

OXFORD MONOGRAPHS ON LABOUR LAW

General Editors: PAUL DAVIES, KEITH EWING,
MARK FREEDLAND

Regulating Flexible Work

<http://www.pbookshop.com>

OXFORD MONOGRAPHS ON LABOUR LAW

General Editors: Paul Davies, Cassel Professor of Commercial Law in the London School of Economics; Keith Ewing, Professor of Public Law at King's College, London; and Mark Freedland, Fellow of St John's College, and Professor of Employment Law in the University of Oxford.

This series has come to represent a significant contribution to the literature of British, European, and international labour law. The series recognizes the arrival not only of a renewed interest in labour law generally, but also the need for fresh approaches to the study of labour law following a period of momentous change in the UK and Europe. The series is concerned with all aspects of labour law, including traditional subjects of study such as collective labour law and individual employment law, but it also includes works which concentrate on the growing role of human rights and the combating of discrimination in employment, and others which examine the law and economics of the labour market and the impact of social security law and of national and supranational employment policies upon patterns of employment and the employment contract. Two of the authors contributing to the series, Lucy Vickers and Diamond Ashiagbor, have received awards from the Society of Legal Scholars in respect of their books.

Titles already published in this series

Freedom of Speech and Employment
LUCY VICKERS

*International and European
Protection of the Right to Strike*
TONIA NOVITZ

The Law of the Labour Market
SIMON DEAKIN AND FRANK
WILKINSON

The Personal Employment Contract
MARK FREEDLAND

The European Employment Strategy
DIAMOND ASHIAGBOR

Towards a Flexible Labour Market
PAUL DAVIES AND MARK
FREEDLAND

*EU Intervention in Domestic
Labour Law*
PHIL SYRPIS

Welfare to Work
AMIR PAZ-FUCHS

Regulating Flexible Work

DEIRDRE McCANN

<http://www.pbookshop.com>

OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries

Published in the United States
by Oxford University Press Inc., New York

© Deirdre McCann, 2008

The moral rights of the author have been asserted

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Database right Oxford University Press (maker)

First published 2008

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
without the prior permission in writing of Oxford University Press,
or as expressly permitted by law, or under terms agreed with the appropriate
reprographics rights organization. Enquiries concerning reproduction
outside the scope of the above should be sent to the Rights Department,
Oxford University Press, at the address above

You must not circulate this book in any other binding or cover
and you must impose the same condition on any acquirer

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloguing in Publication Data

McCann, Deirdre M.

Regulating flexible work / Deirdre McCann.

p. cm.—(Oxford monographs on labour law)

Includes index.

ISBN-13: 978-0-19-921879-0

1. Hours of labor, Flexible—Law and legislation—Great Britain.
 2. Hours of labor—Law and legislation—Great Britain.
 3. Labor laws and legislation—Great Britain.
 4. Equal pay for equal work—Law and legislation—Great Britain.
 5. Temporary employment—Law and legislation—Great Britain.
- I. Title.

KD3136.M33 2008

344.4101'25724—dc22

2007048887

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India

Printed in Great Britain

on acid-free paper by

Biddles Ltd., King's Lynn, Norfolk

ISBN 978-0-19-921879-0

1 3 5 7 9 10 8 6 4 2

To my parents

<http://www.pbookshop.com>

General Editors' Preface

The aim of our series of labour law monographs has been to publish works which are, on the one hand, of the highest quality of scholarship, and which are on the other hand innovative or experimental, serving to expand the boundaries of the subject or to throw bright new light upon established areas of discussion. The present work creditably maintains that by-now established tradition, and continues the progressive extension of the series from labour law, as previously understood, towards a larger notion of regulation of the labour market. Moreover, although the focus of this work is upon British employment law, the author follows another trajectory of the series to the extent that the British experience is considered as a case-study of one particular approach to, or policy-set for, non-standard employment among a range of international alternatives.

By so designing her project, Deirdre McCann has located her work at the heart of vibrant contemporary debates, political and academic, about the future role of and prospects for labour law, both within Europe and more widely. She brings to those debates a special concern with the way in which the idea and ideology of flexibility, and more especially individual choice, for workers in the formulation of their arrangements for work and their patterns of work, may serve as the justification for conferring upon employing enterprises an enhanced and protected freedom to offer employment in more and more precarious forms. The author is rightly interested in the ways in which this policy and practice of 'flexibility' has a major impact upon the situation, of women in particular, in the labour market.

So we compliment the author upon the work which she has presented for inclusion in our series, and commend it with confidence that readers will regard the work as a significant contribution both to the series and to a discussion which at the moment is taking place under the currently fashionable banner of 'flexicurity'. At once topical and perennial, this is the notion of seeking to combine in socially and economically beneficial ways the apt-to-be-divergent goals of ensuring labour market flexibility while protecting the security of vulnerable workers. This book will serve to inform and enrich these contemporary debates.

Paul Davies, Keith Ewing, and
Mark Freedland

Preface

As deregulatory rhetoric continues to dominate, and even strengthen its hold over, employment policy arenas across the globe, the concerns about its persistence, and tendency to obscure alternative methods of organizing working life, have crystallized in part around the ever more prominent tendency to convert disadvantage into the language of 'choice'. As an element of this discourse, precarious working patterns are lauded as offering workers the forms of 'flexibility' they need, while labour law is cast as no more than an element of the 'business environment'. One of the heartening aspects of the scholarly research on labour law, however, is the international dialogue that has emerged around techniques and approaches to protect workers who have historically been at the margins of labour law's protections. This book is intended to contribute to this discussion, by offering, as a case study for the broader debates, an assessment of the evolution of the regulation of non-standard work in the UK over the last decade. Its aim is to add to the debates on the scope of labour law, the impact of flexibility discourses, and the regulation of non-standard work, by assessing the advances that have been made in the UK. It also endeavours to highlight the particular challenges that arise when efforts to 're-regulate' non-standard forms of work are embedded within a policy context resistant to substantial regulatory reforms, and preoccupied with a vision of flexibility in which precarious working arrangements are recast as the outcome of workers' choices and as aligned with their needs.

This project had its origins in my doctoral research, and I am indebted to my supervisor, Sandra Fredman, whose guidance and encouragement were invaluable, and whose refusal to allow the rhetoric of flexibility to mask the reality of disadvantage is an inspiration. I am indebted also to my DPhil thesis examiners, Mark Freedland and Simon Deakin, for their encouragement and suggestions for the future direction of my work. In Oxford, I benefited from discussing my research with Michelle Gallant, Joe Hermer, Jill Murray, and Melanie Thomas, and was privileged to have had the opportunity to be a friend of Sally Ball. At the International Labour Office, it is my great fortune to be able to discuss my research and collaborate with Sangheon Lee; and I am grateful also for the support and encouragement I have received from François Eyraud. Many thanks are due also to Ariel Golan and his team in the ILO Library.

Completing this book would have been exceptionally difficult had I not had the opportunity to be a guest of the International Institute for Labour Studies, and I am grateful both to Gerry Rodgers for inviting me to visit the Institute

and to William Salter for enabling me to forego my day-to-day work for the period needed to complete this study. I am grateful also for the fellowship and intellectual stimulation provided by my colleagues at the Institute, in particular Christiane Kuptsch, Kostas Popadakis, Ann Posthuma, and Tzehainesh Teklè, and, for making my stay there so smooth, Hilda Addison, Judy Rafferty, Vanna Rougier, and Thuy Ngyuen.

Finally, I am grateful for the support of the editors of the Oxford Monographs on Labour Law series, Paul Davies, Keith Ewing, and especially Mark Freedland for encouraging me to undertake this project; to the anonymous reviewer who provided invaluable suggestions on an earlier draft; and to Gwen Booth, Lucy Stevenson, and Virginia Williams at Oxford University Press for their patience and support.

Deirdre McCann

International Labour Office

Geneva

7 September 2007

<http://www.pbookshop.com>

Contents

<i>Table of Cases</i>	xv
<i>Table of Legislation</i>	xix
<i>List of Abbreviations</i>	xxiii
1. Non-Standard Work, Flexibility, and United Kingdom Labour Law	1
1. Introduction	1
2. The Standard Model in United Kingdom Labour Law	3
2.1 Defining 'Non-Standard' Work	4
2.2 The Emergence and Dominance of the Standard Employment Relationship	8
3. Non-Standard Work as a Form of Flexibility	11
3.1 The Pre-eminence of Labour Market Flexibility	11
3.2 Flexibility and Non-Standard Work in Labour Market Policy	15
3.3 Labour Law and Flexibility in Contemporary UK Policy Discourse	21
4. The Scope and Structure of the Book	26
2. 'The Employee' and 'the Worker': The Fragmented Expansion of UK Labour Law	30
1. Introduction	30
2. Employment Status and Non-Standard Work: The Narrow Gateway to Statutory Rights	31
2.1 Disguised Employment	32
2.2 Semi-Dependent Workers	34
2.3 Casual Workers	37
2.4 Workers in Multilateral Relationships	38
3. Protecting 'the Worker': A Promise Yet to be Fulfilled	41
4. Conclusions: A Retreat from the Protection of Non-Standard Workers	48
3. Ensuring Equality and Availability: The Regulation of Part-Time Work	55
1. Introduction	55
2. Part-Time Work, Gender, and Disadvantage	56
3. Exclusion, Discrimination, and Part-Time Work: Regulation Pre-New Labour	58

3.1	Employment Protection and Discrimination: The Dualist Approach	58
3.2	Part-Time Workers' Disadvantage as a Form of Sex Discrimination	61
3.2.1	The Procedural Complexities of Part-Time Work as 'Women's Work'	63
3.2.2	What is Part-Time Work Worth? The Justification Defence	66
3.3	The Right to Work Part-Time?	69
4.	Part-Time Work, Flexibility, and Labour Law: The Statutory Regimes	75
4.1	Part-Time Work in UK Employment Policy: Compatible Flexibilities?	75
4.2	The Right to Equality in the Part-Time Workers Regulations	78
4.2.1	The Scope of Comparison: A Procedural Retreat	80
4.2.2	Justifying Discrimination: The Gateway to Flexibility?	85
4.3	Temporal Flexibility and the Right to Work Part-Time	87
4.3.1	Transfers to Part-Time Work in the Part-Time Workers Regulations	89
4.3.2	The Right to 'Flexible Working'	90
5.	Conclusions: Substantive Protection, Procedural Constraints, and the Employer Prerogative	93
4.	Permanency and Protection: The Incomplete Integration of Temporary Work into United Kingdom Labour Law	101
1.	Introduction	101
2.	The Heterogeneity of Temporary Work	102
3.	The Extent and Disadvantage of Temporary Work	104
4.	The Traditional Regulatory Approaches	107
4.1	Exclusion: Qualifying Periods, Continuity of Employment, and 'Contracting-Out'	107
4.2	The Protective Dimension Pre-New Labour	114
4.3	Temporary Contracts and Pregnant Workers	115
5.	Contemporary Approaches to Temporary Work	119
5.1	Temporary Work in the Flexibility Agenda	120
5.2	Extending Universal Legislation	122
5.2.1	Qualifying Periods	123
5.2.2	Waivers	127
5.3	The Indefinite Contract and Equal Treatment: The Fixed-Term Employees Regulations	128
5.3.1	An Overarching Limitation: Personal Scope	130
5.3.2	Asserting the Standard Model? The Right to an Indefinite Contract	131
5.3.3	Equality for Temporary Workers: Procedural Restrictions and the 'Overall Package' Approach	135

6. Conclusions: Evolving Policy and Legal Discourses on Temporary Work	138
5. Temporary Agency Work: Capturing the Tripartite Working Relationship	143
1. Introduction	143
2. The Growth and Conditions of Temporary Agency Work	144
3. Employment Status, Allocation of Responsibilities, and Specific Rights: Traditional Regulatory Approaches to Temporary Agency Work	146
3.1 Leaving Limbo? The Employment Status of Temporary Agency Workers	147
3.2 Targeting the Client: Temporary Agency Workers and the Discrimination Regimes	152
3.3 The Specific Rights Approach: A Limited Endeavour	154
4. Temporary Agency Work under New Labour	156
4.1 Labour Market Flexibility and the Regulation of Temporary Agency Work: The Policy Context	156
4.2 'The Worker' Model and Temporary Agency Workers	158
4.3 The Conduct of Employment Agencies and Employment Businesses Regulations 2003	160
4.3.1 'Employment Agencies' and 'Employment Businesses'	161
4.3.2 The Agency/Temporary Worker Agreement	162
4.3.3 Wage Protections	163
4.3.4 Fees	164
4.3.5 Protection from Hazardous Work	164
4.3.6 Freedom of Movement	165
5. Conclusions: Regulating for Flexibility in Temporary Agency Work	168
6. Conclusions. Non-Standard Work, Labour Market Flexibility, and Contemporary Labour Law—An Inchoate Reform	173
1. Choice and Employability: Contemporary Flexibility Discourses and the Regulation of Non-Standard Work	174
2. Interpretive and Procedural Retreats from the Protection of Non-Standard Workers	178
3. A Cumulative Disadvantage: Fragmented Working Patterns and Labour Regulation	179
4. Work/Family Reconciliation and Non-Standard Work	180
<i>Bibliography</i>	183
<i>Index</i>	193

