Chapter 5
Relationship between Employment Status and Scope of Social Security Protection: The United Kingdom Example

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I. Introduction

In common with many other advanced western economies, in both common law and civil law jurisdictions, the United Kingdom labour market has experienced the proliferation of non-standard forms of employment, in particular over the last decade and beyond. These developments have generated much academic and political comment. These forms of non-standard employment include part-time work, agency work, "zero-hours" contracts,[1] and "gig" work, in which workers are paid per piece of work supplied through digital platforms.[2] A further distinguishing feature of many workers in the "gig" economy is that they are regarded as self-employed for both revenue and social security purposes, rather than as employees, or even as "workers".[3] The intermediate category of "worker" has a long pedigree in UK legislation, going back to the Employers and Workmen Act 1875, designed to allow county courts an enlarged and flexible jurisdiction in disputes between an employer and a "workman".[4] As a discrete category within the labour market, "workers" are entitled to the national minimum

1 These are work contracts in which the worker is not guaranteed a set number of working hours weekly, and their weekly hours of work are liable to fluctuate considerably, along with their weekly wage or salary.

2 The Rise of the Sharing Economy, The Economist, 9 March 2013, www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy. Accessed 15 April 2020.

3 On certain occasions the UK courts have ruled that certain categories of "gig" workers are, in reality, "workers" rather than self-employed persons. This will be examined below.

4 See Pimlico Plumbers Ltd and Another (Appellants) v. Smith (Respondent) UKSC 29, at para. 8. Section 10 of the Employers and Workmen Act 1875 defines a "workman" as a manual labourer working for an employer under "a contract of service or a contract personally to execute any work or labour."

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wage, and paid holidays, but are taxed at the same level as self-employed persons, and are unable to bring claims in unfair dismissal.[5]

One problem which has frequently beset those in non-standard forms of employment has been that many of them are prone to fall into the "poverty trap" (whereby it remains more profitable for citizens, especially those with dependent children, to sustain themselves through welfare benefit receipt rather than engage in gainful employment[6]), due to the irregular weekly hours which they work, and subsequent varying wage rates. It is fortuitous that the UK Coalition Government of 2010 - 2015 initiated both a policy initiative and legislation to deal with the "poverty trap" while the non-regular sector of the labour market was expanding. In the absence of any form of judicially enforceable, entrenched, bill of rights in the UK guaranteeing a minimum income and access to the basic means of life, it remains for legislators to continue to address the problem of the poverty trap.[7] Parliament has made various legislative attempts to incentivise paid work and subsequent employment skills acquisition, the most significant being the introduction of Universal Credit (hereinafter: UC) in the Welfare Reform Act 2012, a process which is still ongoing.[8] In conjunction with the introduction of the National Living Wage in 2016,[9] it was anticipated in Government circles that UC, with its considerably lower claw-back rates when recipients' number of working hours and wages rise, would lead both to an alleviation of poverty among low-paid families and

5 It should be mentioned, however, that workers who are not included in the "Pay As You Earn" (PAYE) tax scheme for employers are not entitled to the financial protection of the "Job Retention Scheme" initiated during the recent Covid-19 lockdown, as employees are. The Court of Appeal recently held in Adiatu v. Her Majesty's Treasury, CO/1636/2020, that this policy decision is compatible with the relevant provisions in the ECHR.

6 The problem of poverty caused by wages of just subsistence level or even below was first identified among agricultural workers in Southern English counties during the 1790s, which obliged magistrates to instigate the "Speenhamland System", providing labourers a payment out of local rates based on the price of bread and the number of people in their families. Essentially the same principle forms the foundations of Family Income Supplement, Family Credit, Working Tax Credits, Tax Credits, and, indeed, Universal Credit.

7 Indeed, the incorporation of the European Convention of Human Rights into UK law has made minimal impact on the increasing conditionality which has been a feature of welfare legislation for more than three decades.

8 Universal Credit is gradually becoming operational in various regions throughout the UK.

9 The National Living Wage replaced the National Minimum Wage in 2016 for citizens over the age of 25.

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individuals, and an increase in the number of UK citizens accepting lower-paid positions in the labour market.[10] Such developments were expected to have concomitant social benefits, with the civic virtues of industry and thrift being inculcated in citizens, permitting the lower-paid to achieve the economic independence which Hayek believed necessary for a "market order" to flourish.[11] By 2022 an estimated 7.2 million families will receive Universal Credit, 3.9 million of whom will be in work.[12]

The aim of this chapter is to examine the relationship between employment status and the entitlement to social security, in particular UC, but including other benefits, analysing the factors which could prevent their successful operation. The chapter will also examine the question of whether, and how, the Welfare Reform Act (WRA) 2012 can be made effective through legislative and technological reform.

II. Evaluation of Non-Standard Forms of Employment

While it is difficult to arrive at exact figures for those in non-standard forms of work, it has been estimated that by the end of 2019 there were some 974,000 people in the labour market on zero-hours contracts,[13] while some 4.7 million people were estimated to be self-employed as part of the gig economy,[14] a number which had effectively doubled since 2016, and

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10 This must certainly have been a consideration for MPs at the time of the passage of the Welfare Reform Bill, with the possible prospect of the UK leaving the European Union and a restriction in the number of migrant workers to fill up the low-paid positions in the labour market.

11 See *Hayek, Friedrich*, Law, Legislation and Liberty, Volume Three: The Political Order of a Free People, Chicago: University of Chicago Press 1979, p. 12. See also *Larkin, Philip*, Universal Credit, "Positive Citizenship", and the Working Poor: Squaring the Eternal Circle?, in: Modern Law Review, 81 (2018) 1, pp. 114 and 121.

12 Citizens Advice. Universal Credit Needs to Adapt to the Modern Labour Market, https://www.citizensadvice.org.uk/Global/CitizensAdvice/welfare%20publications/Summary%20briefing%20-%20UC%20and%20modern%20employment%20reports%20.pdf. Accessed 16 April 2020.

13 Office for National Statistics, People in Employment on Zero Hours Contracts, 18 February 2020, https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/emp17peopleinemploymentonzerohourscontracts. Accessed 17 April 2020.

14 See Statistical Services and Consultancy Unit (SSCU) and University of Hertfordshire and Hertfordshire Business School (HBS), The TUC and University of Hertfordshire Joint Report Platform Work in the UK. 2016 - 2019, https://www.feps-e

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now represents 9.6 per cent of the adult working population of the UK.[15] This steep increase demonstrates not only the omnipresence of the internet, but also the volume of demand for the products and services provided through digital platforms, which in turn creates the need for gig workers particularly in large centres of population.[16]

It is possible that this significant move towards the digital platform economy reflects not only the traditional Anglo-Saxon model flexibility of the UK economy, but the increasing "atomisation" of the labour force into a mass of self-employed individuals working off a digital platform also indicates that internet technology now undermines Coase's economic presumption formulated in the 1930s that the "firm" or company hiring employees under contract is the most efficient manner of production and directing the productive capacity of each individual employee, rather than continually contracting out for services.[17] Certainly the trend is symptomatic of the breakdown of the Fordist model in the UK, which involved large collective numbers of factory employees manufacturing all components of a particular product.[18] In socio-legal terms, the dilution of the traditional legal forms of employment in favour of the fluidity of the gig economy could represent what Delanty has labelled the "emerging crisis of solidarity"[19] not only in the UK but throughout Europe, hastened by recession, a development which manifests itself in the weakening of historical ties between employer and employee in the labour market, and, importantly, as Veitch states, changes to traditional assistance offered to citizens via the welfare state.[20]

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urope.eu/attachments/publications/platform%20work%20in%20the%20uk%2020 16-2019%20v3-converted.pdf. Accessed 18 April 2020. See also *Partington, Richard*, Gig Economy in Britain Doubles, Accounting for 4.7 Million Workers, The Guardian, 28 June 2019.

15 See ibid.

16 For example, it was reported that London's gig economy has grown by 70 per cent since 2010. See *Osbourne, Hilary*, London's "Gig Economy" has Grown More than 70 Per Cent since 2010, The Guardian, 27 December 2016.

