OPEN ACCESS
ISSN 2280-4056

E-Journal of International and Comparative LABOUR STUDIES

Volume 6, No. 3, September-October 2017

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E-Journal of International and Comparative **LABOUR STUDIES**

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Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

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The Victorian Inquiry into Labour Hire and Insecure Work: Addressing Worker Exploitation in Complex Business Structures

Anthony Forsyth [1]

Abstract Purpose. This paper highlights the growing evidence over the last 3 years of systemic non-compliance with workplace laws in Australia, and considers a range of reform options.

Design/methodology/approach. The paper draws upon scholarly evidence presented to the independent Inquiry into Labour Hire and Insecure Work carried out in the state of Victoria, Australia (2015-16), along with other sources, to examine the connection between complex business structures and exploitation of vulnerable workers.

Findings. Non-compliance with workplace laws, including underpayments and health and safety breaches, are commonly associated with the use by businesses of various structures through which they are effectively distanced from direct responsibility for employment obligations.

Research limitations/implications. The research contributes to international debates on the 'fissuring' of work and regulatory responses to worker exploitation.

Originality/value. The paper collates recent evidence on the nature and extent of exploitative labour practices within labour hire arrangements, franchising and supply chains in Australia.

Paper type. Law and policy paper.

Keywords: *Worker Exploitation, Vulnerable Workers, Business Structures, Labour Hire, Franchising, Supply Chains, Victorian Labour Hire and Insecure Work Inquiry*

[1] Professor in the Graduate School of Business and Law, RMIT University, Melbourne, Australia; and Consultant with the Corrs Chambers Westgarth Employment Labour & Safety Group. Email address: anthony.forsyth@rmit.edu.au.

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1. Introduction

For the last 25 years or so, the employment and workplace relations debate in Australia has focused primarily on the broad shape of the legislative framework. Conservative (Coalition) and Labor governments have engaged in periodic 're-writes' of the federal labour statute, with the pendulum swinging back and forth between intervention in the labour market and deregulation/flexibility. Frequently, the debate is about the extent to which labour law should prioritise collective bargaining and the representational role of unions. In the wake of radical deregulatory reforms which operated between 2006 and 2009,[2] much attention has also been centred on the impact of reducing legislative protections on individual workers. The main federal legislation regulating employment, the *Fair Work Act 2009* (Cth) (Fair Work Act) was introduced by the former Labor Government to restore those protections and the primacy of collective bargaining. The Coalition Government which has held office since 2013 has not yet made any more than marginal amendments to the Fair Work Act.
Until recently, however, there has been far less focus on the plight of vulnerable workers operating in the 'black labour market'. This has shifted dramatically over the last 3 years, with widespread media coverage of many examples of blatant worker exploitation, for example:

- An ABC 'Four Corners' program in May 2015 revealed the exploitation of horticultural and food-processing workers, by a number of labour hire suppliers in the fresh food supply chain.[3]

- This was followed by ABC and Fairfax Media's joint exposé of significant underpayments affecting employees in 7-Eleven franchises, many of whom are overseas students.[4] Both the Chairman and CEO of 7-Eleven resigned over the scandal. In its wake, Hardy and others raised concerns that the franchising business model creates an incentive for franchisees to underpay workers and engage in visa breaches.[5]

[2] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).
[3] ABC *Four Corners*, 'Slaving Away', 4 May 2015.
[4] A Ferguson, '7-Eleven: Head office is not fooling anyone', *The Sydney Morning Herald*, August 31, 2015.
[5] T Hardy, 'Franchising – all care and no responsibility', *The Conversation*, October 29, 2015.

- Major retailer Myer faced allegations that cleaners engaged through a series of sub-contractors were on 'sham contracts' intended to deprive them of minimum employment entitlements.[6]

This high quality investigative reporting has brought to the public's attention the role of major brands in overseeing labour hire arrangements, franchising and complex supply chains through which workers are exploited. Academic commentators in Australia have also examined the connections between these business models and the incidence of employer non-compliance with workplace laws.[7] These various models have been used increasingly to distance employers from legal responsibility for workers' minimum employment standards, shifting that burden to smaller business units operating in highly competitive markets.[8]

Underpayments, health and safety breaches, and non-compliance with taxation and superannuation legislation are now quite widespread, affecting large numbers of vulnerable workers (many of whom are overseas backpackers or international students).[9] Regulatory intervention to address these practices has taken some time to emerge. However, both major parties took policies to the 2016 federal election aimed at increasing the levels of protection for vulnerable workers and the penalties for non-compliance. These policies are considered further in this paper, along with the increasing vigilance of the federal enforcement agency, the Fair Work Ombudsman (FWO). It has signalled very clearly to Australian businesses that they must take responsibility for workplace law breaches occurring within their supply chains – even if they are not strictly *legally* responsible.[10]

Two federal parliamentary inquiries have also examined exploitation affecting migrant workers in particular. In March 2016, the Senate Education and Employment References Committee concluded its inquiry into the impact of

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[6] 'Myer cleaners accuse retailer of underpayment, denying entitlements with 'sham contracting' practice', *ABC News*, October 22, 2015; M A Tranfaglia, 'Law allows Myer to outsource responsibility for labour hire workers', *The Conversation*, October 28, 2015.

[7] T Hardy, 'Who should be held liable for workplace contraventions and on what basis?', in *Australian Journal of Labour Law*, 2016, vol. 29, n. 1, 78; T Hardy and J Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Non-Compliance in Complex Supply Chains', in *Journal of Industrial Relations*, 2015, vol. 57, n. 4, 563.

[8] R Johnstone and A Stewart, 'Swimming against the Tide? Australian Labor Regulation and the Fissured Workplace' in *Comparative Labor Law and Policy Journal*, 2015, vol.37, 60.

[9] See Fair Work Ombudsman, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016; I Campbell, M Boese and J Tham, 'Inhospitable workplaces? International students and paid work in food services', in *Australian Journal of Social Issues*, vol. 51, n. 3, 279.

[10] Speech by FWO Chief Counsel, Janine Webster, to the Australian Chamber of Commerce and Industry, September 20, 2016.

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Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders. The Labor-Greens Majority Report '*A National Disgrace: The Exploitation of Temporary Work Visa Holders*'[11] made several recommendations for regulatory reform, including in respect of the labour hire industry (where it found significant evidence of mistreatment of migrant workers). These recommendations included the introduction of a national licensing regime for labour hire contractors, requiring demonstrated compliance with all workplace, employment, tax and superannuation laws; and providing that businesses can only use a licensed labour hire contractor, including where labour hire is subcontracted.[12] Government members of the Senate Committee supported some aspects of the majority report, but rejected a number of the key recommendations, including the introduction of labour hire licensing.[13]
The Commonwealth Parliament Joint Standing Committee on Migration released the report of its *Inquiry into the Seasonal Worker Programme* in May 2016. The inquiry reported on: '… media coverage over the alleged mistreatment of seasonal worker participants. These reports alleged that seasonal workers were underpaid, housed in substandard accommodation, refused medical access and pastoral care, and verbally abused and underfed.'[14] The report sets out substantial evidence of unlawful practices by labour hire operators. The Committee was 'of the view that labour hire companies and, in particular, the so called 'phoenix' operators are particularly harmful to the industry and seasonal workers.'[15] The report included a recommendation, significant because it was supported by all members of the Joint Standing Committee, that the Senate *Temporary Work Visa Report* proposal for a national labour hire licensing scheme be adopted by the federal Government.[16]
Another response has come from three Labor state governments around Australia, which established inquiries in 2015 to examine the labour hire industry. The Parliament of Queensland, Finance and Administration Committee, *Inquiry into the practices of the Labour Hire Industry in Queensland,* was

[11] Commonwealth of Australia, Senate Education and Employment References Committee, *op. cit.*
[12] Ibid, 328.
[13] Ibid, from 331.
[14] Parliament of Australia, Joint Standing Committee on Migration, *Seasonal Change - Inquiry into the Seasonal Worker Programme*, May 2016, 135. The Seasonal Worker Programme provides low-skilled, temporary migrant workers from designated Pacific Island countries to employers, predominantly in the Australian agricultural industry.
[15] Ibid, 149.
[16] Ibid, 149-150.

established on 2 December 2015 and released its report in June 2016.[17] The Parliament of South Australia, Economic and Finance Committee, *Inquiry into the Labour Hire Industry*, was established on 11 June 2015 and reported on 18 October 2016.[18]

The Victorian Government took a different approach, establishing an independent *Inquiry into the Labour Hire Industry and Insecure Work* in September 2015, which I was appointed to chair.[19] In summary, the Inquiry's Terms of Reference required me to examine:

- the extent and nature of the labour hire sector in Victoria, and insecure work more broadly (e.g. the increasing use of casuals, contractors and fixed-term workers);
- allegations that labour hire and sham contracting arrangements are being used to avoid workplace laws and other statutory obligations; and
- the implications of labour hire and insecure work for workers, businesses and the Victorian economy.

I was also requested to make recommendations based on my findings,[20] taking into account relevant international standards and the delineation of legislative powers as between Commonwealth (i.e. federal) and state governments.[21]

In the sections that follow, as well as providing a more detailed examination of labour hire, franchising and complex supply chains, and some of the non-compliance issues connected with each of these business models, this article outlines various regulatory options for addressing these problems. These

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[17] Parliament of Queensland, Finance and Administration Committee, *Inquiry into the practices of the*
labour hire industry in Queensland, Report no. 25, 55th Parliament, June 2016.

[18] Parliament of South Australia, *Final Report: Inquiry into the Labour Hire Industry*, 93rd Report of the Economic and Finance Committee, October 2016.

[19] See: http://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry (accessed January 12, 2017).