Table of Cases

UNITED KINGDOM

Abbey Life Assurance v Tansell [2000] IRLR 387 (CA)	153–4
Airfix Footwear v Cope [1978] IRLR 3396 (EAT)	37, 111
BBC v Ioannou [1975] QB 781 (CA)	113
BBC v Kelly-Phillips [1998] IRLR 294 (CA)	114
Biggs v Somerset CC [1996] IRLR 203 (CA)	64
Booth v United States of America [1999] IRLR 16 (EAT)	110, 114
Boyd Line Ltd v Pitts [1986] ICR 244 (EAT)	111
BP Chemicals v Gillick [1995] IRLR 128 (EAT)	153
British Airways v Starmar [2005] IRLR 862 (EAT)	74, 92, 97, 99
Brown v McAlpine and Co Ltd, 22 September 2005 (EAT)	73, 94
Bunce v Postworth Ltd t/a Skyblue [2005] IRLR 557 (CA)	148
Byrne Brothers (Formwork) Ltd v Baird and Others [2002] IRLR 96 (EAT)	45, 47
Cable and Wireless Plc v Muscat [2006] IRLR 355 (CA)	152
Cairns v Visteon Ltd [2007] ICR 616 (EAT)	152
Calder v Kitson Vickers 1998 IRLR 318 (CA)	33
Carmichael v National Power plc [1998] ICR 1167 (HL)	37, 112, 140
Caruana v Manchester Airport [1996] IRLR 378 (EAT)	117–8
Cast v Croydon College [1998] IRLR 318 (CA)	70
Cheng Yuen v Royal Hong Kong Golf Club [1998] ICR 131 (PC)	39, 170
Clark v Oxfordshire Health Authority [1998] IRLR 125 (CA)	37, 112
Clarke v Eley (IMI) Kynoch [1983] IRLR 482 (EAT)	63
Clymo v Wandsworth LBC [1989] IRLR 241 (EAT)	70, 72, 74
Construction Industry Training Board v Labour Force Ltd [1970] 3 All ER 220 (CA)	40, 147–8
Cornwall CC v Prater [2006] IRLR 362 (CA)	38, 48, 52, 110
Corton House Ltd v Skipper [1981] ICR 307 (EAT)	60
Dacas v Brook Street Bureau (UK) Ltd [2004] IRLR 358 (CA)	151–2, 169
Davies v Neath Port Talbot County BC [1999] ICR 1132 (EAT)	63
Department for Work and Pensions v Webley [2005] IRLR 288 (CA)	133, 142
Dixon v BBC [1979] QB 546 (CA)	113
Eley v Huntleigh Diagnostics, 1 December 1997 (EAT)	70–1, 74
Esso Petroleum Ltd v Jarvis, 18 January 2002 (EAT)	150
Ferguson v Dawson [1976] 1 WLR 1213 (CA)	33
Flack v Kodak Ltd [1986] IRLR 255 (CA)	110
Foley v Post Office [2002] ICR 1283 (CA)	73
Ford v Warwickshire CC [1983] IRLR 126 (HL)	109
Franks v Reuters [2003] IRLR 423 (CA)	150–1, 169
Fulton v Strathclyde Regional Council [1986] IRLR 315 (CA)	66
Handley v Mono [1979] ICR 147 (EAT)	67–8, 87, 94
Hardys and Hansons Plc v Lax [2005] IRLR 726 (CA)	73–4, 97, 100
Hayward v Cammell Laird [1988] ICR 464 (HL)	138

Hellyer Bros Ltd v McLeod [1987] ICR 526 (CA)	111
Hewlett Packard Ltd v O'Murphy [2002] IRLR 4 (EAT)	150
Home Office v Holmes [1984] ICR 679 (EAT)	69–70
Hygena Ltd v Cook, 23 July 1996 (EAT)	110
James v Greenwich Council [2007] ICR 577 (EAT)	152
James v Redcats (Brands) Ltd [2007] IRLR 296 (EAT)	46, 48, 51–2
Jenkins v Kingsgate [1981] IRLR 388 (EAT)	67–8
Kendal and Others v Caley Fisheries Ltd, 9 February 2005 (EAT)	38
Khan v Checkers Cars Ltd [2006] All ER (D) 149 (Feb)	38
Kidd v DRG [1985] ICR 405 (EAT)	68, 86–7
Kingston upon Hull City Council v Mountain, 17 December 1998 (EAT)	113
Lane v Shire Roofing Co [1995] IRLR 493 (CA)	35
Lloyds Bank Ltd v Secretary of State for Employment [1979] ICR 258 (EAT)	60
London Underground Ltd v Edwards No 2 [1998] IRLR 364 (CA)	66, 69, 72
McMeechan v Secretary of State for Employment [1997] IRLR 353 (CA)	33, 40–1, 148, 169
Massey v Crown Life Insurance [1978] ICR 590 (CA)	33
Mathews and Others v Kent and Medway Towns Fire Authority and Others [2006] ICR 365 (HL)	84–6
Ministry of Defence (Royal Navy) v MacMillan, 22 September 2004 (EAT)	73, 99
Mirror Newspaper Group Ltd v Gunning [1986] ICR 145 (CA)	46, 51
Montgomery v Johnson Underwood Ltd [2001] IRLR 269 (CA)	147–8
Montgomery v Orenstein & Kopple 10 November 1999 (EAT)	148
Motorola Ltd v Davidson [2001] IRLR 4 (EAT)	149–51, 169
Nethermere v Taverna [1984] ICR 612 (CA)	111
Normanton v Southalls [1975] IRLR 74 (EAT)	110
O'Kelly v Trusthouse Forte [1983] IRLR 369 (CA)	37, 40, 111
O'Sullivan v Thompson-Coon (1973) 14 KIR 108 (DC)	148
Patefield v Belfast CC [2000] IRLR 664 (NIC)	153
Peremps v Nixon, 1 October 1993 (EAT)	41
Preston v Wolverhampton Healthcare NHS Trust (No 2) [2001] IRLR 237 (HL)	64
Quinnen v Hovells [1984] IRLR 227 (EAT)	44
R v Associated Ocel [1997] IRLR 123 (HL)	155
R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1994] IRLR 176 (HL)	28, 60, 62, 64–5, 68, 83, 108, 123
R v Secretary of State for Employment, ex parte Seymour-Smith [1994] IRLR 448 (DC); [1995] IRLR 464 (CA); [1997] IRLR 315 (HL); [2000] ICR 244 (HL)	115, 123, 137, 139
Ready Mixed Concrete v Minister of Pensions [1968] 2 QB 497	149–50
Redrow Homes (Yorkshire) Ltd v Wright [2004] IRLR 720 (CA)	46, 53
Secretary of State for Trade and Industry v Rutherford (No 2) [2004] IRLR 892 (CA)	66
Services Agency v Cragg [1997] IRLR 380 (EAT)	113
Sillars v Charrington Fuels Ltd [1988] IRLR 180 (EAT)	110
Snook v AC Electrical Wholesale Plc, 13 December 1996 (IT)	71, 73
Staffordshire Sentinel Newspapers Ltd v Potter [2004] IRLR 752 (EAT)	46
Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471 (EAT)	37
Stimpson v The Dewjoc Partnership 1993 (IT)	71
Tanna v Post Office [1981] ICR 374 (EAT)	46
Webb v EMO Air Cargo [1993] IRLR 27 (HL)	116
Webb v EMO Air Cargo (No 2) [1995] IRLR 645 (HL)	116–17
Whiffen v Milham Ford Girls' School [2001] IRLR 468	115
Wickens v Champion Employment [1984] ICR 365 (EAT)	35, 40, 147–8, 169

Wilson v Rentokil Initial (UK) Ltd, 24 March 1998 (ET)	71, 73
Young & Woods v West [1980] IRLR 201 (CA)	33

EUROPEAN COURT OF JUSTICE

Adeneler and Others v Ellinikos Organismos Galaktos (ELOG) Case

C-212/04 [2006] IRLR 176	129, 132, 134, 140–1
Allonby v Accrington and Rossendale College Case C–256/01 [2004] IRLR 224	52–3, 171
Barber v Guardian Royal Exchange Case C–262/88 [1990] ECR I–1889	63, 138
Bilka-Kaufhaus GmbH v Weber von Hartz Case C–170/84 [1986] IRLR 317	63, 68, 83, 86
Elsner-Lakeberg v Land Nordrhein-Westfalen Case C–285/02 [2004] ECR I–5861	63, 98
Gerster v Freistaat Bayern Case C–1/95 [1997] IRLR 699	63
Habermann-Beltermann v Arbeiterwohlfahrt Case C–421/92 [1994] ECR I–1657	116
Jenkins v Kingsgate (Clothing Productions) Ltd Case 96/80 [1981] ICR 592	62
Jiménez-Melgar v Ayuntamiento de los Barrios Case C–438/99 [2001] IRLR 848	118
Kording v Senator für Finanzen Case C–100/95 [1997] IRLR 710	63
Kowalska v Freie und Hansestadt Hamburg Case C–33/89 [1990] IRLR 447	63
Krüger v Kreiskrankenhaus Ebersberg Case C–281/97 [1999] IRLR 808	63
Kuratorium für Dialyse und Nierentransplantation eV v Lewark Case C–457/93 [1996] IRLR 637	63
Kütz-Bauer v Freie und Hansestadt Hamburg Case C-187/00 [2003] IRLR 368	68–9, 94
Lawrence v Regent Office Care Ltd Case C–320/00 [2002] ECR I–7525	171
Mangold v Helm Case C–144/04 [2005] ECR I–9981	129
Nimz v Freie und Hansestadt Hamburg Case C–184/89 [1991] IRLR 222	63
Preston v Wolverhampton Healthcare NHS Trust Case C–73/98 [2000] IRLR 506	64
R v Secretary of State for Employment, ex parte Seymour-Smith Case C–167/97 [1999] ECR I–623	115
R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematograph and Theatre Union Case C–173/99 [2001] ECR I–4881	125–7, 131, 137
Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG Case 171/88 [1989] IRLR 493	63, 67–8
Stadt Lengerich v Helmig Joined Cases C–399/92, C–409/92, C–425/92, C–34/93, C–50/93 and C–78/93 [1994] ECR I–5727	63, 98
Steinicke v Bundesanstalt für Arbeit Case C–77/02 [2003] IRLR 892	69, 94
Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund I Danmark Case C–109/00 [2001] ECR I–6793	118–19
Webb v EMO Air Cargo Case C–32/93 [1994] ECR I–3567	116
Wippel v Peek and Cloppenburg GmbH & Co KG Case C–313/02 [2005] ECR I–9483	140, 180

Table of Legislation

UNITED KINGDOM	
Statutes	
Contracts of Employment Act	
1963	31, 59
Disability Discrimination Act	
1995	10, 60, 114, 153–4
s 12	154
s 68	44
Employment Act	
2002	75, 90
Employment Agencies Act	
1973	155
s 6(1)	164
s 13(2)	161
(3)	161
Employment Protection Act	
1975	59
Employment Protection (Consolidation) Act 1978	62
s 67(2)	64
Employment Relations Act	
1999	49–50, 127
s 10(6)	160
ss 10–15	159
s 13	43, 159
(1)(a)	47
(2)	160
s 20(4)	89–90
s 23	49
Employment Rights Act	
1996	31, 56, 114–5, 128, 134, 139–40
Part II	45
Part IVA	159
Part VIII	32
Part VIIIA	90
s 1(4)(g)	115
s 29	108
s 43K	159
(1)	159
(b)	46
(2)(a)	160
s 65	108
s 80F	91
(1)(a)	90
(b)	90
(3)	90
(8)(a)(ii)	91
(b)	91, 158
s 80G(1)(b)	91
s 80H(1)	91
s 86(1)	108, 115
(4)	115
s 95(1)(b)	115
s 99	114
s 100	114
s 108(1)	38, 109
s 136(1)(b)	115
s 197	113
s 198	112
s 210(4)	109
s 212(1)	109
(3)(a)	109
(b)	109
(4)	109
s 230	31–2
(2)	151
(3)	43
(b)	47
s 235(2A)	115
(2B)	115
Equal Pay Act 1970	82–3, 95, 136
s 1(2)(c)	82
(6)(c)	83
Health and Safety at Work etc Act	
1974	155
s 3	155
Industrial Relations Act	
1971	31, 113
National Insurance Act	
1946	31
National Minimum Wage Act	
1998	26, 45–9, 159
s 1(2)	43
s 34	159
(2)(b)	160
s 54(3)(b)	47
Race Relations Act 1976	9, 60, 83, 114, 136
s 7	153
s 78	44