17 See *Coase, Ronald Harry*, The Nature of the Firm, in: Economica, 4 (1937) 16, pp. 386-405.

18 Davidov, Guy/Langille, Brian (eds.), The Idea of Labour Law, Oxford: Oxford University Press 2013, p. 45.

19 See *Delanty, Gerard*, Fear of Others: Social Exclusion and the European Crisis of Solidarity, in: Social Policy and Administration, 42 (2018) 6, pp. 676-690.

20 See *Veitch, Kenneth*, Social Solidarity and the Power of Contract, in: Journal of Law and Society, 38 (2011) 2, pp. 189-214.

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In the UK context, this crisis of solidarity is perhaps aggravated by the welfare state regionalism effected by devolution, especially in Scotland and Northern Ireland.[21] In this theory the move away from the contributory Bismarckian welfare state based on social insurance contributions to a common fund is mirrored by developments such as the growth of the gig economy, changes which serve to erode the various contractual links between different social groups and institutions. Even the Conservative Party, most closely associated with neo-liberal policies over the past four decades in the UK, has been cognisant of these changes for over a decade now:

> Today the challenges facing Britain are immense. Our economy is overwhelmed by debt, our social fabric is frayed, and our political system has betrayed the people.[22]

1. *Advantages of Non-Standard Forms of Employment*

Whatever the negative effect on the traditional contractual labour market ties the gig economy and zero-hours contracts may have, the fact that these forms of work have proliferated to such an extent demonstrates how advantageous consumers find the services which they provide. The internet permits consumers instant connection with gig workers to promote efficiency, immediately linking individual demand to supply, reinforcing Veitch's notion of the new "cult of the consumer", and the concomitant notion that consumers should provide for their own care needs.[23] Neither are the benefits of non-standard forms of work confined to consumers: from the onset of the economic recession the gig economy in particular has helped create at least some income for a large sector of the working population, those who were unable to secure traditional type employment.

One feature of the last economic downturn in the UK was that rates of unemployment did not rise to the levels of the early 1980s, standing at 4.8 per cent in 2017.[24] Furthermore, platform work provides a level of flexibil-

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21 See *Simpson, Mark*, Renegotiating Social Citizenship in the Age of Devolution, in: Journal of Law and Society, 44 (2017) 4, pp. 646-673.

22 Conservative Party, Invitation to Join the Government of Britain: Manifesto 2010, Conservative Research Department 2010.

23 See *Veitch, Kenneth*, Social Solidarity and the Power of Contract (fn. 20), p. 190.

24 This is practically equivalent to full employment. See Office for National Statistics, UK Labour Market: Estimates of Employment, Unemployment, Economic Inactivity and other Employment-Related Statistics for the UK, 15 March 2017,

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ity to crowd workers to set their own hours of work around their family lives and other social commitments, a level of overall control which many employees do not normally possess.[25] For those citizens who already possess the status of full- or part-time employee, work in the gig economy offers them the opportunity to supplement their income, with research indicating that the pairing of employment and self-employment has grown over 20 per cent over the past decade.[26]

2. *Disadvantages of Non-Standard Forms of Employment*

It is nevertheless difficult to avoid a number of significant disadvantages which both the gig economy and zero-hours contracts contain for those who work under them. The first is the obvious point that, having the status of self-employed workers, they do not receive the statutory protection their employed counterparts enjoy, such as the rights to the national minimum wage,[27] statutory sick pay and the rights to bring claims for unfair dismissal and redundancy.[28] Furthermore, because they do not make the necessary national insurance contributions, they are not eligible for "new style" contributory jobseeker's allowance,[29] and, being self-employed, cannot receive Industrial Injuries Benefit for injuries sustained in the course of employment.[30] Neither do gig workers receive the protection of the tor-

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https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/mar2017. Accessed 20 April 2020.

25 See *De Stefano*, *Valerio*, The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labour Protection in the "Gig" Economy, in: Conditions of Work and Employment Series, International Labour Office, Geneva, 71 (2016), p. 6, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf. Accessed 12 September 2020.

26 Office of Tax Simplification, The Gig Economy: An OTS Focus Paper, 2 December 2016, http://www.gov.uk/government/publications/the-gig-economy-an-ots-focus-paper. Accessed 20 April 2020. See also *De Stefano*, *Valerio*, The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labour Protection in the "Gig" Economy (fn. 25), p. 6.

27 Contained in the National Minimum Wage Act 1998. It should be noted, however, that zero-hours contract workers are entitled to certain rights such as the right to the national minimum wage and limits to working time.

28 These are contained in the Employment Rights Act 1996.

29 See below for a discussion of this.

30 Self-employed persons are eligible, however, for Council Tax reductions during periods of economic inactivity, and are also entitled to the hosing benefit element of UC. See below.

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tious doctrine of vicarious liability if they carry out a tort in the course of their work, as do employees. However, for the purposes of this chapter the central problem of non-standard forms of work is their lack of stability and predictability of income for the worker. As De Stefano graphically asserts:

> "income stability remains a mirage for most of the workers in the gig economy […]: as praised in the words of one of the businesses' managers quoted above, one of the chief sources of flexibility is exactly the possibility to hire people and "fire them after […] ten minutes"[31].

Leaving aside the issue of the possibility of easy dismissal of gig and zero-hours workers, the reality is that the hours of work and the number of jobs ("gigs") they carry out may vary daily, weekly, or even seasonally, leading to an inevitable fluctuation in income, which in turn makes it difficult for individuals and families to plan and budget. Adams and Deakin have associated non-standard forms of work in the labour market with inequality and precariousness, mainly because there is little certainty in terms of regular income.[32] Indeed, zero-hours contracts and gig workers feature in much of non-academic literature on that sector of the workforce which has been labelled the "Precariat".[33] Irregularity of income has another negative consequence for such workers, namely, that it presents significant difficulties in the accurate calculation and delivery of social security benefits, in particular Universal Credit, a form of benefit specifically designed, amongst other purposes, to assist those on lower income. In order to understand the interrelation between non-standard contract workers and the social security system, some background must be given on UC and other relevant benefits.

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31 See *De Stefano*, *Valerio*, The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork and Labour Protection in the "Gig" Economy (fn. 25), p. 6.

32 *Adams*, *Zoe/Deakin*, *Simon*, Institutional Solutions to Precariousness and Inequality in Labour Markets, Centre for Business Research, University of Cambridge Working Paper No. 463, September 2014, p. 1.

33 See, for example, *Bloodworth*, *James*, Hired: Six Months Undercover in Low-Wage Britain, London: Atlantic Books 2019, and *Standing*, *Guy*, The Precariat: The New Dangerous Class, London: Bloomsbury Press 2014.

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III. Universal Credit and Other Related Social Security Benefits

1. Universal Credit, Unemployment and Work

Although structurally and technically innovative, there is little that is conceptually new in UC. Indeed, it builds upon the system of "tax relief payment", or "tax credits" introduced by the first New Labour Government of 1997 - 2001, a payment administered primarily through the revenue authorities, designed to support financially the family unit and provide parents with the incentive to find and retain paid employment.[34] The advantage of the tax credit system was that recipients could avoid the stigma of claiming a benefit, unlike Family Income Supplement and Family Credit which preceded it, and together with the introduction of the national minimum wage[35] it was hoped that paid employment would be sufficiently rewarding to encourage one or both parents to remain in employment.[36] Later New Labour governments developed the tax credits policy, with Working Families Tax Credit and Disabled Persons Tax Credit being replaced by "working tax credit", and forms of support for children through tax and social security with a "child tax credit" in the Tax Credits Act 2002.[37] Furthermore, by the time that the policy began in 1997, wage levels for the lowest decile of the workforce had fallen to historically low levels, as a result of deregulatory measures such as the abolition of Wages Councils and the legislative neutralisation of trade unions during the years of Conservative Government.[38] These factors not only occasioned a reduction in "job security", but also impacted negatively on employees' ability to negotiate reasonable wage increases.[39]

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34 See *Larkin, Philip*, Universal Credit, "Positive Citizenship", and the Working Poor: Squaring the Eternal Circle? (fn. 11), pp. 114 and 117.

