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Consent in Contracts of Employment

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This article considers the problem of questionable consent in contracts of employment. We suggest that in the context of employment, consent should be understood as a continuum that includes some level of coercion and some level of choice. We show that despite labour law's assumption of inequality of bargaining power, consent is still legally valid in various contexts of employment. We propose some solutions: procedural rules increasing the chance of free and informed consent, and substantive standards restricting recognition of consent due to public policy considerations. The 'menu' we put forward includes some solutions already recognised by law (in some specific contexts) and we also propose some new ones. We then demonstrate how the proposed solutions, both procedural and substantive, can be applied in common contexts where employee consent might be put into question: variation of contractual terms, waiver of access to courts, waiver of legislated rights, waivers related to human rights, and implicit waivers of employee status.

INTRODUCTION

Consent is considered questionable in contracts of employment.[1] It has been described as difficult, compromised and problematic.[2] Subject to some rare exceptions, consent by an employee to waive a legislated employment right is deemed invalid. At the same time, there are several contexts in which consent by employees vis-à-vis their employer is legally valid or at least meaningful (in the sense of being relevant to the analysis of whether some agreement is valid). In such cases, what counts as consent? Should we apply the same standards that apply to any other contract, ignoring the inequality of bargaining power that is acknowledged and assumed by labour laws for so many purposes? This question has not received much attention from courts or in the academic literature so far. The current contribution hopes to fill this gap.

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1 To some extent, consent is questionable also in contracts for 'work' not classified as employment – see section below headed 'Should we focus on identifying "free" consent?' We chose to focus here only on contracts of employment for the sake of simplicity.
2 Steven L. Willborn, 'Consenting Employees: Workplace Privacy and the Role of Consent' (2005) 66 Louisiana L Rev 975, 976, 980; Samuel R. Bagenstos, 'Consent, Coercion, and Employment Law' (2020) 55 *Harvard Civil Rights-Civil Liberties Law Review* 409; Philippa M. Collins, *Putting Human Rights to Work: Labour Law, the ECHR, and the Employment Relation* (Oxford: OUP, 2022) 71 and references therein.

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The employment relationship contains an inherent tension, which can even be described as a paradox. On the one hand, it is contractual, based on a voluntary agreement between an employer and an employee, according to which work will be performed under the direction of the employer in return for wages. On the other hand, it is heavily regulated by labour laws setting limits on the parties' agreement, based on the understanding that due to inequality of bargaining power (or market failures, or employee vulnerabilities)[3] the agreement is often not based on free will. As Karl Marx eloquently explained, the wage-labourer 'is *compelled* to sell himself of his own free will';[4] the relationship is based on a 'deceptive illusion of a transaction' and 'the appearance of independence is maintained … by the legal fiction of a contract'.[5] In the words of Kahn-Freund, freedom of contract in the context of employment is merely an 'indispensable figment of the legal mind'.[6] This remains true, in principle, today as well. Just recently, Mark Freedland and Simon Deakin noted that 'there is necessarily a degree of coercion within every employment relationship'.[7]

Given the element of coercion or compulsion, one might question whether consent even matters in employment. Questioning consent in employment may reflect conceptual concerns of whether consent can be meaningfully discussed against the background of coercive circumstances. The conceptual concern informs legal concerns as to whether the law attributes, or should attribute, any weight to claims of consent. This is true whether the party claiming consent as legally meaningful is the party seeking consent (the employer), or the party whose consent is sought (the worker).

Recognising the coercive background of the employment relationship, labour law attributes limited weight to claims of consent to terms of employment falling below certain minimal standards. As a general rule, labour rights are non-waivable.[8] However, for quite a few specific questions, consent does matter, and is a necessary or sufficient condition for certain terms. Consider for example the consent of an employee to work more hours than the maximum set by law (a waiver that is allowed under UK law). Or consent for being under video surveillance at work. Or an agreement for pay cuts, when the new pay is still above the minimum wage. These are just some examples of cases in which consent by an employee is relevant for the legal analysis. It might not be sufficient by itself (depending on the legal question), but it is relevant according to

3 The classic exploration of inequality of bargaining power is in Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (London: Stevens & Sons, 1983) (*Kahn-Freund*) ch 1. For a discussion of this concept as well as market failures and inherent vulnerabilities, see Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: OUP, 2016) ch 3.
4 Karl Marx, *Capital: Vol 1* (London: Penguin, 1976, first published 1867) 932 (emphasis added).
5 *ibid*, 719, 1064.
6 Kahn-Freund, n 3 above, 18.
7 Mark Freedland and Simon Deakin, 'The Exchange Principle and the Wage-Work Bargain' in Mark Freedland et al (eds), *The Contract of Employment* (Oxford: OUP, 2016) 52, 70.
8 See for example Employment Rights Act 1996, s 203(1); National Minimum Wage Act 1998, s 49(1); Working Time Regulations 1998, reg 35(1). And see more generally Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40 OJLS 482; Sergio Gamonal C. and César F. Rosado Marzán, *Principled Labor Law: U.S. Labor Law Through a Latin American Method* (New York, NY: OUP, 2019) ch 4.

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current laws. And if consent is questionable, because of the power imbalance, how can we rely on it?

The goal of this article is to explain this problem and offer some solutions. It builds on the existing literature on the contract of employment,[9] and addresses what we see as a gap in the literature, namely the role of consent in such contracts. The next part introduces the concept of consent in labour law, suggesting it should be assessed within a *sui generis* law of employment contracts (the first section), and that it should be understood as a continuum that includes some level of coercion and some level of choice (the second section). The following sections list concrete solutions: procedural rules that increase the chance of free and informed consent, and substantive standards restricting recognition of consent due to public policy considerations. The third part demonstrates how the proposed solutions, both procedural and substantive, can be applied in common contexts where employee consent might be put into question: variation of contractual terms, waiver of access to courts, waiver of legislated rights, waivers related to human rights, and situations that amount to (implicit) waiver of status. Our analysis is limited to the cases where consent is already considered relevant under existing law; we do not suggest giving consent a greater role in labour law. The fourth part concludes.

DEALING WITH QUESTIONABLE CONSENT: AN OVERVIEW OF POSSIBLE SOLUTIONS

In some areas of law (and ethics), society emphasises choice because it does not consider any alternative inherently superior. It is the actor's autonomy that justifies protecting certain choices: of affiliations, expression, thought, identity, romantic relationships, consumption or other aspects of life. In the context of employment, however, we do not assume a morally neutral choice between equally acceptable alternatives. Labour law establishes certain arrangements as a default, promoting the options perceived to reflect the best interests of workers. The worker's choice to depart from the default rule may be respected in some circumstances, but the underlying assumption is that the default serves their best interests unless proven otherwise. A related assumption, resulting from the special character of the employment relationship and the worker's inferior bargaining power and dependence on their employer, is that consent is questionable. The following sections ask how the law can address this difficulty, taking the contractual nature of employment relationships as our starting point.

9 See notably Mark Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003); Mark Freedland et al (eds), n 7 above; Zoe Adams et al, *Deakin and Morris' Labour Law* (Oxford: Hart, 7th ed, 2021) (Deakin and Morris) ch 3; Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (Cambridge: Cambridge University Press, 2nd ed, 2019) ch 3; Hugh Collins, 'Contractual Autonomy' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015) 45.

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A sui generis law of employment contracts

If a contract is supposed to represent the free agreement of both parties, treating employment as a contract can be seen as a misleading sham. Kahn-Freund made the point that on the employee's side, freedom of contract may be 'not more than the freedom to restrict or to give up one's freedom', but he added that this was a *necessary* fiction because it symbolises the shift away from forced labour.[10] He clarified that we should not assume a real agreement on the part of the employee to the terms dictated by the employer: 'the danger begins if "freedom of contract" is taken for a social fact rather than a verbal symbol'.[11] Note that Kahn-Freund assumes at least *some* level of free choice – real and not only symbolic – which separates employment from forced labour. We know that some people have several potential employers to choose from, but others only have one option at a given time. So even the choice to enter into specific employment is sometimes (perhaps even often) heavily constrained. In contrast, it is certainly not unusual for employees to have some bargaining power and be able to choose the employer, and also to influence the terms of their engagement to some extent. Rather than describing the situation in dichotomous terms, it is perhaps most accurate to say that there is a spectrum of possibilities between completely free choice and complete coercion, with employment often being closer to coercion compared to many other (notably commercial) contracts. We will describe this in the next section as the continuum of consent.

The questionable freedom of contract in the context of employment has led some scholars to reject the contractual lens altogether.[12] We agree that this lens is limited and insufficient, but it is still necessary, at least for some purposes. At the very least, it is needed when non-unionised employees receive better terms than the minimum required by labour laws. If the minimum wage guaranteed by the law is £9.50, and E is making £15, it is not a result of the law and (in a non-unionised setting) not a result of collective agreements. If the employer fails to pay the £15 at some point, E can bring a claim to an employment tribunal to enforce the agreement between the parties regarding the wage. There is no better way to understand this situation than through the contractual lens.

Does this mean that the regular laws of contract apply, with regard to any dealings above the legislated floor of rights? One might argue that once E is earning more than the minimum wage, they have sufficient bargaining power, so freedom of contract is no longer a fiction. But this seems highly artificial. Although the wage does say something about bargaining power, and therefore can suggest the level of ability to influence the terms of the engagement, there are many other factors that impact the bargaining power of an employee. Most notably, during the relationship an employee is in a position of subordination and dependency vis-à-vis the employer, or under its practical authority,[13]

10 Kahn-Freund, n 3 above, 18, 25.
11 *ibid*, 25.
12 See Brian A. Langille, 'If Labour Law is a Subset of Employment Law, What is Employment Law a Subset of?' (2020) 43 Dalhousie LJ 581. See also John Gardner, 'The Contractualisation of Labour Law' in Hugh Collins et al (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018) 33.
13 Hugh Collins, 'Is the Contract of Employment Illiberal?' in Collins et al, *ibid*, 48.

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and there are significant barriers to leaving for alternative employment.[14] Even high-wage employees are therefore very limited in their dealings with the employer. For this reason, although the regular laws of contract apply as a default, there are various contexts in which they have been adapted for the context of employment.[15] The point was made forcefully in *Autoclenz Limited* v *Belcher* (*Autoclenz*), where the Supreme Court explained that due to the inequality of bargaining power, contracts of employment should be interpreted differently, with more emphasis given to the reality of the relationship, as opposed to how it was described in the written contract.[16]

The contract of employment has often been characterised as a relational contract, and as such reflects an ongoing relationship that involves incremental changes.[17] As Collins suggests, the formal contract itself is the framework for a relationship that develops and changes, where the expectations of the parties, especially an expectation of cooperation, are more important than the express terms of the contract.[18] Because of the relational nature of the contract of employment, some might suggest that regular contractual requirements such as consent do not matter, as obligations evolve over time. However, we should distinguish between a descriptive view of the relationship as relational, and normative implications, reflecting the unequal bargaining power of the parties.[19] As far as the normative implications are concerned, an understanding of the contract as relational but also as one of inherent inequality and dependency should lead to the creation of safeguards to prevent the employer from using the 'evolving' or 'informal' nature of the relationship against the employee, to violate their rights or take some of their benefits unilaterally. The relational understanding of the contract of employment may lead us to characterise the relationship as one of partnership and cooperation rather than conflict,[20] a characterisation that is meaningful to the question of consent, but, more often than not, we believe that treating consent with scepticism better reflects a recognition of the inherent conflict in employment relations.