Redundancy Payments Act 1965	31	(1)	164
Sex Discrimination Act 1975	9, 56, 60,	(3)	164
62, 65–7, 74, 83, 85, 94–5,		reg 14	162
97, 114, 136, 152–3		(1)	163
s 1(2)(b)	69	(4)	163
(i)	66	(5)	163
(iii)	67	(6)	163
(2)	66	reg 15(a)	163
s 5(3)	65	(c)	163
s 9	153	(d)	163
s 82	44	(e)	163
Sex Disqualification (Removal) Act		(f)	163
1919	56	reg 18	165
Trade Union and Labour Relations		(d)	165
(Consolidation) Act		reg 19	165
1992	31	(b)	165
s 152	114	reg 20(1)	165
s 235	43	reg 22	165
s 295(1)	31	Employment Equality (Age) Regulations	
s 296(1)(b)	47	2006 (SI 2006/	
Trade Union Reform and Employment		1031)	10, 60
Rights Act 1993	22	reg 2(2)	44
Wages Act 1986	22	reg 9	153
Statutory Instruments		Employment Equality (Religion or	
Conduct of Employment Agencies and		Belief) Regulations, 2003	
Employment Businesses		(SI 2003/1660)	10, 60
Regulations 1976		reg 2(3)	44
(SI 1976/715)	155–6, 162–6	reg 8	153
reg 9(1)(b)	166	Employment Equality (Sex Discrimination)	
(5)	164	Regulations 2005	
(6)(a)	162	(SI 2005/2467)	66
(b)	163	Employment Equality (Sexual Orientation)	
(8)	164	Regulations 2003	
(9)	166	(SI 2003/1661)	10, 60
(10)	163	reg 2(3)	44
Conduct of Employment Agencies and		reg 8	153
Employment Businesses		Employment Protection (Part-time	
Regulations 2003		Employees) Regulations	
(SI 2003/3319)	40, 143,	1995 (SI 1995/31)	108
156, 160–72		Fixed-term Employees (Prevention of	
Part IV	165	Less Favourable Treatment)	
reg 5	164	Regulations 2002	
reg 6(1)	166	(SI 2002/2034)	28, 50,
(a)(i)	166	102, 119, 128–39,	
reg 8	162	141–2, 158, 172	
(2)	162	reg 1(2)	130
reg 10	168	reg 2(1)(a)	136
(4)	168	(b)	136
(5)	168	reg 3(1)	135
reg 12	163–4	(2)	135
reg 13	164	(3)(b)	137
		(6)	135

(7)	135	Regulations 2001	
reg 4(1)	137	(SI 2001/2260)	66
reg 8(2)(b)	131	Unfair Dismissal (Variation of Qualifying	
(4)	134	Period) Order 1985	
(5)	132–3	(SI 1985/782)	108
reg 11	115, 128	Working Time Regulations 1998	
reg 19	130, 158	(SI 1998/1833)	45, 123,
Sch 1	132	125–6, 159, 170	
Flexible Working (Eligibility, Complaints,		reg 2	43, 47
and Remedies) Regulations		reg 4	170
2002 (SI 2002/3236)		(1)	96, 112, 175
reg 3(1)(a)	38, 123	reg 10	170
reg 3B	90	reg 12	170
Flexible Working (Eligibility, Complaints,		reg 36	159
and Remedies) (Amendment)		(2)	170
Regulations 2007		Working Time (Amendment)	
(SI 2007/1184)	90	Regulations 2001	
Management of Health and Safety at		(SI 2001/3256)	125
Work Regulations 1999			
(SI 1999/3242)	155, 165		
reg 15(3)	155		
Maternity and Parental Leave etc			
Regulations 1999			
(SI 1999/3312)	123		
reg 2(1)	32, 49		
reg 13(1)	38, 123		
Part-time Workers (Prevention of Less			
Favourable Treatment)			
Regulations 2000			
(SI 2000/1551)	28, 49, 56,		
	62, 75, 78–90, 94–5,		
	98, 119, 130,		
	135–40, 171		
reg 1(2)	43, 47, 50		
reg 2(3)(c)	82		
(d)	82, 84		
(4)	81		
(a)(ii)	82		
(b)	83		
reg 3	79, 89		
reg 4	80, 89		
reg 5(2)(b)	79, 85		
(3)	79		
(4)	98		
Paternity and Adoption Leave			
Regulations 2002			
(SI 2002/2788)	32, 123		
reg 4	32		
reg 4(2)(a)	123		
reg 8(2)(a)	123		
Sex Discrimination (Indirect Discrimination			
and Burden of Proof)			

		GERMANY	
		Act on Part-Time Work and Fixed-Term	
		Contracts	88
		GREECE	
		Presidential Decree No 81/2003	
		Art 5(4)	134
		NETHERLANDS	
		Act on the Adaptation of Working	
		Time	88
		EUROPEAN UNION	
		Treaties	
		Treaty of Amsterdam 1997	
		Art 2	13
		Treaty establishing the European	
		Community 1957	123
		Art 138	79
		Art 139	79
		Art 141	28, 53, 63
		(1)	52
		Treaty on European Union (Treaty of	
		Maastricht) 1992 Protocol	
		and Agreement on Social	
		Policy	78
		Art 3	79
		Art 4	79

Directives

Council Directive (EEC) 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19	28	on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4	26, 49, 79
Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40	28, 118, 123	Council Directive (EC) 97/81 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L14/9	26, 28, 49, 75–6, 78–9, 81, 83, 89, 95, 128–30, 140, 172, 180
Council Directive (EEC) 91/383 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [1991] OJ L206/19	78, 155	Council Directive (EC) 99/70 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/42	28, 79, 81–2, 119, 121–2, 127–9, 131–2, 134–5, 139, 141, 172, 177
Council Directive 92/85 (EEC) on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Art 16(1) of Directive 89/391) [1992] OJ L348/1	118	Preamble	129, 141, 172
Council Directive (EC) 93/104 concerning certain aspects of the organization of working time [1993] OJ L307/18	26, 125–7	Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community, OJ [2002] L 80/29	17
Preamble	126		
Art 7(1)	125		
Council Directive (EC) 96/34 on the Framework Agreement			

INTERNATIONAL LABOUR ORGANIZATION

Employment Relationship Recommendation 2006 (No 198)	42
Part-Time Work Convention 1994 (No 175)	80
Part-Time Work Recommendation 1994 (No 182)	80, 87–8
Private Employment Agencies Convention 1997 (No 181)	160
Private Employment Agencies Recommendation 1997 (No 188)	162, 166

List of Abbreviations

BECTU	Broadcasting, Entertainment, Cinematograph and Theatre Union
CA	Court of Appeal
CEAEBRegs	Conduct of Employment Agencies and Employment Businesses Regulations
CEC	Commission of the European Communities
CEEP	Centre Européen des Entreprises à Participation Publique
DDA	Disability Discrimination Act
DTI	Department of Trade and Industry
EA	Employment Act
EAT	Employment Appeal Tribunal
EC	European Community
ECJ	European Court of Justice
EES	European Employment Strategy
EMU	Economic and Monetary Union
EOC	Equal Opportunities Commission
EPA	Equal Pay Act
EPCA	Employment Protection (Consolidation) Act 1978
ERA	Employment Rights Act
ERelA	Employment Relations Act
ETUC	European Trade Union Confederation
EU	European Union
FTD	Fixed-Term Work Directive
FTERegs	Fixed-Term Employees Regulations
HC	House of Commons
HL	House of Lords
HMSO	Her Majesty's Stationery Office
ILC	International Labour Conference
ILO	International Labour Organization
IRLR	Industrial Relations Law Reports
MHSWRegs	Management of Health and Safety at Work Regulations 1999
NACAB	National Association of Citizens Advice Bureaux
NI	National Insurance
NMWA	National Minimum Wage Act
PC	Privy Council
PTWD	Part-Time Work Directive
PTWRegs	Part-Time Workers Regulations
PWD	Pregnant Workers' Directive
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
RRA	Race Relations Act
SDA	Sex Discrimination Act

TUC	Trades Union Congress
TULRCA	Trade Union and Labour Relations (Consolidation) Act
UNICE	Union des Confédérations de l'Industrie et des Employeurs d'Europe
WERS	Workplace Employee Relations Survey
WTRegs	Working Time Regulations

<http://www.pbookshop.com>

Non-Standard Work, Flexibility, and United Kingdom Labour Law

1. Introduction

The changing nature of working life over recent decades has challenged the relevance and impact of traditional models of labour regulation. As intersecting social and economic trends as diverse as the entry of growing numbers of women into the workforce, increased global economic integration, the waning influence of trade unions, and the influence of neo-liberal discourses on labour market policies coincide to challenge labour law's structures and techniques, scholars have been incited to explore whether the protection labour law once offered, albeit to a limited category of workers, can be revived and extended; and to determine how existing regulatory regimes can be adapted both to serve new ends and to extend to workers they were never intended to protect.¹ To this end, recent labour law literature has examined the various forces that have combined to undermine labour law and suggested a range of responses to them in a diverse body of scholarship that has questioned the conceptual foundations of the field, suggested new regulatory concepts and techniques to achieve both its longstanding regulatory objectives and the novel goals it is being called on to fulfil, and identified the enforcement mechanisms that will ensure that legal prescriptions can have a meaningful influence on working life.

Forming part of this literature are efforts to assess the implications of the quest for 'labour market flexibility' for the role and content of labour law.² Given the

¹ See eg Hugh Collins, Paul Davies, and Roger Rideout, *Legal Regulation of the Employment Relation* (London: Kluwer, 2000); Joanne Conaghan, Richard Michael Fischl, and Karl Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002); Joanne Conaghan and Kerry Rittich (eds.), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford: Oxford University Press, 2005); Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (Melbourne: Centre for Employment and Labour Relations Law, The University of Melbourne, 1995); Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001).

² See eg Simon Deakin and Hannah Reed, 'The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration', ESRC Centre for Business Research, University of Cambridge, Working Paper No. 162, March 2000; Sandra

dominance of the discourse of flexibility in debates on labour market policy across industrialized and developing countries,³ labour lawyers have been driven to question how to balance flexibility with social goals and to configure it in ways protective of workers and responsive to their needs. These analyses have crystallized in part around the question of how to regulate the working patterns of the most 'flexible' of the workers in 'flexible labour markets': the part-time, temporary, and semi-dependent workers who often bear the brunt of employers' quests to extend operating and opening hours, adjust staffing levels, and avoid labour costs. Scholars have examined the labour law treatment of these 'non-standard' or 'atypical' workers, revealing how the law has been shaped to perpetuate their exclusion or consign them to a subordinate status; and as measures specifically tailored to protect certain of these groups have been introduced, these have been examined and evaluated and suggestions made for their improvement.

This book is a contribution to that endeavour. It examines the treatment of non-standard workers under the traditional model of UK labour law, but focuses in particular on their status in this regulatory regime as it has evolved during the last decade to offer certain of these workers enhanced protection. The intent of the book, however, is not to undertake an analysis relevant solely to the UK. Instead, it offers its examination of the regulation of non-standard work as a case study, which contributes to the international debates by analysing a regime in which measures have been introduced to regulate non-standard work, and by indicating the promise and limitations of the regulatory mechanisms deployed. In part, then, the book is a study of a transition to a new model of regulation; a shift from a regime in which legal protection was substantially moulded around the paradigm of the standard worker to one that, at least to some degree, addresses the needs and interests of individuals whose working arrangements do not reflect this model. The goal of this book, in this regard, is to assess the settlement that has been reached by this transition; to evaluate the extent to which non-standard workers are protected, gauge the degree to which the techniques and assumptions of the traditional regulatory model continue to influence their regulation, and identify the factors that are inhibiting a more advanced level of protection.

Among the obstacles to a heightened legal support for non-standard workers, the book's particular concern is the influence on legislation and court decisions of the conception of labour market flexibility that dominates UK employment policy. Its aim is to highlight how this account of flexibility has shaped the regulatory

Fredman, 'Women at Work: The Broken Promise of Flexicurity,' *Industrial Law Journal*, 33 (2004), 299–319.

³ Beyond industrialized countries, see François Eyraud and Daniel Vaughan-Whitehead (eds) *Evolving World of Work in the Enlarged EU: Progress and Vulnerability* (Geneva: International Labour Office and European Commission, 2007); Alan Felstead and Nick Jewson, *Global Trends in Flexible Labour* (Houndsmills and London: Macmillan, 1999); Sangheon Lee and François Eyraud (eds) *Globalization, Flexibilization and Working Conditions in Asia and the Pacific* (Oxford: Chandos, 2008); Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (Basingstoke: Macmillan Press, 1999).

techniques on non-standard work including by indicating how it blocks pathways towards more protective forms of flexibilization. To this end, the book studies the conflict between the twin currents of protection and flexibility that flow through modern labour law and highlights how the tension between them is reflected in the substance and tenor of legislative measures and case decisions. Indeed, it will be argued that the dominant notions of labour market flexibility embedded in recent employment policy documents have merged with a longstanding reluctance on the part of the courts to protect non-standard workers and a broader confusion about how to conceptualize non-standard working arrangements, to generate a tentativeness in the regulation of non-standard work that tempers the protection afforded to these workers.

This chapter sets the scene for this discussion by elaborating the concepts that are central to the remainder of this study, namely 'non-standard work' and 'labour market flexibility'. It first elaborates the book's understanding of non-standard forms of work, by delineating the standard employment relationship and indicating how different forms of non-standard work diverge from this paradigm along one or more axes; and then indicates the primary preoccupation of the book, the four broad categories of workers who are its primary subjects, workers who are not employees, and part-time, temporary, and temporary agency workers. The emergence and significance of the standard employment relationship in UK labour law is then examined, focusing in particular on its embodiment in the statutory measures first introduced in the 1960s. The chapter then analyses in detail the visions of flexibility that have been elaborated in UK employment policy since the election of the 'New Labour' government in 1997, centring on the roles envisioned for non-standard working arrangements in advancing this flexibility.⁴ It then turns to the government's understandings of the role of labour law within this flexible economy, including the hints as to its vision of how non-standard work should be regulated, which are elaborated in subsequent chapters in their discussions of the measures introduced by the government to extend and strengthen labour law's protection of non-standard workers.

