pa/cm201415/cmselect/cmscotaf/928/928.pdf (date last accessed 24 October 2019).

[68]SC report, n.17, 10 and the Oral and Written Evidence to the SC at, 135, 153, https://www.parliament.uk/documents/lords-committees/Personal-Service-Companies/personalservicecompaniesevvolume.pdf (date last accessed 17 September 2019; henceforth 'SC Evidence). These figures were significantly higher than the 1,000 individuals and 120,000 employers who said they were service companies in their 2011/12 tax returns, but HMRC attributed the difference to ignorance or a conscious decision not to answer the question, perhaps for fear of triggering an IR35 investigation: see HMRC, SC Evidence, 151.

Still more opaque is the approximate number of individuals who would, but for the interposition of the PSC, be an employee or worker of the client or agency, and who are therefore potentially excluded from the scope of protective legislation. The official statistics on business owners are limited and fail to provide the necessary data.[69] Nor does the number of companies applying the IR35 hypothetical contract provide the answer because HMRC believes only about 10% of companies correctly apply the legislative rules.[70] Supporting its current estimate, that around a third of the individuals providing services through PSCs in the private sector would be employees if they were directly engaged,[71] is the experience in the public sector. In the first 10 months after rules were introduced placing responsibility on the public sector body or the agency rather than the PSC to ensure compliance with IR35, income tax and NICs were paid in respect of an additional 58,000 individuals each month.[72] If one includes those individuals who would fall within the broader statutory category of 'worker' but for the interposition of the PSC, the number of individuals affected can only be higher—probably much higher.

Whatever the precise numbers, all the (limited) evidence indicates a steep increase in PSCs over recent years. In 1999, shortly before IR35 was introduced, HMRC estimated there were between 33,000 and 66,000 PSCs;[73] its recent estimate for 2012–13 was of 265,000 PSCs, an increase of 65,000 on the previous year alone.[74] Further support for these trends is the doubling in the number of one- or two-person companies between 2000 and 2016, a much higher increase than the growth in employment in the same period;[75] the steep rise in the number of employers declaring themselves as service

[69] Adam et al., 'Tax, Legal Form and the Gig Economy', n.22, 7. See too Institute for Fiscal Studies (IFS), *Who are Business Owners and What are They Doing?* (June 2019), 36 https://www.ifs.org.uk/uploads/R158_Who_are_business_owners_and_what_are_they_doing.pdf (date last accessed 8 August 2019).

[70] See *Off-payroll Working in the Private Sector*, n.28, 5. See too HMRC's evidence to the SC, n.68, 149, referring to 6,000 companies applying IR35 in 2015 and the *Small Business Tax Review*, n.23, 39 (referring to 9,500 companies applying IR35 or the MSC legislation in 2008/09).

[71] *Off-payroll Working in the Private Sector*, n.28, 5.

[72] *Off-payroll Working in the Private Sector*, n.28, 12.

[73] See the May 1999 Regulatory Impact Assessments, quoted by Burton J in *ex parte Professional Contractors Group*, n.18, [7]–[10]. But cf. HMRC's estimate to the SC of 90,000 in 1999: SC Evidence, n.68, 135.

[74] See HMRC, *Intermediaries Legislation (IR35): Discussion Document*, n.1, 4.

[75] See (IFS), *Who are Business Owners and What are They Doing?*, n.69, 12.

companies on their tax returns in recent years;[76] and the increase in companies with no employees other than the owner-manager.[77] On the basis of a model estimating incorporations where there was a genuine choice over employment status, the OBR estimated that such companies grew 7% annually between 2000 and 2014, much faster than the growth in employment or self-employment.[78]

Now there are many factors driving individuals or companies to use PSCs, including responses to tax changes.[79] But it is remarkable that PSCs seem to have consistently increased since 2000 at a higher rate than employment despite two factors. The first is that during this period the relative tax advantage of incorporation compared with employment decreased, even if a significant advantage persists at most income levels.[80] The second is the adoption of the IR35 legislation in 2000, making PSCs less financially attractive to individual workers (and, since 2007, to clients in the public sector). Indeed, HMRC itself considers that IR35 has *deterred* a high number of individuals from using PSCs—hence its written evidence to the SC that the legislation generates about £405 million annually from those it puts off using PSCs.[81] The Government's own estimate for 2010–11, though hedged with caveats, was higher still, assuming that 4% of employees earning above £50,000 would incorporate, but for the existence IR35.[82] The less benign tax environment in existence from 2000 thus undermines HMRC's contention to the SC that the increase of PSCs was because more people 'have chosen' to use a PSC or was due to tax reasons.[83]

[76] See HMRC's oral evidence to the SC, n.68, 151, that 120,000 employers said they were service companies on the P35 form in 2011/12. Compare the OTS, *Small Business Tax Review*, n.23, 39, referring to, 70,000–75,000 employers in 2007/08 and 2008/09 who declared themselves as service companies in their tax return.

[77] See Crawford, 'Corporation Tax and Entrepreneurship', n.47.

[78] OBR, *Economic and Fiscal Outlook*, *November 2016* (Cm 9346), 121, https://cdn.obr.uk/Nov2016EFO.pdf (date last accessed 16 September 2019). See too Adam et al., n.22, 207–10, on the increase in individuals working for their own business compared with overall employment from 2008 to 2016.

[79] See the useful summary in OTS *Employment Status Report*, n.8, 24–5, 65–7.

[80] See Adam et al., 'Tax, Legal Form and the Gig Economy', n.22, 217–20; Crawford, 'Corporation Tax and Entrepreneurship', n.47, 240–3.

[81] HMRC, Supplementary Written Evidence (20 January 2014): SC evidence, n.57, 164.

[82] See *House of Lords Select Committee on Personal Service Companies: The Government's Response* (Cm 8878, 9 June 2014), Annex 1, 13–14, https://www.parliament.uk/documents/lords-committees/Personal-Service-Companies/Personal-Service-Companies-Government-Response.pdf (date last accessed 15 September 2019).

[83] SC Evidence, n.68, 136, 139. The third factor it relied on, how the labour market was 'evolving', begs more questions than it answers.

If individual tax incentives seem to be an incomplete explanation for the rise in PSCs since 2000, several pieces of evidence support an alternative or complimentary hypothesis, that PSCs were increasingly imposed by employers or agencies in order to circumvent legal protections. The context is that from 1998 some important protective legislation was passed, including legislation placing significant duties on agencies. It included the NMWA and the provisions for paid annual leave in the Working Time Regulations 1998 (WTR),[84] both of which apply to workers and agency workers;[85] and AWR 2010, conferring equal treatment on agency workers compared with directly employed workers in respect of pay and some other terms.[86] As we shall see below, the use of a PSC is a potential means of side-stepping this legislation, even if in some cases the law is not clear-cut, and there has been a steep rise in incorporations since 2010 which does not correlate with any increase in the relative tax benefits of incorporation.[87]

Much evidence already confirms the imposition of PSCs in order to avoid these (and other) duties. The contracts adopted in respect of Ryanair pilots and City Link drivers, sprinkled with provisions apparently designed to take workers outside labour protections (such as substitution clauses and clauses denying the existence of an employment relationship), can readily be interpreted in this light. In evidence to the SC, the Professional Contractors Group (PCG), referred to a 2013 survey finding that 54% of those using PSCs did so primarily because otherwise the agency or client would not engage them.[88] The denial by Amey plc that it did not 'force' individuals to use a PSC was contradicted by its own assertion that it 'rarely' took someone on for a temporary contract unless they agreed to operate through a PSC.[89] There is evidence of PSC arrangements being imposed on migrant workers as a condition of employment and of individuals operating through PSCs being paid at rates below the national minimum wage.[90]

[84] SI 1998/1833.

[85] See s 34 NMWA and regulations 13–16 and 36 of WTR, discussed below.

[86] AWR, regulations 5, 6.

[87] See Adam et al., 'Tax, Legal Form and the Gig Economy', n.22, 225.

[88] SC Evidence, n.68, 335. See similarly Giant Group, 132; the Institute of Chartered Accountants, 184–5; Low Incomes Tax Reform Group, 257–8; but cf. the Freelancer and Contractor Services Association, 121–2.

[89] SC Evidence, n.68, 33.

[90] See SC Report, n.17, 40; OTS, n.8, 43, 70–71; OTS, n.23, 411.

The treatment of agency workers, especially numerous in the UK and typically lower-paid than directly employed workers,[91] provides a useful illustration of using PSCs to circumvent social rights. It appears that many agencies insist on services being provided via PSCs.[92] When tax liability was placed on agencies in 1988 it seems they cottoned on to using PSCs to avoid this duty.[93] The belated enactment of AWR 2010, to much opposition from business, appears to have given a further boost to the practice.[94] The absurd claim to the SC that some individuals 'do not want the protections' of AWR—when triggering the rights is entirely optional—was contradicted by evidence that individuals were forced to use PSCs precisely because agencies wanted to avoid the duties in AWR.[95] Should the Government deliver on its promise to remove the 'Swedish derogation' in regulation 10 AWR[96]—one of the principal alternative means by which agencies and clients presently avoid equality in pay for agency workers—a further jump in the use of PSCs is predictable.

The imposition of PSCs to circumvent employment rights has important normative consequences. First, it undermines the language of 'choice' used by the Government, HMRC and others,[97] as well as policies justified on the basis that all PSCs are autonomous entrepreneurial businesses seeking to grow. Second, especially in respect of the low paid, it undercuts the argument that lower rates of tax are some sort of 'fair' and economically rational trade-off for reduced employment rights. Though the tax details are complex, in broad terms the income tax personal allowance and the NIC primary threshold for employees, coupled with the requirement to pay any salary due from the PSC at the rate of the national minimum wage, mean that for the low paid the tax benefits of incorporation are likely to be less significant as a proportion of income.[98] It is the principally the employer

[91] For the empirical data, see L. Judge and D. Tomlinson, *Secret Agents: Agency Workers in the New World of Work* (London: Resolution Foundation, 2016) https://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf (date last accessed 16 September 2019).

[92] See e.g. Low Incomes Tax Group, SC Evidence, n.68, 256.

[93] See now s 44 ITEPA, containing provisions in formerly s 134 of the Income and Corporation Taxes Act 1988 and, on the empirical evidence, OTS, n.8, 44–5 and SC Report, n.17, 13.

[94] See SC Report, n.17, 13–14.

[95] See SC Report, n.17, 13–14.