We should further clarify that we do not deny, for the purposes of this article, the existence of some space for unilateral decision-making by the employer (known as the managerial prerogative). It is not our intention to examine the boundaries of this prerogative here, but rather to focus on elements of the

14 See Davidov, n 3 above, ch 3.
15 See the various chapters in Freedland et al, n 9 above.
16 *Autoclenz Limited* v *Belcher* [2011] UKSC 41 at [17]-[35]. See further strengthening and development of this idea in *Uber BV & Ors* v *Aslam & Ors* [2021] UKSC 5 at [76].
17 On the idea of relational contracts – that are long-term, open-ended and complex, with various implications – as opposed to discrete transactions, see generally Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven, CT: Yale University Press, 1980).
18 Hugh Collins, 'Employment as a Relational Contract' (2021) 137 LQR 426, 434-435. See also Hugh Collins, 'The Contract of Employment in 3D' in David Campbell et al, *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Basingstoke: Palgrave Macmillan, 2013) 65; Freedland, n 9 above, 271.
19 For a critique of the use of the 'relational contract' framework in the context of employment without sufficient recognition of the dependency and unequal bargaining power of the parties, see Douglas Brodie, 'How Relational is the Employment Contract?' (2011) 40 ILJ 232.
20 See Brodie, *ibid*, 240, and the reference to *State of South Australia* v *McDonald* [2009] SASC 219 therein.

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contract that can only be changed by consent. Yet consent by an employee, as noted, is highly questionable.

Once we accept the fact that the employment relationship is contractual, but at the same time acknowledge the difficulty of questionable consent, there are three possible legal routes that can be taken in terms of legal structure and strategy. We can either use employment legislation as the *only* method to correct problematic results; or use general contract law doctrines to prevent unacceptable contracts; or develop solutions as part of the *sui generis*, unique law of the contract of employment. The latter two solutions do not need to be exhaustive; they can come alongside employment legislation. The question is whether they are needed and justified at all. Below we briefly explain each of these three options and why we support the third one.

One theoretical possibility is to retain a complete separation between contract law and labour legislation, with any corrections to problematic consent limited to employment legislation prohibiting unfair terms. Thus, for example, we can say that the Minimum Wage Act protects employees from the compromised agreement to work for less than £9.50 per hour, and other labour laws similarly invalidate various agreements which we have reason to believe were not made freely (or we find unacceptable for other reasons). According to this approach, the solutions created by employment legislation are exhaustive, as far as the problem of consent is concerned, so any agreement not prohibited by such legislation is allowed (with the rare exceptions where an agreement is considered void by general contract laws). This approach has the advantage of preserving the 'purity' of contract law and its ethos of respecting the parties' autonomy. However, the unique characteristics of employment (most notably inequality of bargaining power, or inherent vulnerability of employees) which render consent questionable do not miraculously disappear when an employee is making one penny over the minimum required by law. Moreover, employment relations are dynamic and quite frequently new problems arise which were not addressed by legislation. When courts are asked to resolve such new problems, resorting to the regular laws of contract amounts to ignoring the unique characteristics of employment, which have been thoroughly recognised by the legislature. Indeed, UK courts have recognised some room for the development of the common law alongside statutory protections, and scholars have called for further developments along these lines.[21]

If the interpretation of employment contracts must be sensitive to their unique characteristics, there are still two possible ways to achieve this result. One is to apply the *general* laws of contract in a way that shows sensitivity to context and recognises that inequalities of power often make the freedom of choice questionable.[22] Along these lines, courts have noted the need to apply contract

21 See Freedland, n 9 above, 11; A.C.L. Davies, 'The Relationship Between the Contract of Employment and Statute' in Freedland et al, n 9 above, 73, 75; Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 CLP 67; Douglas Brodie, *The Future of the Contract of Employment* (Cheltenham: Edward Elgar, 2021) ch 12. There has been some concern that the judgement in *Johnson* v *Unysis Ltd* [2001] UKHL 13 stifles such development, but as Bogg explains this in not necessarily the case.

22 Guy Mundlak, 'Generic or Sui-generis Law of Employment Contracts?' (2000) 16 Int J Comp Lab Law & Ind Rel 309.

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doctrines differently when dealing with relational contracts or with large discrepancies in bargaining power.[23] In particular such sensitivity to context and power relations can lead courts to apply the doctrines of unconscionability, duress and public policy more frequently, rather than retaining them only for very extreme and rare situations.[24] Such developments can be useful for employees but are not understood as unique to contracts of employment, which are only one example of relational or asymmetrical contracts. At the theoretical level, an approach that calls for changing the general laws of contract in this direction can be supported by theories that see the goals of contract law as including distributive justice,[25] or advancing self-determination.[26] It can also result quite directly from a realistic view of modern-day contracts, which are often very far removed from the ideal of two equal parties freely negotiating and mutually concluding the terms of their agreement.[27]

Although the contractual doctrines noted above are important and in some cases very helpful, they do not offer a practical solution for the problem considered here. Even if courts will change the general law of contracts in a more progressive direction, doctrines such as unconscionability are by their very nature limited to *exceptional* cases and cannot help to alleviate problems of compromised consent being *the norm* in the context of employment. This brings us to the final approach: developing the law of employment contracts as a separate, *sui generis* branch of the law.[28] The advantage of this approach is that it allows the development of the law in line with the goals of labour law, rather than merely the goals of contract law. It also recognises the context and inequality of bargaining power as an inherent, permanent part of the law concerning employment contracts, avoiding the need to prove these characteristics in specific cases. In some countries, including the UK, such *sui generis* law has been developed. There are several legal rules developed by the courts specifically for the interpretation of contracts of employment, and a rich academic literature dedicated to the contract of employment as a specific, unique branch of the law.[29] This branch is distinct from both the legislation setting substantive employment standards and the general laws of contract. Contracts of employment, even if they are subject as a default to the general

23 See Douglas Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' in Freedland et al, n 9 above, 124, 125; Collins, 'Employment as a Relational Contract' n 18 above.

24 See for example Jodi Gardner, 'Being Conscious of Unconscionability in Modern Times: *Heller* v *Uber Technologies*' (2021) 84 MLR 874. For a discussion of the Canadian developments in this regard and scepticism about the chances of their adoption in the UK, see Douglas Brodie, 'Canadian Jurisprudence and the Employment Contract' (2022) 51 ILJ 626.

25 Anthony T. Kronnman, 'Contract Law and Distributive Justice' (1980) 89 Yale LJ 472; Hugh Collins, *Regulating Contracts* (Oxford: OUP, 2002) ch 11; Aditi Bagchi, 'Distributive Justice and Contract' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford: OUP, 2014) 193.

26 Hanoch Dagan and Michael Heller, 'Can Contract Emancipate? Contract Theory and the Law of Work' in *Theoretical Inquiries in Law* (forthcoming).

27 See *Uber Technologies Inc* v *Heller* [2020] SCC 16 at [56] of the majority opinion (*Uber* v *Heller*).

28 It is also possible to describe this as a mixture of general contract law and a unique employment contract law. See Collins, n 9 above.

29 See notably the references in notes 9 and 21 above (also for a review of the relevant cases).

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laws of contracts, are also subject to an additional layer of unique laws that apply specifically to them. This is the level we focus on in this article.

Solutions to the problem of employees' compromised consent can be developed by the courts as part of the common law of the contract of employment. They can also, however, be legislated.[30] In such cases, the difference from the first approach noted above is that the legislation will create rules regarding consent and what it means for the validity of employment contracts, rather than setting minimum substantive terms.

Should we focus on identifying 'free' consent?

Before we turn to consider some specific solutions, a preliminary issue is whether the aim is to identify 'real' consent at the time of the agreement, ie to set a clear dividing line between consent and coercion. In this section we explain why we do not believe this is a useful route for a majority of employment-related purposes. To clarify, we do not deny that in some cases it could be possible to prove that an employee did not freely agree to a contract. This is possible (and should be possible) under the general laws of contract, especially the doctrine of duress. For some extreme situations, this can be a suitable solution. But a factual, case-by-case examination of the 'true' intent of a person is not a realistic solution to the broad problem we wish to consider here.

Consent is assessed in various contexts, where a person with the capacity to understand the options presented to them and their reasonably foreseeable consequences makes a free and informed choice between different alternatives.[31] In some circumstances, consent may be enthusiastic – as in accepting the offer of a night out or another helping of dessert. In others, it may be less enthusiastic and more calculated, such as a business transaction in a competitive market. In some situations, consent might reflect an acceptance of the lesser of two evils, for example when choosing between the risks of undergoing a medical procedure and the risks of refusing it. Sometimes, the choice between two evils is so constrained we will hesitate whether to even consider it as consent – for example, when the choice of one option might result in physical violence. As these different examples demonstrate, the question of consent is not a simple yes or no question, but one of degree and context; the continuum of consent extends between free enthusiastic choice and duress.

The choices of wage-labourers, whether they work in fields, factories or offices, can be found along this continuum. In some cases, the coercion is blatant and severe. Workers might be forced to work by violence, confinement to the workplace, threats, debt bondage, or the threat of loss of status resulting

30 Mark Freedland has drawn attention to the neglected role of legislation in regulating the contract of employment (Mark Freedland, 'General Introduction – Aims, Rationale, and Methodology' in Freedland et al, n 9 above, 3, 20-22).

31 Compare Sexual Offences Act 2003, s 74; Mental Capacity Act 2005, s 3; *Gillick* v *West Norfolk and Wisbech AHA* [1985] UKHL 7.

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in detention and deportation.[32] These extreme situations may be characterised as forced labour, or even servitude or slavery. However, coercion in labour relations is not limited to the most extreme situations or to the use of illegal means. 'Forced labour' and 'free labour' are not two binary options, but two ends of a continuum.[33] Most labour relations exist at some point on this continuum, subject to some degree of coercion or unfreedom, but also reflecting some choice. The coercion common to all workers is economic – the need to earn enough to support oneself and one's family, and the lack of means to do so outside wage labour.[34] Even without physical force, indirect coercion or coercion resulting from the workers' circumstances limits their freedom and choice.[35] In some circumstances, the economic coercion is accompanied by legal means effectively denying workers the power to terminate the employment relationship. A tech worker might, for example, be required to accept a too-restrictive non-compete clause; and a migrant domestic worker might be legally tied to her employer and lose her visa if the employment relationship ends.

32 See for example *Siliadin* v *France* Application no 73316/01, Merits and Just Satisfaction, 26 July 2005; *R* v *SK* [2011] EWCA Crim 1691; *Hounga* v *Allen* [2014] UKSC 47 (*Hounga*); *The Hacienda Brasil Verde Workers* v *Brazil* [2016] Inter-American Court of Human Rights; *Taiwo & Anor* v *Olaigbe & Ors* [2016] UKSC 31; *Chowdury and Others* v *Greece* Application No 21884/15, Merits and Just Satisfaction, 30 March 2017.