2. The Standard Model in United Kingdom Labour Law

This section sets the scene for the remainder of this book by clarifying the concepts of 'standard' and 'non-standard' work that are central to it, including by outlining the four forms of work that are its primary concern. It also highlights an additional concept that shapes the analysis, 'precarious work', which enriches the analysis of non-standard work by grounding it in a concern for the disadvantages with which it is associated and the role of law in both perpetuating and alleviating them. The role of the standard employment relationship in UK

⁴ New Labour has since been re-elected in 2001 and 2005.

labour law is then examined, by tracing its emergence in the postwar period, highlighting its embodiment within the dominant model of labour law during that era, 'collective *laissez-faire*', then tracing the transfer of this model to the earliest statutory labour law measures, outlining its presence in the employment protection legislation, while indicating also the presence of a contrasting, more expansive, model of labour law's coverage offered by anti-discrimination legislation. Finally, the most prominent critique of the dominance of the standard employment relationship is examined, namely that it has tended to marginalize women and thereby undermine gender equality.

2.1 Defining 'Non-Standard' Work

This concept of 'non-standard' work, which frames the analysis in this book, embraces a variety of working arrangements that, although diverse, share a common feature: they all differ, along one or more axes, from the dominant model of employment. Indeed, these forms of work are most often identified and defined by their difference, their categorization as 'non-standard' an indication of their divergence from what has come to be termed the 'standard employment relationship'. The 'standard worker' can therefore be characterized, in a definition that will be relied on throughout this book, as a full-time worker engaged from nine to five, five days a week under a contract of indefinite duration, who is engaged in a bipartite relationship with an employer and works on the employer's premises.⁵ Non-standard working patterns are commonly, and usefully, categorized according to the paths of their divergence from this standard model, and this device can be employed to delineate the four forms of divergence, and their related working patterns, that feature in each of Chapters 2 to 5 of this book.⁶

First, this study is concerned with working arrangements that differ from the standard model in that they are not legally classified as employment relationships, and, as a result, the workers engaged in them are not deemed party to a contract of employment, but instead classified as independent contractors.⁷ In

⁵ See Judy Fudge and Rosemary Owens, 'Precarious Work, Women, and the New Economy: The Challenge to Legal Norms', in Fudge and Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford: Hart, 2006), 3–27; Judy Fudge and Leah Vosko, 'By Whose Standards? Re-regulating the Canadian Labour Market', *Economic and Industrial Democracy*, 22 (2001), 271–310; Patricia Leighton, 'Marginal Workers', in Roy Lewis (ed), *Labour Law in Britain* (Oxford: Basil Blackwell, 1986), 503–25; Ulrich Muckenberger, 'Non-standard Forms of Work and the Role of Changes in Labour and Social Security Legislation', *International Journal of the Sociology of Law*, 17 (1989), 381–402; Leah F Vosko, 'Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity', in Vosko (ed), *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2000) 3–39.

⁶ For such a categorization see Ida Regalia, 'New Forms of Employment and New Problems of Regulation', in Regalia (ed), *Regulating New Forms of Employment: Local Experiments and Social Innovation in Europe* (London and New York: Routledge, 2006), 4–22, at 8.

⁷ Ch 2.

contrast, the second set of work relationships that will be examined diverge from the standard model according to the volume and scheduling of their working hours, embracing jobs that are not carried out on a full-time basis but in one of the various configurations of part-time work, whether worked in regular or fragmented schedules.⁸ Non-standard work, thirdly, embraces working relationships that differ from the standard form in respect of their duration, in that they are not indefinite (or ‘permanent’), encompassing work performed under fixed-term contracts, for example, temporary agency work, and casual working arrangements.⁹ Finally, another set of working patterns contrasts with the standard employment relationship by virtue of its distribution of the obligations and responsibilities of the employer among more than one entity, in bipartite or multilateral relationships such as those that emerge from the ‘leasing’ of workers between firms, or, the concern of this book, in temporary agency work.¹⁰

A range of additional working arrangements can be defined as non-standard and has been incorporated in the available typologies and examined in the literature, including, perhaps most significantly, those that diverge from the spatial dimension of the standard model by involving work outside the premises of the employer, such as home working or ‘teleworking’ arrangements. The four broad categories examined in this book, however—non-employment and part-time, temporary, and temporary agency work—constitute the forms of non-standard work that are most prominent in the academic and policy debates. More significantly, they also reflect the forms of divergence from the standard employment relationship that have engendered their marginalization under UK labour law, and which have been addressed in the measures introduced more recently to extend labour law’s protection to non-standard workers.¹¹

This delineation of the categories of standard and non-standard work is not, however, intended to suggest that a clear-cut binary distinction between these working arrangements is uniformly possible or desirable, or to suggest that the range of non-standard working patterns constitutes a homogeneous group. As has already been hinted at, there is potential for overlap among these different working arrangements, which is identifiable in working patterns that exhibit the features of two or more of its forms. Indeed, a variety of configurations are possible, emerging, for example, in fixed-term jobs that are performed on a part-time basis, temporary agency work arranged on a casual basis, or seasonal work performed by semi-dependent workers. As will become clear in the following chapters, these kinds of intersections among non-standard work-forms can exacerbate the disadvantage encountered by the workers who engage in them,

⁸ Ch 3.

⁹ Ch 4.

¹⁰ Ch 5.

¹¹ Home workers, for example, have not been directly excluded from the coverage of UK labour law, due to a spatial divergence from the standard model, but instead indirectly, as a result of the intermittent and semi-dependent nature of their working arrangements. See further Ch 2.

including their treatment under labour law, and render the identification of the appropriate ways to regulate them highly complex.

The positing of a strict dichotomy between ‘standard’ and ‘non-standard’ has also been argued to be insufficiently rigorous, to the extent that an overarching concept of the ‘non-standard’ serves to homogenize distinct working patterns that are the product of different dynamics and subject to differing forms and intensities of disadvantage¹² and obscure the differential impact of these changes as they occur in different economic and occupational contexts.¹³ Moreover, exhibiting an attentiveness to the continuities, rather than differences, between diverse working relationships, commentators have warned that the positing of a firm binary divide between standard and non-standard work should not engender complacency about the contemporary nature of standard jobs by obscuring the substantial deterioration of their terms and conditions in recent decades, in a process of convergence with non-standard forms of employment.¹⁴ Finally, it has been suggested that the burgeoning of non-standard work in recent decades renders the ‘standard’/‘non-standard’ nomenclature inapposite,¹⁵ to the extent that it can be understood to indicate the quantitatively marginal status of these working arrangements.¹⁶

Despite these concerns about the conceptual and terminological limitations inherent in the notions of ‘standard’ and ‘non-standard’ work, these terms will be adopted throughout this book. In part, they are used simply because they are familiar from the academic and policy literature, and in particular because they have accrued a substantial degree of acceptance in the legal debates. More substantially, however, these designations can be considered particularly apt in the labour law context, since, as is explored in the following chapters, the standard employment relationship has been firmly embedded in labour law and continues to represent the dominant model of legally protected work, even as other working arrangements have proliferated.¹⁷ The notions of ‘standard’ and ‘non-standard’, then, serve to highlight the prominence of the standard employment relationship in the legal arena by gesturing to the presence of a binary distinction in labour

¹² Fudge and Owens, ‘Precarious Work’, n 5 above, at 11; Vosko, ‘Precarious Employment’, n 5 above, at 11.

¹³ Davies and Freedland, for example, highlight the distinction between a senior managerial employee who becomes a part-time consultant to his or her firm and a manual employee who works on a casual basis. Paul Davies and Mark Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (Oxford: Oxford University Press, 2007), at 18.

¹⁴ Fudge and Owens, ‘Precarious Work’, n 5 above, at 11. See also Vosko, ‘Precarious Employment’, n 5 above, at 11.

¹⁵ Other terms are available. Regalia, for example, cites ‘precarious’, ‘contingent’, ‘atypical’, ‘new’, ‘flexible’, and ‘non-traditional’. Regalia, n 6 above, at 4.

¹⁶ Reinhold Fahlbeck has made this argument against the use of the term ‘atypical’. ‘Flexibility: Potentials and Challenges for Labor Law’, *Comparative Labor Law and Policy Journal*, 19 (1998), 515–45, at 526. See also Vosko’s concern that terms such as ‘non-standard’ can ‘neutralize social problems’ and her preference for ‘precarious employment’. Vosko, n 5 above, at 13–14.

¹⁷ See also Regalia, n 6 above, at 7.

law between a privileged configuration of the working relationship and the range of its other forms. Yet, an attentiveness to the specificities of each of the primary forms of non-standard work and their sub-categories, and the potential for working relationships to impinge on various of their forms, remains necessary, and is effected in this project in an analysis of the legal concepts, reasoning, and techniques through which each of the forms of work under consideration have been marginalized by labour law, and an exploration of their differential treatment under the recent mechanisms that have been designed to enhance their protection.

The other primary concept that informs the analysis in this book is that of 'precarious work'. Elaborated by Rodgers to embrace four facets of the terms, conditions, and regulation of working relationships, the notion of precarious work encompasses the degree of certainty of continuing employment; the level of control available to the worker;¹⁸ the degree of regulatory protection available;¹⁹ and the income provided by the job. Precarious jobs, then, in this analysis, are short-term or at a high risk of being lost, entail limited control over working conditions, wages, or pace of work, are subject to low levels of regulatory protection, and are low-income.²⁰ This conception of precarious work has been adopted in recent years in analyses that have highlighted that precariousness is, to a substantial extent, associated with non-standard jobs; and that have explored the intersection of these jobs with the other facets of precariousness identified by Rodgers, and other vulnerabilities, such as poor health and safety outcomes and obstacles to the reconciliation of work and family life.²¹ This book is a contribution to this project, in that it is devoted to one element of the conception of precarious work, the level of legal protection, in this case of four of the primary forms of non-standard work. The broader notion of precariousness, however, is the starting point of this analysis, in that the underlying concern of the book, and the rationale for its examination of the legal status of non-standard workers, is the disadvantage that can be associated with the treatment of these workers under the law. The analysis in this book, then, is not confined to identifying the persistent marginalization of non-standard workers by labour law, but also aims to assess the extent to which this legal treatment can shape or exacerbate other forms of vulnerability and to examine the promise of the legal measures tailored toward addressing them.

¹⁸ The element of control is elaborated by Rodgers to embrace control, individual or collective, over working conditions, wages, and pace of work. Gerry Rodgers, 'Precarious Work in Western Europe: The State of the Debate,' in Gerry Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (Geneva: International Institute for Labour Studies, 1989), 1–16, at 3.

¹⁹ Rodgers includes in this regard a range of forms of protection including laws, collective agreements, customary practices, and social protection. *Ibid.*, at 3.

²⁰ See eg *ibid.*, at 3.

²¹ See, in particular, Fudge and Owens, n 5 above; Vosko, n 5 above.

2.2 The Emergence and Dominance of the Standard Employment Relationship

In recent decades, the standard model of employment has been exposed, across a range of literatures, as having a central influence in building dominant conceptions of the nature and configuration of work, including by being envisaged as the model for employment and social policies and as the beneficiary of the range of job-related benefits and entitlements, whether statutory or provided by the employer. The most significant facet of its influence, for present purposes, is in the field of labour law. Over the last 20 years, the literature has revealed labour law regimes across industrialized countries to have been shaped around this model, through different processes and mechanisms, yet with the strikingly similar outcome that the standard model has been the primary subject of labour law, in the sense that individuals whose working arrangements are best aligned with this paradigm have been the beneficiaries of the most expansive regulatory protection.²² This positing of the standard model as the subject of this legal field, however, has rendered these regulatory regimes unable to capture the range of alternative configurations in which workers engage in paid labour, and, as a consequence, effectively to protect non-standard workers.²³

As has been well documented, this archetypal vision of employment emerged in parallel with the Fordist model of production: in the wake of World War II, and, as a consequence, reflects the working arrangements and workers of the heavy manufacturing industries of that period.²⁴ In the UK, the standard employment relationship emerged in parallel with, and was embedded in, the model of labour law that represented, until relatively recently, the dominant form and ideology of labour market regulation, namely 'collective *laissez-faire*'.²⁵ The product of a suspicion of substantive legislated rights, or at least a wariness of the history of judicial intervention in employment relations, this regulatory model assumed collective bargaining to be the primary form of labour market regulation and, as a consequence, embodied statutory collective rights, to support freedom of association and collective bargaining, while eschewing substantive individual rights. This abstention from statutory regulation was not comprehensive; legislation was deemed justifiable for sectors in which, and workers for whom, collective bargaining was not prevalent, including in the mandating of a minimum wage

²² See eg Cynthia J Cranford and Leah F Vosko, 'Conceptualizing Precarious Employment: Mapping Wage Work across Social Location and Occupational Context', in Vosko, *Precarious Employment*, n 5 above, 43–66; Fudge and Owens, 'Precarious Work', n 5 above; Rodgers, n 18 above.

²³ For early analyses of the UK, see Leighton, n 5 above; Jill Rubery, 'Precarious Forms of Work in the United Kingdom', in Rodgers and Rodgers, n 18 above, at 49–73.

²⁴ See eg Fudge and Owens, 'Precarious Work', n 5 above, at 11; Regalia, n 6 above, at 4.

²⁵ On the concept of 'collective *laissez-faire*' as elaborated by Otto Kahn-Freund, see Paul Davies and Mark Freedland, *Kahn Freund's Labour and the Law* (London: Stevens and Sons, 1983), at 18.

for selected low-wage sectors.²⁶ By relying primarily on collective agreements to regulate terms and conditions of employment, however, collective *laissez-faire*, while sustaining the autonomy of collective bargaining, simultaneously marginalized non-unionized workers, and thereby the vast majority of non-standard workers, not only as a regulatory model, but also as a normative conception of labour law.