[20] The Inquiry was conducted as a Formal Review under the *Inquiries Act 2014* (Vic). The final report was provided to the Victorian Premier and Minister for Industrial Relations on 31 August 2016 and tabled on 27 October 2016. The paper on which this article is based was written prior to the report's release; therefore the findings and recommendations of the Inquiry are not traversed herein. See further A Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report*, Department of Economic Development, Jobs, Transport and Resources: Melbourne, August 2016; and Victorian Government, *2017 Victorian Government Response to the Victorian Inquiry into the Labour Hire Industry and Insecure Work*, Department of Economic Development, Jobs, Transport and Resources: May 2017.

[21] Under the Australian Constitution, legislative power over employment and industrial relations is shared between the Commonwealth and the states. In practical terms, however, most Australian employers and employees are covered by the federal workplace relations system operating under the Fair Work Act. Victoria is unique among the states, in having referred almost all of its legislative power in this area to the Commonwealth.

include labour hire licensing schemes; and affixing lead firms and head contractors in franchises and supply chains with various forms of liability. The article concludes with an assessment of likely future directions for more effective enforcement of the minimum workplace standards of Victorian/Australian workers.

2. Labour Hire

The nature of labour hire

Labour hire employment arrangements typically involve a 'triangular relationship'[22] in which a labour hire agency supplies the labour of a labour hire worker to a third party (host) in exchange for a fee. In a labour hire employment arrangement, there is no direct employment or contractual relationship between the host and the labour hire worker. Instead, the worker is engaged by the labour hire agency, either as an employee or as an independent contractor. What is termed 'labour hire' in the Australian context is referred to as 'agency work' in the United Kingdom and much of continental Europe.
Stewart et al explain the 'usual' labour hire arrangement in more detail, as follows:

> *… [it] involves the agency entering into an agreement with the worker, and arranging to hire out their services to a host, or to a series of hosts. The worker generally performs these services at the host's premises, and may be supervised (if their work requires supervision at all) either by the host's staff or by other workers supplied by the same, or a different, agency. The worker is paid by the agency, but aside from any requirement to submit timesheets may have relatively little contact with it. The host, on the other hand, pays a fee to the agency which covers the worker's remuneration and any associated on-costs. … In many instances the nature of the arrangement is such that there is no obligation on either side to give or accept work. If an assignment is accepted, a contract is formed (usually on the agency's standard terms). But in between assignments, there may be no mutuality of obligation and hence no contract.*[23]

[22] R Johnstone, S McCrystal, I Nossar, M Quinlan, M Rawling and J Riley, *Beyond Employment: The Legal Regulation of Work Relationships*, The Federation Press: Annandale, 2012, 60.
[23] A Stewart, A Forsyth, M Irving, R Johnstone and S McCrystal, *Creighton and Stewart's Labour Law*, 6th edition, The Federation Press: Annandale, 2016, [10.23] (references omitted).

Growth and extent of labour hire

Labour hire employment arrangements have been a feature of the Australian labour market since the 1950s, in the form of 'temping' agencies to fill short term vacancies for hosts.[24] However, from the late 1980s and throughout the 1990s there was dramatic growth in what has been referred to as the 'pure' labour hire industry, which offers contract labour as a flexible alternative to ongoing employees or workforces across a wide range of industries.[25] This industry has become well established in Australia in the past two decades.[26]
In a 2005 paper, Underhill[27] described how labour hire arrangements had evolved to take many forms, including:

- the supply of short-term placements;
- outsourcing of specific functions such as maintenance;
- providing a substantial proportion of an organisation's workforce for an extended period of time, including in call centres and retail businesses; and
- providing the entire workforce for a host.

In the May 2016 IBISWorld industry report on Temporary Staff Services in Australia,[28] the main activities of the industry are described as: contract labour services; labour on-hiring services; labour staffing services; labour supply services; and temporary labour hire services. The industry is distinguished from employment placement and recruitment services, which are businesses that provide employment placement services or recruit staff for permanent positions for client companies.[29]
The growth in temporary staffing industries over the past two decades has been fuelled by a general trend towards outsourcing of non-core activities. Whilst growth in the past five years has slowed, it remains moderate due to comparatively low unemployment and increasing client demand for a flexible workforce.[30]

[24] R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76, ACIRRT, University of Sydney, April 2002.
[25] P Laplagne, M Glover and T Fry, *The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Working Paper, Melbourne, February 2005.
[26] A Allday, *Temporary Staff Services in Australia*, IBISWorld Industry Report N7212*,* May 2016, 4.
[27] E Underhill, The importance of having a say: Labour hire employees' workplace voice, *Reworking work: Proceedings of the 19th conference of the Association of Industrial Relations Academics of Australia and New Zealand*, Sydney, February 9-11, 2005, 528.
[28] Allday, *op. cit.*
[29] Ibid, 2.
[30] Ibid, 6.

Australian Bureau of Statistics (ABS) data provide an indication of the number of people, in particular industries and occupations, who found their job through and were paid by a labour hire firm or employment agency.[31] If a person has found their job through such firms/agencies and then continues to be paid by them, this category of worker can reasonably be construed as a 'labour hire employee', in that the hiring agency becomes the employer (albeit the work being paid for is undertaken for another business/organisation).[32]
The data indicate that approximately 1.1% of all employed persons across Australia are labour hire employees.[33] Labour hire employees are most prevalent in the following industries:

- Administrative and support services (5.4% of the workforce)
- Mining (2.8%)
- Manufacturing (2.6%)
- Electricity, gas and water services (1.8%)
- Public administration and safety (1.7%)
- Information, media and telecommunications (1.4%).

Current regulation of labour hire

Labour hire is entirely lawful both in Victoria and across Australia. There is little specific regulation of the labour hire sector. Cochrane and McKeown describe Australia as having a 'lightly regulated framework' for agency work. They note that there are few national regulations surrounding agency work, such as sectoral limitations or limitations on reasons for hire, maximum duration of hire, maximum renewal or total duration.[34]
Generally speaking, employment laws in operation in Victoria/Australia do not differentiate between labour hire employment and any other type of employment. In a direct employment relationship, the employer and the party controlling the day-to-day work of an employee are one and the same. However, in a labour hire employment arrangement, the party with de facto control over the employee's work is not the labour hire agency employer, but the host. The employee commences and concludes work in accordance with

[31] ABS, *Characteristics of Employment, Australia*, Cat. No. 6333.0, August 2014, released October 27, 2015, First Issue.
[32] ABS, *Australian Labour Market Statistics, Jan 2010: Labour Hire Workers*, Cat. No. 6105.0, January 2010, derived from the 2008 Forms of Employment Survey (ABS, *Forms of Employment*, November 2008, Cat. No. 6359.0), 2.
[33] ABS, Cat No 6333.0, *op. cit.*
[34] R Cochrane and T McKeown, 'Vulnerability and agency work: from the workers' perspectives', in *International Journal of Manpower*, 2015, vol. 36, n. 6, 947, 948.

the requirements of the host, works at the direction of the host, at the host's workplace, and in many cases alongside direct employees of the host.

These inherent features of labour hire employment arrangements mean that despite the equal application of employment regulation to labour hire employment and non-labour hire employment in a formal sense, there are quite different substantive consequences for the obligations of labour hire employers and hosts, and the rights of labour hire employees. As the national industrial tribunal, the Fair Work Commission (FWC), has observed:

> *The diversity of labour hire arrangements is considerable, reflecting the need for flexibility in modern workplaces. However, these arrangements can be a minefield for all concerned, both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment. The actions of a host employer – particularly when its managers and supervisors engage in disciplinary action against labour hire employees – can have a direct and fundamental impact on the rights and obligations, as between the labour hire agency and its employees.*[35]

The overwhelming majority of labour hire employees are engaged on a casual (rather than full-time or part-time) basis. ABS statistics indicate that compared to employees generally, labour hire workers were more likely to be without paid leave entitlements (79% compared to 23% of employees overall), which is commonly used as an indicator of casual employment.[36] Further, the data show that a greater proportion of labour hire workers were engaged on a fixed-term contract basis compared to all employees (15% compared with 3%).[37]

As casuals, most labour hire employees are not entitled to annual leave, paid personal/carer's leave, paid compassionate leave, paid jury service leave, notice of termination, payment in lieu of notice or redundancy pay under the National Employment Standards (NES) provisions of the Fair Work Act.[38] Other minimum standards which only apply in limited circumstances include the right to request flexible working arrangements, the right to unpaid parental leave and public holidays. The loading of 20-25% on base hourly pay rates, which casual employees are entitled to under most awards, is intended to compensate for the absence of some of these minimum terms and conditions.

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[35] *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925, [46].
[36] ABS, Cat. No. 6105.0, *op. cit.*, 4.
[37] Ibid.
[38] Fair Work Act Part 2-2.

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Award regulation of labour hire

The Fair Work Act provides for the making, application and enforcement of modern awards.[39] These instruments, which set minimum terms and conditions for employees in particular industries or occupations, are enforceable under the legislation. There are currently 122 modern awards in operation, and the majority of these are industry based.[40] Typical features of a modern award include a wage and skill-based classification system, arrangements for when work is performed, rostering, overtime and weekend penalty rates, allowances and dispute resolution and consultation processes.

Most modern awards include the following labour hire/on-hire provisions:

> *'on-hire means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.'*
>
> [and]
>
> *'This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries). This sub-clause operates subject to the exclusions from coverage in this award.'*

Through these provisions, modern awards play a critical role in ensuring that labour hire employees have the protection of minimum hourly rates of pay, and certain other minimum conditions which vary depending on whether they are engaged as casuals or fixed-term employees. For example, labour hire employees engaged to work for a host business in a manufacturing plant would be entitled to the minimum pay and conditions set out in the *Manufacturing and Associated Industries and Occupations Award 2010*.

The on-hire provisions in most modern awards appear to operate effectively to ensure the extension of award terms and conditions to labour hire employees performing work covered by the relevant award. However, there is also considerable evidence of non-compliance with minimum award wages and other conditions in certain sectors of the Victorian (and Australian) economy, which is discussed further below.

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[39] Fair Work Act Part 2-3.

[40] See: https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list (accessed January 16, 2017).