[96] See *Good Work Plan*, n.11, 16, 28–9.

[97] See e.g. *Government's Response*, n.82, 3–4; SC Evidence, n.17, 136 (HMRC), 33 (Amey), 335 (Professional Contractors Group), 357 (Recruitment and Employment Confederation).

[98] For details, see e.g. HMRC guidance for 2018–19 at https://www.gov.uk/guidance/rates-and-thresholds-for-employers-2018-to-2019 (date last accessed 5 September 2019) and R Benneworth, *Budget: Impact on Incorporation Decisions – Up-dated* (https://www.accountingweb.co.uk/tax/business-tax/budget-impact-on-incorporation-decisions-updated (date last accessed 5 September 2019). I am grateful to Judith Freedman for this point.

who wins from PSC arrangements in these circumstances, being subject to lower NICs, less tax administration and fewer employment duties. And the individualised model underpinning the trade-off argument fails at a more fundamental level. Employment rights are not economic benefits to be sold in exchange for lower rates of tax; rather, it is the public interest that labour standards are systemically effective, as Lord Reed memorably spelt out in the *UNISON* case.[99]

These normative issues have not been addressed by successive governments. Instead, the history provides an object lesson of how ambivalence in policies and undisturbed common law doctrines can widen gaps in protective legislation. Even after the IR35 legislation was passed in order to discourage the use of PSCs in respect of those who would be employees, the tax advantages of incorporation over direct employment persisted. The enactment of protective employment rights legislation, such as AWR, further increased pressure within the system and PSCs remained available as a convenient means of reducing or eliminating it. It would be interesting to investigate if case-law developments, making it harder to use carefully drafted written contracts to avoid employment rights, also led to employers and agencies switching attention to PSCs.[100] By ignoring the potential effect of PSCs on employment rights, successive governments at once left open an easy escape route from social legislation and also contributed to the fiscal problems which the IR35 legislation was intended to address—a form of internal systemic dysfunctionality.

3. THE EXISTING LEGAL CONTROLS

To see why PSCs are potentially attractive to employers and agencies in terms of employment rights requires fuller explanation, but there has also been little analysis of how the law might protect an individual worker using such a vehicle. The paradigmatic domestic definitions of 'worker' and 'employee' require a contractual link between the individual and the putative employer,[101] which, as explained in the introduction, is broken by the

[99] *R (UNISON) v Lord Chancellor* [2017] ICR 1037 [67]–[72].

[100] For example, the ruling of the Supreme Court in *Autoclenz v Belcher* [2011] ICR 1157, giving emphasis to practice rather than the written contract.

[101] See, for example, the definitions of 'worker' and 'employee' in s 230 of the Employment Rights Act 1996 (ERA), adopted in other legislation such as s 54 NMWA and in regulation 2 of WTR.

interposition of the PSC. The legislature has not directly enacted provisions directed at PSCs and employment rights, with the result that the legal effects of PSCs must be examined through the lens of various legislative provisions and case-law principles, almost none of which is targeted specifically at PSCs.

In what follows, in Sections A-F, I examine the existing patchwork of legal provisions which may impose legal liability on the undertaking for which an individual works, notwithstanding the existence of a PSC, in specific legal contexts; then, in Section G, I consider wider arguments for 'looking through' the PSC, based on labels, shams or piercing the corporate veil. For these purposes, I shall assume, first, that absent the PSC the individual would be an employee or worker of the relevant undertaking for which he or she works. Second, I assume that the PSC alone is party to the contract with the agency or client. In the event that the individual worker is *also* a party to that (or another) contract with the client or agency, the legal analysis is very different because the PSC no longer blocks the existence of the necessary contract with the individual. While the existence of a parallel contract with the PSC *might* be a factor relevant to the classification of that separate contract, the courts possess sufficient tools to look beyond the written terms to identify the 'true agreement' with the individual.[102]

A. Employment Agencies: The CEAEB Regulations 2003

Apart from the tax legislation, the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (CEAEB Regulations)[103] are the only statutory provisions intended specifically to address PSCs. Made under the legislation which once required licensing of agencies, the Employment Act 1973,[104] they place various duties on employment agencies—unhelpfully referred to as 'employment businesses'—and recruitment agencies in relation to 'work seekers'.[105] These include duties not to withhold pay from a work-seeker even though the agency has not been paid by the hirer, to record certain compulsory terms in writing and to ensure the work-seeker is suitable for the role. A 'work-seeker' is defined in regulation 32 so as to include a company. But the

[102] See *Carmichael v National Power* [1999] ICR 1226; *Autoclenz*, n.100; *Uber*, n.20.

[103] SI 2003/3319.

[104] Original ss 1–4, repealed by the Deregulation and Contracting Out Act 1994.

[105] Confusingly, the definition of 'employment business' is close to the traditional concept of agency while that of 'employment agency' means a recruitment business (see s 13(3)).

same regulation permits contracting out of the duties in the case of a corporate work-seeker where both the company and worker agree and inform the hirer of this, subject to an exception for the young and vulnerable.[106]

The predecessor regulations[107] contained no such opt-out. When the coalition Government consulted on amendments to the CEAEB Regulations in 2013 and 2016 with the aim of reducing 'burdens on business' it was little surprise that the opt-out for companies was not a target. The Government justified it by asserting baldly that it involved 'a business to business relationship'.[108] That the regulation might be imposed on the weaker party is implicitly acknowledged, however, by the fact that no contracting out is permissible for 'vulnerable persons', defined to mean those 'in need of care or attention' by reason of matters such as age or infirmity or those under 18.[109] Outside those very deserving persons, however, the legislation expressly incentivised the adoption of PSC arrangements to circumvent provisions protecting agency workers who, as all the data show,[110] are often in a weak bargaining position. Once again, the legislation exemplifies the deep tensions and inconsistencies in government policies in this area. At a time when the detrimental fiscal consequences of PSCs were already under the official spotlight and had led to legislative attempts to control their use, the ideology of deregulation manifested in the CEAEB Regulations nonetheless strongly encouraged their adoption. The best that can be said is that there was *some* attempt to resolve the tension, by seeking to protect the most vulnerable. In other areas, the response has been to leave PSC arrangements untouched, making the legal controls of PSCs dependent on principles and provisions not designed with them in mind.

B. Discrimination Law: Domestic and EU Routes

Part 5 of the Equality Act 2010 (EqA 2010) protects, broadly, employees against discrimination and harassment in relation to employment. By section

[106] See regulation 32(9).

[107] SI 1976/715.

[108] See BIS, *Reforming the Regulatory Framework for the Regulatory Sector: Government Response to Consultation* (July 2013) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/212084/13-1021-reforming-the-regulatory-framework-for-the-recruitment-sector-government-response.pdf. See too the Impact Assessment for the 2016 amendments in SI 2016/510, at https://www.legislation.gov.uk/ukdsi/2016/9780111144169/impacts (date last accessed 12 November 2018).

[109] See current regulation 2 and 32(12), replicating the effect of the original regulation 32(12).

[110] For the evidence, see L. Judge and D. Tomlinson, *Secret Agents*, n.91.

83, this means employment under a contract of employment or a contract 'personally to do work'. Where an individual provides services through a PSC, the starting point is that he or she will not be seeking 'employment' with, or be an 'employee' of, the client within the ordinary meaning of section 83 owing to the absence of any actual or potential contractual relationship with the client. If the individual engaged via the PSC discriminated against direct employees of the client while at work, the client *might* be liable for those acts on the ground that the individual was acting as its agent for the purpose of section 109 EqA,[111] though such a finding is by no means certain, given that the statute adopts the common law concept of agency.[112] But the Act is not symmetrical in effect. Where the individual engaged via a PSC is not the perpetrator but the victim of discriminatory acts by the client, its agents or employees, the existence of the PSC creates a potential exclusion zone. The EqA provides two possible means of penetrating this zone: the first, domestic route is to rely on the provisions enacted to protect contract workers; the second, more fundamental attack is to use EU law to argue that the individual is 'employed' directly by the client. Neither route is without difficulties.

(i) Contract Workers—Section 41 EqA

In common with workers engaged through a PSC, agency workers ordinarily lack a contractual link *vis-à-vis* their user undertaking. To close this gap, the predecessor anti-discrimination legislation contained provisions protecting 'contract workers',[113] now codified in section 41 EqA. The section operates by imposing duties on a 'principal', meaning a person 'who makes work available for an individual', where that individual is employed by 'another person' and is supplied under a contract with the principal. The potential for section 41 to apply to workers engaged via a PSC is shown by *MHS Consulting Services v Tansell.*[114] Mr Tansell bought an off-the-shelf company, Intelligents Ltd, of which he was the sole shareholder and which

[111] In turn leading to liability on the part of the individual under s 110 EqA.

[112] See *Kemeh v Ministry of Defence* [2014] ICR 625 per Elias LJ [38]–[46] and compare cases on discrimination by workers engaged by a third party, such as *Lana v Positive Action Training* [2001] IRLR 501, *Mahood v Irish Centre Housing Ltd* (UKEAT/0228/10/ZT, 22 March 2001).

[113] See, especially, s 9 Sex Discrimination Act 1975 (discussed by the CA in *Allonby v Accrington College* [2001] ICR 1189, 1202–3), s 7 Race Relations Act 1976, s 12 Disability Discrimination Act 1995.

[114] [2000] ICR 789. Discussed by Deakin, 'The Changing Concept of the Employer', n.14.

supplied his services to Abbey Life via a further intermediary (an employment agency). He claimed he was subject to disability discrimination by Abbey when it terminated his services following a diagnosis of diabetes. The Court of Appeal held that, in accordance with the ordinary wording of section 12(6) of the Disability Discrimination Act 1995, which used similar language to section 41 EqA, the tribunal had jurisdiction to hear his complaint. Mummery LJ's conclusion, that it made no difference that his work was supplied not via a direct contract with the PCS but through another intermediary, has now been affirmed by the revised wording in section 41(5)(b) EqA which is, if anything, wider than the provisions in the predecessor legislation.[115]

A significant limitation on section 41 for present purposes is that it applies only where the individual is 'employed by another person'—here, meaning the PSC. Even though 'employed' encompasses both a contract of employment and a contract 'personally to do work' within the meaning of section 83 of the EqA, the concept is not infinitely elastic. The cases addressing whether a director is an 'employee' for the purpose of domestic law highlight the uncertainty of the exercise given the multiple relevant factors.[116] The absence of a written contract of employment, of regular salary, or of control over the director all tend to count against an employment relationship with the PSC.[117] Nor is the wider category of a 'contract personally to do work' much help here. The domestic courts have consistently construed the EqA concept of employment as the mirror image of EU law on worker or employment status, for which an element of subordination is necessary.[118] The case-law of CJEU suggests such an element will be absent in the relationship between a director and his or her PSC so long as the director's ability to influence the company is 'not negligible'.[119] The recent ruling of the CJEU in *Bosworth* confirms that where a director determines the terms of his contract with the company and has control over its business, the necessary hierarchical

[115] In particular, under s 41(5)(b) EqA, it is explicit that the 'other person' who employs the individual need not be a party to the contract with the principal; and it is no longer a requirement that the work is done 'for' the principal (compare e.g. s 7 of the Race Relations Act 1976, discussed in *Leeds City Council v Woodhouse* [2010] IRLR 626).