As universal legislated rights began to be introduced into UK labour law in the 1960s, these measures also operated to marginalize non-standard workers as the standard model was transplanted to the statutory arena. Details of the modes in which this legislation has excluded various of the categories of non-standard workers are provided in subsequent chapters of this book, but are nonetheless worth rehearsing at this point, if only to highlight the persistence of the standard model in UK labour law as it began to incorporate statutory employment rights. This earliest set of legislated rights, to notice periods for dismissal, protection from unfair dismissal, and redundancy compensation, reinforced the standard employment relationship by excluding certain non-standard working arrangements, in different ways, both explicit and implicit. Part-time workers, for example, were excluded through the mandating of hours thresholds for entitlement to the rights contained in the legislation;²⁷ while the range of forms of temporary work fell foul of the requirement that a minimum period of continuous service be completed to trigger the coverage of the legislation.²⁸ Other groups of non-standard workers, namely those who encounter difficulties in being identified as parties to a contract of employment, were also excluded from the model of personal scope contained in the employment protection regime, since this legislation confined entitlement to the rights it contained to employees.²⁹ The outcome of this set of limitations, then, was that individuals whose working relationships did not match the standard model were either excluded from the coverage of these laws or subject to lower levels of protection.

On the introduction of anti-discrimination legislation into the terrain of UK labour law in the 1970s, however, a contrasting model of the scope of labour law was offered, to accompany that embodied in the employment protection statutes. The Sex Discrimination Act 1975 (SDA) and Race Relations Act 1976 (RRA) extended their coverage to the groups of workers marginalized under the employment protection regime. This legislation extended beyond workers party to a contract of employment, and made no distinction between their coverage of part-time and temporary workers and their 'standard' counterparts; a model

²⁶ Sandra Fredman, 'Precarious Norms for Precarious Workers', in Fudge and Owens, *Precarious Work*, n 5 above, 176–200, at 182.

²⁷ See further Ch 3, Sect 3.1.

²⁸ See further Ch 4, Sect 4.1. See also Leighton, n 5 above.

²⁹ See further Ch 2, Sect 2.

that has been reflected in subsequent anti-discrimination measures.³⁰ From this point, then, UK labour law has been offered twin models for its coverage, and also embodied a tension between limited and expansive coverage that persists today in its interface with non-standard forms of work. This tension between these twin models of coverage, one shaped to embody the standard employment relationship in legislative form, the other to reach beyond it to groups of workers whose working relationships diverge along one or more axes from this paradigm, continues to fracture labour law. Indeed, this binary divide has been of some significance over the period in which the regulation of non-standard work has been reformed by the New Labour government, since this programme of reform has, in part, had recourse to the anti-discrimination legislation as a model for bringing non-standard workers within the embrace of the law.

Central to the literature that examines the standard model's failure to capture the range of alternative configurations in which workers engage in paid labour is an exploration of its implications for gender equality, in work that highlights the legacy of the standard employment relationship as a model tailored to protect the male workers dominant in the heavy manufacturing era in which it emerged, and therefore crafted to suit their working arrangements and lifestyles.³¹ This work has exposed the standard model to have articulated and sustained the male breadwinner/female caregiver model, by envisaging men to engage in paid labour, and women to exit the labour force on marriage or childbirth to take primary responsibility for unpaid caring and domestic labour and to engage in paid work only in non-standard forms, to supplement the 'male wage'. As a consequence, women have been particularly disadvantaged by the centrality of the model of the archetypal worker, including in the labour law arena. Moreover, the gendered impact of the standard model has been exacerbated by its persistent influence over recent decades in which growing numbers of women have entered the labour force, forming a central element of the broader failure of labour law to respond to transitions in the nature and structure of employment relationships and the needs of contemporary workers. As has been observed in the literature, in the period in which the standard employment relationship was born, legal rights grounded on this model coalesced in the form of employment that was overwhelmingly dominant, and therefore aligned with the working lives of a substantial number of workers.³² The influence of this model, however, has lingered beyond this era

³⁰ Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660); Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661); and Employment Equality (Age) Regulations 2006 (SI 2006/1031).

³¹ See eg Rosemary Crompton, 'Non-standard Employment, Social Exclusion, and the Household: Evidence from Britain', in Jens Lind and Iver Hornemann Moller, *Inclusion and Exclusion: Unemployment and Non-standard Employment in Europe* (Aldershot: Ashgate, 1999), 131; Sandra Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce', *Industrial Law Journal*, 256 (1997), 337–52, at 33; Fudge and Owens, 'Precarious Work', n 5 above, at 4, 11.

³² On the transitory nature of the dominance of the non-standard worker, see Regalia, n 6 above, at 7.

and, as this book highlights with respect to the UK, has had a particularly harsh impact on women. This point is returned to throughout the book and considered in most detail in the discussion of part-time work in Chapter 3.

3. Non-Standard Work as a Form of Flexibility

In conjunction with the persistent influence of the account of non-standard working patterns as marginal, reflected in and perpetuated by labour law, a contrasting current that has shaped the regulation of these forms of work is the quest for labour market flexibility that has dominated the employment policies of industrialized countries since the 1980s.³³ Indeed, there is a striking discrepancy in the depiction of non-standard working arrangements in the literature that explores their tendency towards precariousness and in the employment policy documents that valorize them as beneficial for employers, workers, and the economy. As a consequence, this book is concerned with working relationships that have both been governed by labour law as insignificant deviants from the paradigm of the standard employment relationship and hailed in the employment policy arena as 'flexible' forms of work to be nurtured and promoted.

A primary strand of the analysis in this study is an examination of the role and value ascribed to the various forms of non-standard work in the flexibility discourse that is being elaborated in UK employment policy and of how this account of flexibility envisions the treatment of these workers under the labour law regime. To do this, the book traces the influence of the flexibility narrative on the relevant legislation and court and tribunal decisions, and in particular on the initiatives taken in recent years to extend the protection of labour law to non-standard workers. To ground this endeavour, this section examines the policy discourse from which the contemporary approach to non-standard work has evolved, and in which the recent measures to reform the regulation of these working patterns are embedded, to identify the value ascribed to labour market flexibility, the processes and adjustments it is assumed to entail, and, in particular, the faith invested in non-standard working patterns. Its aim is to illuminate the ambitions that are held for these working arrangements and the reigning notions of how they should be regulated.

3.1 The Pre-eminence of Labour Market Flexibility

Britain needs a flexible and efficient labour market in which enterprise can flourish, companies can grow, and wealth can be created.³⁴

³³ See Standing, n 3 above.

³⁴ Department of Trade and Industry (DTI), White Paper, *Fairness at Work* (Cm 3968) (London: HMSO, 1998), at para 2.10.

The promotion of labour market flexibility as a pathway to economic prosperity is a hallmark of the labour market policy of the New Labour government. It was elaborated early in its tenure in the flagship labour law policy document, the 1998 White Paper, *Fairness at Work*, which outlines the government's vision for labour law and was the starting point for a number of the legislative measures introduced during its first term, including to establish a new statutory procedure for trade union recognition, extend the period of statutory maternity leave, and halve the two year qualifying period for the right to be protected against unfair dismissal.³⁵ *Fairness at Work* is also among the policy documents that have elaborated the role envisioned by the Labour government for flexibility, both its significance as an aspiration for the UK labour market, and, less precisely, as will be discussed below, its nature and implications for labour law.

Fairness at Work embeds labour market flexibility in a broader vision of the UK economy in which the government's primary goal is to enhance and spread prosperity and the primary mode of realizing this goal to build and maintain a competitive economy.³⁶ Adopting the language of the 'high road', the paper rejects a model of competition grounded in low-skill, low-wage jobs in favour of a 'high-quality, high performance, high skills, high productivity, high value' economy.³⁷ It then identifies the three 'pillars of the government's strategy for competitiveness: creating strong markets in which competition can foster innovation and spread 'best business practices'; encouraging 'modern companies', defined as those that develop their workforces, 'work with all their partners in constructive business relationships', and 'are open to new ideas'; and building 'an enterprising nation,' as a source of innovation and in which individuals and firms are able to take risks.³⁸

The role for flexibility embedded in this vision of the economy emerges most prominently in the government's elucidation of its two primary objectives for the labour market, of efficiency and fairness:

We want to see efficiency because we want people to work well enough and hard enough to generate prosperity for the country as a whole. And we want to see fairness because people at work deserve to be treated decently—and they perform better when they are.³⁹

These twin goals are correlated with the two 'keys' to securing them: 'employability', which is defined as ensuring that workers are 'well prepared, trained and supported' on entering the labour market and throughout their working

³⁵ The White Paper is characterized as 'a statement of the Government's principles' on labour law. DTI, *Fairness at Work*, *ibid*, at 1.11

³⁶ *Ibid*, at para 1.1.

³⁷ *Ibid*, at para 1.3. See also *Analytical Report* (London: HMSO, 1998), at para 1.3.

³⁸ *Fairness at Work*, n 34 above, at para 1.3.

³⁹ *Ibid*, at para 2.12.

lives; and 'flexibility', through which firms are able to adapt quickly to changing demand, technology, and competition.⁴⁰

In valorizing labour market flexibility, the Labour government has adhered to the now conventional policy assumption that it is the key to averting unemployment and stimulating job creation; flexibility helps generate competitive businesses, which, it is assumed, ensure employment growth.⁴¹ The government's stated aim in this regard is full employment, a goal that was set out in the 2001 Green Paper, *Towards Full Employment in a Modern Society*.⁴² This parallels a shift within the EU-level policy discourse towards the same objective, which culminated at the Lisbon European Council of March 2000 in a pronouncement that full employment is a goal of the Union,⁴³ replacing the prior aspiration to a 'high level' of employment reflected in Article 2 of the Treaty of Amsterdam.⁴⁴ In the UK, given the comparatively low levels of unemployment in recent years, the policy documents highlight the need to end long-term unemployment and to integrate the economically inactive into the labour market, and display a particular concern for the concentration of unemployment among certain regions, age groups, and minority ethnic communities.⁴⁵

New Labour's employment policies, then, exhibit a continuity with those of the Conservative administrations that governed the UK during the 1980s and 1990s, at least in the centrality of their call for enhanced labour market flexibility. The assumption that flexibility, of some orientation, will be a key feature of the UK labour market has not been dislodged, and its advantages are expressed

⁴⁰ Ibid, at para 2.13.

⁴¹ *Analytical Report*, n 37 above, at para 1.3.

⁴² Department for Education and Employment Green Paper, *Towards Full Employment in a Modern Society* (Cm 5084) (London: HMSO, 2001).

⁴³ This goal is expressed as targets, of overall employment of 70 per cent and a more than 60 per cent employment rate for women by 2010. Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, Bull EU-3/2000, 7–17, para 30. The 2005–10 Social Agenda retains the goal of full employment. Commission of the European Communities, *Communication from the Commission on the Social Agenda*, COM(2005) 33 final (Brussels: Commission of the European Communities, 2005).

⁴⁴ See Catherine Barnard, *EC Employment Law*, 3rd edn (Oxford: Oxford University Press, 2006), at 26; Diamond Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford: Oxford University Press, 2005), at 115–20, 139. Ashiagbor argues that the Lisbon Council offered 'a rather modest version of full employment' compared to the post-war concept (at 167).

⁴⁵ See DTI, *Full and Fulfilling Employment* (London: HMSO, 2002), at 6 and 37. The paper notes the low employment rates of lone parents, mainly lone mothers; disabled people; ethnic minority groups, particularly people of Pakistani/Bangladeshi origin and especially women; the over 50s; people with no formal qualifications; and some local areas, in particular parts of London, Wales, and Northern Ireland (at 39). On the concentration of unemployment on selected individuals, households, and socio-economic groups and in geographical areas and New Labour's policy responses, see Richard Dickens, Paul Gregg, and Jonathan Wadsworth, 'New Labour and the Labour Market', *Oxford Review of Economic Policy*, 16 (2000), 95–113. Freedland and Davies have pointed out that the unemployment rate of around 5 per cent over most of the period since 2000 'would have been regarded as representing no more than moderate success in any period up until the middle of the 1970s'. *Towards a Flexible Labour Market*, n 13 above, at 234–5.

with some force as numerous and far-reaching. As discussed in the following sections, however, the government's conceptions of the forms that flexibility should take and its implications for labour market regulation, including for labour rights, differ from the starkly neo-liberal approach of its Conservative predecessors. Moreover, there are also prominent strands of the policy rhetoric that distinguish New Labour's policy documents from those of the Conservative governments, in particular the vision of the objectives to which labour market flexibility can be harnessed.