Enterprise agreements and labour hire

The Fair Work Act also provides for the making of enterprise agreements. These are collective agreements negotiated between employers and their employees, sometimes with the involvement of unions, which prescribe enterprise-specific wages and other employment conditions.[41] The legislation also contains a framework which facilitates bargaining in good faith for enterprise agreements, provides for representation during bargaining (including by unions) and permits industrial action to be taken in support of bargaining claims.[42]

When an enterprise agreement applies to an employer and employee, it has the effect of displacing the application of the modern award which would otherwise apply to that employer and employee.[43] Employees must be better off overall under an enterprise agreement than the applicable modern award (this is known as the 'BOOT test').[44]

Nothing in the Fair Work Act prevents a labour hire employer and its employees from making an enterprise agreement which would cover the performance of work by the labour hire employees on a host's site. However, this tends to occur mainly in highly unionised sectors such as construction and manufacturing.

Some labour hire agencies which seek to implement their own enterprise agreements have had proposed agreements rejected by the FWC because they did not pass the BOOT test.[45] In *MP Resources Pty Ltd*, the FWC made the following observations in considering an application to approve a labour hire employer's agreement in the meat industry:

> *There have been a number of applications for approval of enterprise agreements covering labour hire agencies in the same industries which appear to be competing against each other on the basis of inferior terms and conditions. No unions or other employee representatives are involved in the negotiation of these enterprise agreements, which are poorly drafted and involve complex wages provisions. The employees are geographically dispersed from each other and from the employer. The agreements are broad reaching in the scope of work covered and in their geographical application.*
>
> *A common feature of the applications for approval of these agreements appears to be reliance on exceptional circumstances in a small area of the proposed coverage of the agreement to justify the inferior conditions that will apply to all employees.*

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[41] Fair Work Act Part 2-4.
[42] Fair Work Act Parts 2-4 and 3-3.
[43] Fair Work Act s 57.
[44] Fair Work Act Part 2-4 Division 4 Subdivision C.
[45] See e.g. *Mk2 Recruitment Pty Ltd* [2015] FWC 6600; this agreement was subsequently approved, see *Mk2 Recruitment Pty Ltd* [2015] FWCA 6915.

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> *This approach is contrary to the objects of the [Fair Work] Act which provide for the guaranteed safety net of "fair, relevant and enforceable minimum terms and conditions" through, among other things, modern awards and achieving "productivity and fairness" through an emphasis on enterprise agreements. At best, the repeated attempts to gain approval of agreements in terms that have previously been rejected by the Commission or modified by the provision of undertakings is careless, at worst it lacks integrity.*[46]

In contrast to the approach outlined above in respect of modern awards, where the applicable terms and conditions for labour hire workers are determined with reference to the conditions applicable under the award for direct employees of the host, the framework for enterprise agreement-making under the Fair Work Act does not readily facilitate the application of a host's enterprise agreement to a labour hire employee working in that business.

Labour hire employees are not permitted to take part in bargaining for a host's enterprise agreement. Agreements may only be made between the host and its direct employees.[47] Once approved, enterprise agreements apply only to the relevant employer and its direct employees.[48] Further, the permissible content of enterprise agreements is limited to matters pertaining to the relationship between an employer and its own employees; and the relationship between the employer and a union covered by the agreement.[49] Accordingly, a host's enterprise agreement cannot include conditions for labour hire employees unless there is a sufficient connection between those conditions and the relationship between the host and its own direct employees or their union. Limits or qualifications on the employer's ability to utilise labour hire employees generally do not have the requisite connection.[50]

Notwithstanding the limits on host enterprise agreement application to labour hire workers outlined above, some agreements include 'parity,' 'site rates,' or 'jump-up' clauses. The effect of a parity clause is to provide that where a labour hire worker is performing work which is the subject of an enterprise agreement, that employee is entitled to be paid at the same rate, and receive the same conditions, as a direct employee performing that work. Parity clauses are a fairly common feature of labour hire arrangements in unionised sectors like construction and manufacturing.

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[46] [2015] FWC 6820, [37]-[39]. The FWC referred (at [28]) to several other similar decisions: *Top End Consulting Pty Ltd* [2010] FWA 662; *Mondex Group Pty Ltd* [2015] FWC 1148; *Agri Labour Pty Ltd* [2015] FWC 5332.
[47] Fair Work Act s 172(2)(a).
[48] Fair Work Act ss 51-53.
[49] Fair Work Act s 172(1)(a)-(b).
[50] *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313.

Parity clauses may be included in enterprise agreements where they sufficiently relate to the job security of the host's direct employees.[51] However, terms of a host's enterprise agreement relating to use of, or conditions relating to, labour hire employees are not able to be directly enforced by the labour hire employees who are supposed to benefit from a parity clause in the agreement. As those employees do not fall within the scope of the agreement, they are not considered to be 'covered' by it within the meaning of s 53(1) of the Fair Work Act, a necessary prerequisite for being able to enforce the agreement. Only a union that is also covered by the agreement could take enforcement action if the parity clause in a host's enterprise agreement is not being observed in respect of particular labour hire employees.

Non-compliance with workplace laws in the labour hire sector

Various studies, media reports and recent inquiries have revealed considerable evidence of labour hire practices which are not compliant with employment and workplace laws, across various sectors of the Australian economy. This evidence shows that non-compliance amongst labour hire agencies is particularly prevalent in industries such as horticulture, meat processing, cleaning and security.[52] However, the following discussion focuses only on the horticulture sector.
Labour hire is used extensively, and relied upon heavily, in the horticulture industry (including the picking and packing of fresh fruit and vegetables). The main reasons for this are the seasonal nature of the work, unpredictable and variable workplace needs, domestic labour shortages, and the lack of time and human resources capabilities amongst growers.[53]
There is a significant body of evidence demonstrating that many labour hire operators in the horticulture industry do not comply with their legal obligations towards their workers. For example Underhill and Rimmer, on the basis of their 2013-14 study of the Australian horticulture industry (including Victoria), examined the comparative working conditions for workers engaged directly by farmers (198 workers) and those engaged through labour contractors (75 workers). They found that:

[51] Commonwealth of Australia, *Fair Work Bill 2008 Explanatory Memorandum*, [672]; *Asurco Contracting v Construction, Forestry, Mining and Energy Union* (2010) 197 IR 365; *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339.
[52] See e.g. Commonwealth of Australia, Senate Education and Employment References Committee, *op. cit.*, Chapter 7.
[53] See e.g. E Underhill and M Rimmer, 'Layered Vulnerability: Temporary migrants in Australian Horticulture', in *Journal of Industrial Relations*, 2016, vol. 58, n. 5, 608-626; Parliament of Queensland, Finance and Administration Committee, *op. cit.*,17.

- the mean hourly earnings for workers paid by contractors (A$12.66) was less than that of workers paid by farmers (A$14.86), and substantially less than A$21.09, the minimum award hourly rate of pay for a casual employee at the time of the study;
- non-payment of wages was a significant problem for workers engaged by contractors – 15% of survey respondents had experienced not being paid for work performed, and working for a contractor rather than a farmer directly more than doubled the likelihood of non-payment of wages;
- very short working hours were twice as likely amongst contractor employees, resulting in an inadequate income, and conversely, around a fifth of all workers reported long hours – dissatisfaction with the number of working hours was considerably greater amongst employees of contractors;
- seasonal workers employed by contractors endured far harsher conditions of employment than when working for a farmer, being more likely to work in extreme heat and miss drink breaks; and
- workers, hostel owners and migrant community representatives reported a high level of violence, and threats of violence, by contractors supplying labour in horticulture.[54]

The Queensland Labour Hire Inquiry found the existence of 'rogue operators in the horticulture industry' in that state, engaging in the 'undercutting' of labour hire workers' employment conditions such as paying below award rates, unsafe working conditions (e.g. long hours with few breaks), and non-payment of superannuation, tax and workers' compensation premiums.[55] The two recent federal parliamentary inquiries found that, frequently, similar kinds of abuses involve vulnerable migrant workers on working holiday or student visas – or participating in the federal Government's Seasonal Workers Programme – who are engaged to work in the horticulture sector via labour hire contractors/agencies.[56]

[54] E Underhill and M Rimmer, 'Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational safety and health', in *Policy and Practice in Health and Safety*, 2015, vol. 13, no. 2, 24.
[55] Parliament of Queensland, Finance and Administration Committee, *op. cit.*, 17, 19-21, 24-25.
[56] Commonwealth of Australia, Senate Education and Employment References Committee, *op. cit.*, Chapters 4, 7 and 8; Parliament of Australia, Joint Standing Committee on Migration, *op. cit.*, Chapter 10.

FWO compliance activity: horticulture/labour hire

The extent of non-compliance with workplace laws in the horticulture industry has seen a considerable increase, in recent years, in the FWO's compliance activities focused upon this sector (including the use of labour hire arrangements).[57]

In 2010, FWO established a Horticulture Industry Shared Compliance Program. The six-month program consisted of an education phase and a compliance phase. As at November 2010, the program had recovered A$227,308 for 585 workers. It conducted 277 audits, and of these found 36% of employers were contravening workplace laws nationally.[58]

In August 2013, FWO commenced a three year 'Harvest Trail Campaign'. The Harvest Trail is a Commonwealth Government initiative linking jobseekers to jobs in the horticulture industry around Australia.[59] This FWO campaign was established to review compliance within the fruit and vegetable industry 'as a result of persistent complaints and underpayments in the horticulture sector'.[60] It summarises these complaints as follows:

> *Being ripped off on transport or accommodation costs – this is usually encountered through new arrivals agreeing to enter into arrangements with someone (normally an unscrupulous labour hire provider) who meets them at a regional airport or bus depot and promises work, accommodation and transport for a certain sum of money. They are then normally driven to the accommodation via an ATM and asked to provide money in advance for bond, transport and accommodation costs. They are also promised work, normally at a farm that has some sort of arrangement with the so-called labour hire provider. The work is normally at a piece rate so low that it is not possible to pick enough fruit to make at least the minimum hourly rate required. When they complain or raise the issue with the provider they may be bullied or told that they will not get their bond back, nor would they have their visa extension signed off.*[61]

FWO has also highlighted the role that growers and accommodation providers play, with some growers accepting offers from labour hire agencies which offer

[57] In addition to the initiatives discussed below, see also the report of the Ombudsman's extensive inquiry into the mistreatment of overseas backpackers (arising largely from the requirement to perform at least 88 days' work in regional Australia, to obtain a second year on the working holiday visa): FWO, *op. cit.*

[58] FWO, *Horticulture Industry Shared Compliance Scheme*, Final Report, November 2010.