35 This was introduced in the National Minimum Wage Act 1998.

36 See *Larkin, Philip*, Universal Credit, "Positive Citizenship", and the Working Poor: Squaring the Eternal Circle? (fn. 11), pp. 114 and 117.

37 *Wikeley, Nick*, Tax Credits Act 2002: Annotated Legislation, London: Sweet and Maxwell 2002.

38 See *Puttick, Keith*, 21st Century Welfare and the Wage-Work-Welfare Bargain, in: Industrial Law Journal, 41 (2012) 1, p. 125. See also *Larkin, Philip*, Universal Credit, "Positive Citizenship", and the Working Poor: Squaring the Eternal Circle? (fn. 11), p. 117.

39 See *Gregg, Paul/Wadsworth, Jonathan*, Feeling Insecure? An Analysis of Job Tenure from 1975 to 1995, Employment Audit, London: Employment Policy Institute 1996. See also *Nickell, Stephen/Jones, Patricia/Quintini, Glenda*, A Picture of Job Insecurity Facing British Men, in: The Economic Journal, 112 (2002) 476.

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Viewed in their entirety, tax credits appear to have been instrumental in improving the financial circumstances of a sizeable sector of the population out of poverty: Gordon Brown, as Chancellor, claimed that the means-tested Working Families Tax Credit, combined with child benefit, was responsible for raising 1.2 million children out of poverty.[40] The effectiveness of tax credits in reducing inequality and aiding social mobility in the UK is also evidenced by an OECD Report which demonstrates that while during the period between the late 1990s and the early years of the present decade the prospects of the poorest people in societies across the world worsened, in the UK they actually improved dramatically.[41] At the beginning of the period some six in ten people in the bottom income quintile were trapped in this position, but four years later this figure had fallen to four in ten.[42] This improvement in social mobility is important, because, as the Report emphasises, lack of social mobility can damage the foundations of growth in modern market economies, leading to the underdevelopment of human talent and a dearth of spending power and a subsequent shortfall in investment in the economy.[43] The improvement itself is held to be a triumph of policy design, namely, the development of tax credits to ensure that paid work was sufficiently rewarding, and a minimum wage which steadily increased during the relevant period.[44] However, the tax credits system contained certain flaws, the main one being the high level of clawback which claimants experienced when their working hours, and subsequently salaries, increased, thus acting as a disincentive for both couples and individuals to engage further with the labour market, and ultimately become financially self-sufficient.[45]

The introduction of UC was brought about by two main policy aims. The first is to achieve maximum participation in the labour market by ensuring that paid employment will always be more lucrative than benefit re-

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40 The measurement of poverty for these purposes is a household with less than 60 per cent of median national income. See Households Below Average Income Statistics Department for Work and Pensions (11 April 2002). See also *Lee, Natalie,* The New Tax Credits, in: Journal of Social Security Law, 10 (2003) 1, p. 10.

41 OECD, A Broken Social Elevator? How to Promote Social Mobility, OECD Publishing, Paris, 2018, http://dx.doi.org/10.1787/9789264301085-en. Accessed 30 July 2020.

42 Ibid., p. 23. See also *Strauss, Delphine*, Social Mobility Progress at Risk as EU Divorce Saps Economy, Financial Times, 13 July 2018.

43 Ibid., p. 23.

44 See *Larkin, Philip*, Universal Credit, "Positive Citizenship", and the Working Poor: Squaring the Eternal Circle? (fn. 11), p. 117.

45 See ibid.

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ceipt. The second is to achieve greater administrative efficiency in terms of time and cost. UC, the outline structure of which is contained in the WRA 2012,[46] is essentially a form of income-based benefit, which incorporates six former means-tested benefits and tax credits,[47] and is administered and disbursed entirely by the Department for Work and Pensions.[48] These reforms were motivated by more than efficiency: it was also intended to simplify the system for claimants, since it proved difficult in practice to understand how the different tax credits and benefits they applied for related to each other.[49]

UC itself is an income-based benefit, although a remnant of social insurance-based is represented in the "new style" jobseekers allowance (JSA), which is payable to those claimants who have made sufficient national insurance contributions in the last two tax years before the claim.[50] In order to be eligible for UC, the claimant must be at least 18 years old, be in Great Britain, not receiving education, and has accepted a relevant

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46 As with other welfare and tax credit legislation, the outline structure of UC is contained in the Welfare Reform Act (WRA) 2012, while much of the detail is set out in Regulations.

47 Income-based jobseeker's allowance, income support, income-related employment and support allowance, housing benefit, working tax credit, and child tax credit. This abolition is contained in WRA 2012, Section 33. See also *McKeever, Gráinne*, Social Citizenship and Social Security Fraud in the UK and Australia, in: Social Policy and Administration, 46 (2012) 4, pp. 465 ff., and *McKeever, Gráinne*, Balancing Rights and Responsibilities: The Case of Social Security Fraud, in: Journal of Social Security Law, 16 (2009) 3, p. 139.

48 This marks a change from the previous system of tax credits, which were administered entirely by the revenue authorities.

49 To exemplify the complexity of the previous system, a claimant with children in rented accommodation might have had to claim four different benefits from three different authorities. This was complicated by the fact that entitlement to tax benefits were calculated on the basis of an entire tax year, whereas four of the six benefits abolished by the WRA 2012 were calculated weekly and paid fortnightly. See *Mesher, John/Poynter, Richard/ Wikeley, Nick/Wood, Penny*, Universal Credit, Volume V: Social Security Legislation 2013/14, London: Sweet and Maxwell 2014, p. 4. See also *Larkin, Philip*, Universal Credit, "Positive Citizenship", and the Working Poor: Squaring the Eternal Circle? (fn. 11), p. 118.

50 New style JSA and UC may be claimed together, if the individual or household's finances do not reach sustenance level on JSA alone. Unlike UC, new style JSA may be claimed even if the claimant or their household have more than £16,000 in savings. See the Welfare Reform Act 2012 (Commencement No. 11 and Transitional and Transitory Provisions and Commencement No. 9 and Transitional and Transitory Provisions (Amendment)) Order 2013, SI 2013/1511. New style JSA claimants are subject to the more rigorous UC claimant commitment and the sanctions which accompany this.

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claimant commitment.[51] Furthermore, claimants and households with financial resources over a certain threshold are not eligible for UC.[52] Section 1 of the WRA 2012 sets out the categories of claimant to whom UC may be awarded, namely, single persons, and couples jointly, both in and out of work.[53] This section of the WRA also outlines the structure of UC, affirming that it consists of a standard allowance, and separate amounts for children and young persons, for housing, and for other particular needs or circumstances.[54] The detailed rules on UC claims are contained in the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013.[55] To create a notional link between receipt of UC and the labour market, it is paid fortnightly so as to reflect the reality that some 75 per cent of the working population now receive their earnings monthly and in arrears.[56]

Probably the most progressive reform made by the WRA 2012 is to change the manner of calculation of UC from that of tax credits, enhancing the incentive for families and individuals to enter and remain in the labour market. The "work allowance"[57] allows considerably higher earnings disregards than other income-based benefits such as income support or jobseeker's allowance. Claimants should thus be able to retain more of their earned income before their UC award is reduced, and if the figure calculated for earned income during the assessment period does not exceed the applicable work allowance then no deduction is made from the maximum amount.[58] Furthermore, once the reduction begins, claimants will only lose 65 per cent of the increase in their income rather than 100 per

51 Section 4 of the WRA 2012.
52 Section 5 of the WRA 2012. The threshold figure is £16,000.
53 Section 1 of the WRA 2012.
54 Section 1 (3) (a) – (d).
55 SI 2013/380. See also WRA 2012, Sections 3 and 4.
56 See *Puttick, Keith*, 21st Century Welfare and Universal Credit: Reconstructing the Wage-Work-Welfare Bargain Part 2, in: Industrial Law Journal, 41 (2012) 2, p. 239.
57 The structure of the "work allowance" and "higher work allowance" is set out in the WRA 2012, Section 8 (3) and UC Regulations 2013, Regulation 22. The higher and lower work allowances are each applied at six discrete rates which are specified in a table which forms part of Regulation 22.
58 See *Mesher, John/Poynter, Richard/Wikeley, Nick/Wood, Penny*, Universal Credit, Volume V: Social Security Legislation 2013/14 (fn. 49), p. 4. See also *Larkin, Philip*, Universal Credit, "Positive Citizenship", and the Working Poor: Squaring the Eternal Circle? (fn. 11), p. 125.