One prominent trend, for example, has been for calls for flexibility to be embedded in the discourse of the 'knowledge economy', mirroring statements on the need for economies to be grounded on high levels of education, skills, and innovation that have been a hallmark of employment policies across industrialized countries over the last decade. At the EU level, for example, this theme has been most visible in the unveiling at the Lisbon Summit of a new 'strategic goal' for the Union to be, by 2010, 'the most competitive and dynamic knowledge-based economy in the world', and thereby to regain the conditions for full employment.⁴⁶ In the UK, the Labour government has also promoted the notion of the knowledge economy with some vigour as the path to competitiveness and employment, most visibly in its 1998 White Paper, *Our Competitive Future: Building the Knowledge Driven Economy*.⁴⁷ Labour market flexibility remains paramount within this discourse, and its suggested implications for both firms and workers generally mirror those long familiar from the flexibility debates, of ensuring a swift response to change. In this context, the emphasis is frequently on the need to adapt to technological advances, and the primary suggestions are that businesses should be sufficiently flexible to respond quickly to technological developments, including by recruiting highly skilled workers, and that individuals should equip themselves with the kind of skills needed to secure employment in the knowledge economy.⁴⁸

The other feature of the Labour government's employment policy documents that distinguishes them from those of the Conservatives, which is particularly significant in teasing out the role ascribed to non-standard forms of work, is the prominence of supply-side rationales for labour market flexibility.⁴⁹ In this regard, most attention is devoted to the need for flexibility on the part of parents, which emerges in discussions of 'work-family balance' or 'work-life balance',⁵⁰ and embraces flexibility in working hours, including time-off for family emergencies,

⁴⁶ Presidency Conclusions, n 43 above, at paras 5–6.

⁴⁷ DTI, White Paper, *Our Competitive Future: Building the Knowledge Driven Economy* (Cm 4176) (London: HMSO, 1998).

⁴⁸ DTI, *Fairness at Work*, n 34 above, at para 2.10; DTI, *Analytical Report*, n 37 above, at para 4.34.

⁴⁹ On the demand- and supply-side rationale for labour market flexibility, see Deakin and Reed, n 2 above, at 4–6.

⁵⁰ DTI, *Full and Fulfilling Employment*, n 45 above, at 41.

and working from home.⁵¹ This supply-side account of flexibility also, however, envisages a broader role for non-standard forms of work, here repackaged as 'flexible' working arrangements, in integrating underrepresented groups into the labour force, not only women, but also two other groups of workers who are suggested not to want, or to be unable to take up, full-time permanent jobs, namely older workers and students.⁵² This supply-side account of flexibility is not, however, it is worth noting, presented as solely in the interests of workers, but often tied, implicitly or explicitly, to instrumental goals. Thus, the objective of reconciling work and family life is configured as ensuring parents work more productively ('[h]elping employees to combine work and family life satisfactorily is good not only for parents and children but also for businesses'⁵³), and suggested to advance competitiveness by offering businesses a larger pool of available workers, especially the highly skilled.⁵⁴

3.2 Flexibility and Non-Standard Work in Labour Market Policy

In line with the observation that 'flexibility' is an elusive term that can be attached to a diverse range of features in a given labour market, a review of the New Labour government's employment policy documents leaves a stronger impression of the government's conviction that the UK labour market should be more flexible, and of the benefits expected to flow from this transition, than of the forms of work organization, contractual arrangements, and regulatory techniques that flexibility is understood to embrace.⁵⁵ Despite the deference shown to labour market flexibility and the faith invested in it as one of the pathways to economic success, the policy documents tend not to embody any expansive enunciation of its dimensions.⁵⁶ Regardless of the elasticity of the term, however, pinning down with more precision the meanings and implications of flexibility in specific policy contexts is a useful endeavour, not only to engender a degree of clarity about what it is understood to entail but also, as is reflected in the approach adopted in this

⁵¹ DTI, *Fairness at Work*, n 34 above, at para 5.3. Flexibility in working time is stated to be part of a broader set of initiatives, including the National Childcare Strategy and the Working Families Tax Credit (at para 5.4).

⁵² DTI, *Full and Fulfilling Employment*, n 45 above, at 7, 41, 44.

⁵³ DTI, *Fairness at Work*, n 34 above, at para 5.2.

⁵⁴ *Ibid.*, at para 5.1.

⁵⁵ On the elusive nature of labour market flexibility, see Deakin and Reed, n 2 above, at 4; Francesca Bettio and Samuel Rosenberg, 'Labour Markets and Flexibility in the 1990s: The Europe-USA Opposition Revisited', *International Review of Applied Economics*, 13 (1999), 269–79, at 269; Bernard Casey, Ewart Keep, and Ken Mayhew, 'Flexibility, Quality, and Competitiveness', *National Institute Economic Review* 168 (1999), 70, at 70; Peter Wagner, 'The Exit from Organised Modernity: "Flexibility" in Social Thought and in Historical Perspective', in Bo Stråth (ed), *After Full Employment: European Discourses on Work and Flexibility* (Brussels: PIE—Peter Lang, 2000), 35–63.

⁵⁶ An exception is the Treasury study, *EMU and Labour Market Flexibility*, which offers a typology of various forms of flexibility. HM Treasury (London: HMSO, 2003), Chapter 2.

book, to assess how it influences the regulatory regimes that shape the legal protection of the workers involved.

At the risk, then, of ascribing to the UK employment policy literature a more coherent vision of labour market flexibility than it can reasonably support, a more probing analysis of these documents offers a degree of detail on the forms of flexibility that are being advocated and their overlap with the non-standard working arrangements outlined in the previous section, including the four forms that are addressed in this book. This examination is undertaken by tying the dimensions of labour market flexibility that appear in the policy documents to certain of the forms identified in the typologies of flexibility offered by the research literature, an endeavour that contributes to the analysis in the remainder of the book by underpinning its attempt to assess the extent to which the discourses of flexibility that dominate the policy literature have influenced the regulation of non-standard work, whether in the crafting of legislative measures of a domestic origin, the transposition of EU-level instruments, or the deliberations of the courts.

At the level of the firm, a number of strategies for the organization of work and the terms on which labour is hired have been promoted under the rubric of flexibility in recent years, which, drawing on the forms of flexibility identified in the research literature most relevant to non-standard work, can be classified as advancing flexibility in its functional, temporal, or numerical forms.⁵⁷ The notion of functional flexibility, as reflected in firms in which workers possess and deploy a broad range of skills that enable them to adapt to the introduction of new technologies, for example, to undertake a variety of different tasks, or be redeployed between different jobs⁵⁸ is most often identified in the literature as emanating from the EU. Most prominent in these discussions is the European Commission's 1997 Green Paper, *Partnership for a New Organisation of Work*,⁵⁹ which promoted a transition from fixed systems of production to what it characterizes as 'the flexible firm', a model of the modern enterprise as 'high trust and high skill' staffed by workers equipped with interchangeable skills.⁶⁰ This approach has more recently been pursued under the 'adaptability' theme of the European Employment Strategy (EES), including in the 2005–2008 policy guidelines in the call for the 'promotion and dissemination of innovative and adaptable forms of work organisation, with a view to improving quality and productivity at work'.⁶¹

⁵⁷ Most typologies also include financial flexibility, on which see Casey *et al*, n 55 above, at 71.

⁵⁸ Deakin and Reed, n 2 above, at 4; Arne L Kalleberg, 'Organizing Flexibility: The Flexible Firm in a New Century', *British Journal of Industrial Relations*, 39 (2001), 479–504, at 481.

⁵⁹ Commission of the European Communities (CEC), Green Paper: *Partnership for a New Organisation of Work* COM(97) 128 final (Brussels: Commission of the European Communities, 1997).

⁶⁰ CEC, *Partnership for a New Organisation of Work*, *ibid*, Introduction.

⁶¹ CEC, Employment Guidelines 2005–2008, Guideline No 32, OJ [2005] L205/21.

Calls for enhanced functional flexibility are, however, also found in the domestic policy literature, including the 2003 HM Treasury study *EMU and Labour Market Flexibility*, which singles it out as part of the most developed available typology of the forms of flexibility favoured by the New Labour government.⁶² This document advances a conception of functional flexibility, however, that notably diverges from the definitions commonly found in the academic literature and EU employment policy. From the starting point that '[s]killed workers can adapt faster and more effectively to technological change, making the economy more flexible and more productive over the longer term',⁶³ *EMU and Labour Market Flexibility*, while depicting functional flexibility as 'the ability of the labour force to acquire and apply different skills',⁶⁴ views it as emerging in the shifting between jobs in the external labour market, rather than within the firm; its aspiration is that workers 'have the basic skills to compete for a wide and changing range of jobs'.⁶⁵ This conception of functional flexibility is strongly related to the notion of 'employability' as it has emerged within UK employment policy, which is returned to below, in that it shifts the *locus* of security towards the capacity of individual workers to move smoothly between jobs, rather than the more expansive approach that has been present within EU employment policy, which has coupled a desire for employability with a conception of security that can also be centred in the individual firm.⁶⁶

In contrast to the Treasury study, the 2002 Department of Trade and Industry discussion paper, *High Performance Workplaces*, addresses work organization in ways that reflect the concept of functional flexibility in its more familiar form, by offering a vision of firms characterized by 'high levels of adaptability, flexibility, and involvement by both employees and employers'.⁶⁷ Its elaboration of the components of this brand of functional flexibility is aligned with the paper's objective, which was to launch the debate on the transposition of the EC Information and Consultation Directive⁶⁸ into UK law, and therefore most prominently features calls for firms to improve their methods of communication

⁶² This study identifies the characteristics of flexible labour markets as wage flexibility, geographic labour mobility, employment flexibility ('demonstrated by a high incidence of part-time working and the adoption of flexible working practices'), and functional flexibility. HM Treasury, *EMU and Labour Market Flexibility*, n 56 above, Chapter 2.

⁶³ *Ibid.*, at para 2.102.

⁶⁴ *Ibid.*, at para 2.103.

⁶⁵ *Ibid.*

⁶⁶ CEC, *Partnership for a New Organisation of Work*, for example, suggested the 'key issue' is to strike the right balance between flexibility and security, and that '[w]orkers need above all to be reassured that after the changes are made they will still have a job and that this job will last for a reasonable time'. CEC, n 59 above, para 31. Although see CEC, Green Paper, *Modernising Labour Law to Meet the Challenges of the 21st Century* COM(2006) 708 final (Brussels: CEC, 2006).

⁶⁷ DTI, *High Performance Workplaces: The Role of Employee Involvement in a Modern Economy. A Discussion Paper* (London: HMSO, 2002), at 1.5.

⁶⁸ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ [2002] L80/29.

and consultation.⁶⁹ The paper also, however, alludes to functional flexibility as fuelled by workers who possess a broad range of skills, here in the image of a 'trade-off' between intra-firm security and functional flexibility, in a reference to 'modern, high performance workplaces' as including those in which agreements have been reached for employment security in exchange for 'flexibility' from individuals on how they will be deployed within the firm.⁷⁰

These gestures towards functional flexibility are relevant to the debates on the protection of non-standard workers, in part because the available evidence suggests that substantial numbers of these workers do not have access to the training that would ensure the skills needed to work within an internally flexible firm or, in the Treasury's version of functional flexibility, successfully compete for available jobs. The functional flexibility strand of the flexibility discourses is also of particular relevance to one of the forms of non-standard work, namely semi-dependent work,⁷¹ since the vision of the organization of work embodied in the policy documents tends to point to workers who have a high degree of autonomy and control over their work and the way it is performed, a kind of working relationship that has proven ill-suited to the dominant legal conceptions of the employment relationship, as is discussed in detail in Chapter 2.⁷²

The notions of flexibility deployed in UK employment policy are of a more direct relevance to non-standard working arrangements to the extent that the policy documents promote 'temporal' and 'numerical' forms of flexibility. Temporal flexibility, usually defined to embody techniques that permit a divergence from the temporal dimension of the standard employment relationship, the nine-to-five, Monday-to-Friday workweek, embraces both traditional techniques, such as overtime or shift work, and more recent ones, including annualized hours and compressed workweeks, but is relevant to this book primarily when it takes the form of part-time work. In contrast, 'numerical' flexibility is defined to embrace strategies that allow firms easily to adjust their staffing levels, through liberal hiring and firing policies, for example, the subcontracting of work, or, in the primary concern of this book, hiring workers on a temporary basis, whether directly or through an employment agency.⁷³ Both the temporal and numerical dimensions of flexibility, including in the form of non-standard working arrangements, are promoted in the policy literature. They are conflated, for example, in *EMU and Labour Market Flexibility* under the rubric of 'employment flexibility', which is initially defined as 'the ability, or willingness, of employees to change

⁶⁹ DTI, *High Performance Workplaces*, n 67 above, at para 2.1. On functional flexibility as entailing participation in decision-making, see Kalleberg, n 58 above, at 481.

⁷⁰ DTI, *High Performance Workplaces*, *ibid.*

⁷¹ For a definition of this form of work, see Ch 2, Sect 2.2.