[59] National Harvest Labour Information Service, *Harvest Guide – Work your way around Australia*, 13th Edition, June 2016).

[60] FWO, *Growers, hostels, labour-hire contractors cautioned over backpacker, seasonal worker entitlements*, Media Release, January 5, 2015.

[61] Ibid.

to supply labour for less than the minimum hourly rate, and some accommodation providers bonding backpackers to a particular hostel and requiring them to work for non-compliant labour hire agencies.[62]

FWO's compliance activity as part of this campaign has included initiatives in Victoria. In 2014, FWO conducted inspections of strawberry growers in the Yarra Valley. It reported that many strawberry growers in the region use the services of contractors to source pickers and other seasonal workers. One farmer was paying a labour hire contractor a fee per worker equating to A$2.00 less than the minimum wage.[63] FWO has also recently reported on underpayments by labour hire contractors in horticulture in regional Queensland[64] and South Australia.[65]

FWO compliance activity is continuing to occur in respect of labour hire arrangements in the horticulture industry across Australia. Examples include:

- FWO proceedings against a family farm and its manager in Queensland, who were fined A$60,000 in the Federal Court of Australia for setting up sham companies to avoid overtime obligations for fruit pickers.[66]
- An enforceable undertaking entered into between FWO and a NSW mushroom grower caught using overseas workers who had been significantly underpaid. Gromer Enterprise Pty Ltd signed up to the undertaking after FWO said it must share responsibility for underpayments by labour provider TDS International Investment Group. FWO had found that TDS engaged 52 Chinese and Taiwanese nationals, most of whom could not speak English, to pick mushrooms at the farm at a flat rate of A$16.37 an hour, resulting in A$92,381 in underpayments in 2013-14.[67]

Regulatory responses to labour hire internationally

As indicated earlier in this article, in Australia there is little in the way of specific regulation of labour hire arrangements, beyond the application of laws applicable to employment generally. In contrast, the laws of many other

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[62] Ibid.

[63] FWO, *Results of Yarra Valley strawberry farm visits*, Media Release, November 10, 2014.

[64] FWO, *Lettuce farm contractor signs workplace pact after short changing almost 100 overseas workers*, Media Release, November 10, 2014.

[65] FWO, *Adelaide employer underpays visa-holder $22,000*, Media Release, November 10, 2014.

[66] *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 3)* [2016] FCA 186.

[67] A Patty, 'Chinese and Taiwanese mushroom pickers short changed $92,000', *Sydney Morning Herald (Business Day)*, March 2, 2016.

countries impose registration, licensing or other regulatory requirements on labour hire agencies.

The European Foundation for the Improvement of Living and Working Conditions (Eurofound) has provided the following overview of approaches to regulation of temporary work agencies (TWAs) across the European Union:

> *… most [EU] Member States have some form of licensing, while over half of the countries (Austria, Croatia, Cyprus, the Czech Republic, Germany, Greece, Hungary, Latvia, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia and Spain) require all TWAs – as a minimum – to have authorisation prior to commencing activity. A further seven countries (Belgium, Bulgaria, France, Italy, Netherlands, Norway and Poland) have registration systems …* [68]

These various forms of regulation in many EU countries are imposed to ensure that relevant authorities are aware of who is operating as a labour market intermediary, and to safeguard against the risk to workers' and states' finances from unrestricted access to this sector (hence the common requirements to show no criminal convictions/civil violations and to pay financial bonds or guarantees).[69]

Although there are many different approaches to regulating agency work, licensing or registration schemes applicable to TWAs and/or the businesses which source migrant workers are among the more common. Arguably the leading example of that approach is the United Kingdom's Gangmasters Licensing Authority (GLA), established under the *Gangmasters (Licensing Act) 2004* (UK) (GLA Act). The GLA scheme was introduced following the drowning deaths of 23 undocumented Chinese cockle-pickers, hired through a labour intermediary, at Morecambe Bay in February 2004.[70] This regulatory initiative was supported by all major political parties and key stakeholders including the major UK supermarkets and the National Farmers Union.[71] Support from businesses in the regulated sectors continues now on the basis that GLA licensing 'promotes fair competition'.[72]

The GLA licensing scheme requires organisations providing workers to employers in the agriculture and shellfish-gathering sectors, and associated processing/packaging activities, to register and obtain a licence through the

[68] Eurofound, *Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour*, Publications Office of the European Union: Luxembourg, 2016, 21.
[69] Ibid, 22-23.
[70] K Strauss, 'Unfree Labour and the Regulation of Temporary Agency Work in the UK', in J Fudge and K Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work*, Routledge: New York, 2014, 164.
[71] Professor D Whyte, *Submission to the Victorian Inquiry into Labour Hire and Insecure Work*, 4.
[72] GLA, *Gangmasters Licensing Authority: Annual Report and Accounts: 1 April 2014 to 31 March 2015*, July 2015, 12.

GLA. Users of these labour provision services must not enter into arrangements with unlicensed gangmasters. The licensing standards include a 'fit and proper test' (relating to the persons involved in running a labour supply business), assessments of the applicant business's arrangements in relation to payment and taxation, health and safety, and accommodation; and the prevention of forced labour. Criminal offences including fines and imprisonment can be imposed on gangmasters who operate without a GLA licence, and those who use their services.
Numerous studies have demonstrated the effectiveness of the GLA licensing scheme over the last ten years, in combating exploitation in the sectors to which it applies.[73] However, some concerns have been expressed about this sector-specific approach to regulation of labour supply, including the potential for non-compliant businesses to divert their operations into other industries.[74] Recently, the UK Government has implemented reforms[75] which are likely to see the GLA, now known as the Gangmasters and Labour Abuse Authority, addressing exploitation across the economy under the umbrella of a new Director of Labour Market Enforcement.[76]

3. Franchising

Overview

Franchising is 'a method of growing a business in which a franchise owner (franchisee) is granted, for a fee, the right to offer, sell or distribute goods or services under a business system determined by the business founder (franchisor). The franchisor supports the franchised business group by providing leadership, guidance, training and assistance in return for ongoing service fees.'[77] In 2015-16, the franchise industry had revenue of A$171.6 billion, and employed 570,000 people across Australia. There are 1,180

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[73] See e.g. M Wilkinson, G Craig and A Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority*, Contemporary Slavery Research Centre, Wilberforce Institute, University of Hull, undated; M Wynn, 'Regulating Rogues: Employment Agency Enforcement and Sections 15-18 of the Employment Act 2008', in *Industrial Law Journal*, 2009, vol. 38, n. 1, 64.
[74] Strauss, *op. cit.*; A Geddes, S Scott and K Nielsen, *Gangmasters Licensing Authority Evaluation Study Baseline Report,* GLA, 2007.
[75] Under the *Immigration Act 2016* (UK); see ACL Davies, 'The Immigration Act 2016', in *Industrial Law Journal*, vol. 45, no. 3, 431.
[76] Department for Business Innovation and Skills and Home Office, *Tackling Exploitation in the Labour*
Market: Consultation, October 2015; BIS and Home Office, *Tackling Exploitation in the Labour Market: Government Response*, January 2016.
[77] Claudia Burgio-Ficca, *Franchising in Australia*, IBISWorld Industry Report, May 2016), 2.

franchise enterprises comprising 92,950 establishments Australia-wide. Of these establishments, approximately 25.1% are located in Victoria.[78]
The Franchise Council of Australia (FCA) indicates that the franchise sector has been a major contributor to the Australian economy.[79] At the core of the success of franchising as a business model is that franchisors and franchisees are able to focus on different business activities, so that small businesses are enabled to compete effectively against major corporations. Further, according to FCA, franchised businesses are often market leaders; and it is vital that the industry is not hamstrung by inappropriate legislation, regulatory duplication or red tape.[80]
However, Johnstone et al see a number of risks for workplace law compliance arising from the franchise model:

> *This business model allows the work provider and business controller, the originator of a business concept, to derive profits, without investing in any of the tangible assets required for the business, and without taking on the risks and responsibilities of employing any staff. …*
> *Many if not most of the risks associated with operating the business will be borne by the franchisees.*[81]

Legally, franchisees are the employers of workers engaged to work in their business, so these workers have no recourse against franchisors in the event of non-compliance with the FW Act or minimum award pay rates by franchisees.

7-Eleven

One of the major examples of worker exploitation in Australia recently has been the systemic underpayment of many temporary foreign workers across the 7-Eleven convenience store franchise network. A 2015 joint Fairfax/ABC *Four Corners* investigation into 7-Eleven exposed widespread exploitation of its largely migrant workforce, throughout the franchise network, through underpayments and doctoring of payroll records.[82] The investigation quoted a whistleblower who stated that:

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[78] Ibid, 3.
[79] See FCA's website at: http://www.franchise.org.au/ (accessed January 16, 2017); FCA, *Submission to the Senate Standing Committee on Education and Employment Inquiry into Australia's Temporary Work Visa System*, September 2015; FCA, *Submission to the Review of the Franchising Code of Conduct, 2013* February 2013.
[80] Ibid.
[81] Johnstone et al, *op. cit.*, 70; see also A Kellner, D Peetz, K Townsend and A Wilkinson, '"We are very focused on the muffins": Regulation of and compliance with industrial relations in franchises', in *Journal of Industrial Relations*, 2016, vol. 58, no. 1, 25, 29-30.
[82] ABC *Four Corners*, '7-Eleven: The Price of Convenience', August 30, 2015.