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cent, a reform which accounts for the significant difference in outcome between working claimants on jobseeker's allowance and those on UC.[59] This reform in particular does make some headway in reducing the long-enduring disincentives for individual citizens and families of different types to engage with the labour market, particularly in the light of the post-2010 Coalition Government's commitment to ensure that 85 per cent of childcare costs for the least affluent UC recipients would be made by public funds.[60]

One might expect those citizens engaged in non-standard forms of work in particular to benefit from these reforms, occupying as they do many of the lower-paid positions in the labour market. The reforms also demonstrate a genuine desire on the part of legislators to remedy the shortcomings of the existing tax credits system.[61] It should also be noted that, like tax credits, UC may also be claimed by the self-employed, including the large number of gig workers, an important continuity since the self-employed proportion of the UK labour market began to rise since the early years of the century, and increased from 3.8 million in 2008 to 4.6 million in 2015, a trend hastened by the economic recession beginning in 2007.[62] Given that some 60 per cent of those families in poverty are actually working families,[63] one might expect UC to be instrumental in improving the living standards of such citizens. Seen through the prism of the WRA 2012, individual citizens are viewed very much as *producers* who should be economically active, rather than simply possessors of unearned rights, and in keeping with the view of Grover and Stewart that such reforms have been shaped by:

> […] ideas with a long standing tradition in England: that economically inactive people are lazy, and react rationally to the availability of social security by making themselves inactive, or prolonging their inactivity.[64]

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59 See *Larkin*, ibid.

60 See *Wintour, Patrick/Mason, Rowena*, Prime Minister Pitches to Families with Childcare Cash, The Guardian, 18 March 2014.

61 See ibid.

62 See Office for National Statistics. Trends in Self-Employment in the UK: 2010 to 2015, https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2001to2015. Accessed 10 July 2020. These figures also include gig workers.

63 See ibid.

64 *Grover, Chris/Stewart, John*, Modernising Social Security? Labour and its Welfare-to-Work Strategy, in: Social Policy and Administration, 34 (2000) 3, p. 236.

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2. *Universal Credit, New Style ESA, and Incapacity for Work*

Both zero-hours contract workers and gig workers may also be eligible to claim "new style" Employment and Support Allowance (ESA) if they are incapacitated or unable to work because of illness, and have made sufficient national insurance contributions over the past two tax years before the claim, and eligibility for this benefit also extends to the self-employed.[65] ESA was first introduced by the last Labour Government in the Welfare Reform Act 2007, replacing the former system of incapacity benefit and income support. Unlike UC, which was promoted primarily on the message of encouraging citizens to engage with the labour market, ESA was introduced for the more stringent purpose of ensuring what has been named "positive citizenship", or to almost coerce citizens back into the labour market and productivity as soon as possible.[66] The Welfare Reform Act 2007[67] is paradigmatic of the ideology which has underpinned much welfare reform legislation over the past four decades, reducing further the importance of national insurance benefits while rendering them more difficult to attain, with entitlement linked to increased conditionality.[68] As one UK former Secretary of State for Social Security asserted, "[…] people who earn a modest wage resent seeing neighbours, apparently as fit as themselves, living on invalidity benefit"[69]. This did not prevent the Labour Government from presenting the legislation as providing an opportunity for citizens to find fulfilment in the labour market, thus demonstrating the continuity in ideology at the foundation of welfare reform:

The reforms in the Bill set out a new direction of travel for our welfare system. They are underpinned by a belief in an active enabling welfare state that sees tackling poverty and social exclusion, with no-one left behind and no-one written off.[70]

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65 The transition from ESA to "new style" ESA is set out in Regulation 23 of the Universal Credit (Transitional Provisions), Regulations 2013, SI 2013.

66 See *Larkin, Philip*, Incapacity, the Labour Market and Social Security: Coercion into "Positive" Citizenship, in: Modern Law Review, 74 (2011) 3, pp. 385 ff. It should be mentioned that receipt of UC is also hedged around with conditionality.

67 And the Welfare Reform Act 2012 which superseded it.

68 See *Larkin, Philip*, Incapacity, the Labour Market and Social Security: Coercion into "Positive" Citizenship (fn. 66).

69 HC Deb vol 236 cols 135 - 136 24 January 1994. This was the original core reason for replacing the former invalidity benefit with Incapacity benefit.

70 John Hutton MP, HC Debs vol. 449 col 616 24 July 2006.

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As with UC, emphasis was placed on the idea of aspiration, and that citizens should strive to better their own social position through engagement in paid employment. For those non-standard workers who have made sufficient national insurance contributions, it is indeed possible to claim ESA, which has a contributory and non-contributory element, modelled closely on new style jobseeker's allowance.[71] Income-based ESA has been abolished by the WRA 2012,[72] but its essential structure was retained in the WRA and the Universal Credit Regulations 2013.[73] The basic entitlements are relatively uncontroversial, but in Section 37 of the WRA 2012 and Regulations 38 and 39 of the UC Regulations the key concepts of "limited capability for work" and "limited capability for work-related activity" the self-conscious aim is to place focus on what work the claimant can actually do, rather than their incapacity or illness.[74] In combination with these, the Work Capability Assessment, the framework for which is set out in the Regulations,[75] is designed to be a more stringent form of test than the personal capability assessment which preceded it. The majority of incapacitated UC claimants go through the first element of the procedure, which is the assessment of limited capability for work, usually decided on the basis of a face-to-face interview, and is judged on a series of activity descriptors, and scores are awarded for each activity.

The WCA was designed to modernise comprehensively the nature of those tasks prevalent in the contemporary labour market, and incapability to perform a task must arise from a specific bodily disease or disablement, or a mental equivalent. Establishing limited capability for work entitles the claimant only to the basic UC allowance, and the extra components they may receive will depend upon whether it is judged that they do or do not have limited capacity for work-related activity. This involves a claimant having to undergo more rigorous assessment and a person is deemed to have such a limited capability if, by reason of their physical or mental condition, at least one of the criteria contained in Schedule 9 to the UC Regulations applies to him or her. Those who fail to establish such limited capa-

71 See *Larkin, Philip*, Incapacity, the Labour Market and Social Security: Coercion into "Positive" Citizenship (fn. 66), p. 398. See also *Wikeley, Nick/Laurie, Emma*, Welfare Reform Act 2007, Annotated Legislation, London: Sweet and Maxwell 2007.

72 Section 33 of the Welfare Reform Act 2012.

73 SI 2013/376.

74 See *Larkin, Philip*, Incapacity, the Labour Market and Social Security: Coercion into "Positive" Citizenship (fn. 66), p. 398.

75 Schedules 6 to 9 to the UC Regulations 2013.

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bility will receive the work-related activity component of UC, and are obliged to attend one or more work-focused interviews, the aim being to assess the claimant's chances of obtaining or remaining in work, and helping them back into the labour market.

New style ESA and UC for incapacitated claimants may have a special relevance for both zero-hours contract workers and those engaged in the gig economy: the introduction of the ESA coincided with some of the most arduous years of the economic recession, when positions in traditional forms of employment contract tended to be scarce. Even in the early years of the operation of income-based ESA statistics demonstrated that work capability assessments resulted in more than 66 per cent of ESA claimants being judged fit to work, with the decision of the Department for Work and Pensions being upheld in 62 per cent of appeals.[76] Given that the unemployment rate did not rise hugely during the recent recession, it is highly likely that many of those deemed fit for work or work-related activity may have been directed towards, or simply found, work in either the gig or zero-hours sector of the economy, work which frequently does not require a high level of skills or training. One of the central factors in the growth of digital platform and other such activity could have been the operation of the Welfare Reform Acts of 2007 and 2012, with claimants seeking to enter the labour market in any capacity not only to avoid legislative sanctions, but due to the opprobrium of an increasingly unsympathetic British public.[77] As Taylor-Gooby notes, it is this revival of lack of empathy for the less materially well-off that distinguishes the UK from continental Europe, and ensures that UK welfare legislation tends to be "sharper-edged and cruder" than that in continental nations.[78] It is unlikely that attitudes have changed greatly since the tailing-off of the last recession: they may even have been fortified by the knowledge that there appears to be a surfeit of positions in the non-regular economy.