⁷² *Ibid.*

⁷³ Part-time work has been classified as either a form of 'numerical' or 'temporal' flexibility. Compare, for example, Casey *et al.*, n 55 above, at 71 and Jonathan Michie and Maura Sheehan, 'Labour Market Deregulation, "Flexibility" and Innovation' *Cambridge Journal of Economics*, 27 (2003), 123–43, at 126.

employment quickly,⁷⁴ but discussed as reflected in part-time and temporary work as well as non-standard working time arrangements such as shift work, night work, and weekend work, the voluntary termination of employment, and the evidence of substantial variations in the length of weekly working hours in the UK.⁷⁵ It is also with regard to temporal and, to a lesser extent, numerical forms of flexibility that the supply-side dimension of flexibility mentioned earlier emerges. This mainly takes the form of calls for flexibility in working time, although references can also be found to temporary agency work,⁷⁶ and, in particular, part-time work, which, previously regarded as a peripheral form of employment, now takes centre-stage as a prized form of flexibility of value to the workforce as a whole and parents in particular.⁷⁷

It is worth noting that these notions of flexibility have emerged within a discourse in which the extent of non-standard working arrangements, rather than raising concerns about the quality of work or worker protection, is adopted instead as an indicator of the health of the labour market. *EMU and Labour Market Flexibility*, for example, favourably assesses the degree of flexibility in the UK labour market as reflected in high levels of part-time and temporary work;⁷⁸ and both *High Performance Workplaces*⁷⁹ and the document designated as the policy statement for New Labour's third Parliament, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers*,⁸⁰ celebrate the extent of 'diverse and flexible' working arrangements, highlighting part-time and temporary agency work. Moreover, coupled with, and related to, this theme of the value of diversity, is a notion of worker-choice that, as will become clear in subsequent chapters, permeates the policy and legal discourses on non-standard work, and in which the availability of non-standard work is depicted as responding to the needs of workers. In part, this discourse is present in, and sustained by, a reliance on data on workers' preferences, which, although notoriously difficult to interpret, are adopted as the primary indicator of the desirability of non-standard work.⁸¹ As a consequence, the voluntary nature of non-standard work appears to

⁷⁴ HM Treasury, *EMU and Labour Market Flexibility*, n 56 above, at para 2.85.

⁷⁵ *Ibid*, at paras 2.85–2.101.

⁷⁶ It is suggested in *Full and Fulfilling Employment*, for example, that temporary agency work benefits 'individuals who do not want to enter into long-term employment commitments'. Department of Trade and Industry, n 45 above, at 9.

⁷⁷ See further Ch 3.

⁷⁸ The study also refers to shift and evening work, job turnover in the form of voluntary terminations, and diversity in the duration of weekly working hours. HM Treasury, *EMU and Labour Market Flexibility*, n. 56 above, at paras 2.85–2.101.

⁷⁹ DTI, *High Performance Workplaces*, n 67 above, at para 1.3.

⁸⁰ DTI, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers* (London: HMSO, 2006), at 5.

⁸¹ *EMU and Labour Market Flexibility*, for example, highlights the low rates of involuntary part-time and temporary employment (HM Treasury, n 56 above, para 2.96). For a critique of notions of worker choice in statistical data see Colette Fagan, 'Time, Money and the Gender Order: Work Orientations and Working Time Preferences in Britain', *Gender, Work and Organization*, 8 (2001), 239–66.

preclude a consideration of the quality of these jobs, including the level of legal protection they attract, and their long-term implications for workers' lives, of the kind that is inspired by the notion of precariousness outlined in Section 2.1.

Another aspect of the policy context in which the dominant notions of labour market flexibility are embedded, of significance to its identification with non-standard working arrangements, is the government's overarching objective of promoting 'employability'. This notion has dominated the government's conceptualization of unemployment, both its causes and the viable responses to it, including through the grounding of its set of 'New Deals' for the unemployed in 'active' labour market approaches that are aimed at enhancing the 'employability' of the unemployed, in this context taken to imply, in the words of Peck and Theodore, a 'collection of work characteristics, including attitudes towards work, expectations regarding employment and wages, and behaviours... that are increasingly seen as determinants of employment chances'.⁸² Aside from its centrality to the government's policies on unemployment, however, the notion of employability is of broader import, to the extent that it has come also to be viewed as the pathway to security in working life. In this guise, employability connotes both flexibility and security: 'flexibility', since, as discussed above, it is defined, in one of its forms, as the capacity to change jobs easily; and security, since this is envisaged to emerge from improved educational standards and workplace training, which, in turn, are suggested to ensure that workers can easily change jobs, and thereby realize a form of security across their working lives. This policy approach is captured, for example, in a 2006 Treasury paper published jointly with the Swedish Finance Ministry, which identifies as the appropriate policy response to the globalized economy, 'protecting an individual's employability, not specific jobs or declining sectors'.⁸³

The latter elaboration of the notion of 'employability', to connote security, has implications for the regulation of non-standard work; more specifically, it has the potential to colour policies on, and the regulation of, temporary forms of work. Under a model in which security is no longer anchored in a long-term job, but instead lies in the ability of workers readily to shift between different jobs across the course of their lives, temporary jobs are not as problematic as they are in a policy context that understands the rupturing of an employment relationship to be of greater significance to the worker concerned. For within a labour market policy discourse in which long-term attachment to the same firm or job is not highly valued, temporary work becomes not an aberration, but instead could even approach the optimum configuration of working life. As a result, the focus on employability could detract from a concern for the quality of temporary jobs

⁸² Jamie Peck and Nikolas Theodore, 'Beyond "Employability"', *Cambridge Journal of Economics*, 24 (2000), 729–749, at 731.

⁸³ This is characterized as a 'social bridges' approach. HM Treasury, *National Reform Programme 2006* (London: HMSO, 2006), at 39, citing Swedish Ministry of Finance and HM Treasury, *Social Bridges: Meeting the Challenges of Globalisation* (London: HMSO, 2006).

to the extent that it displaces any consideration of their temporary nature as in itself presenting problems for the workers who engage in them, a point that is returned to in Chapter 4.⁸⁴

3.3 Labour Law and Flexibility in Contemporary UK Policy Discourse

To enrich the classifications of flexibility that are focused on the firm level, an analysis centred at the level of the system of regulation can be extended to the contemporary labour market policy discourse in the UK in order to elucidate its visions of the relationship between the microeconomic aspirations captured by the conventional classifications of flexibility and labour market regulation, including the primary concern of this book, the field of labour law.⁸⁵ The objective of this study, as noted earlier, is to examine dominant understandings of the role and value of non-standard work, and the notions of flexibility and the role of labour law that emerge from policy discourses, legislative measures, and court decisions. In particular, the objective is to examine the set of measures tailored towards protecting non-standard workers, to highlight their advances and limitations, while attending to the implications of their situation within an overarching discourse of the need for labour market flexibility. This section offers a backdrop to this project by situating the regulation of non-standard work in the UK within the broader discourses on labour market regulation that appear, at least to some degree, to be informing it.

The account of labour market regulation as undermining labour market flexibility has proven durable across industrialized economies since its emergence in the 1980s and prominence in the debates instigated by the *OECD Jobs Study* in the 1990s. This account, of legal regulation inciting ‘rigidities’ in the labour market while ‘flexibility’ is associated with ‘unregulated’ markets,⁸⁶ persists in the dominance of neo-liberal discourses in policy arenas across the globe. The contemporary form of these accounts of labour law has become more defined in recent years, particularly in the international policy arena, and situates legal protections within a discourse in which the needs of business are the paramount concern. Under this model, labour laws are assessed solely as elements of the ‘business environment’, and designated as antagonistic to it, a judgement that is emphasized in the various available indices in which countries are ranked according to their levels of labour market flexibility, or deregulation, including the most influential, the World Bank’s *Doing Business* index.⁸⁷

⁸⁴ Ch 4, Sect 6.

⁸⁵ On conceptions of flexibility at the level of the regulatory system, see Deakin and Reed, n 2 above, at 4 and 6–21.

⁸⁶ *Ibid.*, at 7.

⁸⁷ See World Bank, *Doing Business 2007* (Washington: World Bank, 2006). For a critique of the methodology of the index with respect to working time regulation, see Sangheon Lee and Deirdre

It is well known that the detrimental impact of labour regulation on employment was an article of faith of the UK's Conservative governments of the 1980s and 1990s, and underpinned a reorientation of the dominant conception of labour law in the policy arena, from embodying a protective function to being an instrument deployed to advance economic objectives.⁸⁸ Echoing the tenets of orthodox economic theory, and in line with the analysis advanced in the *OECD Jobs Study*,⁸⁹ the government viewed state intervention in the labour market as distorting supply and demand, thereby restricting employment creation and being among the primary causes of unemployment. In line with this ideology, the Conservative governments adopted regulatory strategies intended to heighten the autonomy of the employer at the firm or company level, within the EU by opposing proposals for labour law measures, including those designed to protect 'atypical' workers, and in the domestic sphere by dismantling collective rights and foreclosing the elaboration of additional individual statutory entitlements and restricting the scope of the existing protections.

Given the flimsy framework of protections available at the time, the Conservatives' deregulatory agenda took a strikingly passive form with regard to individual statutory rights, its reform of trade union laws being more active, and embracing the repeal of union recognition and extension mechanisms and undermining the closed shop. Within the sphere of individual protections, the impact of the government's efforts on non-standard workers was in part indirect, most obviously in the abolition of the Wages Councils, which set minimum wage rates in certain sectors and covered substantial numbers of non-standard workers, a significant proportion of them women.⁹⁰ The most direct attack on statutory rights was with respect to employment protection rights, which, within this broader deregulatory account of labour market flexibility, were cast as rigidities, or 'barriers to business', that must be curbed to stimulate growth.⁹¹ In this regard, the Conservatives' deregulatory agenda again disproportionately

McCann, 'Measuring Labour Market Institutions? Conceptual and Methodological Questions on "Working-Hour Rigidity"' in Janine Berg and David Kucera (eds), *Labour Institutions in the Developing World: Cultivating Justice through Labour Law and Policies* (Geneva and London: ILO and Palgrave Macmillan, 2008).

⁸⁸ See Davies and Freedland, *Labour Legislation and Public Policy: A Contemporary History* (Oxford: Clarendon Press, 1993); Linda Dickens and Mark Hall, 'The State: Labour Law and Industrial Relations', in Paul Edwards (ed), *Industrial Relations: Theory and Practice in Britain* (Oxford: Blackwell, 1995), 255–303. As an example of the policy literature of this era, see Department of Trade and Industry, *Burdens on Business: Report of a Scrutiny of Administrative and Legislative Requirements* (London: HMSO, 1986).

⁸⁹ Organisation for Economic Co-operation and Development, *The OECD Jobs Study: Evidence and Explanations* (Paris: OECD, 1994).

⁹⁰ The process of dismantling the Wages Councils began with the Wages Act 1986 and was completed by the Trade Union Reform and Employment Rights Act 1993. See further Davies and Freedland, n 88 above, at 541–5.

⁹¹ DTI, *Burdens on Business*, n 88 above, at 13. See also *Employment: The Challenge for the Nation* (Cmnd 9474) (London: HMSO, 1985); Dickens and Hall point out that the contemporary research 'failed to find employment protection legislation prevented job creation or inhibited recruitment' (n 88 above, at 272).

impacted on non-standard workers. Indeed, a significant element of its efforts to effect and sustain a deregulated economy was that it fashioned as a policy principle the notion that non-standard workers are not entitled to the same levels of protection as workers in standard relationships. In line with this analysis, within the employment protection regime the burden of flexibility was shifted onto these segments of the workforce by assigning non-standard workers to lower levels of protection, through both actively removing employment protection rights, in the case of temporary workers,⁹² and failing to extend the coverage of these protections to the burgeoning numbers of part-time workers.⁹³

Among the New Labour policy documents that address the role of labour law, some adopt a strikingly orthodox neo-liberal analysis reminiscent of the policy rhetoric of the Conservative administrations, in particular when stressing the role envisaged for labour market flexibility in realizing full employment. In *Full and Fulfilling Employment*, this is reflected in an analysis of the influence of labour standards on employment that is in thrall to the economic orthodoxy, in that it assumes a trade-off between protection and employment and suggests that recessions and swings in the economic cycle are exacerbated where businesses cannot cut wage and staffing levels 'quickly and flexibly' in response to changes in market conditions ('it is no good avoiding redundancies in the short term if the economic consequence is higher unemployment in the longer term').⁹⁴ This paper also elaborates a dichotomy between two clearly delineated constituencies, designated as labour market 'insiders' and 'outsiders', an image again familiar from orthodox economic theory and hence the *OECD Jobs Study* and the work of the IMF and the World Bank.⁹⁵ Within this school of thought, labour rights are deemed the product of 'rent-seeking' by these insiders, usually defined to embrace unionized or relatively well-paid workers, and emerging in *Full and Fulfilling Employment* in the suggestion that regulations, of an unspecified nature, that strengthen the position of labour market insiders, again undefined, generate a pool of long-term unemployed who are difficult to integrate into the labour market.⁹⁶

In contrast to this deregulatory rhetoric, however, *Fairness at Work* offers the image of a balance or integration of social and economic objectives for the labour market, encapsulated in the mantra of 'flexibility and fairness':

Efficiency and fairness are wholly compatible. It is perfectly possible to have a modern, flexible and efficient labour market which is both a vital engine for economic growth and business output and a means for people to find well-paid and satisfying jobs.⁹⁷

⁹² See Ch 4, Sect 4.1.

⁹³ See Ch 3, Sect 3.1.

⁹⁴ DTI, *Full and Fulfilling Employment*, n 45 above, at 8.

⁹⁵ See eg World Bank, n 87 above.

⁹⁶ DTI, *Full and Fulfilling Employment*, n 45 above, at 8. These points are caveated by the, rather imprecise, assurance that '[t]o make these points is not to put efficiency before the primacy of human values' (at 8–9).

⁹⁷ DTI, *Fairness at Work*, n 34 above, at para 2.12.