> *[7-Eleven] Head office is not just turning a blind eye, it's a fundamental part of their business. They can't run 7-Eleven as profitably as successfully as they have without letting this happen, so the business is very proud of itself and the achievements and the money it's made and the success it's had, but the reality is it's built on something not much different from slavery.*[83]

A key allegation was that franchisees were conducting a 'half pay scam', whereby the franchisee would record and pay for only half the hours worked by the relevant employee. Many staff were international students, subject to a limit of 20 hours' work per week under their visas. Franchisees would threaten to report employees' visa breaches following any complaint about salary or working conditions. The range of illegal activity by franchisees was alleged to have extended beyond wage fraud to include blackmail and withholding passports and drivers' licences of staff. It was alleged that franchisees continued to underpay staff even after being caught out by investigators from FWO.[84]

Shortly after the reports of exploitation were aired, 7-Eleven established an independent wage panel, chaired by Professor Allan Fels AO, to investigate claims for underpayment by current and former employees of its franchisees. At a Monash Business School seminar in October 2015, Professor Fels described a range of methods of underpayment that had been engaged in by 7-Eleven franchisees, including: simply underpaying by half of the required rate, only reporting half of the hours worked; unpaid training; deductions for losses such as robberies and petrol drive-offs; and the franchisee requiring repayment of salary by accompanying the employee to an automated teller machine. Some students engaged as employees paid the franchisee or their agent a considerable fee prior to coming to Australia, and worked for free to pay the fee off. As at October 2015, 430 underpayment claims had been processed by Professor Fels' panel.[85]

However, in May 2016, 7-Eleven terminated the independent wage panel arrangements, reportedly due to the panel's refusal to accept conditions which it considered would compromise the independence of its processes.[86] 7-Eleven then established its own internal wage repayment program, supported by

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83 See: http://www.smh.com.au/interactive/2015/7-eleven-revealed/ (accessed January 16, 2017).

84 Ibid.

85 A Fels, Speech to Monash Business School Seminar, *Falling through the gaps: Employment regulation and the protection of international students, migrant and other vulnerable workers*, Melbourne, October 27, 2015.

86 A Ferguson and S Danckert, '7-Eleven kills independent wage panel', *Sydney Morning Herald*, May 11, 2016; A Ferguson and S Danckert, '7-Eleven 'spooked' by large claims, *The Age*, May 14, 2016.

accounting firm Deloitte.[87] 648 wage claims had been determined as at mid-August 2016, to the value of almost A$25 million.[88]

A report by FWO following its inquiry into 7-Eleven found that several franchisees had breached the Fair Work Act through underpayment of employees and falsification of wages records.[89] Although finding that 7-Eleven head office was not liable for the franchisees' conduct, FWO was critical of the company's failure to implement measures to prevent the conduct from occurring. Despite this, FWO determined that it did not have a sufficient basis to bring proceedings alleging that 7-Eleven was liable as an accessory to the contraventions under section 550 of the FW Act.[90] On the other hand, FWO has brought a number of successful enforcement proceedings against 7-Eleven franchisees in respect of underpayments and other Fair Work Act breaches.[91]

The 7-Eleven underpayments scandal led to media speculation that other franchise enterprises may be similarly affected. For example in September 2015, *The Age* reported allegations of similar practices of underpayment in the franchise stores of Bakers Delight, United Petroleum, Subway, Dominos Pizza and Nando's.[92]

Proposals for further regulation of franchises

Presently, franchises are regulated by the *Franchising Code of Conduct* (Code), a mandatory industry code made pursuant to the *Competition and Consumer Act 2010* (Cth) and administered by the Australian Competition and Consumer Commission (ACCC). However, as indicated earlier, franchisors are not legally responsible for the employment arrangements of franchisees within their operations.

Hardy argues that the strategic position of head franchisors means they often exercise varying degrees of formal and informal control over the business practices of their franchisees. She notes that the Code limits the capacity of a franchisor to terminate its relationship with a franchisee, and argues that strengthening the termination rights of franchisors by amending the Code is one way to ensure that franchisors can promptly halt franchisee misconduct

[87] 7-Eleven, *Wage Repayment Program*, at: http://www.wagerepaymentprogram.com.au/ (accessed January 16, 2017).
[88] Ibid.
[89] FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven*, April 2016.
[90] On accessorial liability under FW Act section 550, see further below.
[91] See e.g. *FWO v Mai Pty Ltd and Anor* [2016] FCCA 1481; *FWO v Hiyi Pty Ltd* [2016] FCCA 1634.
[92] A Ferguson, 'The labour market's dark side – the case for changing worker exploitation', *The Age,* September 26, 2015.

and prevent further worker harm. However, Hardy suggests another more controversial way to address some of the issues outlined above would be to make head franchisors more accountable for workplace contraventions that take place on their watch. She advocates for an approach which will change the 'compliance calculus' of all entities throughout the franchise network, supporting measures such as more rigorous monitoring of franchisee workplace practices and greater employment-related support and assistance for franchisees and workers.[93]

Kellner, Peetz, Townsend and Wilkinson contend that franchises are based on transfer of risk – most obviously the transfer to franchisees of the financial risk involved in opening a branch of a business in a new location, but less obviously the transfer of industrial relations risk. They argue (based on three case studies of Australian food services franchises) that 'to franchisors, 'good IR' was exhibited by a lack of known indiscretions. They were more focused on the muffins, on the internal regulation of product quality', than on compliance with industrial relations laws.[94]

In 2015, the Australian Greens introduced a bill into federal Parliament to enable employees of a franchisee to recover any unpaid wages or other entitlements from the franchisor or its head office entity.[95] This bill was proposed largely in response to the 7-Eleven underpayments scandal and (according to the Greens): 'would ensure that instead of leaving it to vulnerable workers to uphold the law through expensive legal action, head offices would take more responsibility for ensuring compliance with industrial laws in stores that carry their name'.[96] Franchisee employees would be able to seek recovery of unpaid entitlements (including pay, leave and superannuation) against the franchisor in a court – following an unsuccessful written demand seeking to recover those entitlements from the franchisee employer.[97]

The Australian Labor Party (ALP) promised in the 2016 election campaign to increase protections for franchise workers, including by requiring franchisors (under the Code) to take reasonable steps to assist franchisees to comply with workplace laws; and enabling employees or FWO to bring underpayment claims against franchisors (as well as franchisees). The Labor policy also proposed a ten-fold increase in civil penalties for underpaying workers (to A$540,000), in cases of 'serious contraventions'.[98]

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[93] Hardy, 2015, *op. cit.*
[94] Kellner, Peetz, Townsend and Wilkinson, *op. cit.*, 40-41.
[95] Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015.
[96] *Explanatory Memorandum for the Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015*, 2.
[97] Ibid, 3-5.
[98] ALP, *Protecting Rights at Work Fact Sheet (Labor's 100 Positive Policies)* (2016).

The Liberal/National Coalition, which was re-elected at the July 2 poll, also adopted a policy to introduce new protections from exploitation for vulnerable workers, which included imposing additional liability for workplace law breaches upon franchisors.[99] The Coalition's policy stated that:

> *The 7-Eleven scandal revealed not only a systemic underpayment of workers, but also a widespread practice of franchisees paying their employees the lawful rate, but then coercing them to pay back a certain proportion of their wages to the employer in cash.*
>
> *The Coalition will deliver stronger protection for vulnerable workers by: … introducing new offence provisions that capture franchisors and parent companies who fail to deal with exploitation by their franchisees.*[100]

The Coalition's policy also indicated that new provisions would be introduced to apply to franchisors who fail to deal with exploitation by their franchisees:

> *The Fair Work Act will be amended to make franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries in situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from occurring. Franchisors who have taken reasonable steps to educate their franchisees, who are separate and independent businesses, about their workplace obligations and have assurance processes in place, will not be captured by these new provisions.*[101]

The ALP criticised the Coalition's policy on the basis that 'workers would have to prove that the franchisor should reasonably have been aware of the [workplace law] breaches'. Labor proposed, instead, to reverse the onus of proof so that a franchisor would have to prove that they could not have reasonably known or been aware of breaches by their franchisee.[102] The Coalition's policy was implemented through legislation enacted by the Australian Parliament in September 2017 (see further the Conclusion below).

4. Outsourcing and complex labour supply chains

Overview

US scholar, Professor David Weil, has considered the major shift in the way businesses organise their production and delivery of goods and services, and its implications for labour standards compliance:

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[99] Liberal/National Coalition, *The Coalition's Policy to Protect Vulnerable Workers*, May 2016.
[100] Ibid.
[101] Ibid.
[102] ALP, *op. cit* .

By focusing on core competencies, lead businesses in the economy have shed the employment relationship for many activities, and all that comes with it. Shedding the tasks and production activities to other businesses allows lead companies to lower their costs … . It also does away with the need to establish consistency in those human resource policies, since they no longer reside inside the firm.[103]

Using the notion of 'the fissured workplace', Weil describes how these 'lead firms' have replaced the large workforces traditionally employed to fulfil their objectives with 'a complicated network of smaller business units', operating in highly competitive markets. This has created 'downward pressure on wages and benefits, murkiness about who bears responsibility for work conditions, and increased likelihood that basic labor standards will be violated'.[104]

In 2001, Johnstone, Mayhew and Quinlan identified that outsourcing grew substantially across a range of industries in most industrialized countries, including Australia, where survey data indicated that the number of contractors, agency workers, outworkers, and volunteers increased by almost 40% in the 5 years to 1997.[105] The authors noted that outsourcing alters legal relations between the organisation that previously used its own employees to provide the product or task and those now contracted to do this. The legal status of outsourced workers may vary substantially from self-employed individuals or groups, to employees of small firms, casual employees and temporary labour supplied by labour hire agencies.[106]

In their 2012 book, Johnstone et al note that:

The supply chain is another business structure that by its nature obscures the real economic relationship between business controllers and the workers who actually carry out the work.