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76 Work Capability Assessment Statistical Release, para. 3, January 2010, https://www.gov.uk/government/statistics/employment-and-support-allowance-work-capability-assessment-july-2010. Accessed 10 July 2020.

77 A British Social Attitudes Survey, drawn up roughly at the early operation of the WRA 2012, indicated that the working population are less tolerant of the "plight" of their less affluent, unemployed counterparts in low-income social groups, especially if they perceive that benefit recipients are malingering.

78 This survey is cited in the Economist 26 January 2008.

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3. The Legislative Benefit Cap

One central point which should be mentioned for the purposes of background information is that all welfare benefit recipients and their family units in the UK are subject to a legislative benefit cap, or limit, which was also contained in the Welfare Reform Act 2012,[79] representing another reform in the overall wide-ranging review of the social security system carried out by the Coalition Government, and as part of the austerity measures effected simultaneously. Introduced in April 2013, by 2014 some 36,471 households had experienced benefit reductions, with 17,102 being in London.[80] Originally set at £26,000 per household, the level of the cap was reduced to £20,000 for families from autumn 2016.[81] Like the WRA 2007, the benefit cap is credited with encouraging many citizens to enter or re-enter the labour market, with figures in 2014 indicating that some 8040 households had come off the benefit cap, and that 40 per cent of those who came off the cap had found gainful employment.[82] Lord Freud, Minister of Welfare Reform, also stated:

> Our reforms are creating an alternative to life on benefits and already we are seeing an increasing number of people changing their circumstances so they are no longer subject to the cap.[83]

It is entirely plausible that many people seeking to escape the financial strictures of the benefit cap, and to avoid the legislative sanctions contained in the Welfare Reform Act 2012 for those not deemed to be taking sufficient steps to find employment, have accepted zero-hours contracts or are online platform workers. The benefit cap has been subject to legal challenge on the grounds that it infringed provisions of international human

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79 The framework for the benefit cap is contained in Sections 95 - 96 of the WRA 2012, and the Benefit Cap (Housing Benefit) Regulations 2012, SI 2012/2994, and the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016, SI 2016/909.

80 See Department for Work and Pensions, Benefit Cap: Number of Households Capped to December 2013, https://www.gov.uk/government/statistics/benefit-cap-number-of-households-capped-to-december-2013. Accessed 28 April 2020.

81 Apart from the London area, where the cap was reduced to £23,000, due to increased living costs.

82 See Department for Work and Pensions, Benefit Cap: Number of Households Capped to December 2013 (fn. 80).

83 Cited in BBC News. Thousands Hit by Government Benefit Cap Now in Work, 6 February 2014, https://www.bbc.co.uk/news/business-26065080. Accessed 10 July 2020.

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rights law, but, in two majority decisions, the Supreme Court ruled that the relevant human rights law had not been breached.[84] As usual with issues relating to social policy and social security law, it was felt by some of the judges[85] that deliberations and action on such matters are best addressed in the political arena of the legislature.

IV. Non-Standard Forms of Work and the Social Security System

It would be inaccurate for the Coalition Government to claim that it had not been given advance warning of some of the main issues which could beset the operation of UC, which has caused perhaps most problems especially for those working non-standard contracts. While the operation of UC has revealed a variety of design defects in UC, it is this latter category of people that the sole focus will be upon. Referring to legislative measures towards simplicity and administrative efficiency, Baroness Hale stated that while such aims were self-evidently laudable, there was a good reason why the social security is so complicated in nature: the multipurpose welfare system must cope with a great number of life situations, which inevitably means that it must be, by nature, inherently complex.[86] A similar thesis is expounded by Harris, who argues that despite the longstanding ambition of both Labour and Conservative Governments to merge the tax and benefit systems in order to achieve administrative savings and a simplification of the frequently labyrinthine bureaucracy in both welfare and revenue systems, the life situations which both branches of law cover remain as complex as ever.[87] These views were also shared by Sainsbury,[88] Brewer,[89] and even the Policy Exchange on the Standing Committee for the Welfare

84 The cases are R (SG and Others) v Secretary of State for Work and Pensions [2015] UKSC 16, and R (DA & Ors) v Secretary of State for Work and Pensions and R (DS & Ors) v Secretary of State for Work and Pensions UKSC 21.

85 Lord Wilson, for example, in R (DA & Ors) v Secretary of State for Work and Pensions; R (DS & Ors) v Secretary of State for Work and Pensions [2019] UKSC 21.

86 See Hinchy v. Secretary of State for Work and Pensions [2005] UKHL 16 at para 48.

87 See *Harris*, *Neville*, Law in a Complex State: Complexity in the Law and Structure of Welfare, Oxford: Hart Publishing 2013, pp. 60-61.

88 Committee Debate – First Sitting: House of Commons 22 March 2011, col. 6.

89 Ibid.

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Reform Bill.[90] In addition, the increased atomisation of the labour force, the factors which compel increasingly more citizens to accept non-standard forms of work, and the move towards what Bauman has called the "society of consumers",[91] has further compounded an already tangled socio-economic situation in the UK. Indeed, some commentators representing the more populist right of the political spectrum actively promoted the growth of the gig economy as a means of encouraging activism among unemployed citizens.[92] During the parliamentary debates relating to the passage of the Welfare Reform Bill 2012, John McDonnell MP[93] stated that in his own parliamentary constituency many of the jobs on offer tended to be casual and low-paid, with many of his constituents working on zero-hours contracts in which weekly rates of pay can fluctuate significantly.[94] He may also feasibly have mentioned the then growing number of gig workers in the economy, a development which had not yet really attracted a great degree of public attention.

The calculation of tax credits for those on non-standard contracts was already problematic under the previous system, and it appears that some of the same issues still beset the UC system. Before it came into operation, Seddon and O'Donovan criticised vociferously the information technology-dominated "industrial design" of UC, viewing it as fundamentally flawed, and they also predicted huge disruptions in its service flow, duplication of effort, and, as a result, rising costs.[95] These authors cite Adam Smith's notion of the division of labour to suggest that the administration of UC will actually be less efficient than that of tax credits, since in the case of the latter the burden of administrative tasks were shared by both the De-

90 This was Matthew Oakley, Head of Economics and Social Policy at Policy Exchange. See ibid. M. Oakley was acting as an expert witness in the Committee Debate.

91 *Bauman*, *Zygmunt*, Does Ethics have a Chance in a World of Consumers, Cambridge: Harvard University Press 2008, Chapter 3.

92 See *Kirkup, James*, Help Welfare Claimants to Join the Gig Economy, Daily Telegraph, 3 February 2016. See also *Bulman, May*, Amber Rudd Says People Should Take Zero-Hour Contracts to void Having Benefits cut, The Independent, 19 December 2018. Amber Rudd MP was then Secretary of State for Work and Pensions.

93 Member of Parliament for Hayes and Harlington and former Deputy Leader of the Labour Party.

94 HC Deb vol col 988 9 March 2011.

95 *Seddon, John/O'Donovan, Brendan*, The Achilles Heel of Scale Service design in Social Security Administration: The Case of the United Kingdom's Universal Credit, in: International Social Security Review, 66 (2013) 1, pp. 1 ff.

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partment for Work and Pensions and the tax authorities.[96] To at least some extent these predictions have been borne out in the operation of the WRA 2012.