[116] See especially *Secretary of State for Business v Neufeld* [2009] ICR 1183.

[117] See e.g. *Clark v Clark Construction Initiatives Ltd* [2008] ICR 635.

[118] See *Hashwani v Jivraj* [2011] ICR 1004; *X v Mid-Sussex CAB* [2013] ICR 249.

[119] See Case C-47/14, *Holterman v Spies von Büllesheim* [2016] ICR 90 [46]–[47], where the director was a minority shareholder, director and manager of four companies.

relationship will be lacking.[120] This makes the application of section 41 EqA to individuals engaged via PSCs rather haphazard and uncertain because it was not designed with PSCs in mind.

(ii) EU Law

The more radical alternative is to use EU law to argue that the individual is a 'worker' in relation to the client, cutting out the PSC altogether. Both the CJEU and the Supreme Court have recognised that non-discrimination is a general principle of EU law with the consequence that it has horizontal effect and any inconsistent national law must be disregarded.[121] So far so simple: provided an individual engaged via a PSC is a worker of the client as a matter of EU law, the route is clear to bring a claim of discrimination under the EqA regardless of the wording of the UK provisions.

The first problem is establishing the boundaries of the autonomous EU law concept. The fragmented landscape of the CJEU jurisprudence has been convincingly plotted by Nicola Kountouris.[122] As he notes, in cases such as *Allonby*[123] and *O'Brien*,[124] the CJEU 'is not overly preoccupied with the form of the relationship and with whether it meets particular contractual requirements', with the consequence that the classification under national law is not decisive.[125] So in *Allonby* the CJEU held that hourly paid lecturers engaged via an agency, classified as self-employed and not required under their contracts to accept any specific assignment,[126] could still be workers for the purpose of, now, Article 157 TFEU, where their independence was 'merely notional'; the absence of an obligation to accept an assignment was of 'no consequence'.[127] An even more fundamental break

[120] Case C-603/17, *Bosworth v Arcadia Petroleum* [2019] IRLR 668. Though the case concerned the definition of 'contract of employment' under s 5 of Title II to the Lugano II Convention, both the CJEU and Advocate General Saugmandsgaard Øe referred to cases on 'worker' in this context, such as *Sindicatul Familia Constanta v Directia Generala de Asistanja Sociala* [2019] ICR 211: see AG at [43], CJEU at [26].

[121] See, especially, Case C-555/07, *Kücükdeveci v Swedex* [2010] IRLR 346; Case C-193/17 *Cresco Investigation v Achatzi* [2019] IRLR 380; *R(Chester) v Secretary of State for Justice* [2014] AC 271 per Lord Mance [61]–[62]; *Walker v Innospec* [2017] ICR 1077 per Lord Kerr [72]–[73].

[122] N. Kountouris, 'The Concept of "Worker" in EU Law: Fragmentation, Autonomy and Scope' (2018) 47 ILJ 192.

[123] Case C-256/01, *Allonby v Accrington & Rosedale College* [2004] ICR 1328.

[124] Case C-393/10, *O'Brien v Ministry of Justice* [2012] ICR 955.

[125] Kountouris, n.122, 211.

[126] See AG Geelhoed, *Allonby*, n.123, [31].

[127] *Allonby*, n.123, [71]–[72].

with contract arose in *Albron*.[128] In light of the wording and objectives of the Acquired Rights Directive,[129] the CJEU held that an 'employment relationship' could exist with the company to which employees were *de facto* assigned, even though their formal contracts of employment were with another company in the same group. That no contract is necessary under EU law receives further support from recent cases in which the CJEU has referred to an 'employment relationship' rather than a contract as the means of identifying a 'worker'.[130]

In the context of the very fundamental social rights engaged in discrimination, now strengthened by Articles 21, 23 and 26 of the Charter of Fundamental Rights of the EU, the door is at least ajar for a claim against the client brought by a worker engaged via a PSC. Arden LJ has already indicated, *obiter*, that EU law should apply even in a 'complex situation' involving the intermediary of a PSC.[131] The essential question, according to the CJEU's mantra, is whether for a certain period of time a person performs services for and under the direction of another in return for remuneration.[132] Here it appears that priority is given to the factual existence of subordination, such as freedom to choose the time, place and content of work, and integration into the employer's undertaking, rather than the domestic characterisation of the legal nature of the relationship for tax or other purposes.[133] The remuneration criterion extends to pay which is received 'directly or indirectly' in respect of employment, so that it should extend to remuneration paid through the conduit of the PSC pursuant to an agreement with it.[134] In free movement cases, on which the discrimination case-law draws explicitly, the CJEU has held that a person can be a

[128] Case C-242/09, *Albron Catering v FNV Bondgenoten* [2011] ICR 373.

[129] Directive 2001/23/EC.

[130] Case C-216/15, *Betriebsrat der Ruhrlandklinki v Ruhrlandklink* [2017] IRLR 194 [27]–[29] (see too AG Saugmadsgaard Øe [24]–[27], who was explicit on the lack of a need for a contract); Case C-147/17, *Sindicatul Familia*, n.120, [41]–[48].

[131] *Halawi v WDFG UK Ltd* [2015] IRLR 50, [4].

[132] *Allonby*, n.123, [67].

[133] See e.g. *Allonby*, n.123, [71]–[72]; Case C-413/13, *Kunsten v Staat der Nederlanden* [2015] 4 CMLR 1 [35]–[37]; *Sindicatul Familia*, n.120, [42]–[46].

[134] *Allonby*, n.123, [68]. Arden LJ appeared to accept this in *Halawi*, n.131, [28]. See the definition in Article 157 TFEU, reflecting Article 1(a) of the ILO Equal Remuneration Convention 1951, which has been read across into EU Directives in equal pay and beyond: see Case C-191/03, *North Western Health Board v McKenna* [2006] ICR 477 [29], on then Directive 75/117; AG Trstenjak [69]–[81] in Case C-155/10, *British Airways v Williams* [2012] ICR 847, on remuneration for the purpose of paid annual leave.

worker irrespective of the source of their remuneration.[135] Finally, it may not to be an insurmountable obstacle that the individual may also be an employee or worker *qua* director of the PSC as a matter of UK law. Dual employment was a feature of *Albron*, with the legal context determining which employer took precedence.[136] Liability for infringement of the fundamental social right not to be discriminated against should, accordingly, attach to the discriminating entity.

None of the above is meant to suggest that the issue is clear-cut. First, the CJEU has not yet expressly considered the position of workers engaged through the intermediary of their own company. If *de facto* subordination to the client is sufficient for an employment relationship, difficult questions may arise as to the effect of terms in the contract between the PSC and the client and how EU law applies to them.[137] It may also pose problems in identifying which body is the employer. The second, critical problem of relying on EU law to bridge the protective gap is, of course, Brexit. While its occurrence and effects are as chronically uncertain as ever, at the time of writing and in accordance with the European Union (Withdrawal) Act 2018 (EUWA), after 'exit day' general principles of EU law cannot be used to override any enactment.[138] It will therefore be necessary to rely instead on the *Marleasing* principle of conforming interpretation, apparently preserved post-Brexit by section 5(2) EUWA.[139] While that 'far reaching' duty usually enables the courts to interpret section 83 EqA so as to correspond with the EU law concept of 'worker',[140] just as they have invariably done to date,[141] they might decide that identifying the employer in the absence of a direct contractual link cuts against the grain of EqA or engages policy questions which place it beyond the bounds of interpretation. It will not assist that, on the current state of the envisaged post-Brexit law, the court will be unable to refer questions to the CJEU in order to clarify or establish the

[135] Case C-344/87, *Bettray v Staatsecretaris Van Justitie* [1989] ECR 1621 [15]; Case C-456/02, *Trojani v Centre Public d'Aide Sociale* [2004] ECR I-7573 [16].

[136] n.128 [29]–[32].

[137] For example, the effect of a substitution clause in relation to EU law: see *Halawi*, n.131, above.

[138] EUWA, s 5 (also excluding the Charter from domestic law) and Sched 1. For discussion, see P. Craig, 'Constitutional Principle, the Rule of Law, and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82(2) MLR 319.

[139] See the Explanatory Notes [104].

[140] See the summary of the principles by Sir Andrew Morritt in *Vodafone 2 v Revenue and Customs* [2010] Ch 77 [37], endorsed by the Supreme Court in *Robertson v Swift* [2014] 1 WLR 3438 [20]–[21].

[141] See *Jivraj*, n.118; *Halwai*, n.131.

necessary premise of the argument, of whether an individual engaged via a PSC is a 'worker' for the purpose of EU law.[142] All that can safely be said in conditions of such political and legal uncertainty is that Brexit is only likely to weaken the arguments for 'looking through' the PSC.

C. Working Time

The domestic rules on working time, contained principally in WTR,[143] are also underpinned by EU law, both the relevant Directives[144] and Article 31 of the Charter. In accordance with the health and safety objectives of the Directives, the CJEU has adopted the same wide concept of 'worker' here as in the discrimination field, based on autonomous criteria which apply irrespective of the classification under national law.[145] The congruence is now more complete following the judgment of the Grand Chamber in *Bauer*, holding that the right to paid annual leave affirmed by Article 31(2) of the Charter is an 'essential principle of EU social law, mandatory in nature' which therefore has horizontal direct effect against all employers.[146] But reliance on EU law in this context faces similar uncertainty and temporal limitations as it does in relation to discrimination. For example, under the current EUWA, the EU Charter will no longer be part of UK law after exit day,[147] so that courts will have to decide whether the individual is a 'worker' for the purpose of EU law unassisted by a reference to the CJEU, and, if he or she is, whether the *Marleasing* duty permits them to achieve a conforming interpretation of the domestic definition in regulation 2(1) WTR.