… These integrated supply chain systems are structured to insulate businesses at the apex of supply chains from liabilities towards workers at the base.

… These arrangements enable firms at or near the apex of the chain to avoid the legal proximity with workers that may attract various obligations and liabilities, but at the same time enable them to maintain effective commercial control over the work performed.[107]

Johnstone et al point out that although supply chain structures are common in the Australian textile clothing and footwear (TCF), transport, construction and

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[103] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014), 11-12.

[104] Ibid, 8.

[105] R Johnstone, C Mayhew and M Quinlan, 'Outsourcing Risk? The regulation of occupational health and safety where subcontractors are employed', in *Comparative Labor Law and Policy Journal*, 2001, vol. 22, 351.

[106] Ibid, 352.

[107] Johnstone et al, *.op. cit.*, 66 (reference omitted).

cleaning industries: 'beyond the regulation of clothing outwork and the trucking industry, there is little or no regulation specifically targeted at these supply chains to protect the workers at the base.'[108]

Wright and Kaine observe that supply chains, production networks and other complex inter-organisational relationships are now defining features of contemporary business organisations. They note the structural shift in the nature of work and production from internal hierarchies contained within organisations, to markets and networks stretching across multiple organisations.[109]

Johnstone and Stewart argue that that 'fissuring' or leased labour, franchising, supply chains and sub-contracting have become commonplace in Australia. They note that some features of Australian labour law have played a part in countering some of the adverse effects of fissuring.[110] These include: modern awards and the NES, which to some extent protect employees at the foot of franchise, sub-contracting and supply chain arrangements; the enforcement efforts of FWO (including enforcement proceedings based on the FW Act accessorial liability provisions); transfer of business laws; measures to protect against sham contracting; and the model work health and safety laws. They note that there has been some judicial acceptance of arguments that a worker at the foot of a fissured work structure is not a risk-taking entrepreneur but rather an employee protected by a safety net of minimum conditions.[111] However, they describe the overall protections against fissuring in the Australian context as 'piecemeal'.[112]

Similarly, Hardy contends that while some Australian workplace statutes are innovative and inclusive, critical regulatory gaps remain.[113] In her view, whilst the Fair Work Act prescribes a comprehensive safety net for employees, making it less appealing for lead firms to shed direct employment, its continued reflection of the binary notion of employment and the unitary concept of the employer makes it more difficult for regulators and others to hold lead firms responsible for workplace contraventions taking place in their

[108] Ibid, 68-69. TCF supply chain regulation is discussed briefly below; on the road transport industry, see e.g. R Johnstone, I Nossar and M Rawling, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal', in *Federal Law Review*, 2015, vol. ,43 397.

[109] C Wright and S Kaine, 'Supply chains, production networks and the employment relationship', in *Journal of Industrial Relations*, 2015, vol. 57, n. 4, 483.

[110] Johnstone and Stewart, *op. cit.*, 63-86.

[111] Ibid, 87.

[112] Ibid, 89.

[113] T Hardy, *Reconsidering the notion of "employer" in the era of the fissured workplace: should labour law responsibilities exceed the boundary of the legal entity?,* 2016 JILPT Tokyo Comparative Labour Law Seminar, Country Report, Australia, 2016, 1.

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supply chains or franchises.[114] Hardy argues that harnessing the power, position and resources of lead firms is critical to addressing exploitation at the bottom of supply chains.[115]

Supply chain regulation in the Australian TCF industry

A significant body of academic literature has documented contracting chains and the use of home-based workers in the TCF industry.[116] Labour supply chains in this sector are often long and complex, which can lead to a lack of transparency in contracting arrangements and make it difficult to identify and remedy instances of exploitation. Australia has developed a comprehensive regulatory framework for these supply chains, reflected in the Fair Work Act,[117] the relevant modern award[118] and complemented by a number of schemes established through State legislation.[119] Key features of supply chain regulation in the textile industry include:

- a requirement that supply chain participants who arrange for work to be performed on their behalf be registered, and only deal with other registered participants;[120]
- a requirement to keep and file quarterly lists detailing supply chain activity;[121]
- requirements to document the details of each engagement with a worker, directed at demonstrating compliance with the minimum award terms and conditions;[122]
- provisions which require minimum terms and conditions to be afforded to TCF outworkers, irrespective of their formal status as employee or contractor;[123] and
- provisions allowing recovery of unpaid remuneration to be traced up the supply chain to parties other than the directly engaging party.[124]

[114] Ibid, 3-4.
[115] Ibid, 17.
[116] See e.g. R Burchielli, A Delaney and K Coventry, 'Campaign strategies to develop regulatory mechanisms: Protecting Australian garment homeworkers', in *Journal of Industrial Relations*, 2014, vol. 56, n. 1, 81 .
[117] Fair Work Act Part 6.4A.
[118] *Textile, Clothing, Footwear and Associated Industries Award 2010.*
[119] See e.g. *Outworkers (Improved Protection) Act 2003* (Vic).
[120] *Textile, Clothing, Footwear and Associated Industries Award 2010*, F.3.1.
[121] Ibid, F.3.3.
[122] Ibid, F.3.2, F.4.2
[123] Fair Work Act Part 6.4A, Division 2.

A voluntary code also exists in the TCF industry, which supplements these regulatory measures.[125]

FWO activity in regulating supply chains

FWO has been particularly active lately in seeking to ensure that lead firms take responsibility for underpayments and other breaches of workplace laws occurring within their supply chain. In 2016,[126] the Ombudsman described the FWO's findings about the role of Woolworths in addressing conditions of the contracted trolley collectors at its supermarkets,[127] as follows:

> *Once again we find a big, established company at the top of a chain that involves worker exploitation, reaping the benefit of underpaid labour while failing to keep sufficient watch on what its contractors are paying the workers. …*
> *Multi-tiered sub-contracting arrangements created a faceless workforce at some supermarket sites and an entrenched culture of non-compliance in the supply chain.*
> …
> *The community is tiring of established businesses claiming they 'did not know' what was going on in their networks and labour supply chains, while at the same time failing to put adequate governance arrangements in place.*
> *You see no evil when you hold your hands over your eyes!*
> *With so many unauthorised layers of contracting, there were cases where the underpayment of workers was inevitable, with the insufficient money being paid by Woolworths for all the contractors to make a profit while meeting their employees' entitlements.*
> *Woolworths, like many other companies, says it takes its responsibilities under workplace laws very seriously. A decade after we first started investigating allegations of exploitation at its sites, I need more than words from Woolworths. It's time for Woolworths to show us all that it means it, and to commit to action.*[128]

FWO has also explained its supply chain focus as follows: 'It is now business as usual for us to investigate the drivers of behavior in complex supply chains and develop strategies to shine a light on and stamp out non-compliance with workplace laws.'[129]

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[124] Ibid, Division 3; *Textile, Clothing, Footwear and Associated Industries Award 2010*, F.8.
[125] See: http://ethicalclothingaustralia.org.au/ (accessed January 18, 2017).
[126] N James, *You see no evil when you hold your hands in front of your eyes*, FWO Media Release, June 25, 2016).
[127] See FWO, *Inquiry into trolley collection services procurement by Woolworths Limited*, June 2016.
[128] James, *op. cit.*, emphasis added.
[129] FWO, 'The view from the top – building a culture of compliance in Australia's labour supply chains', *Address to the Australian Labour and Employment Relations Association National Conference by Natalie James, Fair Work Ombudsman*, May 27, 2016, 2 .

A key mechanism utilised by FWO in its campaign to increase responsibility for compliance with workplace laws in supply chains has been litigation based on the 'accessorial liability' provision, s 550 of the Fair Work Act, which provides as follows:

> *(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. …*
> *(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:*
> *(a) has aided, abetted, counselled or procured the contravention; or*
> *(b) has inducted the contravention, whether by threats or promises or otherwise; or*
> *(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
> *(d) has conspired with others to effect the contravention.*

Over recent years, FWO has actively sought to utilise s 550 to establish legal responsibility for contraventions of workplace laws on the part of parties not directly responsible for compliance. In 2014-15, 26 of 33 civil penalty matters instigated by FWO, then decided by a court, involved penalty orders against an accessory.[130]

On most occasions, the accessorial liability provision is used to attach liability to an individual director or officer involved in the decision-making which led to the relevant contravention.[131] However, there have been a small number of matters in which a separate corporation has been held liable pursuant to s 550 for the employment law breaches of another corporation, including in a contracting chain.

Recent high profile examples of this can be found in a series of proceedings initiated in 2014 by FWO regarding the underpayment of trolley collectors who performed work, subject to supply chains with a number of parties, for Coles supermarkets. FWO commenced proceedings against Coles along with a number of other parties in the relevant supply chain, as well as the direct employers of the workers. This proceeding was resolved by Coles voluntarily entering an enforceable undertaking and agreeing to back-pay the employees of the subcontractors. However, the litigation against other contracting parties continued, and a number of other these parties have been held liable by the courts pursuant to s 550.[132]

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[130] FWO, *Annual Report 2014-15*, 34.

[131] See e.g. *FWO v Konsulteq and Ors* [2015] FCCA 1882; *FWO v Liquid Fuel Pty Ltd and Ors* [2015] FCCA 2694; *FWO v Singh* [2016] FCCA 1335; *FWO v Step Ahead Security Services Pty Ltd and Anor* [2016] FCCA 1482.

[132] See e.g. *FWO v South Jin Pty Ltd* [2015] FCA 1456; *FWO v South Jin Ltd (No 2)* [2016] FCA 832; *FWO v Al Hilfi* [2016] FCA 193.