Non-standard work activities in the UK cover a wide variety of fields, and are not confined to courier work or other forms of manual or lower-skilled tasks. Research carried out in 2018 gave a broad definition of the gig economy, more comprehensive than that commonly understood.[97] The same research demonstrated that the age profile of those involved in the gig economy was skewed towards those aged 34 and under,[98] and more likely to be based in London.[99] While the provision of courier work was the most common type of gig activity, performing other types of job found through websites or apps was almost as common, and it was found that this could range from low-skilled work to professional work such as web development or work in the creative industries or media.[100] Very significantly, 25 per cent of survey respondents reported that they earned an hourly income of less than £7.50 per hour, which was then the national minimum wage, while the level of annual average earnings from the gig economy overall was relatively low, with 41 per cent stating that they normally earned less than £250 weekly through their services.[101] In addition, 87 per cent of everyone involved in the gig economy said that they had earned less than £10,000 in the past 12 months.[102] It is noteworthy, nevertheless that even with the issues which beset the gig economy, it was stated by Taylor that many self-employed persons experience greater financial

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96 See ibid, pp. 3-5.

97 For example, the term was held to include not only individuals using platforms which play an active role in facilitating work and taking a proportion of the pay or charging providers' fees for using the platform (such as Deliveroo or TaskRabbit), but also the ad hoc provision of labour to either individuals and businesses, and, importantly, people providing services who are either freelancers or have set up a one-person business to offer their services, and people for whom the gig economy is the main source of income and those who use it to top up their income from other sources. See the Department for Business, Energy and Industrial Strategy. The Characteristics of those in the Gig Economy: Final Report, p. 12, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687553/The_characteristics_of_those_in_the_gig_economy.pdf. Accessed 30 April 2020.

98 Only some 10 per cent of the sample survey were aged 55 or over. See ibid, p. 14.

99 Some 24 per cent of the gig economy workers are based in London. See ibid., p. 17.

100 See ibid., p. 5.

101 See ibid., p. 6.

102 See ibid.

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certainty than other labour market groups such as agency or zero-hours contract workers.[103] It might be expected that these would be exactly the people who would benefit from UC and the operation of the WRA 2012, and certainly many of these would come within its remit.

However, it is at this interface between the labour market and the social security system that real problems arise: for many, if not all, online platform workers and zero-hours contract workers, in whatever field they may be engaged, experience weekly and monthly fluctuations in earnings, and, unlike previous forms of benefit, UC is paid monthly in arrears. UC itself has been observed to operate most effectively for those engaged in traditional working arrangements of fixed hours and paid a fixed income each calendar month.[104] Yet in one survey on UC claimants, it was discovered that less than 50 per cent reported that they were being paid monthly, a finding backed up by analysis from the Resolution Foundation, which uncovered that 58 per cent of claimants moving on to UC were paid fortnightly or weekly in their current or previous job.[105] This held true for non-standard contract workers, whose income tends not to be received monthly (gig workers are remunerated per job), and, although the overall value of their annual benefit entitlement does not change, those trying to combine non-monthly wages with a monthly benefit.[106] For example, it is possible for a zero-hours contract worker, who may be paid weekly, and, due to the fact that each month does not contain the same number of weeks, their earnings in each calendar month will vary, since during some months they will receive four wage payments and in others five. This will undoubtedly lead to fluctuating UC payments, and subsequent problems in household budgeting. Furthermore, when two four-weekly wage pack-

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103 *Taylor, Matthew/Marsh, Greg/Nicol, Diane/Broadbent, Paul*, Good Work: The Taylor Review of Modern Working Practices, Independent Report, July 2017. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf. Accessed 30 April 2020.

104 See Citizens Advice. Universal Credit and Modern Employment: Non-Traditional Work, https://www.citizensadvice.org.uk/Global/CitizensAdvice/welfare%20publications/Universal%20Credit%20and%20non-traditional%20employment.pdf. Accessed 30 April 2020.

105 See *Brewer, Mike/Finch, David/Tomlinson, Daniel*, Universal Remedy: Ensuring Universal Credit is Fit for Purpose, The Resolution Foundation, October 2017, p. 6, https://www.resolutionfoundation.org/app/uploads/2017/10/Universal-Credit.pdf. Accessed 10 May 2020.

106 See Citizens Advice. Universal Credit and Modern Employment: Non-Traditional Work (fn. 104), p. 16.

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ets are paid in the same month, this can push the overall earnings considerably over the threshold level, entitling the claimant to no UC for that month, causing difficulties for those used to a set amount of tax credit benefit.[107] For a benefit which was designed to inculcate regular habits of industry and thrift among recipients, one survey discovered that of over 800 working families receiving UC, 43 per cent stated that they were never able to put money aside as savings, while only 17 per cent were reported being able to do so regularly,[108] and this lack of flexibility in household budget prevents recipients from being able to plan for UC fluctuations. Zero-hours contract workers have the added problem of varying weekly income, causing them to have to make multiple claims in order to erode their surplus earnings.[109] Another problem which has beset many UC claimants has been the waiting time for the benefit, and it frequently takes some five to six weeks for the first payment to be made, a period during which those already in a precarious financial position can fall into poverty, requiring recourse to non-governmental sources of help such as charity food banks.[110]

The self-employed status of many gig workers, in combination with the irregularity of their earnings, brings to the fore a further factor compounding their frequent precarious financial position. In addition to not usually receiving a monthly wage or salary, gig workers and ordinary self-employed persons also face the inevitability of income fluctuation according to the vagaries of the market. Self-employed persons' access to UC is subject to them being deemed "gainfully self-employed",[111] a process which involves potential claimants undertaking a "Gateway Interview" carried out by Jobcentre Plus[112] Work Coaches who tend to lack specialist knowledge in assessing small business plans and activity for viability. It was not-

107 See ibid., at p. 17. Those familiar with tax credits are becoming fewer as the operation of UC progresses.

108 Citizens Advice. Universal Credit and Modern Employment: Non-Traditional Work (fn. 104), p. 18.

109 This problem was specifically mentioned by the Social Security Advisory Committee. See The Universal Credit, Miscellaneous Amendments, Savings and Transitional Provisions, SI 2018 No. 65. Report by the Social Security Advisory Committee, January 2018.

110 See *Purves*, *Libby*, The State has Earned Universal Discredit, The Times, 23 October 2017.

111 The definition of "gainful self-employment" is contained in Regulation 64 of the Universal Credit Regulations 2013, SI 2013/376.

112 The Jobcentre Plus serves not only as a form of labour exchange but also as a means of executive body which effects social security legislation and policy in the UK.

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ed by the House of Commons Work and Pensions Committee that viability interviews of this nature require specialist knowledge and understanding of business development (knowledge usually beyond the remit of work coaches), since, in its view, it is vital that the DWP supports potentially successful businesses while not wasting resources on unsustainable ventures.[113] One key UK Government policy aim over the past decades, of both main political parties, has been to encourage entrepreneurship and individual self-reliance among citizens, and online platform and freelance workers could certainly be said to adhere to these criteria.

Like other self-employed UC claimants, online platform and other gig workers are subject to a "Minimum Income Floor" (MIF), which assumes that they are making a certain minimum amount of monthly income.[114] For the majority of claimants the MIF is the equivalent of a full-time worker's (which equals 35 hours weekly) wage on the national living wage. For the first year of business new self-employed persons are exempt from the MIF, a period known as the "Start-up Period", the rationale given by the DWP for this idea being that it is "to encourage individuals to increase their earnings through developing their self-employment" and to address "[…] flaws in legacy benefits which allowed self-employed claimants to receive state support while declaring low or zero earnings"[115]. The Resolution Foundation, a UK think tank, has voiced doubt about the effects of the MIF on self-employed UC claimants:

> Applying the MIF on a monthly basis could leave self-employed workers much worse off than employees, despite having identical incomes. This situation would arise as a result of a self-employed person's UC award being capped by the MIF when their income is low, without then being recovered in months when they earn more.[116]

113 See the House of Commons Work and Pensions Committee, Self-Employment and the Gig Economy: Thirteenth Report of Session 2016-17 HC 847, 1 May 2017.

114 This is set out in Regulation 62 of the Universal Credit Regulations 2013, SI 2013/376.

115 Reported in Citizens Advice. Universal Credit and Modern Employment: Non-Traditional Work (fn. 104), p. 16. It did constitute a valid concern among legislators that directors of small and medium-sized enterprises would deliberately pay themselves a very basic salary in order to be able to avail of UC.