WTR have a separate provision giving protection to 'agency workers' in regulation 36. Its genesis is probably the requirement of EU law that agency workers, meaning those who have a temporary employment relationship with an employment business, enjoy the same level of health and

[142] EUWA s 6(1).

[143] Additional regulations apply to specific sectors, but the core concepts are usually very similar: see e.g. the Civil Aviation (Working Time) Regulations 2004, SI 2004/756; Merchant Shipping (Working Time: Inland Waterways) Regulations 2003, SI 2003/3049.

[144] Principally Directive 2003/88/EC, but along with other Directives specific to the excluded sectors.

[145] Case C-428/09, *Isère v Premier Ministre* [2011] IRLR 84 [27]–[32]; Case C-316/13, *Fenoll v Centre d'Aide Par Le Travail* [2016] IRLR 67 [25]–[34]; *Sindicatul Familia*, n.120.

[146] Case C-569/16, *Stadt Wuppertal v Bauer* ECLI:EU:C:2018:871 [80]–[86]. For discussion, see M. Ford, 'The EU Charter of Fundamental Rights and Working Time: *Bauer*, *Kreuziger* and *Shimizu* before the Grand Chamber' (2019) *International Labor Rights Case Law* 242.

[147] EUWA s 5(4).

safety protection as 'ordinary' employees.[148] This makes it less malleable than section 41 EqA as a means of applying to workers engaged through PSCs because the regulation will be read as intended to implement EU law. But the wording of regulation 36 also differs from section 41 EqA, making it an awkward fit with PSC arrangements. First, even assuming that the PSC is an 'agent' for the purpose of regulation 36, the regulation only applies in the 'absence of a worker's contract between the individual and the agent' (regulation 36(1)(b)). Where there is such a contract between the individual and the PSC—the 'agent' for this purpose—the condition may not be met.[149]

Second, by virtue of regulation 36(3), the duties under WTR are imposed on 'whichever of the agent or the principal is responsible for paying the [individual] in respect of the work' or, if neither is, which of them in fact pays the individual: that person is then treated as the employer. Translated into the circumstances of an ordinary PSC arrangement, the most obvious reading of the section is to impose liability not on the client but on the PSC. Assuming the client pays fees to the PSC as the named recipient, the PSC alone is contractually liable to remunerate the individual in respect of the work; it, in theory, determines how the payments it receives are distributed, and whether they are paid to the individual; and it only in fact pays sums to the individual. The individual must, therefore, look forlornly at the PSC to grant her rest breaks, limit her weekly hours, and give her paid annual leave: an object lesson in making legal duties redundant While one cannot exclude an ingenious interpretations of regulation 36 in multi-partite arrangements, the regulation is ill-suited to imposing liability on the client or agency which engages workers via a PSC.

D. National Minimum Wage

The problems generated by PSCs disguising wage labour is perhaps exposed most starkly in relation to the national minimum wage. Not buttressed by EU law, the NMWA falls to be construed in accordance with ordinary domestic rules. The Act gives every 'worker' a contractual right to be paid at

[148] See the Temporary Workers Directive 91/383/EC, Arts 1 and 2.

[149] This will depend on the terms of the contract between the individual and the PSC, and whether the individual is an employee of the PSC or, alternatively, is a 'limb (b)' worker under regulation 2 WTR, by which he or she undertakes personally to do work for the PSC. On the meaning of working 'for', see *Leeds v Woodhouse*, n.115.

the minimum rate.[150] But the definition of 'worker' depends on the existence of an actual contract of employment or a 'worker's contract' between the individual and the employer.[151] Where an individual is engaged via a PSC, no such contract will exist with the client or agency using the labour because, on *Salomon* orthodoxy, there is no contract with it in which to imply the statutory entitlement. The duty is imposed solely on the PSC, in economic terms identical with the individual, and then only if there is a worker's or employment contract with it.

While section 34 of NMWA extends protection to agency workers, it uses language almost identical to regulation 36 WTR, and its application to PSCs faces similar problems. In common with regulation 36, the section will not apply if there is a 'worker's contract' between the individual and the PSC;[152] and by section 34(2) liability to pay the national minimum wage only attaches to whichever body is responsible for paying or in fact pays the individual (ordinarily the PSC). The only appellate decision on the provision is the EAT judgment in *Hurst v Galloway*, in which an actor claimed that an agency which sent him to auditions should have paid him the national minimum wage.[153] In very succinct reasons, the EAT upheld a tribunal finding that it was the hirer, the TV company, and not the agency which was responsible for paying him.[154] The conclusion is only justifiable, I think, on the basis that payments were made directly to him by the TV company or via the agent as a mere conduit. In a normal PSC arrangement, however, payments will be made to the PSC and in its name; and by the metaphysics of separate corporate personality it alone is legally responsible for paying, and in fact pays, the individual worker, removing liability from any other body. Thus, it appears that the use of a PSC may permit circumventing the national minimum wage, in tension with the social objectives of the legislation and the prohibition on contracting out in section 49 NMWA.[155]

This is not to say that claimants are bereft of legal resources. An individual may well be a 'worker' *vis-à-vis* the PSC for the purpose of section 54(3), meaning that there is a statutorily implied term that *it* pays the national

[150] NMWA s 17.
[151] NMWA s 54.
[152] See s 34(1)(b).
[153] UKEAT/0111/04/ILB (22 June 2004).
[154] UKEAT/0111/04/ILB (22 June 2004), [14]–[15].
[155] Another potential route can be discounted. By s 48 NMWA, where an 'immediate employer [A] of a worker is himself in the employment of some other person [B]', and the worker is employed on B's premises, then B is jointly made the employer with A. But while an individual may be a 'worker' of the PSC (that is, A), the PSC is not in the 'employment' of B within the meaning of s 54(5) because it is not an 'individual'.

minimum wage. Where the user undertaking knows of or turns a blind eye to the existence of that contract and breach of the implied statutory term, it is possible that it would be liable to the individual worker for an economic tort, such as inducing a breach of contract or causing loss by unlawful means.[156] This will arise most clearly where the user undertaking requires the establishment of a PSC in order to avoid the statutory rate. Liability may even extend to directors of the undertaking.[157] But such a claim takes us into uncharted legal waters with some hidden rocks,[158] requires some legal ingenuity and resources behind it, and cannot be brought in the employment tribunal, meaning that it comes with considerable costs risk. It is not a realistic avenue for most workers.

Though there is limited data at present on the extent to which PSCs are in fact used to pay at levels below the minimum wage[159]—the Government did not take up the recommendation of the House of Lords SC to extend the remit of the Low Pay Commission to examine the use of PSCs by low-paid workers[160]—it would be naive to assume this is not already occurring given the low-paid occupations into which PSCs are spreading. For those workers, the 'choice' to have wages paid gross of tax operates in powerful synergy with employer's interest in minimising wage rates. The NMWA exemplifies how the failure to address PSCs leaves them free to work their magical disruption of apparently universal labour rights, with dangerous spill-over effects on tax, social insurance and the reduction of poverty.

[156] See *OBG Ltd v Allan* [2008] 1AC 1; *Clerk & Lindsell on Torts*, 22nd edn (London: Sweet & Maxwell, 2019), Ch 24, especially [24–14]–[24–19], [24–72]–[24–74]. It is even possible for accessory criminal liability to arise because a refusal or deliberate failure to pay the national minimum wage is a criminal offence—see s 32 NMWA and A. Bogg and P. Davies, 'Accessory Liability for National Minimum Wage Violations in the Fissured Workplace' in A. Bogg, J. Collins, M. Freedland and J. Herring (eds), *Criminality at Work* (Oxford: OUP, 2020).

[157] *Antuzis v DJ Houghton Catching Services Ltd* [2019] IRLR 629.

[158] For example, how to apply the doctrine that the party induced—presumably the PSC—cannot claim for the tort of inducement because it must resist, whereas the third party (the worker) can: see *Clerk & Lindsell*, n.156, [24-14], *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, per Upjohn LJ, 639–60.

[159] Though see the references in n.90.

[160] See SC Report, n.17, [172] 44; *Government's Response*, n.82, [2.68], 10; and the Low Pay Commission Remit for 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/321065/letter-to-chair-low-pay-commission.pdf (date last accessed 19 March 2019).

E. Whistle-Blowing

The exception which proves the rule is section 43K of ERA, defining 'worker' for the purpose of the whistle-blowing provisions in Part IVA of ERA. In particular, section 43K(1)(a) applies in circumstances where an individual (i) is supplied or introduced to do work by a 'third person' (A) and (ii) the terms on which he is engaged are in fact determined not by the individual but by 'the person for whom he works' or the third party (B). The person who 'substantially determines' the terms is then deemed to be the employer. The focus is not restricted to contractual terms and extends to what happens on the ground.[161]

Construing the section in light of its purpose of extending protection, the EAT in *Croke v Hydro Aluminium Worcester Ltd*[162] held that it enabled a claim by an individual whose services, under a contract between his PSC and an agency, were supplied to another company, the respondent, under a separate contract with the agency. In *Keppel Seghers UK v Hinds*,[163] the EAT upheld a ruling that the claimant was 'introduced' as an individual to the respondent even though this took place via a chain of contracts involving him, his PSC, an agency and the respondent. While these cases both involved the added intermediary of an agency, it is but a small step to interpret the PSC as the third party which 'supplies' the individual to the putative respondent, especially given the wide construction given to whistle-blowing provisions.[164] That whistle-blowing may engage Article 10 ECHR reinforces such an interpretation.[165]

F. Trade Union Organisation, Statutory Recognition and Industrial Action

Collective action offers a potential means of redressing the segmentation of workers into legally privileged insiders and unprotected outsiders. Of course, workers or unions may face significant practical difficulties in organising in some of the sectors where PSCs flourish, just as they would if the workers were direct employees, meaning that collective bargaining is a palliative not a panacea for the lack of legal rights. But workers engaged via PSCs face three specific additional legal obstacles in relation to organisation, collective

[161] *Day v Lewisham & Greenwich NHS Trust* [2018] ICR 917, per Elias LJ [29].
[162] [2007] ICR 1303.
[163] [2014] ICR 1105.
[164] *Day v Lewisham*, n.161.
[165] See *Hill v Great Tey Primary School Governors* [2010] ICR 691.

bargaining and industrial action. Here, the issue is the extent to which Article 11 ECHR, embodying the rights to trade union activities, collective bargaining[166] and strikes,[167] and given domestic effect by the Human Rights Act 1998 (HRA), can come to the rescue. These too are uncharted legal waters, though existing litigation, considered below, should shed further light on the issue. While I consider each issue separately, it should be borne in mind that the European Court of Human Rights (ECtHR) will examine the totality of measures in considering whether a State is in breach of Article 11.