33 See Klara Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* Joseph Rowntree Foundation, 2010 at https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation [https://perma.cc/SJH6-S8MM]; Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of "Freedom"' (2010) 10 *Global Networks* 244; Katie Cruz, 'Beyond Liberalism: Marxist Feminism, Migrant Sex Work, and Labour Unfreedom' (2018) 26 *Feminist Legal Studies* 65. For a critique of the idea of a continuum of exploitation see Judy Fudge, '(Re)Conceptualising Unfree Labour: Local Labour Control Regimes and Constraints on Workers' Freedoms' (2019) 10 *Global Labour Journal* 108. An important distinction between our discussion of continuum here and the discussion of continuum in the literature on trafficking and forced labour is that this literature focuses not just on consent or unfreedom, but also on a continuum of exploitation or poor conditions. The consideration of multiple elements (control, coercion, exploitation, poor conditions) as one continuum is one of the points criticised by Fudge. Here, however, we focus on the specific issue of consent. A second distinction is that in the context of forced labour, the idea of a continuum is evoked to reject the arguments for a binary divide between forced labour or trafficking for labour exploitation, and between other violations of labour law common in employment relationship (a binary that could be identified, for example, in decisions such as *Basfar* v *Wong* [2022] UKSC 20 at [43] per Lord Briggs and Lord Leggatt). As our focus is on 'ordinary' or 'acceptable' work, this aspect of a continuum of coercion and exploitation is less relevant.

34 Marx, n 4 above, 1019-1038. And see Judy Fudge, 'Making Claims for Migrant Workers: Human Rights and Citizenship' (2014) 18 *Citizenship Studies* 29, 13; Jamie Morgan and Wendy Olsen, 'Forced and Unfree Labour: An Analysis' (2014) 4 *International Critical Thought* 21, 25. This can also be called 'structural dependency' or 'structural domination'; see Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33 Int J Comp Labour L & Ind Rel 365, and Matthew Dimick, 'Review of Philosophical Foundations of Labour Law' (2021) 41 Comp Lab L & Pol'y J 795.

35 Allen Wood, 'Unjust Exploitation: Unjust Exploitation' (2016) 54 *The Southern Journal of Philosophy* 92, 99-100; Genevieve LeBaron et al, 'Confronting Root Causes: Forced Labour in Global Supply Chains' Open Democracy and the Sheffield Political Economy Research Institute, 2018 at https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/confronting-root-causes/ [https://perma.cc/8NBZ-YMBE] ; Jessica Elliott, *The Role of Consent in Human Trafficking* (London: Routledge, 2015) 66, 235.

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The understanding of a continuum of consent is important for several reasons. First, it emphasises that, at least in the context of work, consent is not a question of yes or no, but more-or-less. Second, placing the idea of consent in the context of employment in relation to consent in other contexts (such as business transactions, sexual interaction or medical treatment) helps identify the distinction between consent as enthusiastic reflection of free will, and consent as acquiescence to one of several unattractive alternatives. Describing consent as a continuum that includes these different contexts helps us identify the relevant part of the continuum of consent. The notion of a continuum of consent also helps us further narrow down the focus of the analysis in this article, to only specific instances of questionable consent in the context of employment. The examples we consider here are generally those characterising work relationships that do not reach the level of highly exploitative or unacceptable work – the latter problem falls outside the scope of this article.

The understanding of a continuum of consent is also relevant for an important aspect of UK labour law that distinguishes between 'employees' working under contracts of employment and 'workers' (sometimes referred to as 'limb (b) workers') who are also subject to significant parts of labour law, though not all.[36] Generally, the conceptual understanding of consent above also applies to workers not classified as 'employees', and many of the solutions proposed below could be relevant to their situation. However, the degree of coercion (or risk thereof) may be somewhat lower, justifying some variations. To avoid excessive complexity, we focus in this article only on employees, and leave the application of the same ideas to the situation of other 'workers' for future research.[37]

Given the understanding of consent as a continuum that includes economic and legal coercion, we do not believe it is possible to delineate a clear separating line between free and informed consent on the one hand and coercion on the other. We can set such a line to prevent the more extreme cases of coercion – indeed we *need* a clear line for these cases, which require criminal sanctions – but it is not a realistic solution for 'regular' employment relations.

Recognising the limited choices workers face and their questionable capacity to freely accept or reject the conditions offered to them, labour law establishes a non-waivable set of labour rights. Yet, beyond this floor, there are still significant areas of the law where consent matters, which are the focus of this article. In the next two sections we discuss two types of solutions for the problem of

36 Employment Rights Act 1996, s 230(3); National Minimum Wage Act 1998, s 54(3); Working Time Regulations 1998, s 2; Employment Relations Act 1999, s 13; Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg 1.

37 Note that some relations between clients and independent contractors are also not very far from employment, on the continuum of consent, and might justify some of the same solutions. Indeed, even in interactions between two businesses, power gaps between the parties might be significant, resulting in limited choice for the weaker or dependant party but to comply with the demands of the stronger party (see for example *Pakistan International Airline Corporation* v *Times Travel (UK) Ltd* [2021] UKSC 40). However, as a default, the assumption of free consent applies for such relations.

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questionable consent in 'regular' employment relations: procedural rules and substantive rules.

Procedural rules

Procedural solutions in this context are designed to create a supportive setting for the employee before making a decision. The goal is to raise the chances of consent being closer to the 'free and informed' side of the spectrum, without presuming that a clear line can be drawn between consent and coercion, or that consent is necessarily free when all the procedural rules are met. We list here nine solutions that can be found in different legal systems,[38] and can be used separately or in combination with each other. Many of them are already used in UK labour law, albeit for very limited purposes. This is obviously a non-exhaustive list. Our proposal is to adopt such procedural mechanisms in legislation (as the legislation in some contexts already did) as much as possible.

The first group of solutions increases the chances that consent is informed. First, the law can require some specific agreements (for example waivers) to be explicit and in writing. Given the relational, long-term nature of employment contracts – leading to ongoing changes throughout the employment relationship – implicit and oral agreements are very common. Demanding an explicit stipulation in writing can be useful in making sure that employees are aware of any changes to their benefits and work conditions.[39] A further demand could be for the written consent certain terms or waivers to be clearly distinguishable or separate from the contract signed.[40] Second, we can require that the agreement will be drafted in plain language[41] and include a calculation of the monetary implications.[42] This may help to prevent situations in which employees are asked to agree to some change in their benefits package, without fully understanding what the change means – especially if it is drafted in legalistic, convoluted language. A legal rule that invalidates terms if they cannot be understood by a reasonable employee without legal representation, or if the monetary implications

38 Some of these solutions appear in American Law Institute, *Family Dissolution: Analysis and Recommendations* (Philadelphia, PA: American Law Institute, 2002), which also deals with a relationship characterised by systemic inequality of power. For a brief review and analysis see Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Oxford: Hart, 2015) 167.

39 Compare Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (GDPR), Recital 32.

40 cf GDPR *ibid*, Art 7(2).

41 See for example *ibid*.

42 See Employment Rights Act 1996, s 205A(1)(c) and (5), dealing with 'employee shareholder' status, which require the employer to provide a written statement with all the details of the arrangement, the rights attached to the shares and the exclusion from some labour rights. See discussion of this status in the section below headed 'Implicit waivers of status'. See also, in Israel, *Eldad Kanetti* v *Digital Equipment* (National Labour Court, judgment of 1 June 1999), dealing with settlements at the end of the relationship (specifically, when an employee is required to sign a waiver of all future claims in return for getting severance pay), and setting a requirement to include a calculation to ensure understanding of the cost.

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of these terms are not clearly stipulated, can make a difference in some cases. Third, the law can demand that an employee will gain access to an independent advisor (whether legal or other) before consenting to some specific terms.[43] This is especially suitable when a decision involves complex information, particularly with long-term implications, which the advisor can help the employee to understand. Ideally, in such cases, the employer will have to bear the cost of professional advice but without impairing the independence of the external expert.

A fourth procedural tool would require the employer to create a repository of agreements in which employee consent was given for certain terms. The law can require the employer to send this information periodically to a governmental agency or to a union.[44] This tool contributes to improved consent in several ways. It adds another procedure employers have to meet, which increases transaction costs as well as transparency and as a result increases the chances consent will only be sought when necessary. Moreover, it reinforces the requirement for written consent. It can also potentially improve the information available to future employees who will be more informed. Finally, the data available to agencies and unions would enable them to assess trends and respond if needed.

Another group of solutions pay attention to the timing and time span of consent, both in terms of when consent is originally sought and its validity over time. According to the *fifth* proposed solution, the law can create a 'cooling off' period, ie a period of time (whether 10 days, or 30 days, etc.) in which an employee will have the right to rescind an agreement concerning some terms. Another variation, which can be called a 'reflection' period, would require a certain number of days between a request by the employer to introduce a new term and the time an employee needs to reply; or some days between the time the employee received expert advice and the time they need to make a decision.[45] During this time, the employee can presumably consult with additional people or just have more time to think about the agreement. Without such a rule, people are sometimes asked to accept specific terms (which could be highly problematic) 'on the spot' during their job interview. *Sixth*, it is possible for the law to maintain that certain contractual clauses may be revoked by the worker at any time,[46] or will expire automatically after a given period (say, two years).[47] If an employer seeks to reinstate the same provision, they will need to ask the employee to re-sign it, at the time when the employee might have more bargaining power compared to what they had when first entering the

43 See for example Employment Rights Act 1996, s 203 (regarding settlement agreements) and 205A(6)(a) (regarding 'employee shareholder' status); Equality Act 2010, s 147.

44 See the Working Time Directive (2003/88/EC), which sets among the conditions for opt-out from the maximum weekly hours that 'the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days' (Article 22(1)(e)).

45 See for example Employment Rights Act 1996, s 205A(6)(b), requiring that 'seven days have passed since the day on which the individual receives the advice' for an agreement between a company and an individual concerning employee shareholder status to have effect (see 'Implicit waivers of status' below regarding changes to this status).

46 See for example GDPR n 39 above, Art 7(3).

47 See Leah Guggenheimer, 'A Modest Proposal: The Feminomics of Drafting Premarital Agreements' (1996) 17 *Women's Rights Law Reporter* 147, further discussed in Thompson, n 38 above, 170.

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relationship, and perhaps also a better understanding of what the provision means. *Seventh*, it is possible to require that some specific agreements will be made in 'real time' rather than in advance when the agreement refers to a hypothetical situation. For example, employers sometimes ask employees at the beginning of their employment to consent to a polygraph test or an e-mail search in case a suspicion arises sometime in the future. If consent is sought in concrete terms close to the date it becomes relevant, that would significantly increase the likelihood that the employee understands the consequences of consenting.[48]

The seven legal techniques noted above are all useful in promoting better awareness of employees of their agreements and better understanding of the implications. It is important not to overestimate their potential to make a difference and realise that they also carry a risk of masking the power imbalance if courts or legislatures read too much into them.[49] However we believe that the solutions mentioned above can be useful, as long as their limits are acknowledged. For current purposes, we call them 'soft' procedural requirements. The final two procedural solutions we wish to mention are stronger, in the sense that they can also overcome discrepancies in bargaining power. In both of these cases, consent by an employee for certain terms will only be valid after being ratified by an additional, external entity, that is not subordinated to and dependent on the employer.[50] The law can require an approval by some governmental agency (the *eighth* solution). Alternatively, it can require union approval for some individual agreements (the *ninth* solution).[51] Such requirements can be called 'hard' procedural solutions. Union approval is especially powerful as a way to ensure that the terms are acceptable. However, the approval of the union is not proposed as an alternative for individual consent when such consent is required, rather it should come in addition to it.[52]

Substantive standards

Substantive solutions are designed to invalidate agreements which are deemed to be unacceptable. Focusing on the result (the unacceptable term) allows us to avoid the need to decide if the employee who consented to this term was truly

48 Compare the requirement for consent to be 'specific' in the definition of consent included in the GDPR n 39 above, Art 4(11).