116 *Finch*, *David*, Making the Most of UC: Resolution Foundation Report, June 2015, https://www.resolutionfoundation.org/app/uploads/2015/06/UC-FINAL-REPORT1.pdf.

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The point was also underscored in the House of Commons Work and Pension Committee Report that the vagaries of self-employment, including seasonal variations in trade or payments made for ongoing work can easily confuse the true picture of annual income generation.[117] While this Report correctly suggests that this factor could deter people from self-employment,[118] for those who do not possess a high degree of skills, English language ability or education, there may be no alternative to persevering in online platform work, and perhaps taking on more than one set of online jobs in order to keep income at a reasonably steady level, while their financial situation continues to remain precarious. This is in addition to the pressures from the social security system set out above which propel citizens towards the gig economy. The uncertainty surrounding the intermediate category of "worker" was also noted, with many of such workers being on very flexible contracts and being similarly vulnerable to fluctuations, whether as employed or self-employed persons.[119]

V. Judicial Action in the Sphere of Non-Standard Work

On a number of significant occasions the UK courts have operated independently from legislation and used their common law powers to rule that some groups of people who engage in categories of labour market activity actually have the status of "worker" when previously they had been labelled and treated as self-employed gig workers by the on-line platform institutions for which they work. These developments could be declared as progressive insofar as they allow such people certain rights, such as the right to the national living wage. The most important of these cases is *Aslam and Others (Claimants) v. Uber BV and Others (Respondents)*,[120] in which two drivers for the online platform Uber, formerly classed as self-employed gig workers, claimed that they had the right to the national minimum wage and the right to be paid annual leave under the Working Time Regulations 1998,[121] rights enjoyed by both employees and workers.[122]

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117 See Citizens Advice. Universal Credit and Modern Employment: Non-Traditional Work (fn. 104).
118 See ibid., p. 16.
119 See ibid., p. 17.
120 [2017] IRLR 4.
121 SI 1998/1833.
122 The definition of "worker" is contained in Section 230 (3) (b) of the Employment Rights Act 1996.

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The Employment Tribunal held that the drivers fitted the relevant criteria under section 230 (3) (b) of the Employment Rights Act 1996. There were a number of reasons for this decision, the main one being that Uber in reality exerted a substantial amount of control over the drivers. Furthermore, Uber had engaged in conduct reminiscent of an employer, with the platform company deducting fares from the drivers' weekly pay without notice and enforcing the relationship between driver and passenger. The Tribunal also found persuasive the ruling of the North California District Court in *Uber Technologies Inc. v. Berwick*,[123] in which case it was decided that Uber was not simply selling a software package, but rather taxi rides. The Tribunal's decision was later upheld by a majority of the Court of Appeal. Initially there were significant reverberations from the ruling in *Aslam*, particularly when it brought to public attention the reality that the existing structure of the gig economy permitted it to operate with 20-30 per cent less in labour costs,[124] and that online platform providers had been able to evade paying their workers the national minimum wage.[125] Also, in the aftermath of the decision the Government announced a six month review of modern working practices with a special focus on self-employment and non-standard forms of work.[126] The precedent in *Aslam* had further legal impact, for example, in *Dewhurst v. CitySprint*[127] also involving a courier formerly labelled an online platform worker, and it was held that she was entitled to worker protection. Here, the tribunal focused upon whether the drivers were obliged to provide their services. It was discovered that the hiring procedure involved a two day induction, training on how to perform the job, and the supply of uniform and other equipment, so, in reality she could not be described as self-employed.[128]

However, the courts' approach to the gig economy has not been one of uniform extension of worker rights to all online platform workers. When Deliveroo workers brought the issue of their employment status before the

123 No. 15 – 546378.

124 *Kessler, Sarah*, The Gig Economy Won't Last Because It's Being Sued to Death, Fast Company. 17 February 2015, http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death. Accessed 4 May 2020.

125 *Croft, Jane*, Uber Challenged on UK Driver's Status, Financial Times, 20 July 2016.

126 *Taylor, Matthew/Marsh, Greg/Nicol, Diane/Broadbent, Paul*, Good Work: The Taylor Review of Modern Working Practices (fn. 103).

127 ET/220512/2016 of 5 January 2017.

128 Another case in which worker protection was extended to online platform courier workers was in Addison Lee Ltd v. Lange and Others UKEAT/0037/18/BA.

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Central Arbitration Committee,[129] it was concluded that they were self-employed platform workers. Again, the central factor in the decision was the seemingly genuine ability of Deliveroo couriers to substitute other people to carry out their online platform duties.[130] Neither is the finding of employment law "worker" status by the courts necessarily entirely beneficial to the individual in question: while it was held in *Pimlico Plumbers Ltd and Another (Appellants) v. Smith (Respondent)*[131] that although the plumber who had previously been labelled self-employed was in reality a worker, he was not able to claim the substantial amount of back-dated holiday pay he believed that he was owed.[132] As former Supreme Court judge Lord Sumption has argued, courts are not the appropriate forum in which to formulate elements of social policy.[133] Furthermore, declaring that someone is a worker does not necessarily entail that their schedule of working hours and monthly pay remains at a constantly steady level in order to facilitate the regular payment of UC.

VI. Social Security Reforms for the 21st Century UK Labour Market

Given the consumer-led demands for the products and services which the gig economy provides, and its growing importance in the labour market, it is highly unlikely that Parliament can or will create legislation to transform all non-standard contracts into contracts of employment. Although it is possible to overstate the popularity of the flexibility of gig work, for at

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129 This is an independent body which has the function of deciding whether any particular group of workers have the right to be part of a trade union or form a trade union of their own.

130 See *Butler, Sarah*, Deliveroo Riders Lose High Court Battle to Gain Union Recognition, The Guardian, 5 December 2018, https://www.theguardian.com/business/2018/dec/05/deliveroo-riders-lose-high-court-battle-gain-union-recognition. Accessed 10 July 2020.

131 [2018] UKSC 29.

132 See *Butler, Sarah*, Gig Economy: Worker Loses Pimlico Plumbers Holiday Pay Claim, The Guardian, 20 March 2019, https://www.theguardian.com/business/2019/mar/20/gig-economy-worker-loses-pimlico-plumbers-holiday-pay-claim. Accessed 10 July 2020.

133 Lord Sumption was inveighing against excessive judicial activism in the name of social justice, stating that Parliament was really the only place where these issues could be decided on collectively. See Lord Sumption, The Limits of Law, The 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, https://www.supremecourt.uk/docs/speech-131120.pdf. Accessed 10 July 2020.

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least a significant section of self-employed platform workers it remains an important consideration, as does the status of self-employment. In the aftermath of the Deliveroo decision the company welcomed the decision by stating that it was "[…] a victory for riders who have consistently told us the flexibility to choose when and where they work, which comes with self-employment, is their number one reason for riding with Deliveroo"[134].

It is also the case that those in non-standard work contracts constitute one of the groups most in need of social protection, and the operation of UC still remains a flawed form of assistance. However, given the problems in UC outlined above, it should be remembered that what Adams and Deakin have called the "standard employment relationship" (SER), which may be defined as work which is carried out on an integrated physical site, on a continuous or indeterminate basis, by reference to a standard unit of working time such as a complete working day or week, continues to be a core legal and economic institution of market economies.[135] These authors assert that the rise in non-standard work is not entirely driven by social and technological factors external to the legal system, but rather it constitutes a response to developments within the law and the wider framework of legal developments, and that the stricter the degree of protection for core workers, the more likely it is that non-standard work will come to be acknowledged as discrete categories in their own right and regulated as such.[136] Although referring primarily to agency and part-time work, these authors' ideas on regulation could also be applied to gig and zero-hours contract workers. The recommendation for greater regulation of non-standard forms of work has also been made by the Resolution Foundation, which, recognising that the number of zero-hours contracts in the labour market had appeared to have reached a plateau, suggested that legislation should provide a legal right to guaranteed hours for anyone who has been working regular hours on a zero-hours contract for at least three months.[137] Given that research has demonstrated that over 25 per cent of

134 See *Butler, Sarah*, Gig Economy: Worker Loses Pimlico Plumbers Holiday Pay Claim (fn. 132).

135 See *Adams, Zoe/Deakin, Simon*, Institutional Solutions to Precariousness and Inequality in Labour Markets (fn. 32), p. 4.