(i) Trade Union Dismissals and Detriments

Article 11 is probably at its most powerful in relation to individuals who are subject to detrimental treatment, such as dismissal, because they are trade union members or participate in trade union activities. Such action strikes at the heart of trade unions' and individual workers' freedom of association.[168] Under the principal domestic provisions, individuals engaged via PSCs face the problem that only an 'employee' can complain of unfair dismissal on union grounds, and only a 'worker' has a right not to be subject to a detriment on such grounds.[169] 'Worker' and 'employer' are defined in section 296 Trade Union and Labour Relations Act 1992 (TULRCA) in similar terms to the corresponding concepts in section 230 ERA. But there is a curious difference: 'employer' is defined in section 230(4) ERA as the person 'by whom…the worker is employed', whereas in section 296(2) TULRCA it means the person 'for whom one or more workers work…or normally work', without referring to a contract.[170] The wording hints at the possibility of a

[166] *Demir v Turkey* [2009] IRLR 766.

[167] *RMT v United Kingdom* [2014] IRLR 467, *Ognevenko v Russia* [2019] IRLR 195. For discussion, see A. Bogg and K. Ewing, 'The Implications of the RMT Case' (2014) ILJ 43(3) 221; T. Novitz, 'To Protect the Right to Strike or Not? The Question Before the European Court of Human Rights in app no 2451/16 *Association of Academics v Iceland* and app no 44873/09 *Ognevenko v Russia*' *Comparative Labour Law and Policy Journal*, https://cllpj.law.illinois.edu/dispatches, Dispatch No. 15 – Iceland & Russia (date last accessed 29 March 2019).

[168] See e.g. *Wilson v United Kingdom* [2002] IRLR 568; *Trade Union of Police of Slovak Republic v Slovakia*, App no 11828/08 (11 February 2013); *Danilenkov v Russia* (2014) 58 E.H.R.R. 19.

[169] TULRCA, s 146–167.

[170] In *IWGB v Roofoods Ltd (t/a Deliveroo)* [2018] IRLR 84 [90]–[91], neither the Central Arbitration Committee (CAC) nor counsel could discern the reason for the different language, and the CAC appears to have treated the definitions as congruent [90]–[91]. The origin of the definitions in s 296 was s 167 of the Industrial Relations Act 1971, considered in cases such as *Writers Guild of GB v BBC* [1974] ICR 234. The definition of 'employer' then disappeared in s 30 of the Trade Union and Labour Relations Act 1974, which defined 'worker' but not 'employer'.

claim against a *de facto* employer where a worker is engaged via a PSC, even if that interpretation is rather strained to say the least.[171]

The real question is whether Article 11 mandates such a result. In rejecting an argument that members of the Romanian clergy fell outside the sphere of labour law and hence the right to form a union, the Grand Chamber in *Sindicatul 'Pastorul Cel Bun'* said that the 'only question' was whether they were in an 'employment relationship'.[172] In that regard it gave priority to substance over legal form, applying the criteria in ILO Recommendation No. 98 of 2006, the various language versions of which refer to concepts wider than an employment contract.[173] Paragraph 9 of that Recommendation states that the existence of an employment relationship is:

> guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

Once the PSC is stripped away, a consideration of the factual indicators listed in paragraph 13 of the ILO Recommendation—such as control, integration, work mainly for the benefit of another, specific hours, periodic payment of remuneration—will often support the existence of an employment relationship with the employing institution.[174] Moreover, given the potential seriousness of the infringement of Article 11 rights where trade union victimisation is involved, it is very doubtful that the exclusion of workers engaged via a PSC is 'necessary in a democratic society' for the purpose of Article 11(2).[175]

Assuming that Article 11 requires 'looking through' the PCS in this context—which is most likely where the engagement via a PSC is a pre-condition of employment—I think the interpretative obligation in section 3 HRA is far-reaching enough to achieve horizontal domestic effect.[176] It was section 30 of the Employment Relations Act 2004 which first extended section 146

[171] It would be necessary to show, too, that the putative worker undertakes to perform personally work for the PCS to fall within s 296(1)(b).

[172] *Sindicatul 'Pastorul Cel Bun' v Romania* [2014] IRLR 58 [141] (and see [148]).

[173] *Sindicatul 'Pastorul Cel Bun'*, n.172, [57], [142]. The English version refers to an 'employment relationship'; the French to '*une relation de travail*'; the Spanish to '*una relación de trabajo*'.

[174] Cf. *R (IWGB) v CAC and Roofoods* [2019] IRLR 249, discussed below.

[175] See, most recently, *Ognevenko v Russi*a, n.167.

[176] The relevant principles, derived from *Ghaidan v Godin Mendoza* [2004] 2 AC 557, are indistinguishable from the duty of a conforming interpretation in EU law, summarised in *Vodafone 2*, n.140.

TULRCA to cover 'workers' as well as employees. Its purpose was to bring domestic law into line with Article 11,[177] so that the 'thrust' or 'grain' of the legislation supports a conforming interpretation. The definitions in section 296 are broad and, in any case, the courts are increasingly untroubled by formulating the precise drafting necessary to achieve compliance.[178] Although in *Smith v Carillion*[179] the Court of Appeal held that detrimental treatment of an agency worker by his user undertaking was not covered by section 146 TULRCA, at the relevant time,[180] the protection was restricted to 'employees' and the HRA had not yet come into force. While the history of the case-law to date justifies a degree of caution, the better view is that TULRCA can and should be interpreted so as to protect those engaged via a PSC against victimisation on trade union grounds by the undertaking for which they in fact work.

(ii) Statutory Recognition

The second problem relates to the compulsory recognition mechanism in Schedule A1 of TULRCA. Under Part 1 of Schedule A1, an application for recognition can only be made by a trade union seeking recognition on behalf of 'workers', and the request must go to the 'employer', meaning the employer of the workers in the bargaining unit.[181] These provisions, too, draw on the definitions in section 296 TULRCA, the ordinary reading of which means that they will not permit an application on behalf of workers engaged via PSCs for recognition by the client undertaking.

To date, arguments drawing on Article 11 in this context have barely got off the ground. in *R(IWGB) v CAC and Roofoods Limited* Supperstone J held that Deliveroo cyclists were not in an 'employment relationship' for the purpose of Article 11 because, it appears, they were not contractually required to perform work personally.[182] Subsequently, in *R(IWGB) v University of London*, the same judge rejected an argument that Article 11 gave a union the right to recognition by the *de facto* body which substantially determined the terms and conditions of contracted-out workers

[177] See the Explanatory Notes to the Act [193].
[178] *Wandsworth LBC v Vining* [2004] ICR 499 [74]–[75].
[179] [2015] IRLR 467.
[180] Between 1997 and 1999, before TULRCA s 146 was amended to include a 'worker' by the Employment Relations Act 2004.
[181] Sched A1, paras 1, 2(4), 4.
[182] n.174.

but which did not have a contractual relationship with them.[183] Neither case concerned workers engaged via PSCs, however; the narrow reading of an 'employment relationship' in *Roofoods* has been persuasively criticised;[184] and appeals against both decisions are pending.

Nonetheless, even on the premise that workers engaged via PSCs are in an employment relationship with their user undertaking for the purpose of Article 11, the route to achieving access to statutory recognition is far from straightforward. The principal difficulty is the application of the margin of appreciation under Article 11(2). In *Unite v United Kingdom*, the Strasbourg Court decided that the abolition of the Agricultural Wages Board, in which a form of surrogate collective bargaining for agriculture workers took place, fell within the wide margin of appreciation enjoyed by Member States in relation to their positive obligations in the 'sensitive' task of balancing the interests of labour and management.[185] Unions were not prevented from engaging in voluntary collective bargaining; and even accepting the uncontested evidence that almost zero employers in the agricultural sector crossed the threshold size above which the statutory recognition regime applied,[186] the Court was not prepared to find the limit unjustified.[187] The ruling has been much criticised,[188] but it places a substantial obstacle in the way of any creative reinterpretation of the statutory regime based on Article 11 to accommodate workers engaged via PSCs.

(iii) Immunities for Industrial Action

What about strikes? PSC arrangements further complicate the labyrinthine rules on industrial action in Part V of TULRCA. The 'golden formula' immunity for strikes in section 244 is restricted to a trade dispute 'between workers and their employer'. The definition of 'worker' for this purpose is a subcategory of the concept in section 296 since it is restricted to those workers who are 'employed by that employer' or who were dismissed in

[183] [2019] IRLR 530.

[184] See A. Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) 135 *Law Quarterly Review* 219.

[185] [2017] IRLR 438 [55], [60].

[186] Sched A1, para. 7.

[187] n.185, [29], [55], [65]–[66].

[188] K. Arabadjieva 'Another Disappointment in Strasbourg: *Unite the Union v United Kingdom*' (2017) 46(2) ILJ 289.

connection with the dispute.[189] Translated into circumstances where workers engaged by PSCs are in dispute with the client undertaking for which they in fact work, it means that each PSC is not a 'worker' because it is not an individual, and nor are the individuals 'employed by' the relevant undertaking. The refusal of the courts to pierce the corporate veil on the employer's side of the dispute, even in the context of closely related companies, is likely to be applied to workers in the same way.[190] Moreover, if the individual worker threatens to breach or interferes with a contract of employment[191] between himself or herself and the PSC, the action may constitute illegal secondary action under the strict terms of section 224 TULRCA because the PSC employer is not a party to the dispute.

This is not to say that striking workers who operate via PSCs have no legal arguments. First, depending on the terms of the contract between the PSC and the user undertaking, or the PSC and the individual worker, a refusal to work may not amount to a breach of contract at all or give rise to any tort liability based on unlawful means, although addressing this subject would require another article.[192] Second, Article 11 has a role to play. True, in *RMT v United Kingdom*,[193] the ECtHR upheld the UK's ban on secondary action as falling within the margin of appreciation. But the Court was anxious to limit its judgment to the facts before it, which involved 'classic' secondary action against a third-party employer disconnected from the dispute.[194] It indicated that statutory rules which prevent industrial action as a result of 'complex corporate structures' in which workers work for separate legal entities would require stronger justification because they strike at the 'very substance' of trade union freedom.[195]

These comments are especially apt in relation to workers engaged via PSCs, above all where this structure is effectively imposed as a condition of getting the job, because the *only* body which in reality determines the terms and conditions of workers is the client. If it makes a wage cut, for example, it is the only sensible target for a strike. Moreover, since *RMT*, the

[189] TULRCA s 244(5) and see *University Hospital NHS Trust v UNISON* [1999] ICR 204, CA, per Lord Woolf at 213E-G.