49 Thompson, n 38 above, 166.

50 Compare with the idea of a 'Change Approval Board' (CAB), proposed by Bar-Gill and Davies as an independent mechanism to approve modification of (consumer, but also employment) contracts, Oren Bar-Gill and Kevin Davis, 'Empty Promises' (2010) 84 S Cal L Rev 1 37, 45.

51 An example of both of these last solutions can be found in the Israeli Hours of Work and Rest Act 1951, which sets maximum daily and weekly working hours, but allows an agreement for a longer work-day or work-week if made by a labour union and (also) approved by the Minster of Labour (section 5 of the Act).

52 See for example *Sindicato de Médicos de Asistencia Pública (Simap)* v *Conselleria de Sanidad y Consumo de la Generalidad Valenciana* Case C-303/98 EU:C:2000:528 at [71]-[74] (especially at [74] 'the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself'). See also Joined Cases C-397/01 to C-403/01 *Pfeiffer and others* v *Deutsches Rotes Kreuz, Kreisverband Waldshute* EU:C:2004:584 82-86.

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'free' or not – a question that is often impossible to answer in dichotomous terms. We assume that *as a matter of law* (rather than fact) consent is invalid in such cases. By their very nature, these solutions are structured as open-ended standards rather than specific rules,[53] and as such they rely on the courts' willingness to apply substantive standards in a way that will protect workers. This has not always been the case. However, while statutory protections are more reliable, courts may add an additional layer of protection, if correctly applying substantive standards as proposed here. Among the substantive solutions one can include general contract doctrines such as unconscionability, but as explained above, our focus is on the *sui generis* law of the contract of employment.

It is possible to suggest an entirely open-ended, case-by-case examination by courts, which can be termed, for example, a 'totality of circumstances test'.[54] But this seems to put too much faith in individual judges and their unstructured discretion regarding the parties' relative bargaining power and other unknown criteria. Moreover, such a system means extreme indeterminacy and inability of workers to predict the outcome and know their rights. Somewhat more specific and structured – although still open-ended – are standards such as proportionality, good faith (or 'mutual trust and confidence'), range of reasonable responses, and rationality, which are already being used in different contexts in labour law.[55] We focus below on two of these standards, which we believe could be most useful for current purposes: proportionality and a variation of a reasonableness test. This is not to belittle the importance of additional standards, such as good faith, to labour law; but we find them less relevant as solutions for the specific problem of consent. Compared to other standards, proportionality and reasonableness focus more on the result; arguably, results that fail these tests are also likely to reflect situations an employee would not freely agree to. In the next part we explain how the two standards we chose to focus on can be used in specific contexts to prevent problematic agreements that (among other things) raise questions of compromised consent. Here we provide a brief explanation of what these standards require and their origins.

The principle of proportionality comes from public law, but has been applied in labour law for some time in several specific contexts (whether explicitly or implicitly), most notably when considering infringements of human rights.[56] To comply with a proportionality standard, a decision must first have a legitimate purpose. Then the focus of the examination becomes the relation between the means chosen and the legitimate end. This inquiry is structured by a division

53 There is voluminous literature on the distinction between rules (that are specific and appear easier to apply) and standards (that are open-ended and have many other advantages). See notably Isaac Ehrlich and Richard A. Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 3 JLS 257; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1685; Kathleen M. Sullivan, 'Foreword: The Justice of Rules and Standards' (1992) 106 Harv L Rev 22; Cass R. Sunstein, 'Problems with Rules' (1995) 83 Cal L Rev 953.

54 Chunlin Leonhard, 'The Unbearable Lightness of Consent in Contract Law' (2012) 63 Case Western Reserve L Rev 57.

55 See David Cabrelli, 'The Role of Standards of Review in Labour Law' (2019) 39 OJLS 374; David Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 ILJ 146. See also Davidov, n 3 above, ch 7.

56 Pnina Alon-Shenker and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2013) 59 McGill LJ 375.

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into three tests: there must be a 'rational connection' between the means and the goal; the means chosen are no more harmful than is necessary to achieve that goal ('minimal impairment'); and there must be a proportionate balance between the benefits and the cost in terms of harm created ('proportionality in the narrow sense').[57]

As can be seen, the proportionality standard, when applied in the context of employment, allows the employer to choose its own goals, as long as they are legitimate (which is almost always the case for business-related goals). But the employer has to be careful when making a decision that affects the rights of employees, to make sure that the means chosen actually advance the goal. The employer must also be respectful of the employees' rights and avoid unnecessary harms by choosing the least restrictive means. The third and final requirement is the only one that can significantly impair the ability of an employer to make certain decisions, because it requires the employer to balance the gain it expects to make against the harms imposed by the decision on employees. For this reason, the third proportionality test is used very cautiously by judges, but we believe it is nonetheless crucial to prevent significant harm for the sake of trivial benefits to the employer. Altogether, the three-prong proportionality test is considered the most intrusive standard for employers,[58] and therefore cannot be applied lightly; but it already has some applications in labour law, and can prove a useful tool to prevent some unacceptable employer decisions, even when they appear to be based on employee consent.

Another possible solution can be found in the idea of 'fair exchange', which Mark Freedland and Simon Deakin consider to be (alongside 'stability') a normative principle of the contract of employment.[59] Freedland and Deakin show that various parts of the common law as well as legislation regulating the contract of employment can be seen as designed to ensure a fair exchange in the employer-employee contract – and they argue that this should become a guiding principle when further developing the law. The idea is not only to fill gaps in the law and respond to new challenges, but also to push the courts to better achieve this implicit goal, as part of a re-statement of the law which they term a 'critical re-analysis'.[60] The authors do propose using 'fair exchange' directly as a standard to assess the validity of specific agreements, but rather seem to view this as a principle that can justify more concrete legal solutions. We wish to suggest a requirement of 'reasonable consideration' that can be derived from the general principle of fair exchange (and can be seen as a variation, or a specific application, of a reasonableness test).[61] In the next part we will suggest a specific context in which we believe such a requirement could be justified.

57 See Alon-Shenker and Davidov, *ibid*, for references to cases from various jurisdictions. And compare with *de Freitas* v *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] 3 WLR 675; *R* v *Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 at [27].

58 Cabrelli, 'The Role of Standards of Review in Labour Law' n 55 above.

59 Freedland and Deakin, n 7 above, 54-58. On a requirement of 'fairness' compare to the Consumer Rights Act 2015, s 62-63 and Schedule 2.

60 Freedland, n 30 above, 3.

61 On reasonableness, see Cabrelli, 'The Role of Standards of Review in Labour Law' n 55 above. And compare to the Unfair Contract Terms Act 1977, s 11 and Schedule 2.

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When this requirement applies, courts should examine whether the worker was offered consideration for their consent, and consider whether the value of the right or benefit offered is reasonable, in light of the value of the right waived. For this requirement to be meaningful, reasonable consideration cannot include the ability to retain one's position. Put another way, a consent given under the threat of dismissals and without any other consideration might be valid in some circumstances, but not in situations when we demand 'reasonable consideration'.[62]

We recognise that considering the value of the benefit offered and the right waived reflects, at least to some extent, a commodification of employment rights.[63] We note, however, that all the situations considered below are ones where the law already allows waivers. A better assessment of consent will therefore not increase commodification in such situations and, in some cases, a careful application of the procedural and substantive standards considered here will lead to the rejection of some arrangements that would be accepted otherwise.

A possible helpful aid for the test of reasonable consideration is what we term the 'wage of consent'. In various contexts, such as medical treatment and sexual interactions, the 'age of consent' is a proxy for ability to understand decisions and their reasonably foreseeable consequences. The 'wage of consent' is a similar presumption, although it focuses on power and voluntariness rather than understanding or competence. And like the age of consent, the wage test is not absolute, and individual circumstances might still differ. Nonetheless, we assume that a worker earning close to the minimum wage enjoys fewer options than one earning three times as much, and the former's capacity to negotiate their terms, reject unacceptable conditions and freely consent to terms is much more limited.[64] A low-paid worker's need for labour law protections is likely to be more urgent than that of a highly paid one, and the ability to bargain for conditions over the minimum indicates some level of bargaining power, even if inferior to that of the employer. This test does not replace the procedural rules considered above or public policy considerations, but with high-paid workers, paternalism might be less urgent for some contexts considered below. A related point asks whether an individual was asked to consent to waive

62 In *Woods* v *W.M. Car Services (Peterborough) LTD* (1981) ICR 666, 671 (*Woods*) the employer's prior behaviour was considered by the EAT, and the Tribunal noted cases when employers resorting to 'methods of "squeezing out" an employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms'. See also Davies, n 21 above, 83-84. Although in *Woods* the question concerned conduct amounting to repudiation and constructive dismissal, the need for such assessment might arise in other contexts. In that case, the Tribunal noted the purpose of the employer's behaviour was to get the worker to accept lower wages rather than resign.

63 For this concern, raised as part of a critique of the 'employee shareholder' status, see Jeremias Prassl, 'Employee Shareholder "Status": Dismantling the Contract of Employment' (2013) 42 ILJ 307, 336. See also Vladimir Bogoeski, 'Nonwaivability of Labour Rights, Individual Waivers and the Emancipatory Function of Labour Law' (2023) ILJ (forthcoming).

64 Compare to the regime under the Brazilian DECRETO-LEI N° 5.452, DE 1° DE MAIO DE 1943 Aprova a Consolidação das Leis do Trabalho, Art 444 (+611-A) enabling workers with a higher education degree and who receive a monthly salary equal to or greater than twice the maximum limit of the benefits of the General Social Security System to waive some rights, including working time limitations.

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their labour rights in order to be offered a specific job they are interested in, when other positions (especially well-remunerated ones) are available to them, or to get any access to the labour market at all. Examples of the latter category can be a migrant worker hoping to get a visa and accepting work in a sector with poor conditions, or a young worker in an area with high unemployment and limited options. Examples of the first category will be of a service sector worker looking for a high management role, with more responsibilities, where longer hours are required, or an employed professional looking for a role in a new firm, for example due to its reputation, development opportunities, or technology used.[65] We do not suggest that highly paid workers are free from the coercion and unequal bargaining position experienced by their low-paid colleagues, or that workers paid the minimum wage lack agency. All wage workers make decisions somewhere along the continuum of consent. But a high wage, and ability to earn a high wage in another job, can be taken into account when assessing what counts as 'reasonable consideration', in the sense of allowing some more flexibility for contracting by such employees (in the specific contexts where reasonable consideration is deemed to be a justified requirement).