In addition, in November 2015, a security company was found liable pursuant to s 550 for underpayments by its subcontractor to the subcontractor's employees.[133]
However, a key limitation with the current formulation of the accessorial liability provision is the degree of intentional involvement and specific knowledge which courts have held to be required by the accessory. For this reason, FWO determined not to pursue accessorial liability against the 7-Eleven head office, notwithstanding the systemic nature of franchisee breaches in that case.[134]

5. Conclusion

Many different approaches to combating worker exploitation, arising from the utilisation by employers of complex business structures, have been discussed in this article. Which of these regulatory approaches is likely to be at the forefront of addressing the increasingly visible problem of Australia's 'black labour market' into the future?
We have now seen a significant increase in penalties and enhancement of FWO's investigatory and enforcement powers, following the implementation of the Coalition Government's election policy to protect vulnerable workers.[135]
FWO has sought to reassure the business community that it will act responsibly, and 'with restraint and measure', in exercising its new compulsory evidence gathering powers.[136]
The Government has implemented another policy commitment to establish a Migrant Workers Taskforce, headed by Professor Fels, which 'will identify further proposals for improvements in law, law enforcement and investigation, or other practical measures to quickly identify and rectify any cases of migrant worker exploitation'.[137] The Taskforce will also coordinate the activities of FWO, Department of Immigration and Border Protection, Australian Taxation

[133] See: https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/november-2015/20151120-sis, accessed January 18, 2017 (the Federal Circuit Court's decision in this matter, involving Security International Services Pty Ltd, has not been published).
[134] FWO, April 2016, *op. cit.*, 70-72; see the detailed discussion of 7-Eleven above.
[135] *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), passed by Parliament on 5 September 2017.
[136] 'New powers would be 'responsibly' wielded: FWO', *Workforce*, Issue No 20272.
[137] Australian Government, *Migrant Workers Taskforce (Terms of Reference and Administrative Arrangements)*, released October 4, 2016. This will include monitoring progress in relation to rectification of underpayments by 7-Eleven, and assessing the labour hire practices of companies employing migrant workers.

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Office, Australian Securities and Investments Commission and many other federal agencies involved in tackling migrant worker exploitation.

There appears to be a ground-swell of support building in favour of some form of registration or licensing scheme for labour hire companies in Australia. As discussed earlier, there are many successful examples of such schemes internationally, especially the GLA in the UK, and two federal parliamentary reports have endorsed mandatory labour hire licensing as a critical measure to stamp out unlawful practices.[138] However, as the Coalition Government does not support this approach, licensing schemes are now being implemented at state government level.[139]

In the wake of the 7-Eleven scandal, there has also been a legislative response affixing franchisors (in certain defined circumstances) with liability for underpayments and other workplace law breaches occurring among their franchisees. Liability may b established where a franchisor has failed to take reasonable steps to prevent workplace law contraventions by its franchisees, e.g. by implementing arrangements for assessing franchisees' compliance with workplace laws.[140]

Innovative supply chain regulation is unlikely to be extended beyond the TCF sector in Australia in the foreseeable future. That said, there is some indication of willingness in the business community to see Australian companies held more accountable for activity within their supply chains in the Asian region.[141] In addition, the experimentation of FWO with enforcement proceedings under s 550 of the Fair Work Act is seeing an extension of liability for workplace law breaches to a broader range of individuals and corporate entities.

There is another form of potential liability, or risk, that recent experience shows Australian businesses are exposed to and concerned to avoid: reputational damage. The 7-Eleven case, and many other instances of worker exploitation which have come to the fore in the last 3 years, illustrate that corporate brands suffer considerable damage when these reports are running in the media. It seems that the community is becoming less tolerant of corporate

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[138] See also ALP, *Protecting Rights at Work: Licensing Labour Hire*, Policy for the 2016 Election; ALP, *A Fairer Temporary Work Visa System – Fact Sheet,* 2016.

[139] The state of Queensland has now established such a scheme (see *Labour Hire Licensing Act 2017* (Qld)), with legislation now before the South Australian Parliament and under development in Victoria.

[140] See, again, *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

[141] T Ingram, 'Andrew Forrest calls on government to lead regional response against slavery', *The Australian Financial Review*, October 17, 2016. Further, the federal Government is currently engaging in consultation over the introduction of legislation based on the UK's *Modern Slavery Act 2015*: see Australian Government, *Modern Slavery in Supply Chains Reporting Requirement – Public Consultation*, Attorney-General's Department: 16 August 2017.

misconduct of this kind, and consumers simply associate worker exploitation with the brand (rather than the employer/business that is legally responsible).

In summary, the combination of greater visibility of mistreatment of workers through the media, a highly proactive regulator (FWO), and new forms of regulatory intervention at both federal and state levels add up to a decisive shift in momentum towards improved enforcement of workplace laws for Australian workers.

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Potential of the European Convention on Human Rights in the field of Wage Protection

Elena Sychenko [1]

Abstract Purpose. The research was undertaken to estimate the perspectives of wage claims under the ECHR and investigate whether the provisions of the Convention might be referred to in the claim for decent wage.
Design/methodology/approach. The paper investigated the approach of the European Court of Human Rights to wage claims (non-payment, reduction or deductions from wages), considering relevant case law under the article 1 of Protocol 1(property rights) and article 3 (degrading treatment) of the ECHR.
Findings. The Court perceives salary as a payment which is protected under Article 1 of the Protocol 1. Such approach entitles employees to bring claims on the lack of payment before the ECtHR, as well as claims on the reduction of wages or excessive deductions. It was also established that the ECHR contains certain prerequisites for a potential claim concerning an employee's right to decent wage.
Research limitations/implications. The paper contributes to the discussion about the impact of international human rights instruments upon labour law.
Originality/value. The author draws attention to the potential applicability of the ECHR in cases of wage protection, concerning the right to decent wage in particular.
Paper type. Research paper.

Keywords: *Labour Law, European Court of Human Rights, Decent Wage, Human Rights.*

[1] Associate Professor at Saint Petersburg State University. Email address: elena.sychenko@spbu.ru

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1. Introduction

The gradual expansion of the European Convention on Human Rights over certain rights at work, such as the right to collective bargaining, the right to strike and the right to privacy has become evident in recent years. There are many publications researching relevant ECtHR's case law which demonstrate the growing value of the ECHR for employment law.[2]
In this paper, I would like to reflect upon the potential of the Convention in the field of wage protection, which was little researched to the present moment. This analysis will be based on the review of decisions and judgments of Strasbourg bodies (former European Commission of Human Rights and the ECtHR), bearing in mind the Court's practice of referring to European consensus when establishing new standards of human rights protection and to other sources of International law, as supporting the legitimacy of the Court's expansive interpretation of Convention rights.
The main research hypothesis is the potential applicability of the ECHR in cases of wage protection, concerning the right to decent wage in particular. The paper's structure is designed firstly to provide the analysis of Strasbourg case law on wage protection and secondly to substantiate further expansion of the ECHR over matters of decent wage.

2. The Protection of Wages: Current Cases and Perspectives

Article 1 of Protocol 1 to the ECHR ("**A1P1**") provides:

> *Protection of property:*
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State*

[2] See, for example, contribution to F.Dorssemont, K.Lörcher, I.Schömann (eds), *The European Convention on Human Rights and the employment relation,* Oxford, Hart Publishing, 2013; H. Collins, *Theories of Rights as Justifications for Labour Law*, in G Davidov and B Langille (eds), The Idea of Labour Law, Oxford, OUP, 2011, 137-155; V. Mantouualou, *The Protection of the Right to Work through the European Convention on Human Rights*, Cambridge Yearbook of European Legal Studies, 16 (2013-2014); V. Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, Human Rights Law Review, 13.3, 2013, 529-555; J.-P Marguenaud. et J. Mouly, *Le droit de gagner sa vie par le travail devant la Cour europeenne des droits de l'homme*, Recueil Dalloz, 2006, 182; D. Feldman, *The developing scope of Article 8 of the European Convention on Human Rights,* European Human Rights Law Review, 1997, 265.

> *to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

2.1. General Approach to the Protection of Possessions under A1P1

As the provisions of A1P1 do not contain any definition of "possessions", it must be explained how the Strasbourg bodies perceive this term. As early as in the *Marckx* case, the ECtHR acknowledged that A1P1 in substance guarantees the right of property.[3] A more complex approach has developed over the years and the ECtHR has formed an autonomous concept of "possession".[4] It means that the notion of "possessions" in the A1P1 is independent of the way it is formally classified in domestic law.[5]

The ECtHR emphasised that A1P1 does not include a right to *acquire* property.[6] However, in the light of this article, it considered several cases concerning the right to future income.[7] In such cases, the ECtHR stated that the claims to future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable.[8] In *N.K.M. v. Hungary*, the ECtHR had to decide whether severance pay constituted possession in the sense of A1P1. It held that this payment constitutes a substantive interest protected by A1P1 as it is undeniable that it "has already been earned or is definitely payable".[9] In *Stec and others v. UK*, the ECtHR held that an enforceable claim to a social security benefit can constitute 'possession' within the meaning of A1P1.[10]

[3] ECtHR, Marckx v. Belgium (6833/74) 13/06/1979. para. 63.

[4] The Inter-American Court of Human Rights has developed a similar approach and the protection of property has become an important tool for the economic, social, and cultural rights. See L. Lixinski, *Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law*, European Journal of International Law, 21.3, 2010, 585-604.

[5] ECtHR, Beyeler v. Italy (33202/96) GC 05/01/2000, para. 100

[6] ECtHR, Stec and others v. UK (65731/01, 65900/01) 12/04/2006, para. 53.

[7] ECtHR, Centro Europa 7 S.r.l. and Di Stefano v. Italy (38433/09) GC 07/06/2012; Anheuser-Busch Inc. v. Portugal [GC] (73049/01) 11/01/2007; Tre Traktörer Aktiebolag v. Sweden (10873/84) 07/07/1989.