136 See ibid., p. 18. See also *Schömann, Klaus/Rogowski, Ralf/Kruppe, Thomas*, Labour Market Efficiency in the European Union, Employment Protection and Fixed Term Contracts, London: Routledge 1998.

137 See *Tomlinson, Daniel*, The UK's Tight Labour Market and Zero Hours Contracts, 21 February 2018, https://www.resolutionfoundation.org/comment/the-uks-tight-labour-market-and-zero-hours-contracts/. Accessed 8 May 2020. See also

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men working in low-paid part-time work wanted more working hours,[138] this would at least have the effect of ensuring security of income for those who wish regular hours of work, while allowing easier calculation of UC for the worker and their family unit. It would also bring more citizens into the SER category, with all the attendant rights which this status brings.

One alternative manner of providing social protection for non-standard workers may be to replace UC with some form of universal basic income (UBI), obviating the need for the complex calculations inherent in UC. This is a solution which has been suggested in several quarters, and essentially would mean that every UK citizen would be paid a certain sum of money, dependent on their personal circumstances, such as family size, disability, and employment status, which could take the form of a lump sum payment.[139] Some jurisdictions have already experimented with a universal basic income, including Finland and Luxembourg,[140] while in the UK the city of Hull applied in early 2020 to be the first region to pilot test such a scheme.[141] However, given the political and financial capital which has been expended on unrolling the UC system, it is unlikely that any government will seek to jettison the project in the near or medium future. Neither can it be proved definite that universal basic income would provide any more efficient protection, since, as with UC, the complexities of human life and life situations will remain, and it is possible that the generalised nature of the payment may not provide sufficient financial cover for certain disabilities or other contingencies:

> […] advocates of UBI either unconsciously or wilfully fail to acknowledge that the current system is designed to provide specific payments for people in specific circumstances (e.g. caring, disability, high housing costs, high childcare costs). If you sweep all of that away, you ei-

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Kamm, Oliver, Zero-Hours Contracts are an Example of More Rules Needed, Not Fewer, The Times, 30 April 2018.

138 *Clarke, Clarke/Bangham, George*, Counting the Hours: Two Decades of Changes in Earnings and Hours Worked, London: Resolution Foundation 2018, https://www.resolutionfoundation.org/app/uploads/2018/01/Counting-the-hours.pdf. Accessed 8 May 2020.

139 See *Russell, Jenni*, Basic Income for All Could End the Benefits Trap, The Times, 10 December 2015.

140 See *Ametepe, Fofo*, The Effectiveness of Luxembourg's Minimum Income, in: International Social Security Review, 65 (2012) 1, pp. 99 ff.

141 See *Halliday, Josh*, Hull Asks to be First UK City to Trial Universal Basic Income, The Guardian, 19 January 2020, https://www.theguardian.com/uk-news/2020/jan/19/hull-universal-basic-income-trial. Accessed 8 May 2020.

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> ther have to level up, giving a massive boost to people without those specific needs (at huge cost), or you create a fall in income for those with them. Neither is remotely acceptable in the real world.[142]

Given the somewhat confused situation in the labour market which non-standard contract workers inhabit, it is entirely conceivable that similar problems would affect them as have arisen under UC. The Luxembourg experience of UBI has not been one of uniform success, with a large percentage of the households eligible for the funds not taking them up, and an even larger percentage of EU migrants to the country do not take up UBI.[143] The abolition of UC would also preclude the possibility of reforms being made to the existing system, with its main flaw being that the administration of UC did not receive adequate funding, which had been cut quite drastically during the austerity programme of the Coalition Government.[144] Other changes to UC have been recommended to assist self-employed gig workers, such as specialist work coach advice, a legislative ban on declaring workers self-employed simply because their contracts offer none of the benefits of employment, and a temporary cessation of operation of the Minimum Income Floor until an independent review has been conducted of how UC can be reconciled to the realities of self-employment.[145]

VII. Conclusion

The notion of social protection for non-standard workers in the labour market places UK governments in a difficult position. On the one hand, they have the duty to provide social protection to all citizens, and especially those who fill lower-paid and often unskilled but very necessary positions in the economy, but on the other there exists the fear that over-regulation could cost jobs, especially among non-standard workers, and the de-

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142 See *Goulden, Chris*, Universal Basic Income – Not the Answer to Poverty, The Joseph Rowntree Foundation, 25 April 2018, https://www.jrf.org.uk/blog/universal-basic-income-not-answer-poverty?gclid=EAIaIQobChMIhqWsua-k6QIVC7TtCh3KrgR3EAAYASAAEgLyl_D_BwE. Accessed 8 May 2020.

143 See *Ametepe, Fofo*, The Effectiveness of Luxembourg's Minimum Income (fn. 140), p. 107.

144 See *Nelson, Fraser*, If Universal Credit becomes Mrs May's Poll Tax, She Only has Herself to Blame, The Telegraph, 20 October 2017.

145 See Citizens Advice. Universal Credit and Modern Employment: Non-Traditional Work (fn. 104), pp. 19-20.

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sire on the part of large employers to keep the market as flexible as possible.[146] Despite its flaws, the WRA 2012 and UC do go at least some way towards providing some social protection to this precarious sector of the labour market, and it does appear that governments are now cognisant that reforms must be made to UC, with £1.7 billion being invested during 2018-19 to increase the work allowance element of the benefit, a decision welcomed by anti-poverty campaigners.[147]

However, it is possible that the entire concept and structure of Universal Credit (UC) was outdated[148] and unfit for purpose even from the moments of its inception, and may not assist the very people in the labour market who were supposed to benefit most from it, the main reason being that UC (as with tax credits) was designed largely with a specific set of employment relationships in mind, mainly the traditional "master" and "servant" relationship.[149] With the proliferation of different forms of work contract in the UK labour market, one might assert that UC is, to some extent, already redundant in terms of both conception and structure. Furthermore, the growth of self-employment currently permits companies to evade making a proportionate contribution to the UK's social insurance system and revenue, and the reality that non-traditional forms of employment almost inevitably involve irregular patterns of weekly working hours, makes the calculation and administration of UC both difficult and expensive. It may be that there are limits to the efficacy of legislation in ensuring that non-standard contract workers and their families are able to sustain themselves and in encouraging citizens to remain in self-employment in the gig economy, which seems destined to continue and expand with the advance of technology. Perhaps the optimum solution to maintaining regular and stable payments of UC to gig workers in particular also lies in technology, with some form of integration of revenue authorities and digital platform software, so that gig workers have taxes automatically deducted from their earnings, relieving them of the burden of calculating this for themselves,

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146 *Aldrick, Philip*, Reform of Gig Economy will Cost Jobs, Claim Business Groups, The Times, 12 July 2017.

147 *Anderson, Harriet*, An Important Step in Tackling In-Work Poverty – JRF Responds to the Budget, 29 October 2018, https://www.jrf.org.uk/press/important-step-tackling-work-poverty-jrf-responds-budget. Accessed 9 May 2020.

148 It will be argued below that Universal Credit in particular was designed primarily with those in full-time employment contracts in mind.

149 As set out in the landmark cases of Yewens v. Noakes 6 QBD 530, and Ready Mixed Concrete Ltd v Secretary of State for Pensions and National Insurance [1968] 2 QB 497.

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and these calculations could be reported to the Department for Work and Pensions.[150] Certainly the WRA 2012 demonstrates the drawbacks inherent in creating legislation designed to provide social protection while focusing on a labour market which is changing at such a rapid pace.

150 Estonia already has integrated their tax system with the digital platforms of transport apps so that drivers pay tax as they earn. See *Silva, Rohan*, The Gig Economy is Here to Stay – Now Give the Workers Rights, London Evening Standard, 16 November 2017.

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