FIVE CONTEXTS OF EMPLOYEE CONSENT: CURRENT LAW AND SOME PROPOSALS

The procedural and substantive standards discussed above were described in the abstract. Through consideration of specific contexts where questions of consent may arise, we demonstrate in this part how the solutions proposed above could work in practice. Acknowledging that some terms of the employment contract are unacceptable even with the worker's consent, we focus on the cases where consent may justify the waiver of certain entitlements, under employment law as it currently is, focusing on the UK but considering also a few examples from other jurisdictions. For each context – each of the following sections – we start by describing the current state of the law, then move to propose which procedural or substantive solutions would be appropriate, based on a brief normative analysis. Different solutions from the 'menu' of options discussed above are fitting for different problems – for practical reasons, their location on the continuum of consent, or to reflect other societal interests and values. Generally speaking, the closer the right or entitlement waived to be a fundamental right, the stronger the procedural and substantive rules required.

65 Compare to the Unfair Contract Terms Act 1977, Sched 2 ('"Guidelines" for Application of Reasonableness Test'): 'The matters to which regard is to be had in particular … are any of the following which appear to be relevant … (b)whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term'.

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Variation of contractual terms

One noteworthy context where consent should be assessed is variation of the contract. A variation of terms in the contract of employment generally requires the agreement of both parties,[66] meaning that consent of the employee is required. Statutes prevent derogation from certain employment rights, but above this floor, variation by agreement is not limited.[67] The most obvious examples are wage cuts and a requirement to work longer hours for the same pay. Additional examples for cases that reached the courts include variation concerning the pay structure,[68] designated sales region and related duties,[69] discretionary bonuses,[70] redundancy pay,[71] crew complements,[72] and changes to the sick pay code.[73]

Contract law allows agreement by conduct, which means that an employee could be seen as consenting to unilateral changes (such as wage cuts) simply by continuing to work under the new terms. There are two ways in which UK courts sometimes refuse to accept the conduct of continuing to work as consent. First, if the employee explicitly objects to the change, and continues to work 'under protest';[74] and second, when the change does not take immediate effect.[75] In both of these contexts, however, the case-law is not entirely consistent, or at the very least is highly dependent on specific facts of each case.[76] This means that as a matter of practice, employers can take advantage of the uncertainty and assume relatively little risk by changing the terms unilaterally. We believe that such a result fails to accord sufficient weight to the unique characteristics of the contract of employment. Our proposal is to apply soft procedural requirements: at the very least to require written, explicit consent, to a proposal drafted in plain language. In other words, we propose not to allow variation by conduct. While this might be seen as a significant change, we believe it is not a great impediment on employers and could be useful in

66 *Wandworth* v *D'Silva* [1997] EWCA Civ 2941 (*D'Silva*) at [35]; compare with *Adamas Ltd* v *Cheung* [2011] IRLR 1014 (PC) at [30].
67 Deakin and Morris, n 9 above, 3.26.
68 *Bateman & ors* v *Asda Stores Ltd* [2010] IRLR 370 (EAT) (*Bateman* v *Asda*); *Abrahall* v *Nottingham City Council* [2018] IRLR 628 (*Abrahall*).
69 *Robinson* v *Tescom Corporation* [2008] IRLR 408 (EAT) (*Robinson* v *Tescom*).
70 *Attrill* v *Dresdner Kleinwort Ltd* [2013] EWCA Civ 394 (*Attrill*).
71 *Lee* v *GEC Plessy Telecommunication Ltd* [1993] IRLR 383; *Solectron Scotland Ltd* v *Roper* [2004] IRLR 4 (*Solectron*).
72 *Malone* v *British Airways Plc* [2010] EWCA Civ 1225 (*Malone* v *British Airways*).
73 *D'Silva* n 66 above.
74 See for example *Rigby* v *Ferodo Ltd* [1988] ICR 29 (1987); *Abrahall* n 68 above.
75 In such cases, workers cannot be expected to fully understand changes of no practical application at the time of change or object to them, and failure to express such objection cannot be considered as acceptance. See *Jones* v *Associated Tunnelling Co Ltd* [1981] IRLR 477 at [22]-[23]. See also Deakin and Morris, n 9 above, par 3.28.
76 See *Solectron* n 71 above at [29]-[30]; *Robinson* v *Tescom* n 69 above. For a critique of the approach taken in *Robinson* v *Tescom* regarding the option to 'stand and sue' as irrelevant when employees are working under protest, see Richard White, 'Working under Protest and Variation of Employment Terms: Robinson v Tescom Corporation' [2008] 37 ILJ 365. For a discussion of the case-law regarding variation see also Freedland, n 9 above, 260-261; Deakin and Morris, *ibid*, par 3.33; Nicola Countouris and Astrid Sanders, 'Variation and Suspension of the Contract of Employment and Its Terms' in Freedland et al, n 9 above, 492.

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some cases, at the very least to clarify to employees what their choices are. Additionally, an option for revocation after a certain period would be warranted in some situations, for example when workers agree to a lower payment as an alternative to redundancy in a period when the business faces financial difficulties. 'Hard' procedural requirements will not generally be necessary for changes to the contract that keep it above the legislated floor of rights, but consultation with a trade union, if there is one in the workplace, reflects good practice.[77] Note that consent to variation that *benefits* the employee can be inferred; the legal rules do not need to be reciprocal in this regard, given the discrepancy of power between the parties.[78] Preferably, soft procedural requirements will be adopted in legislation, requiring explicit consent and rejecting variation by conduct. Such a provision can be included, for example, in the 'Employment Particulars' part of the Employment Rights Act. Additionally, or alternatively, the same limits on variation can be set by the courts.

Notwithstanding the possibility of claiming that an employee consented by conduct, the basic rule requires consent to changes in the contract, and employers try to avoid this demand in several ways. First, some decisions can be seen as part of the managerial prerogative rather than changes to the contract.[79] The boundaries of the managerial prerogative are out of the scope of the current article, but surely there are some changes that affect the employee which the employer can make unilaterally.[80] While employers can expect workers to comply with some required changes, the prerogative cannot be relied on for changes of terms such as wages, the length of the workday, or a change to a position completely different from the original job. Our focus here is only on the terms that can be seen as part of the contract. Second, employers might try to rely on a 'fire and rehire' practice, firing the employers and offering re-employment under new terms, reflecting the desirable change. This practice is not currently prohibited in the UK, although depending on the circumstances, the employer might have to pay compensation for unfair dismissal.[81] Third, and more directly raising the question of what counts as consent, employers sometimes include a 'variation clause' – a provision that allows them to make unilateral changes to the contract in the future. Formally, this appears to make those future changes consensual – given the initial consent by the employee. UK courts generally

77 See ACAS 'Making changes to employment contracts – employer responsibilities' https://www.acas.org.uk/changing-an-employment-contract/employer-responsibilities/if-empl-
oyment-contract-changes-cannot-be-agreed [https://perma.cc/5BXD-9WMF].

78 On changes that benefit the employee see *Attrill* n 70 above at [98-99]; *Abrahall* n 68 above at [107]. Hugh Collins has argued that '[v]ariation of relational contracts including contracts of employment should not require an explicit agreement for fresh consideration' (Collins, 'Employment as a Relational Contract' n 18 above, 438), but he seems to focus mostly on changes beneficial to the employee.

79 Deakin and Morris n 9 above, par 3.26.

80 Davidov, n 3 above, 174; Deakin and Morris, *ibid.*

81 See Deakin and Morris, n 9 above, par 3.32. In the recent case of *USDAW and others v Tesco Stores Ltd [2022] EWHC 201 (QB)*, an injunction was given against a 'fire and rehire' practice, but this decision was reversed on appeal – see *Union of Shop, Distributive and Allied Workers & Ors* v *Tesco Stores Ltd* [2022] EWCA Civ 978. It is currently on further appeal before the Supreme Court.

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give effect to such clauses, subject only to a requirement that the reservation of such 'unusual power' will be drafted in 'clear language'.[82] As a result, even unilateral wage cuts have been considered consensual, based on a general clause in which the employer reserved the right to change its handbook (which listed the pay levels).[83]

We cannot see a justification for variation clauses, which make a mockery of the idea of consent. Work is an important part of employees' life, and the wage is crucial to their livelihood. A *carte blanche* to the employer to change the most significant terms without employees' *actual* real-time and specific consent might lead to the abuse of what is already a very unequal relationship. We would apply here a rule requiring all agreements to be specific and timely rather than hypothetical.[84] We note that this proposal is not intended to refer to decisions that are within the managerial prerogative; however, we reject any expansion of the employer's right to unilaterally change contractual terms falling outside the prerogative power. As Reynolds and Hendy note, the unequal bargaining power of the parties, and the unlikelihood that workers would understand the meaning of such broad terms and their possible consequences, render consent too suspicious to rely on in such cases.[85]

Waiver of access to courts

In some contexts, employees are asked to consent to bring all future disputes to arbitration rather than courts or tribunals, or to waive rights to initiate class action suits against the employer.[86] In the United States arbitration agreements that limit access to courts in this way are allowed.[87] Such agreements are valid and irrevocable, and apply to both statutory and contractual rights.[88] When defending arbitration agreements, the US Supreme Court's majority considered the agreements before it as representing the choice and consent of both employers and employees, a position criticised by the dissenting judges and by

82 *D'Silva* n 66 above at [35]; see also *Abrahall* n 68 above.

83 *Bateman* v *ASDA* n 68 above at [6]; see also *Malone* v *British Airways* n 72 above.

84 Collins reaches the same result by relying on a substantive standard of 'reasonable expectations': there is an implicit understanding, on which mutual trust and confidence is based, that wages will not be reduced unilaterally – he sees this as part of the reasonable expectations of the parties which should be enforced in relational contracts (Collins, 'Employment as a Relational Contract' n 18 above, 439). While we agree with the result and the idea of protecting reasonable expectations, we believe that assessing variation through such a standard would be difficult to apply and enforce, compared to the procedural rules proposed above.

85 See Frederic Reynold QC and John Hendy QC, 'Reserving the Right to Change Terms and Conditions: How Far Can the Employer Go?' (2012) 41 ILJ 79, 86.

86 Bagenstos, n 2 above, 415; *Epic Systems* v *Lewis* [2018] 138 S. Ct. 1612 (*Epic Systems*).

87 *ibid*. See also Cynthia L. Estlund, 'Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law' (2006) 155 U Pa L Rev 379, 397.

88 Estlund, *ibid*, 397-398. In Canada, in contrast, the Supreme Court has struck down an arbitration clause between Uber and its (Canadian) drivers, which required them to bring their claims before an arbitrator in the Netherlands(!) and pay excessive fees. Without answering the question of whether the drivers are employees or not, the clause was deemed unconscionable; see *Uber* v *Heller* n 27 above.

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scholars as ignoring the fact that the choice the workers faced was between accepting the arbitration agreement and losing their jobs.[89] This is particularly problematic as arbitration agreements under the US model might take away *all* labour rights at once, as workers will have no practical way to enforce them. In some other countries, such as Israel, non-waivable rights cannot be brought to arbitration, not even when an employee gives consent to do so for a specific dispute.[90]

In the UK, the main employment laws prohibit agreements that preclude a person from bringing proceedings before an employment tribunal.[91] As far as the rights protected by these laws are concerned, arbitration is allowed only with regard to unfair dismissal and flexible working disputes, and only when the arbitration is organised by Acas according to a scheme approved by the Secretary of State.[92] An agreement to submit a dispute to arbitration must be in writing; must concern an existing dispute (ie cannot be signed as part of the contract of employment); can be reached either with the help of a conciliation officer or through a 'compromise agreement'; and has to include a waiver of both parties of regular litigation procedures.[93] When the parties agree to arbitration as part of a compromise agreement, it also has to satisfy the conditions for such agreements, which we discuss in the next section.