[190] See *Dimbleby & Sons v NUJ* [1984] ICR 368.

[191] Note the wide definition of 'contract of employment' for this purpose in s 244(6).

[192] See the explanation of the principal relevant torts in *OBG Ltd v Allan* [2008] 1 AC 1.

[193] *RMT v United Kingdom*, n.167.

[194] *RMT v United Kingdom*, n.167, [98], [101], [104].

[195] *RMT v United Kingdom*, n.167, [98]. The Court referred back to critical assessments of the ILO Committee of Experts [33] and the European Committee on Social Rights [37].

European Committee of Social Rights has reiterated that the restriction of the immunity in section 244 TULRCA to disputes between workers and their employer is not in conformity with Article 6(4) of the European Social Charter, referring explicitly to the fact that workers nowadays often do not work for a 'single clearly defined employer' but instead work under 'a far more diverse matrix of contractual relationships'.[196] The decisions on the Social Charter strengthen the argument that Article 11 should see through PSCs in relation to strikes, in accordance with the 'integrated' approach adopted by the ECtHR in relation to other international instruments, exemplified by the Grand Chamber judgment in *Demir*.[197] Alternatively, strikers might rely directly on the Social Charter as an aid to interpretation of Part V of TULRCA.[198]

But a lot of ground-work is necessary to establish this in domestic case-law. Quite apart from the unpredictability of the ECtHR itself and its retreat since the highpoint of *Demir*, a domestic court might consider a conforming reinterpretation of the detailed rules in section 244 TULRCA goes beyond what is possible, meaning it could only issue a declaration of incompatibility under section 4 HRA. Nor is it the kind of issue that a court would easily deal with on an urgent interim injunction, which strike litigation invariably involves. Pending its resolution, the legal uncertainty acts as a powerful deterrent against strikes by those working though PSCs. For not only does any union which calls the strike risk exposure to injunctions or damages, but in addition the individual strikers face the risk of not being protected against dismissal (the unfair dismissal protection for industrial action in section 238A TULRCA is dependent on the statutory immunity applying, which will not be the case if there is no trade dispute[199]).

G. Pretences, Labels and Piercing the Corporate Veil

The statutory provisions considered above show that in *some* circumstances PSCs may not be an insurmountable obstacle to the imposition of specific legal duties owed to workers, but they do not affect the general position, that individuals engaged via a PSC are not in a contractual relationship with the undertaking for which they work, and so are not ordinarily 'workers'

[196] Conclusions XX-3 (2014).
[197] n.166.
[198] See *Hounga v Allen* [2014] ICR 847 per Lord Wilson [50].
[199] Though, *quaere*, whether Article 11 could assist here too: see *Ognevenko v Russia*, n.167.

or 'employees'. The existing provisions in labour statutes which prevent contracting out are of no assistance here.[200] For if the courts have (mostly) given an expansive interpretation to such provisions, still they only apply where the effect of a contractual provision is to transform the legal consequence of a relationship or event,[201] making it a step too far for them to reconfigure genuine intermediary arrangements themselves, including those based on PSCs.

There are hints in the authorities, however, of a more fundamental assault on PSCs. In *Catamaran Cruisers v Williams*, seven individuals working on pleasure boats brought unfair dismissal complaints.[202] After HMRC challenged the self-employed status of one of them, Mr Williams, he set up a PSC. Thereafter, the PSC was paid gross, including sick pay and holiday pay, Mr Williams worked under the same conditions as direct employees, and he worked only for the single 'employer'. Treating the question of employment status as depending on the 'true relationship', the EAT upheld the tribunal decision that he was working under a contract of service, saying that the formation of a company might be 'strong evidence of a change of status' but that fell be evaluated in the context of all the facts. More recently, in *Sprint Electric Limited v Buyer's Dream Limited*[203] the High Court held that a director engaged via a contract with his PSC was an employee of the client company. The facts are complicated but one issue was whether a contract, on its face between the PSC and Sprint Electric, was a contract of employment so that copyright of software vested in Sprint Electric.[204] Referring to the public interest in persons not escaping taxes by applying 'false descriptions of their contractual relationships', the judge determined that the PSC was a mere 'tool or device' and the 'true relationship' was one of employment, based on factors such as personal service.[205]

In neither of these cases, however, was there full consideration of the relevant legal doctrines which may or may not justify 'looking through' the PSC, and this subject takes us into deep, murky and mostly uncharted waters. Here, I want to highlight some of the difficult issues which loose expressions such as 'label', 'device' or the 'true relationship' tend to obscure.

[200] See, among many others, s 203 ERA and s 144 EqA.

[201] See *M & P Steelcraft v Ellis* [2008] ICR 593 [66]–[74], discussing *Igbo v Johnson Matthey Chemicals* [1986] ICR 505.

[202] [1994] IRLR 386 [10]–[18].

[203] [2018] EWHC 1924 (Ch).

[204] Defined as a 'contract of service' in s 178 of the Copyright, Designs and Patents Act 1988.

[205] n.203, [141]–[142]; [177]–[189].

(i) Implied Contract?

Where there is an actual contract with the individual worker as well as the PSC, the problems posed by PSC for labour rights largely evaporate. This is a possible justification of the conclusion, if not the reasoning, in *Williams*, since it is far from clear whether and if so how a contract with the PSC superseded Mr William's existing contract *qua* individual with his employer.[206] Assuming the written contract is with the PSC alone, however, there is probably little scope for finding an implied contract between the individual and the client, illustrated by the judgment in *James v Greenwich LBC* in relation to agency workers.[207] The fact of the individual working for the client is explained by the express contract with the PSC, making it unnecessary to imply one with the individual. In *Croke v Hydro*, dealt with above in relation to whistle-blowing, after referring to *James* the EAT gave very short shrift to an argument that Mr Croke was a 'worker' within the meaning of section 203(3)(b) on the basis of an implied contract with him.[208] AWR 2010, which help to close the resulting gap in protection for agency workers, will not assist those on PSCs because they too depend on the existence of a contract between an individual and the temporary work agency.[209]

(ii) Labelling?

In both *Williams* and *Sprint Electric*, the courts relied on cases concerned with false labels of self-employment.[210] As Lord Templeman memorably expressed it, the parties cannot transform a five-pronged instrument into a spade by naming it such.[211] But use of the 'label' doctrine is not very apt in the PSC context. The PSC exists with separate personality in accordance with the doctrine in *Salomon v Salomon* and IR35 legislation itself implicitly recognises that it is permissible to use a PSC with actual contractual results: hence the need for a hypothetical statutory contract under section 49 ITEPA. Almost always there will be a written contract between the client and PSC which will provide for payments to the PSC, not the individual, and the practice of paying fees into the PSC account will correspond with that term; there may, too, be a separate

[206] See, to like effect, *Community Based Care Health Limited v Narayan*, UKEATPA/0162/8/JOJ (2 September 2019).

[207] [2008] ICR 545.

[208] n.162, [48]–[49].

[209] Regulation 2(1)—again this is subject to EU law requiring a different result.

[210] Such as *Massey v Crown Life Insurance* [1978] ICR 590, cited in *Williams*, n.202, [13] and *Sprint Electric*, n.203, [138].

[211] *Street v Mountford* [1985] AC 809, 819.

written contract providing for payments from the PSC to the individual. Unless the PSC is stripped out of the picture, which begs the central legal question, it is hard to see how the label misrepresents the true legal position.

(iii) Shams, *Autoclenz* and Piercing?

In *James*, the Court of Appeal left open the possibility that an implied contract could be found 'in some very extreme cases' by exposing 'sham arrangements'.[212] Following the subsequent judgment of the Supreme Court in *Autoclenz*, the circumstances in which courts will disregard written terms in order to find the 'true agreement' go much further than the traditional, narrow 'sham' doctrine, reflected in Lord Clarke's careful avoidance of that pejorative term.[213] Yet the boundaries of *Autoclenz* itself remain contested and indeterminate, as the conflicting judgments of the Court of Appeal judges in the recent *Uber* case show.[214] There is no single answer to how you find the 'true relationship': what aspects of reality are prominent depends on who is looking and the purpose of the search, reflecting deep normative or doctrinal disagreements.[215]

Perhaps the strongest case for 'looking through' a PSC is an arrangement in which (i) the factual relationship bears all the hallmarks of employment save for the PSC and (ii) both parties knowingly constructed the contractual documents to avoid paying tax in accordance with the IR35 legislation. In those circumstances, there may even be a 'sham' in the traditional sense,[216] allowing a court to disregard the arrangement: *Sprint Electric* may be explained as an example of this approach. But, quite apart from the difficulty of proving the documents were a mere façade, a claimant may be reluctant to bring a case to a tribunal if the effect of this is to determine that he or she is liable to account for unpaid tax. Lurking in the background here is the potential bar of illegality. Even if the test is now more flexible following the Supreme Court's rulings in *Hounga v Allen*[217] and *Patel v Mirza*,[218] the illegality hurdle is especially hard to surmount where the contract is central

[212] n.207, per Mummery LJ [51].

[213] *Autoclenz v Belcher*, n.101.

[214] *Uber v Aslam*, n.20; permission to appeal to the SC has been given.

[215] For discussion, see A. Bogg and M. Ford, 'Between Statute and Contract: Who Is a Worker' (2019) 135 L.Q.R. 347. For general discussions of the 'sham' doctrine post-*Autoclenz*, see E. Simpson and M. Stewart (eds), *Sham Transactions* (Oxford: OUP, 2013).

[216] *Snook v London and West Riding Investments* [1967] 2 QB 786, per Diplock LJ at 802.

[217] n.198.