The White Paper does not suggest that ‘fairness’ will be advanced solely through legal regulation; as mentioned earlier, the ‘keys’ to securing efficiency and fairness are instead identified as employability and flexibility.⁹⁸ Indeed, the paper suggests, with its approbation, that ‘for most employers and employees the law is not the determining factor in their relationships’, exposing an assumption that labour standards are relevant primarily when conflict arises, and that recourse to them is in contrast to the majority of workplace agreements, which are suggested to be ‘voluntary, constructive and reached without conflict’.⁹⁹ The role of law, within this fairness and efficiency model, is to establish minimum standards.¹⁰⁰

This latter account of the role of labour law has been identified by Davies and Freedland, in the most significant analysis of labour market regulation under New Labour, as the dominant one, and that reflected in the substantive legislative measures these governments have introduced. They illuminate the approach of the New Labour administration as furthering the shift in the policy discourse on the role of labour regulation that was initiated by the Conservative governments, from one that centres on the objective of redressing inequality of bargaining power to one in which labour market regulation is tailored towards promoting full employment and the inclusion of the ‘inactive’ within the paid labour force.¹⁰¹ Davies and Freedland point out, however, that the New Labour governments have fashioned this approach as less simplistically neo-liberal, by coupling it with an attentiveness to the objectives of social and economic inclusion.¹⁰² Thus, while continuing to assert that regulatory measures should promote economic efficiency, these governments have departed from the policy approach of the administrations that preceded them, the clear-cut equation of efficiency with deregulation, to craft:

...a much more nuanced approach...involving a more sophisticated set of economic arguments in which the positive value of economic and social inclusion and the positive potential of the elevation of ‘market-friendly’ labour standards is recognised rather than denied.¹⁰³

Within this broader account of labour regulation, a number of elements of the government’s vision as it was set out in *Fairness at Work* in particular are pertinent to the concerns of this book, and returned to in subsequent chapters to examine their influence on the regulation of non-standard work. A particularly significant theme for this study, for example, is the government’s preference for what it terms ‘light regulation’, a concept that emerged in the Prime Minister’s foreword in the shape of an assurance that, even after the adoption of the legislative

⁹⁸ Ibid, at para 2.13.

⁹⁹ Ibid, at para 2.14.

¹⁰⁰ Ibid., at para 2.14.

¹⁰¹ Davies and Freedland, *Toward a Flexible Labour Market*, n 13 above, at 229.

¹⁰² Ibid, at 241.

¹⁰³ Ibid, at 247.

measures proposed in the paper, the UK would have ‘the most lightly regulated labour market of any leading economy in the world’.¹⁰⁴ This notion of light regulation appears in a number of different guises in the policy discourse. In certain of its appearances, it borders on the Conservative government’s deregulatory approach, and is even at one point fashioned in the same language, in the admonition that the legislation proposed in the White Paper should not involve unnecessary ‘burdens on business’.¹⁰⁵ Light regulation also emerges as a corollary of the notion of employability, in which education and skills rather than ‘overburdensome regulation’ are the ‘best means of equipping business and people for a modern economy’.¹⁰⁶ In other contexts, however, the restrained role for legal standards appears in a form more akin to ‘Third Way’ or ‘reflexive’ conceptions of labour law identified in the academic literature, as a consciously crafted regulatory mode, in which the law establishes only basic minimum standards as a ground on which voluntary initiatives can be constructed.¹⁰⁷ In this regard, *Fairness at Work* envisages a ‘new culture’ of ‘voluntary understanding and co-operation’, and a role for law in structuring it:

Against such a background the law is there to give shape and support to these new understandings and as a last resort to help resolve differences and disputes if they should arise.¹⁰⁸

With respect specifically to non-standard work, the primary policy documents have tended not to address it in detail, although they do offer two sets of clues to its regulation. First, from the outset, the government rejected any notion that it might restrict the availability of non-standard contracts. *EMU and Labour Market Flexibility*, for example, as mentioned earlier, celebrates the availability of part-time and temporary work, and warns that if regulations were to ‘constrain the choices of employers and employees’ to work in these patterns, they could reduce the variety of available working arrangements and thereby threaten to increase unemployment.¹⁰⁹ The second indication of the rationale foreseen for the regulation of non-standard work is that the supply-side dimension of flexibility outlined earlier has been conceptualized by the government as embracing a significant new role for labour law, of promoting employee-oriented forms of flexibility, especially for parents.¹¹⁰ Most prominently, *Fairness at Work* expressed as among its ambitions realizing ‘a new relationship between work and family life’,¹¹¹ in which legislation, in line with the overarching conception of its role,

¹⁰⁴ DTI, *Fairness at Work*, n 34 above, Foreword.

¹⁰⁵ *Ibid.*, at para 1.13.

¹⁰⁶ *Ibid.*, Foreword, para 1.

¹⁰⁷ See eg Hugh Collins, ‘Is There a Third Way in Labour Law?’ in Conaghan *et al.*, n 1 above, 449–69.

¹⁰⁸ DTI, *Fairness at Work*, n 34 above, Foreword.

¹⁰⁹ HM Treasury, *EMU and Labour Market Flexibility*, n 56 above, at para 2.86.

¹¹⁰ See further Ch 3.

¹¹¹ DTI, *Fairness at Work*, n 34 above, Foreword.

would underpin a proliferation in voluntary initiatives to this end.¹¹² It mentioned as advancing this goal the National Minimum Wage Act, the implementation of the Working Time and Parental Leave Directives, and extension of maternity leave, but also welcomed the Part-Time Work Directive, heralding a central role for part-time work in harmonizing work and family life that is examined in detail in Chapter 3. Given this rather limited enunciation of the government's vision for the regulation of non-standard work in the primary policy documents, however, the approach in this book is to focus also on the documentation associated with each of the regulatory reforms pursued by the government, and also on the regulatory measures in which these changes are embedded, an approach that is pursued in the subsequent chapters of this book.

4. The Scope and Structure of the Book

This book pursues the themes outlined above by analysing the evolution in the regulation of non-standard work under UK labour law, focusing in particular on the period since the election of the first New Labour government in 1997, and on the regulatory measures introduced by this and subsequent governments to extend labour law's coverage of non-standard workers and fashion a role for the law in alleviating other dimensions of their precariousness. The book devotes a chapter to each of the four categories of non-standard work that are its subject: workers who are not legally categorized as employees, part-time workers, temporary workers, and temporary agency workers. In each chapter, the form of work under consideration is defined and its various configurations identified, both to stress the heterogeneity of each of these overarching categories and to aid the identification of significant distinctions in the legal treatment of the various forms of work subsumed under these broad classifications. The incidence of each of the forms of non-standard work in the UK labour market is indicated, where possible, and the available research reviewed that illuminates the working experience of non-standard workers, including by indicating the various forms of disadvantage that they encounter.

Each chapter then analyses the policy literature, to unearth its conceptions of the form of non-standard work under consideration, drawing out the dominant accounts of the role envisaged for these forms of work in the context of the overarching quest for labour market flexibility, and the appropriate modes for their regulation, including, in particular, the degree of protection to which the workers involved are suggested to be entitled. In order to discern a sense of the evolution in the treatment of each category by labour law, the contours of their regulation prior to 1997 are examined and continuities with, and divergences from, the contemporary regulation are highlighted. Subsequent developments are then examined,

¹¹² Ibid, at para 5.5.

through a detailed analysis of the measures introduced by the government to address elements of these workers' disadvantage, and, in the case of part-time work, to make the non-standard arrangement available to a broader constituency, in an analysis that considers in detail the content of the relevant legislative measures and their interpretation by courts and tribunals. The objective, in this regard, is to assess the nature and potential of the current regulatory settlement and to identify the elements of the contemporary regulatory models, and their interpretation, that tend to undermine the protection of non-standard workers.

Chapter 2 is centred on a range of categories of workers who are not captured by the dominant legal conceptualization of the employment relationship. It therefore focuses on the notion of the employment relationship that is reflected in the standard model, to highlight in particular its assumption of a relationship in which a significant level of control is exercised by the employer and which is bilateral in form. The chapter traces the embodiment of this model in a number of the most significant statutory protections enacted in UK labour law since the 1960s, through the tying of their protections to the contract of employment, and therefore to the conventional understandings of the employment relationship developed by the courts. It then outlines the ways in which this model of the employment relationship has limited labour law's protection by excluding many economically dependent workers, singling out a number of categories of workers who tend to be excluded, namely semi-dependent workers, casual workers, and workers in multilateral relationships. It then examines the reforms introduced by the New Labour government with the objective of extending the scope of labour law by grounding certain statutory measures in the model of 'the worker', a more expansive model of personal scope than that of 'the employee'. The chapter highlights, however, that court and tribunal decisions that have set the parameters of this model have, in some instances, limited its promise, which is argued to result from both an assumption that underpins their analysis, that non-standard workers exercise a significant degree of choice over their working arrangements, and a related preoccupation with the formal terms of these workers' contracts, rather than the reality of their working relationships. The chapter also traces the retreat from the government's apparent initial intention to extend 'the worker' model to a substantial array of existing and subsequent legislation, which culminated in a reversion to the use of the 'employee' model in later measures.

Chapter 3 is devoted to the form of non-standard work that has been associated with fundamental changes in UK labour law, namely part-time work, a form of non-standard work which has engendered a reconsideration of the purpose of labour law with respect in particular to its roles in advancing gender equality and reconciling work and family life. The chapter addresses, first, the role of the sex discrimination regime with respect to both improving the terms and conditions of part-time workers and expanding the opportunities to work on a part-time basis, through the application of an indirect discrimination analysis to the plight of women who work on a part-time basis, or would prefer

to. Such claims have been pursued in the UK courts and tribunals and before the European Court of Justice, and gave rise to the House of Lord's decision in *R v Secretary of State for Employment, ex p Equal Opportunities Commission*,¹¹³ which held the exclusion of certain part-time workers from the coverage of the employment protection legislation to be unlawful under EC law. The chapter then examines the twin statutory measures more recently introduced to directly regulate part-time work: the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which were introduced to implement the EC Part-time Work Directive and are tailored towards ensuring improved working conditions for part-time workers by permitting them to compare their terms and conditions with their full-time colleagues; and the 'flexible working' regime, which is an avenue, accompanying the anti-discrimination legislation, through which workers can request to work on a part-time basis. It is argued that both these measures are constrained by their procedural facets, which limit the ability of workers to claim the rights they embody.

Temporary workers, the subject of Chapter 4, have also been excluded from the coverage of the employment protection legislation and embraced by the anti-discrimination regime, while an accompanying theme of their regulation has been a degree of confusion about how to conceptualize and regulate working relationships in which successive fixed-term contracts are used to engage a worker in what is, in effect, an open-ended job. The chapter explores the marginalization of temporary workers under the employment protection regime, and examines how it has been ameliorated, to some degree, by the reforms of the Labour Government. Temporary workers have also become entitled to a right to equal treatment with 'standard' workers in this case those engaged under indefinite term contracts, by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which also set limits on the renewal of fixed-term contracts. This measure, like the regulations on part-time work, stemmed from the government's obligation to implement the relevant EC instrument, the Fixed-Term Work Directive, while also marking an expansion of the equal treatment approach to non-standard work in UK labour law. In this chapter in particular, the heterogeneity of non-standard working arrangements is highlighted, and the treatment of fragmented forms of temporary work, and casual work in particular, is examined in some detail to indicate the extent of their disadvantage, which, it is argued, is structured in part by labour law's inability fully to embrace fragmented working arrangements.

¹¹³ [1994] IRLR 176 (HL). The redundancy payments provisions were held to be in breach of Article 119 of the Treaty of Rome (now amended Article 141 of the EC Treaty) and Council Directive (EEC) 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19, and the unfair dismissal provisions in breach of Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39.

The final category of non-standard work examined in this book is temporary agency work. This trilateral working arrangement is explored in Chapter 5, which documents the long and continuing struggle for temporary agency workers to be recognized as employees, and therefore entitled to the coverage of significant elements of UK labour law, and also to determine which, if either, of the employment agency and the end-user firm, will be considered the employer. As this chapter indicates, the most basic entrance to many of the protections of UK labour law, being recognized as an employee during individual stints of work, remains an insecure entitlement for temporary agency workers. Moreover, this regulatory arena is particularly revealing of the New Labour government's stance on the treatment of non-standard work, in that it has been under no supranational obligation, in the shape of a requirement to implement an EU-level measure on temporary agency work. As will be argued in Chapter 5, this reliance on domestic political will has revealed the government to have adopted a deregulatory stance, since it has refrained from introducing a right to equal treatment at the domestic level while opposing proposals to this end at the EU level. This chapter suggests this reluctance to be related to the centrality in the labour market policy discourse of the need to encourage the private recruitment industry. The chapter also examines the two reforms that have been introduced to regulate temporary agency work: the inclusion in certain statutory provisions of personal scope measures that clarify the coverage of temporary agency workers and allocate responsibilities between agency and end-user; and the amendments to the measures that regulate employment agencies, which have, to some degree, enhanced the protection of this group of non-standard workers.

The book concludes, in Chapter 6, by endeavouring to assess the extent to which non-standard workers have been embraced by UK labour law. Noting that their integration has gained momentum across the period in office of the New Labour government, it assesses this regulatory evolution as significant. The chapter cautions, however, against understanding the various 're-regulatory' measures introduced as a comprehensive programme that has significantly reoriented labour law's treatment of non-standard work, pointing, for example, to the impetus of EC law in introducing rights to equal treatment for part-time and temporary workers, and the absence of any similar measures with respect to temporary agency work. The chapter also highlights the differences that can be observed in the regulation of each of the forms of non-standard work examined in the book—the varying pace and extent of their reform—and highlights the inconsistencies and limitations of the approaches adopted, suggesting a number of themes that underlie the inchoate nature of these reforms.