This is not the place to discuss the model of Acas in general and whether it has been successful.[94] Our focus here is only on the question of employee consent to waive access to courts, and under what circumstances (if at all) it could be allowed. The involvement of Acas ensures the impartiality of the arbitrator and can be seen as a 'hard' procedural limitation, limiting consent to arbitration only to very specific disputes. The addition of some soft procedural requirements, and especially the demand for consent in 'real time' for a specific dispute, seems to provide appropriate protection in this context.

Waiver of legislated rights (where allowed)

While for the most part employment standards are non-waivable, there are exceptions. The most notable in the UK concerns working hours. Under the Working Time Regulations 1998, workers may agree to work more than the

89 *Epic Systems* n 86 above per Ginsburg J dissenting; Bagenstos, n 2 above, 416.
90 The Arbitration Act 1968, s 3. The courts developed some narrow exceptions, especially when the employee acts in bad faith, initiating arbitration and then objecting to it after losing the case. See NLC 163/06 *Sarah Ekstein* v *Holon, Bat-Yam Azur Cities Association for fire extinguishing Ltd* (1 July 2008) at [11]; HCJ 2852/16 *Meonot Yeladim Be'israel Kiryat Hayeled* v *National Labour Court* (11 May 2016) at [11].
91 Employment Rights Act 1996, s 203(1); National Minimum Wage Act 1998, s 49(1); Working Time Regulations 1998, reg 35(1).
92 Employment Rights Act 1996, s 203(5), together with Trade Union and Labour Relations (Consolidation) Act 1992, s 212A; The ACAS Arbitration Scheme (Great Britain) Order 2004; The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.
93 The ACAS Arbitration Scheme (Great Britain) Order 2004, s 26.
94 For an analysis of Acas and its arbitration and conciliation procedures, see notably Linda Dickens, 'Employment Tribunals and Alternative Dispute Resolution' in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford: Hart, 2012) 29.

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maximum 48 hour week, provided that the agreement is in writing and that a clear record is kept.[95] The Regulations allow workers to revoke their consent by giving notice seven days before the change, but this period can be changed by agreement to a maximum of three months.[96] The waiver concerning working time was allowed as an opt-out from the EU Working Time Directive.[97] Interpreting this part of the Directive, the European Courts determined that given free and individual consent, alongside protection of workers' health and safety, even an average of 84 working hours per week is allowed.[98] Considering whether consent to long working hours can be irrevocable under domestic legislation, the European Court further noted that 'a provision of national law, according to which a worker's consent to work more than 60 hours per week in a cohabitant care arrangement cannot be revoked, is compatible with Articles 6 and 22 of the Directive, provided that the general principles of the protection of the health and safety of workers are observed'.[99] Legislation enabling workers to waive rights to maximum working hours or overtime and rest periods can be found in other jurisdictions.[100] Other examples of legislated employment rights subject to the possibility of waiver (to some extent) are protection from wage deductions[101] and the right to minimum notice before termination.[102]

Alongside the possibility of waiving some rights in advance, there are much broader possibilities in the UK to individually waive rights as part of settlement (or 'compromise') agreements. Such agreements can result from a conciliation process (through Acas), but can also be valid without a conciliation process as long as they follow several procedural rules: the agreement must be in writing; relate to the particular complaint; and the worker must receive advice from an independent adviser (either a lawyer, a trade union official, or a representative of an advice centre – all of whom must also be insured against losses as a result of bad advice).[103] These rules apply with regard to settlements concerning the various rights included in the Employment Rights Act, the Minimum Wage Act, and the Working Time Regulations,[104] as well as the Equality Act.[105]

Settlement agreements are most likely to occur after the end of employment. Although the problem of power inequality persists to some extent at this stage –

95 Working Time Regulations 1998, reg 5(1) and 5(4).
96 Working Time Regulations, 1998, reg 5(2) and 5(3).
97 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, 9), Art 22.
98 *Matja Kumba T. M'bye* v *Stiftelsen Fossumkollektivet* [2015] EFTA at [53].
99 *ibid* at [64].
100 Davidov, n 8 above, 484.
101 Employment Rights Act 1996, s 13(1)(b).
102 Employment Rights Act 1996, s 86(3).
103 Note that there is no duty to reimburse the worker for payments to the advisor. Apparently the legislator assumes easy access to free advice from trade unions and advice centres, and the question is whether this assumption is correct. This is in contrast with the approach taken with regard to 'shareholder status', where the employer has a duty to pay for reasonable costs incurred by the worker in obtaining the independent advice; see Employment Rights Act 1996, s 205A(7). This arrangement is somewhat less relevant now – see section headed 'Implicit waivers of status' below.
104 Employment Rights Act 1996, s 203(2) (e) and (f) and 203(3); National Minimum Wage Act 1998, s 49(2), (3) and (4); Working Time Regulations 1998, reg 35(2) and (3). See some additional, more technical requirements, there. And see the Employment Tribunals Act 1996, s 18.
105 Equality Act 2010, s 147.

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especially when the employee still awaits some payments, and also because they rely on the goodwill of the employer in providing references for future employers – the level of inequality is much lower. At the same time, it is important to realise that if we make it easy to waive rights after the end of employment, this will have a significant impact on compliance with labour rights during the time of employment as well. Workers rarely sue during employment. If employers know that in case of legal claims – which are usually brought after the end of the relationship – waivers are possible and relatively easy, there is much less reason for them to comply in the first place. Nonetheless, given that there are often disputes about facts, and legal proceedings could be long and costly, a strict prohibition on compromise settlements would not be in the interest of employees. In some other legal systems, such settlements are possible only with the approval of a labour court.[106] At the very least, the possibility of settlements (subject to the existing measures) should be explicitly limited, in our view, to post-employment proceedings. This indeed is common in some other countries. In Italy, for example, waivers are allowed as part of settlements only post-employment, and only with the approval of a court, or a union or a provincial office of employment.[107] The approval of an external body is obviously a much stronger protection against coercion than the existing system that relies on independent advice as a sufficient validator of waivers through settlements.

With regard to waivers during the time of employment – in particular concerning maximum weekly hours – the current rules are patently insufficient. It is probably not necessary to demand advice from an independent advisor before workers agree to work more hours, because people can understand the implications themselves. Ideally, some 'hard' procedural rules should be added, especially an approval from a union, as is the case in other legal systems.[108] This would make working above the weekly maximum much more difficult and rare, which can be justified by the importance of the working time laws. In addition, we propose adding a substantive requirement of reasonable consideration. A person working for the minimum wage should not be required to work more than 48 hours per week – the maximum set by law – without at the very least getting reasonable compensation for this agreement. To be clear, we are not proposing allowing people to sell their labour rights for a price. But once a legislature has decided to make a specific labour right waivable, ensuring fair compensation for this waiver is one way to mitigate the harm to the interests of workers. It can also be expected to reduce the number of waivers.

106 In Israel, for example, waiver of employment standards is not allowed, including by settlement agreements (with the exception of agreements regarding severance payments). See *Azriel Silshi* v *Aharon Doron & Co* [1978] 10 PDA 32. However, labour courts can approve any settlement and often encourage them.

107 See Civil Code and Cass., Article 2113, sez. lav., 11 October 2018, n. 25315. In Germany there is also limited room for settlements post-employment; see Bogoeski, n 63 above.

108 See for example in Israel, where the maximum daily or weekly hours can be prolonged by a collective agreement approved by the Minister of Labour (Hours of Work and Rest Act 1951, s 5). This is an example of a combination of the two hard procedural rules together.

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Waivers related to human rights

In this section we discuss several human rights that apply, to some extent, in the workplace, and which employers sometimes ask workers to waive. Consider freedom of occupation first. A clear example of waiving this right is the use of non-compete clauses, which restrict the employee's future options and indirectly also restrict their ability to leave their current work.[109] As Estlund notes, employees consenting to such clauses may be high-level executives but also lower-level employees.[110] For high-level executives, the approach of the courts in the UK was that their bargaining position may be similar to that of their employers, and they can therefore 'take care of themselves'.[111] However, even high-level employees with strong bargaining power might fail to appreciate risks related to an unknown time in the future. Also, given that a non-compete clause is inserted when the employee is joining a new workplace, they are likely to hesitate before raising the prospect of leaving to work for a competitor, for fear of harming the trust relations with the new employer. In practice, courts do strike out terms considered too restrictive, using a reasonableness test,[112] which in fact can be seen as employing elements of the proportionality test.[113] While a stricter protection is also possible – in the US, some states prohibit non-compete clauses altogether,[114] and a federal ban is now under consideration[115] – at the very least infringements of freedom of occupation should be limited by the proportionality test.

Consider next the right to privacy. The intrusion of privacy in the workplace can manifest in monitoring an employee's communications, especially electronic communication by email or instant message software,[116] subjecting employees to video surveillance (in the workplace or when working from home),[117] the use of fitness trackers at the workplace,[118] a requirement to undergo a polygraph test,[119] or a requirement to comply with criminal background checks.[120] Different rules apply to different situations. In the

109 Estlund, n 87 above, 407.
110 *ibid*, 392.
111 See *Tillman* v *Egon Zehnder Ltd* [2019] UKSC 32 (*Tillman*) at [82], quoting *M & S Drapers* v *Reynolds* (1957) 1 WLR 9, 19.
112 Thus, terms might be severed because they are held to be 'unreasonable' (see for example *Office Angels* v *Rainer-Thomas* [1991] IRLR 214; *Tillman ibid* at [85]-[86] and references therein), or because they are too wide, or 'greater than reasonably necessary' to protect the employer's interests (see for example *Mason* v *Provident Clothing & Supply Co. Ltd*. [1913] AC 724; *Freshasia Foods Ltd* v *Lu* [2018] EWHC 3644 at [68]; *Tillman ibid* at [75]-[76] and references therein).
113 See Alon-Shenker and Davidov, n 56 above.
114 For a review of state laws, see Federal Trade Commission, 16 CFR Part 910: Non-Compete Clause Rule Notice of Proposed Rulemaking, 49 at https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf [https://perma.cc/H5SL-YJ35].
115 See *ibid*.
116 *Bărbulescu* v *Romania* Application No 61496/08, Merits and Just Satisfaction, 5 September 2017.
117 *López Ribalda* v *Spain* Application nos 1874/13 and 8567/13, Merits and Just Satisfaction, 17 October 2019 (*López Ribalda*).
118 Stefania Marassi and Philippa Collins, 'Is That Lawful? Data Privacy and Fitness Trackers in the Workplace' (2021) 37 Int J of Comp Lab Law & Ind Rel 65.
119 Willborn, n 2 above, 1000.
120 *R (L)* v *Commissioner of Police of the Metropolis* [2009] UKSC 3; *MM* v *UK* Application No 24029/07, Merits and Just Satisfaction, 13 November 2012.