[218] [2016] 3 WLR 399. For discussion, see S. Green and A. Bogg (eds), *Illegality After Patel v Mirza* (Oxford: Hart, 2018). The possibility of illegality operating was briefly discussed in *Sprint Electric* but without reference to the burgeoning case-law: n.203 [142].

to the claim, such as in the case of under-paid wages or unfair dismissal.[219] Under the IR35 legislation as it presently applies in the private sector, the obligation is on the putative worker, via his PSC, to account for tax, a factor counting in favour of barring enforcement by him.[220] Together, these considerations restrict the extent to which clear 'sham' cases are likely to be a practicable or potential means of 'looking through' PSCs.

The more common circumstances will be those where the parties in good faith believe IR35 is not applicable (or at least the contrary cannot be shown), tax is paid in accordance with that legislation or the issue is about 'worker' rather than employment status. Illegality is unlikely to bar a claim simply because the parties' beliefs about classification turned out to be wrong.[221] *Autoclenz* permits a tribunal to give priority to the factual practice over the contract terms in an ordinary two-party employment contract; the big question is whether it could similarly operate to discount the existence of the PSC in a notional three-party arrangement, achieving a similar result to the IR35 legislation by a judicial means. Such a radical possibility is hinted at by *Firthglow Ltd v Szigalyi*, in which the Court of Appeal upheld a tribunal ruling that a written partnership agreement and a services contract between the 'partnership', M & G Coatings, and the putative employer were both inconsistent with the facts of the relationship.[222] While the members of the Court differed slightly in their reasoning, the effect of the decision was to 'see through' the agreement with M & G Coatings and find a contract of employment with one of the partners, Mr Szigalyi. The reasoning in *Szigalyi* was approved in *Autoclenz*.[223]

But ignoring the partnership in *Szigalyi* was a less radical move than 'looking through' a company, as Sedley LJ implicitly recognised in his comment that, even if the partnership were genuine, still the employer would 'have been taking on two men, not a corporate entity'.[224] To disregard the corporate vehicle in a PSC arrangement may stretch the elastic of *Autoclenz* beyond breaking point. First, one source of the *Autoclenz* doctrine was the housing cases cited by Lord Clarke which involve statutory protections for tenants, where the courts have looked behind written terms to find the substance and reality of

[219] See Lord Toulson's range of factors in *Patel*, n.218, [93], [107], and A. Bogg and S. Green, 'Rights Are Not Just for the Virtuous: What *Hounga* Means for the Illegality Torts' (2015) 44 ILJ 101, 119–121.

[220] This will change from April 2020: see nn 41 and 42.

[221] See *Enfield Technical Services v Payne* [2008] ICR 1423.

[222] [2009] ICR 835.

[223] *Autoclenz*, n.100, per Lord Clarke at [29].

[224] *Szigalyi*, n.222, [75].

the transaction.[225] However, the courts thus far have resisted extending this approach to leases to corporate tenants controlled by an individual occupier, even where the motive was to avoid statutory protection and the use of a company was imposed as a condition of occupation.[226] Second, unlike in *Autoclenz* itself and the cases it affirmed, such as *Szigalyi*, in a typical PSC arrangement there will be no obvious contradiction between the practice and the written documents. On the premise that the PCS has a legal existence in accordance with the *Salomon* doctrine, so long as payments are made to it rather than the individual, the practice corresponds with its separate personality. It is because of that legal premise that the courts have deprecated referring to a genuinely incorporated one-individual company as a 'sham'.[227]

This brings us to the fundamental legal issue. 'Looking through' the PSC in the interests of worker protection comes into collision with the law's stubborn adherence to the doctrine of separate corporate personality and the very limited circumstances in which courts will pierce the corporate veil. If some cases suggest it is theoretically possible to lift the veil even where this is to the benefit of the shareholder(s) rather than third parties,[228] in *Prest v Petrodel Resources Ltd*[229] the Supreme Court strongly affirmed the orthodox doctrine of *Salomon v Salomon*. While the judgments did not speak with one voice, they were unanimous in confining piercing to extremely rare cases.[230] The strongest support among the judgments was for Lord Sumption's analysis that, apart from concealment cases, piercing the veil is restricted to circumstances where a person deliberately evades or frustrates an existing legal obligation by interposing a company under his control.[231] The court may then pierce the veil 'only for the purpose' of

[225] See *Antoniades v Villiers* [1990] I AC 417 and *Bankway Properties v Pensfold-Dunsford* [2001] 1 WLR 1369, especially per Arden LJ [42]–[44], cited with approval by Lord Clarke in *Autoclenz*, n.100, [23]. For discussion, see S. Bright, 'Avoiding Tenancy Legislation: Shams and Contracting Out Revisited' (2002) 61(1) CLJ 146.

[226] *Hilton v Plustitle Ltd* [1988] 1 WLR 149; *Eaton Square Properties Limited v O'Higgins* (2001) 33 H.L.R 68.

[227] See *Neufeld*, n.116, [34].

[228] See e.g. *DHN v Tower Hamlets* [1976] 1 WLR 852.

[229] [2013] 2 AC 415. For discussion, see P. Davies and S. Worthington (eds), *Gower: Principles of Modern Company Law* (London: Sweet and Maxwell, 2016), Ch 8.

[230] See R. Miles and E. Holland, 'Piercing the Corporate Veil' in Simpson and Stewart, n.215, 192–207.

[231] *Prest*, n.229, [34]–[35]. Lord Neuberger supported a limited exception to Salomon based on evasion and concealment [60]–[67]; Baroness Hale (with Lord Wilson) was less sure but still restricted disregarding the company to obtain a remedy against the person behind it [92]; Lord Mance and Lord Clarke did not foreclose other principles for disregarding the company but saw such circumstances as 'very rare' given the strength of the Salomon principle [100], [103]; Lord Walker was the most enigmatic [106].

depriving the company or its controller of the advantage of separate corporate personality.[232] Instanced by almost no case-law examples of its successful application, this principle is not apt for piercing the veil of a PSC to allow the individual shareholder to enforce employment rights not to his detriment but for his benefit.

The alternative, stronger argument is based on a purposive construction of the employment law statutes, contending that the foundational categories should be given a generous interpretation, which prevails over the mirage of a separate PSC. But in the course of Lord Sumption's judgment reaffirming *Salomon v Salomon*, he squashed the heterodox doctrine then evolving in the family courts allowing them to see through one-person companies based on wider considerations of justice. He rejected statutory construction as an alternative means of obtaining the assets held by a husband's company, holding that general words in divorce statutes were enacted against a background of fundamental existing legal principles, which could only be overridden by clear words.[233] Those principles include, as well as separate corporate personality, the importance the common law attaches to the identity of the parties to a personal contract of service.[234] They make it especially difficult to construe the existing statutory definitions of 'employee', which adopts the common law contract of service, to see through a PSC.

More promising would be a purposive construction of 'worker'—which is mostly a statutory construct—in which the *Autoclenz* doctrine exposes the 'reality' of a relationship not with a PSC but with a single individual, just as it operates to see beyond the written terms in an ordinary bilateral contract characterised by inequality of bargaining power. This can be seen as no more than an incremental and logical development of the *Autoclenz* doctrine, the justifications for which ultimately lie in public policy. Free from authority, the argument has much going for it: the important social purposes underpinning employment rights should not be frustrated by a juridical split of the worker into two entities, especially when it is the employer who insists on the division. But the law is not an exercise in rational philosophy and such an extension would require a shift away from *Prest* in, probably, the Supreme Court. What judges see as 'real' depends on the prism they

[232] *Prest*, n.229, [35].

[233] *Prest*, n.229, [40].

[234] See Lord Atkin in *Nokes v Doncaster Amalgamated Collieries* [1940] AC 101, 1029–1034, cited by Lord Sumption, n. 229, [40].

are using.[235] Separate corporate personality is very familiar to the many appellate judges who, like Lord Sumption, come from a background in commercial practice in Chancery. As *Prest* shows, when they look for the 'true agreement' the company appears as a visible object, meaning that for them it needs a deliberate act by the legislature to remove it from the scene.

4. CONCLUSION: LEGISLATING FOR THE FUTURE

The above summary demonstrates the patchwork of means by which domestic law *might* protect some employment rights of individuals engaged via PSCs in some circumstances. In almost no case is there a simple, secure legal link between the substantive right and a legal claim by the individual. The most promising resources are EU law and Article 11 ECHR. Displaying significant confluence in their reliance on an employment relationship instead of a bilateral contract, the Strasbourg Court and CJEU may be less bewitched by the metaphysics of separate legal personality than are the UK courts. But the sources can only be deployed in relation to the specific rights underpinned by EU law or the ECHR, the legal arguments are not straightforward and EU law in particular is insecure as a long-term foundation.[236]

The domestic provisions with the strongest bite are section 41 of the EqA and section 43K of ERA, but they are confined to discrimination and whistle-blowing claims respectively, and the need for an employment relationship between the individual and the PSC makes section 41 EqA extremely haphazard in its application. Other provisions designed to cater for agency workers, such as section 34 NMWA, fit uncomfortably with PSCs. When the UK courts, following *Autoclenz*, look to find the 'true agreement' between a worker and the putative employer, it seems that the company appears an impenetrable object in their field of vision, blocking out all light.

To these problems should be added practical obstacles in the way of enforcement. For some claimants, the risk of HMRC seeking to recover past tax will be a disincentive to bringing claims; others may lack the legal expertise to spot the potential way through the legal minefield; for others illegality looms as an obstacle. These factors may explain the relative dearth

[235] On this, see Lord Hoffmann in *MacNiven (Inspector of Taxes) v Westmoreland Investments* [2003] 1 AC 311, [40].

[236] For the moment, the Conservative party has shelved its long-term plan to replace the HRA with a domestic Bill of Rights: see its Manifesto for the 2017 general election, 37, https://www.conservatives.com/manifesto (date last accessed 13 March 2019).

of appellate case-law on PSCs and their effect on employment rights. The result is that PSCs retain their attraction as a mechanism for cutting off most employment rights at the root, above all in relation to purely domestic provisions, such as the national minimum wage and unfair dismissal, but extending to any legal protections which depend on a contract with an individual worker or employee—even potentially health and safety duties.[237]

With judicial activism or a strategy of litigation straining against its limits, and collective resistance weakened by legal obstacles derived from PSCs, a legislative solution offers a more promising solution. Up to now successive governments have ducked the issue, ignoring the tension between the importance of workers' rights and an ideology of unshackling entrepreneurial activity while offering no substantial justification for the effect of PSCs. They have enacted what appear to be rights universally applicable to employees or workers while winking at those who wish to use PSC arrangements to circumvent them. The effect of this avoidance strategy has mostly been to allow background doctrines based on contractual form and the metaphysics of separate legal personality to defeat or render uncertain apparently fundamental labour rights.