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case of criminal background checks, consent to obtain information is generally required.[121] Under the European General Data Protection Regulation (GDPR),[122] and related domestic legislation,[123] consent is recognised as one possible basis to legitimise an intrusion of privacy but not as the only one; meaning that consent is not always necessary, but it is nonetheless legally significant.[124] However, the application of this approach in the context of employment is questionable. Policy makers and scholars have rightly questioned the reliance on consent given the inequality of power in employment relations.[125] Such concerns can also be found in the case law.[126] In the US, the Restatement of Employment Law recognises that consent is not free when it is a condition for obtaining or retaining a job, although it accepts consent as justification for some contexts, such as employee's disclosure of confidential information.[127] In situations when consent was not obtained and not considered necessary, as there was another legal justification for the measures taken,[128] there is no need to assess consent. But in some cases, consent to intrusion of privacy might be sought and relied on, despite the difficulties in considering it as 'freely given'.

In its guidance on the definition of consent, the Article 29 Data Protection Working Party clarified that even with consent, data processing should still meet the requirements of fairness, necessity and proportionality.[129] This position also finds some support in judgments of the European Court of Human Rights (ECtHR) concerning employment relationships, particularly with regard to proportionality.[130] When assessing proportionality of monitoring measures, the ECtHR suggested that courts should assess the following factors: (1) whether workers were notified of the intended surveillance measures, (2) the degree of intrusion, including whether workers have an expectation of privacy in the monitored area, the length of time when surveillance is used, and the width of its scope, (3) whether the employer has legitimate reasons for monitoring, (4) could less intrusive measures be used, (5) the use of the monitoring results

121 Marilyn J. Pittard, 'Criminalization, Social Exclusion, and Access to Employment' in Alan Bogg et al (eds), *Criminality at Work* (Oxford: OUP, 2020) 479.

122 GDPR n 39 above, Art 6(1)(a), Art 9(2)(a).

123 See for example Spain's Organic Law no 15/1999 on the protection of personal data (*Ley Orgánica de protección de datos de carácter personal* – the 'Personal Data Protection Act'); see *López Ribalda* n 117 above at [47].

124 Compare to the situation in the US; see Steven L. Willborn, 'Notice, Consent, and Nonconsent: Employee Privacy in the Restatement' (2014) 100 Cornell L Rev 1423, 1428-1429.

125 Article 29 Data Protection Working Party opinion 8/2001 on the processing of personal data in the employment context, 5062/01/EN/Final WP 48, adopted 13 September 2001 3, 23; Article 29 Data Protection Working Party opinion 15/2011 on the definition of consent, 01197/11/EN WP187, adopted 13 July 2011 at 13; Information Commissioner's Office, 'The Employment Practices Data Protection code' 63 at https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf; Marta Otto, *The Right to Privacy in Employment : A Comparative Analysis* (Oxford: Hart, 2016) 86; Pittard, n 121 above, 482; Marassi and Collins, n 118 above, 80-81.

126 *R (L)* v *Commissioner of Police of the Metropolis* [2009] UKSC 3 at [43] per Lord Hope; *MM* v *UK* n 120 above at [189].

127 Willborn, n 124 above, 1440, 1443.

128 GDPR n 39 above, Art 6(1)(b), 6(1)(e).

129 Article 29 Data Protection Working Party 'Opinion 15/2011 on the definition of consent' 01197/11/EN WP187, at 7.

130 See for example *López Ribalda* n 117 above at [131]; *MM* v *UK* n 120 above at [189]-[190].

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by the employer and the consequences for the worker, and (6) the provision of appropriate safeguards, such as the involvement of staff representation or independent body.[131] Generally speaking then, under European law, intrusion of privacy in the workplace is only allowed when conforming with the proportionality tests, even if the employee consented to the measures.[132] We agree with this position and will argue below that it should apply for all human rights contexts. We emphasise, especially for the context of privacy, that we do not suggest that consent should be adopted as a justification for intrusion of privacy beyond what is already recognised under existing laws. Our argument focuses on how to deal with questionable consent, in situations where existing law already considers consent legally meaningful (to one extent or another).

Another right employees might be asked to waive is freedom of expression. For example, employers sometimes adopt codes of conduct that restrict the content that employees can share on social networks.[133] In some cases, employees were dismissed after sharing content deemed unacceptable.[134] Mantouvalou rightly noted that employees' consent to such terms is questionable.[135]

In some contexts, the expression restricted is of a religious nature, combining freedom of expression and freedom of religion, as well as the right to private and family life. Employees of religious bodies can also be required to meet certain religious and moral standards or observe certain principles as conditions of their employment. Such requirements mean that workers have to waive some rights to private behaviour and family life. In the case of *Obst*, an employee of the Mormon Church in Germany, his contract included a clause according to which '[t]he employee … must refrain from communication or conduct likely to harm the reputation of the Church or to question these principles. It undertakes in particular to observe high ethical standards. He will abstain from smoking, drinking alcohol or coffee beans or use narcotics in the premises of the church and close to them, and during travel or business events …'[136]

This provision demonstrates employee waiver of liberties we would not normally expect to be waived in the workplace, such as smoking and drinking

131 *López Ribalda ibid* at [116], [124]-[126].

132 See Article 29 Data Protection Working Party Opinion 8/2001 on the processing of personal data in the employment context, 5062/01/EN/Final WP 48, adopted 13 September 2001, 18, 20-25; *Bărbulescu* v *Romania* n 116 above at [19], [60]; *López Ribalda* n 117 above at [50], [64], [114], [116]. We acknowledge that suspecting consent in such situations has its own price. Willborn, n 2 above, 980, 995 argues that consent is one of the central values of privacy, in the agentic choice as to what information can be accessed and by whom, and refusal to recognise such choices denies employees their autonomy in the matter. But see, in contract, the critique of the role given to consent (in general and not specifically in the employment context), in Daniel J. Solove, 'Introduction: Privacy Self-Management and the Consent Dilemma' (2013) 126 Harv L Rev 1880.

133 Virginia Mantouvalou, '"I Lost My Job over a Facebook Post: Was That Fair?" Discipline and Dismissal for Social Media Activity' (2019) 35 Int J Comp Lab Law & Ind Rel 101.

134 *Game Retail Limited* v *Laws* [2014] UKEAT/0188/14/DA WL 6862769; *Ms A Gibbins* v *British Council* [2017] 2200088/2017 (Employment Tribunal). See the discussion in Mantouvalou, *ibid*.

135 Mantouvalou, *ibid*, 112.

136 *Obst* v *Germany* Application No 425/03, Merits and Just Satisfaction, 23 September 2010 at [8] (unofficial translation, from the website of The Strasbourg Consortium at https://www.strasbourgconsortium.org/common/document.view.php?docId=5084).

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coffee.[137] Obst himself was dismissed for having an extra-marital affair. The ECtHR determined that he was or should have been aware when signing the contract 'of the importance of marital fidelity to his employer'.[138] Referring to the special characteristic of religious organisations, the margin of appreciation left to state parties in such matters, and to the private interests involved, the Court found no violation of Obst's rights.[139] This finding, while not explicitly using the language of consent or waiver, clearly accepts the reliance on the employee's consent to terms restricting his right to private life.

A related example concerns waivers of religious freedoms in the workplace. In the case of *Eweida* v *United Kingdom*, the ECtHR considered the claims of two applicants who were prohibited from wearing crosses in their workplace (an airline and a hospital), an applicant who lost her job as a registrar of births, deaths and marriages due to her refusal to conduct civil partnership ceremonies for same-sex couples, and an applicant dismissed from his job as a relationship counsellor for his unwillingness to provide counselling to same-sex couples.[140] The Court noted that in previous cases of restrictions on employees' right to observe religious practices, the Commission had considered that as employees had an option to resign, there was no interference with their freedom. The Court considered this approach too strict, preferring instead to assess the possibility to change jobs as part of the assessment of the proportionality of the restriction.[141] We agree that the test of proportionality should be part of the assessment in all cases in which employees waive their human rights. However, it is difficult to accept that as part of this analysis some weight will be given to the theoretical possibility of moving to another job, as a way to assume (at least indirectly) consent to stay in the specific job and accept the intrusion. The possibility of resigning is a poor test for consent, given the limited choices employees face and the inequality of bargaining power.[142]

Where human rights are concerned, substantive standards and strong procedural rules have to be met. As the review above demonstrates, the requirement of proportionality is already imposed in many contexts involving human rights in the workplace, and we believe that it should be used in every situation of waivers related to human rights. In all such situations, the legitimate goal of the term will have to be demonstrated, the least offensive means chosen, and a harm-benefit proportional balance maintained. This substantive standard will help to prevent unjust situations resulting from compromised consent by workers. In addition, to improve the chances of consent being informed and genuine, we propose some procedural rules for all situations of waivers related to human rights. Consent should be given in writing to a document written in plain

137 One might also argue that expecting smokers and coffee drinkers to avoid these habits for eight or ten hours each day might in practice amount to a demand to give them up altogether, further intruding into their private life.

138 *Obst* n 136 above at [50]. On dismissal of Church employees for extra-marital affairs, see also *Schuth* v *Germany* Application No 1620/03, Merits, 23 September 2010.

139 *Obst ibid* at [50]-[53].

140 *Eweida* v *United Kingdom* [2013] Application No 48420/10 and others, Merits and Just Satisfaction, 15 January 2013 at [12], [20], [25]-[27], [34]-[37].

141 *ibid* at [83].

142 See also Otto, n 125 above, 86.

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language. Some of the terms related to waivers of human rights, such as privacy or private life, are phrased in broad and vague terms. This is especially true when employees are asked to accept restrictions on free expression online, or consent to be monitored. Vague and general wording should be considered insufficient; to meet the procedural requirements, terms should be specific and clear.[143] Where practical, examples drawn from past experience or expectations should be included.[144] Whenever possible, consent given in advance to hypothetical arrangements should be accompanied by consent in real time to the specific measures to be adopted, on a case by case basis.[145] Additionally, when there are human rights implications, we believe that consent should be revocable at any time,[146] except in situations that render it meaningless (such as non-compete agreements).

Implicit waivers of status

In all the previous sections we considered situations in which the law gives weight (to one extent or another) to workers' consent, without opposing this basic approach. Rather, our focus was on proposing procedural and substantive solutions to minimise the problem of questionable consent. But there are also contexts in which we believe consent should not be accepted at all. Waivers of employee or worker status are such contexts, where we propose a more drastic change. We explain the change required in two important examples. The first concerns the 'employee shareholder' status, a scheme introduced in 2013 and included in the Employment Rights Act. Although the tax benefits attached to it were abolished in 2016, and the government expressed an intention to abolish the status completely,[147] it is still in force. Under the arrangement as introduced, by agreement to become an 'employee shareholder', a worker will receive shares valued at £2,000 or more, and in return will lose several significant employment protections: the right to redundancy payment, the right not to be unfairly dismissed, the right to request flexible working or undertake study

143 See for example Collins, n 2 above.

144 A good example for the use of examples to demonstrate general principles concerning privacy in the workplace is the Working Group opinion on consent, n 125 above. Examples may also be based on the employer's experience and history, and cases covered in the media or subject to legal proceedings.

145 Compare with Information Commissioner's Office, n 125 above, 74 (concerning specific notice of video surveillance rather than consent). See for example the Israeli case of *Tally Isakov* v *State of Israel* (National Labour Court, 8 February 2011) at [30] dealing with monitoring of e-mail communications. It was ruled, with regard to 'mixed' e-mail boxes that are used also for private communications, that consent at the initiation of the employment relationship is generally insufficient, and consent should be sought again before monitoring the employee's communication.

146 Compare to the Working Group opinion on processing of personal data, n 125 above, 23: 'Consent must at all times be freely given. Thus a worker must be able to withdraw consent without prejudice'.

147 HM Treasury 'Autumn Statement 2016' November 2016, 45 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/571559/autumn_statement_2016_web.pdf [https://perma.cc/745X-JQQY].

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or training, and more.[148] This status shifts significant risks to the employee,[149] to an extent we believe can be seen as a (partial) waiver of employee status. And just like the law does not allow waivers of employee status,[150] we cannot see how this scheme could be justified, in a reality of compromised consent. Although the legislation included a relatively significant package of 'soft' procedural measures,[151] we do not see them (or any other procedural or substantive measures) as sufficient in this context.

A second situation in which consent plays a role which cannot be justified is illegality. Here, the issue is not so much an explicit agreement to exclude certain rights, but rather consent to employment relations prohibited due to public policy.[152] As the illegality of the work means that workers will not be able to claim most of their rights in court,[153] the consent to work illegally implies consent to be excluded from the protection workers normally enjoy under labour laws. In some cases, such as the case of *Zarkasi* v *Anindita* (*Zarkasi*), migrants' willing participation in entering the UK for work and establishing work relations illegally was noted by the courts as relevant to assessing their situation.[154] In *Zarkasi*, the Employment Appeal Tribunal clarified that its analysis is limited to cases where the worker freely entered into the contract for illegal employment, and that the case in front of it 'was not a case of consent; on the findings of fact by the tribunal, it was one of willing participation'.[155] The tribunal's analysis here reflects an understanding of the continuum of consent, considered above. The tribunal noted that 'there may be a fine line that can be drawn on occasions between those who because of their economic circumstances are constrained to work for wages that others would regard as paltry and demeaning, but which none the less represent the fruits of contracts freely entered into, and those who are truly in slavery or servitude'.[156] In the context of employment, especially that of migrant workers in low-wage sectors, we consider the notion of 'willing participation', as a strong form of consent, questionable.[157] Even when some

148 Employment Rights Act 1996, s 205A(2). Somewhat similar is the recent proposal in the US to allow 'worker flexibility agreements' (HR 8442 Worker Flexibility and Choice Act, introduced in July 2022, https://www.congress.gov/bill/117th-congress/house-bill/8442/text), that includes exclusion from minimum wage and overtime protections.

149 Prassl, n 63 above, 334.

150 See for example *Autoclenz* n 16 above.

151 See Employment Rights Act 1996, s 205A. The measures are mostly similar to those for settlement agreements discussed in the section above headed 'Waiver of legislated rights (where allowed)', but with two additions: the independent advisor is paid by the employer, and there is a requirement to provide the employee with full details regarding the implications of the new status.

152 See Alan Bogg, 'Illegality, Public Policy, and the Contract of Employment' in Freedland et al, n 9 above, 397.

153 A narrow exception for claims to discrimination in the case of trafficking victims was recognised in *Hounga* n 32 above, see below. See also Bogg, n 152 above, 399.

154 *Zarkasi* v *Anindita* [2012] ICR 788 at [7]-[8]. It is noteworthy that the claims in this case included ones related to obligations towards victims of trafficking in persons, and some of the EAT's assessment of voluntariness was also relevant for the assessment of trafficking.

155 *ibid* at [34].

156 *ibid*.

157 A similar point was made by Virginia Mantouvalou in 'The Right to Non-Exploitative Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart, 2014) 53.

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evidence suggests consent was freely given, it cannot be considered as sufficient justification to exclude basic employment protections. In *Hounga* v *Allen*, the Supreme Court rejected the Court of Appeal's findings that the worker was a 'willing participant' in the arrangement, and considered the situation as one of forced labour.[158] However, the Court in *Hounga* identified the appellant as a victim of trafficking,[159] and did not rule on the use of the defence of illegality by employers whose conduct did not amount to trafficking. Lord Hughes in his concurring judgment suggested the defence of illegality can be accepted not because A voluntarily accepted the risk of injury following B's behaviour, but due to the close connection between the illegality and A's claim.[160] Such position might weaken the argument that consent to the illegal act is a justification to deny remedy. The later case of *Okedina* v *Chikale* adopted the test of 'knowledge plus participation' for rejecting workers' claims due to illegality.[161]

Our proposal is to altogether prohibit waivers of employee or worker status, including indirectly through the claim of illegality. The employer is responsible for the illegality just as much as the employee, if not more, and should not be allowed to enjoy the fruits of this crime by receiving legal immunity from any labour law claim by the employee.[162] A rule prohibiting reliance on the (implied) consent by the employee to work illegally will require a change beyond labour law, most notably to immigration law, requiring a complete separation ('firewall') between entitlement to labour rights and access to claiming them, on the one hand, and migration control measures on the other. Such protection is required given the particular vulnerability of undocumented workers, for many of whom limited options and a desperate situation would lead to enthusiastic consent to employment, even when exploitative, at the host state.[163]

CONCLUSION

The employment relationship is contractual, relying on the agreement of both parties. At the same time, it is heavily regulated, for the most part by non-waivable laws. The inequality of power that characterises employment relationships explains why in most cases, labour law does not consider consent by an employee (to waive certain rights) as valid. However, there are quite a few situations in which consent still matters in labour law and, for these situations,

158 *Hounga* n 32 above at [38]-[39].

159 *ibid* at [49] Lord Wilson suggested that 'Judicious hesitation leads me to conclude that, if Miss Hounga's case was not one of trafficking on the part of Mrs Allen and her family, it was so close to it that the distinction will not matter for the purpose of what follows'.

160 *ibid* at [57].

161 *Okedina* v *Chikale* [2019] EWCA Civ 1393 at [49], [62]. See also Alan Bogg, 'Okedina v Chikale and Contract Illegality: New Dawn or False Dawn?' (2020) 49 ILJ 258.

162 'Immunity' in this context refers to labour law claims, as employers might still face charges for the offence of employing illegal worker (Immigration, Asylum and Nationality Act 2006, s 21, as amended by Immigration Act 2016, s 35).

163 Bridget Anderson, 'Precarious Pasts, Precarious Futures' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: OUP, 2014) 29, 35 (following John P. Dawson, 'Economic Duress – An Essay in Perspective' (1947) 45 Michigan L Rev 267).

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there are no clear rules to determine what counts as consent. Applying the regular laws of contract seems problematic, given the inequality of power and the inherent vulnerability of employees that explain the need for labour law as a whole. The aim of this article has been to examine the current law and propose some solutions to the problem of questionable consent in employment. We see these solutions as being part of the *sui generis* law of the contract of employment.

We began by arguing that there is a continuum of consent – a spectrum of options between consent and coercion – with employment somewhere in the middle, to varying degrees. With this in mind, we do not believe that a clear line can be drawn between what counts as free consent and what does not. We therefore did not offer tests for 'real' consent by employees. Instead, we focused on two types of solutions: procedural rules, designed to increase the chances of consent being free and informed, and substantive standards, designed to invalidate some agreements considered unacceptable by society, whether they result from 'real' consent or not. The procedural rules were divided into two groups: 'soft' and 'hard' (the latter also able to impact the problem of unequal bargaining power). We hope that this 'menu' of options will prove useful for future discussions of this topic.

The article then moved on to discuss five different contexts in which labour laws currently allow some waiver of rights by consent. For the first four, we proposed some additional measures, procedural and substantive, to take into account the inequality of power that makes such consent questionable. For the final context, we suggested changing the law more drastically to avoid giving any legal force to consent.

The first context is the variation of the contract of employment. Here we suggested some soft procedural rules for changes to the contract, particularly that they must be explicit and in writing. We also proposed requiring changes to be specific and in 'real time', thereby prohibiting the practice of 'variation clauses'. Next, we considered limitations on access to justice, and criticised the US law which accepts arbitration clauses while completely ignoring the unique characteristics of the employment contract. We found the existing UK arrangements in this context to be sufficient. The third context we considered is the waiver of legislated employment rights, notably the right to maximum weekly hours. The current law in the UK is exceptional in allowing such waivers almost without limitations. We proposed the addition of some soft rules and, alongside them, a requirement of reasonable compensation against this waiver, and preferably also approval by a labour union. Another option for waiver of legislated rights is through settlement agreements. UK law includes some safeguards for consent in such cases. We raised some concerns about whether they are sufficient and proposed ensuring, at the very least, that this option is only available post-employment.

The fourth context in which consent is relevant to some extent is human rights, whether the limitations are on freedom of occupation, privacy and private life, freedom of speech or freedom of religion. In some of these contexts, the law (especially European law) demands proportionality. We proposed using this substantive standard to scrutinise consent whenever human rights are implicated, and also to add some soft procedural rules to ensure that consent is

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explicit and the obligations are clear. Finally, we discussed situations which we consider to be tantamount to the waiver of employee status (wholly or partially) – the 'employee shareholder' status and the refusal to give any labour rights to employees in situations of illegality. In both of these cases, the exclusion from various labour rights is a result of consent – in the first case, direct and explicit, while in the second case, implicit. Either way, we argued that such waivers of status should not be accepted.

In this article, we focused on consent by an employee vis-à-vis an employer, as part of the contract of employment. However, our analysis of suspicious consent and possible solutions could be used beyond this context as well. First, we believe that much of the analysis is relevant to 'limb (b) workers' as well, probably with some adaptations that require a separate discussion. Second, employees' consent can be considered according to the proposed substantive and procedural rules even when the arrangement for which their consent is sought is imposed by the state rather than the employer. A good example is the situation of migrant workers on the lower end of the labour market deemed to accept visa conditions that tie their visa and work permit to their employment with a specific employer. Consent to such arrangements might reflect limited choice – the employee may have no practical ability to negotiate regarding such a clause, and would often be forced to choose between it and unemployment.[164] Procedural rules to improve the chances that consent is free and informed, and substantive standards ensuring the proposed terms are reasonable and the exchange fair and proportionate could be applied, with the necessary changes, to the assessment of consent to terms imposed by the state.

164 Guy Mundlak, 'Neither Insiders nor Outsiders: The Contractual Construction of Migrant Workers' Rights and the Democratic Deficit' (2003) 27 Tel Aviv University L Rev 423 [Hebrew]. On structural coercion limiting the choices migrant workers have, see for example Hila Shamir, 'The Paradox of "Legality": Temporary Migrant Worker Programs and Vulnerability to Trafficking' in Prabha Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge: Cambridge University press, 2017); Sallie Yea and Stephanie Chok, 'Unfreedom Unbound: Developing a Cumulative Approach to Understanding Unfree Labour in Singapore' (2018) 32 *Work, Employment and Society* 925; Virginia Mantouvalou, 'Structural Injustice and the Human Rights of Workers' (2021) 73 *Current Legal Problems* 59, 64; Maayan Niezna, 'Paper Chains: Tied Visas, Migration Policies, and Legal Coercion' (2022) 49 *Journal of Law and Society* 362.

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