Which brings us to legislation for the future. My straightforward normative starting point is that workers should not be subjected to lower labour standards simply by virtue of providing their labour through a PSC. In circumstances in which PSCs are frequently imposed as a condition of working, where any 'choice' is usually illusory (because, for example, individuals opt for gross wages owing to economic need) and social rights aim to protect dependent or quasi-dependent labour in the wider public interest, the argument that lower taxes are a rational trade-off for employment rights has little weight. The undermining of legal protection is especially serious because individuals, who would be employees or workers but for the PSC, are permanently exposed to the risk of detrimental treatment by the employer *even if it has not (yet) actually interfered with the relevant legal right*—the true sense of precarity.

Now that the IR35 legislation requires parity in tax law for PSC arrangements disguising employment, in principle (if not always in fact) eliminating the fiscal benefits to the individual of incorporation, it exposes the real

[237] Which are often owed to 'employees', defined in s 53 of the Health and Safety at Work etc. Act 1974 as an individual with a contract of employment: see e.g. the Manual Handling Operation Regulations 1992, SI 1992/2793 (though cf. s 3 of the 1974 Act, based on the employer's 'conduct of his undertaking', and potentially protecting those working *de facto* for an employer: see *R v Associated Octel* [1996] ICR 972).

beneficiary of PSC arrangements affecting dependent workers as the client or agency and its main reward as vaporised employment rights, a reduced risk of collective resistance and, in the private sector for the present at least, a lower NIC burden and tax administration. But the benefits to employers of using PSCs are not balanced by any significant corresponding costs. Compared with other countries, the UK tax regime already places a high 'payment wedge' on firms using standard employees;[238] the differential treatment of employment rights only adds to the incentives to adopt PSCs. The more some employers succeed in using them to undercut labour standards, the higher the pressure on other employers to do the same, and the greater the externalisation of costs on tax-payers—such as where PSCs arrangements permit escaping minimum wage laws or other social guarantees and lead to a higher burden on the benefit system.

There are various possible legal means of redressing this dysfunctional position; none is straightforward. The task not as simple as adjusting the definitions of 'employee' or 'worker' in the relevant legislation. First, as well as identifying the beneficiary of the rights, the contract between worker and employer usually meets the implicit function of ascribing who bears legal responsibility for the relevant act—typically, the employer. To attribute legal responsibility to persons beyond the other party to the contract requires legislative provisions which identify that body, specify for what acts it is potentially liable, and perhaps apportion liability for remedies—a matter of some complexity for which there is no single solution, as shown by the diverse extant domestic provisions which break with the default model of responsibility attaching to the employer alone.[239] Second, in many cases the contract performs additional tasks in giving effect to legal rights. For example, unfair dismissal depends upon a 'dismissal', defined in terms of termination of the contractual relationship with the employer,[240] and the NMWA operates via a contractual implied term. Third, the outline of the legal principles above shows how widespread are the legal provisions affected by PSCs, crossing into areas such as secondary industrial action and compulsory recognition. Different contexts may require different mechanisms, sensitive to the purpose of the underling right.

[238] Milanez and Bratta, 'Taxation and the Future of Work', n.45, 60–66.

[239] Among others, see as s 34 NMWA and regulation 36 WTR (discussed above); ss 41, 109–110 EqA; regulation 14 of AWR 2010.

[240] See s 95 ERA.

In its *Good Work Plan* following the Taylor Review, the Government merely said it will bring forward 'detailed proposals' on aligning the tax and employment legal tests assisted by research on those with 'uncertain employment status' but without giving any further detail.[241] Pending those proposals, I want sketch out the broad parameters of the sorts of legislative provisions which might be used to restrain the use of PSCs to avoid employment rights. They are, of course, part of a much wider debate about which body should have legal responsibility for the delivery of labour and social rights, and the extent to which they should be borne by users of labour or externalised to social insurance schemes.[242] But these should not blind us to what is unique about the fissuring caused by a PSC: the magical split of a worker into a contracting corporate person and the provider of physical labour leaves unaffected the relationship with the employing body. PSCs arrangements are thus more apt for purely legal solutions than are other forms of fissuring based on distinct factual intermediaries, forms of work organisation or new technologies. What the law has broken, the law can mend.

If the aim is to protect those who would, but for the PSC, be an employee or worker, the means of achieving it nonetheless present challenges. The main problems are legal uncertainty, casting the net too widely or narrowly and the potential for the creation of new forms of intermediaries to circumvent the law, illustrated by the bewildering range of existing intermediaries. Quite apart from the insuperable problem of defining in statute the 'right' type of PSC, the last point counts against extending protective legislation to a statutory concept of PSC, only to see it outflanked by another form of intermediary such as an LLP. A better starting point is with which individuals are meant to be protected by the legislation and for what purposes. Nor should it be assumed that equivalent provisions should be adopted across tax and employment law, given the different goals of each system.

One possibility would be a specific, positive provision designed to capture PSCs based on a modified form of section 41 EqA or, better, section 43K ERA.[243] The price of the test in section 43K, of whether an individual's terms are 'in practice substantially determined not by him but by the person for whom he works' or by a 'third person', is delimiting the boundary of

[241] n.11, 28.

[242] See e.g. Prassl, n.14; G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford: Hart, 2006).

[243] There is an existing possible vehicle, in s 23 of the Employment Relations Act 1999, though it does not apply to the EqA.

the concept. It can, for example, capture more than one body[244] and has the potential to extend protection to those who fall far outside the existing categories of worker or employee. This is not a significant problem in whistle-blowing, where the context suggests a wide construction and the respondent is identifiable as the person who subjected the claimant to a detriment; but it is problematic in relation to other forms of statutory right, such as the national minimum wage or unfair dismissal, which presuppose a single employing entity to which liability attaches.

A second possibility would be to extend the hypothetical contract of the IR35 legislation to all the rights currently conferred on employees: perhaps this is closest to what the Government currently has in mind. Even though the test involves some rather convoluted intellectual exercises, no doubt employment tribunals would gradually become accustomed to it. The uncertainty in its operation may in part be a reflection of the lack of clarity of the concepts which underpin the 'employee' category which the legislation following the Taylor Review is meant to improve.[245] In addition, some of the difficulties in enforcement may result from HMRC being a party to the litigation, when it is not best-placed to know or give evidence about the nature of the factual relationship. It is often in the financial interests of both parties who do have such evidence—the tax-payer and the putative 'employer'—to contest employment status under the hypothetical contract. By contrast, where an individual brings an action to enforce his or her employment rights, the individual who knows about the factual arrangements has an interest in showing they point towards employee status.

For the moment, however, we are in the dark about the Government's plans for the wider category of limb (b) workers, whom the Taylor review wants to retain and tax as employees, although relabelled 'dependent contractors'.[246] Unless this category is *also* subject to a form of hypothetical contract, the result will be two groups engaged via PSCs: an elite category of employees, with the best employment rights and subject to taxation of their 'employment income' under IR35; and a periphery of lower category limb (b) workers, not subject to IR35 rules and excluded from many employment rights by virtue of PSCs. The incentives on employers to try and squeeze individuals into the second, lower-rank category will, therefore, be enhanced as compared with the present position, which once more risks undermining

[244] *Day v Lewisham*, n.161.
[245] *Good Work Plan*, n.11, 25–29.
[246] Taylor Review, n.9, 35, 37.

fiscal goals and shrinking the group of workers with the strongest employment rights.

Extending a similar hypothetical contract to 'workers' (or similar categories in the legislation such as EqA) would avoid this result. Even if the boundary of the worker concept can be elusive in some hard cases, it is probably less uncertain than the 'employee' test, making it a better subject for a hypothetical contract. The courts have already developed tools to distinguish 'workers' from those who are conducting genuine business undertakings, which could be adapted to distinguish those PSCs which are growing businesses from those which involve dependent labour:[247] examining, for example, whether the use of the PSC was a condition of employment or whether it was a pre-existing business serving multiple clients.

But by that point, the legislative exceptions to liability based on a bilateral contract between an individual employee and an employer may have overwhelmed the rule. For in addition to the existing statutory exceptions or adjustments to the employment paradigm, courts and tribunals would need to classify actual contracts for 'ordinary' workers and employees not operating via PSCs and hypothetical contracts for both categories engaged via PSCs (and other intermediaries). Instead of multiplying further detailed statutory exceptions to the default model, it might be better to cut through this particular Gordian knot and break with the underlying reliance on a bilateral contract altogether. This is the radical proposal of the Institute for Employment Rights.[248] Identifying the body subject to the corresponding duty would require careful work, but the tools are present in the emerging functional concept of the employer.[249] While I won't pretend the EU or ECHR concepts of worker or employment relationship are free from difficulty, one can't help but compare their clarity and simplicity with the labyrinthine wording of Chapter 8 of Part 2 of ITEPA 2003, soon to be added to by new provisions applying to private sector employers.

For Kahn-Freund, the contract of employment, that 'figment of the legal mind', operated to conceal the inequality of bargaining power inherent in the employment relationship.[250] In 1944, he wrote of how the 'metaphysical

[247] See e.g. *Bates Van Winkelhof v Clyde & Co* [2014] ICR 730.

[248] K. Ewing, J. Hendy and C. Jones (eds), *Rolling out the Manifesto for Labour Law* (Liverpool: Institute for Employment Rights, 2018), Ch 6.

[249] Deakin, 'The Changing Concept of the Employer', n.14; Prassl, *The Concept of the Employer*, n.14.

[250] P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London: Stevens, 1983), 18.

separation' between an individual and a one-person company had become a means of evading liabilities and protecting the shareholder against third parties.[251] Since then, many statutory rights have been built on the contract of employment, often extended to embrace workers, as a partial corrective of inequality of bargaining power. But what Kahn-Freund described as the 'tyrannical sway' of the doctrine of *Salomon v Salomon* survives, mostly undiminished in its dominion.[252] In the case of PSCs, its logic has been exploited to the detriment of the individual behind the company. So long as the law continues to use a contract as the principal foundation of labour rights and simultaneously to recognise two figments—the separate corporate personality of the PSC and a freely negotiated contract with it—the capability of PSC arrangements to cut off statutory rights at the root will persist.

[251] 'Some Reflections on Company Law' (1944) 7 MLR 54.
[252] 'Some Reflections on Company Law' (1944) 7 MLR, 56.