[8] ECtHR, Anheuser-Busch Inc. v. Portugal, para. 64

[9] ECtHR, N.K.M. v. Hungary (66529/11) 14/05/2013, para. 35

[10] ECtHR, Stec and others v. UK, see more in S. Günter Nagel, Francis Kessler, Social Security Law, Council of Europe. Kluwer Law International, 2010, p. 40

In the Grand Chamber judgment of *Kopecký v. Slovakia*,[11] the ECtHR went to some lengths to define the notion of the legitimate expectation in the context of A1P1, and acknowledged that a legitimate expectation might be protected under the ECHR only if the claim has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it.[12]
However, in the recent case of *Béláné Nagy v. Hungary*,[13] the ECtHR acknowledged the applicant's legitimate expectation to receive a disability pension once he had met the administrative requirements of the disability pension scheme as in force at the first material point in time.[14] Based on this argument, the ECtHR acknowledged the right of the applicant for the disability pension, despite decisions by the domestic courts not to grant this right.
This judgment demonstrates that it is not easy to draw the line between potential rights not protected by the article, and the legitimate expectation that the right will materialise, as protected by A1P1.[15]
The ECtHR's jurisprudence provides us with some guidelines in this respect. In *Aizpurua Ortiz and others v. Spain*, the ECtHR acknowledged that the applicants, deprived of the right to access supplementary pensions acquired under an earlier collective agreement, had at least a legitimate expectation of continuing to receive this pension.[16] In *Kjartan Ásmundsson v. Iceland*,[17] concerning the abolition of a disability pension as a result of changes in the way the applicant's disability was assessed, the ECtHR held that the applicant could validly plead an individual legitimate expectation that his disability would continue to be assessed on the basis of his incapacity to perform his previous job and found the violation of A1P1.[18] These cases demonstrate that a legitimate expectation might be established in cases where the lack or reduction of payments was the result of external factors; in other words, when the applicant did not cease to satisfy the requirements to benefit from the payment as it was initially established.

[11] ECtHR, Kopecký v. Slovakia (44912/98)28/09/2004, para. 45-52.
[12] Ibid, para. 52
[13] ECtHR, Béláné Nagy v. Hungary 53080/13 10/02/2015
[14] Ibid, para. 47.
[15] On this point see also G. Gauksdóttir, *The right to property and the European Convention on Human Rights: a Nordic approach*, Lund University, 2004, cited from P. Olsson, *Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights,* in F. Dorssemont, K. Lörcher , I.Schömann (ed.), The European Convention on Human Rights and the employment relation edited, Oxford, Hart Publishing, 2013, 399.
[16] ECtHR, Aizpurua Ortiz and Others v. Spain (42430/05) 02.02.2010, no violation of A1P1 was found as the interference pursued an aim in the general interest.
[17]ECtHR, Kjartan Ásmundsson v. Iceland (60669/00) 12/10/2004
[18] Ibid, para. 44, 45.

The concept of "legitimate expectation" makes us question whether an employee's right to be reimbursed for lost wages in case of unfair dismissal might be protected under A1P1. This question was answered in *Baka v. Hungary*.[19]

In that case, the applicant alleged that the State had violated his right under A1P1 as a result of the premature termination of his mandate as the President of the Supreme Court. One of the effects of the termination was his losing the salary he would have been entitled to obtain had he not been terminated from such a position. The ECtHR pointed that the dismissal of the applicant from the post had indeed precluded him from receiving a further salary; however, that income had not been actually earned and was not definitely payable.[20] Surprisingly, the ECtHR did not look at the national law in order to establish if the applicant's claim "had a sufficient basis in national law."[21] Such a conclusion is, in fact, in contrast with its usual approach to legitimate expectations, which caused labour scholars to argue that the claim of future income can at least be accommodated in legal systems where unjustified dismissals generate damages based on future earnings or reinstatement.[22] At the same time, this judgment demonstrates the lack of coherence in approach to the protection of claims brought under A1P1. It also demonstrates the ECtHR's unwillingness to protect job property, defined by Davies and M. Freedland, as the interest which a worker has in the continuation of his employment.[23] However, it is necessary to reflect on the reasons why the ECtHR refused to protect the right to receive reimbursement for lost wages in this case, where, in its opinion, the dismissal violated articles 6 and 10 of the ECHR.

This judgment makes us remember the cases where, for example, the ECtHR held that the withdrawal of a licence constituted the violation of A1P1 as the nature of these claims has a certain similarity with the claims of lost wage.[24] In *Tre Traktörer Aktiebolag v. Sweden*,[25] it found that the economic interests

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[19] ECtHR, Baka v Hungary (20261/12) 27/05/2014.

[20] Ibid, para. 105.

[21] ECtHR, Kopecký v. Slovakia [GC] (44912/98) 28/09/2004, para 52.

[22] P. Olsson, *op. cite* 14, 397.

[23] Davies and M. Freedland, *Labour Law: Texts and Materials*, London, Weidenfeld and Nicolson, 1984, 428.

[24] It's worth noting that in cases concerning the decrease of income due to legislative changes the ECtHR has been reluctant to find the violation of A1P1: see X v. the Federal Republic of Germany (8410/78) 13/12/1979 (concerning notaries' expectations in respect of fees which had been statutorily reduced), Casotti, Florio and The Consiglio Nazionale Dell' Ordine Dei Consulenti Del Lavoro v. Italy (24877/94) 16/10/1996 (concerning the possible decrease in the income of labour consultants).

[25] ECtHR, Tre Traktörer Aktiebolag v. Sweden (10873/84) 07/07/1989, para. 53.

connected with the running of the restaurant were "possessions" for the purposes of A1P1. In a later case, concerning the granting of a fishing licence, the Commission pointed out that a licence holder cannot be considered to have a reasonable and legitimate expectation to continue his activity if the conditions attached to the licence are no longer fulfilled or if the licence is withdrawn in accordance with the provisions of the law which was in force when the licence was issued. It further reiterated that expectations for future earnings could only be considered to constitute a "possession", if it had already been earned or where an enforceable claim to it existed.[26]
Therefore, the Commission separated the economic interests of the licence holder and the expectation for future earnings. This approach of the Strasbourg bodies to the protection of the rights of licence holders make us question whether the application of Mr Baka, who, in the opinion of the ECtHR, had a reasonable and legitimate expectation to continue his activity as the President of the Supreme Court, would have been more successful if he had claimed that his economic interest in keeping the post was infringed instead of claiming rights to future income as he did. It is likely that the ECtHR would still refuse to find the violation of A1P1. The ECtHR's finding that the dismissal violated the ECHR generally provides the possibility to reconsider the case by the national court. The claim under A1P1 is always additional in such cases. The ECtHR's refusal to grant it might be explained by the reference to the margin of appreciation of the States and the subsidiary role of the ECtHR. It consciously leaves the issue of reimbursement for lost wages to national courts to address.

2.2. Case Law on the Protection of Wages

The Strasbourg Court has on several occasions stated that the provisions of the A1P1 do not guarantee the right to continue to be paid a salary of a particular amount and that it is entirely at the State's discretion to determine what benefits are to be paid to its employees out of the State's budget.[27]
The establishment of a wide margin of appreciation of the states in matters dealing with wage protection is a general peculiarity of the cases considered in the light of A1P1. Even in a case concerning the calculation of a minimum wage, the ECtHR was reluctant to impose any restrictions: in *Nerva and Others v. UK*,[28] the ECtHR declared inadmissible the applications of waiters who

[26]ECtHR, Størksen v. Norway (19819/92) admissibility decision 05/07/1994.
[27] ECtHR, Baka v. Hungary (20261/12) 27.05.2014; Panfile v. Romania (13902/11) inadmissible 20/03/2012; Vilho Eskelinen and Others v. Finland [GC] (63235/00) 19/04/2007.
[28] ECtHR, Nerva and others v. UK (42295/98)24/09/2002.

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argued that the employer's refusal to include the tips paid by cheque or credit card in calculating their statutory minimum remuneration violated their rights under A1P1. The ECtHR' reasoning in this judgment demonstrates that it tends to acknowledge the legitimate expectation of receiving a minimum wage; however, it prefers to leave the calculation of the minimum wage wholly within the margin of appreciation of the State.

The ECtHR left aside the nature of the minimum wage and the nature of tips.[29] Relying on the conclusions of the domestic courts, it found that the applicants could not maintain that they had a separate right to the tips and a separate right to minimum remuneration, and emphasised that the ECHR does not guarantee the right to a higher level of earnings. The ECtHR also noted that it was for the applicants to come to a contractual arrangement with their employer as to how the tips at issue were to be dealt with, from the point of view of their wage entitlements.[30] This statement vividly demonstrates the reluctance of the ECtHR to interfere with relations between private parties of employment contracts and with the establishment of minimum wage regulations. The decision was criticised by British scholars as permitting restaurants to pay down the statutorily mandated UK minimum wage[31] and for not regarding the worker as being entitled to a certain threshold level of remuneration as a matter of right.[32] Some commentators pointed out that such an approach to the minimum wage ultimately led to the inclusion of customers in the employment relationship, and to the legal precariousness of workers.[33]

It is interesting to note that trade unions have successfully campaigned to amend the UK Minimum Wage Regulations, so the amounts of money paid by customers as a service charge or tip should be subtracted from the total of remuneration which the employer pays to the worker. Those changes were adopted in 2009.[34]

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[29] Dissenting Judge Loucaides noted that the nature of tips, given directly to the waiters, demonstrated that the tips were a possession in the meaning of A1P1. See Dissenting opinion of Judge Loucaides, Nerva and others v. UK.

[30] ECtHR, Nerva v. UK, para. 43.

[31] S. Tafreshi, *Here's a Tip, Change the Law-Nerva v. United Kingdom,* Loyola of Los Angeles International and Comparative Law Review, 27, 2005, 127, available at: http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1581&context=ilr (accessed 20.08.2015)

[32] T. Novitz, *Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions?* Industrial Law Journal, 2012, 41, 148.

[33] A. Einat, *A Worker-Employer-Customer Triangle: The Case of Tips*, Industrial Law Journal, 2011, 40, 2, 181.

[34] Hugh Collins, Keith Ewing, Aileen McColgan, Labour Law. Cambridge University Press, 2012, p. 259.

2.2.1. Wage Supplements

In *Vilho Eskelinen and others v. Finland*,[35] the ECtHR established a general rule that the establishment or annulation of wage supplements should be left within the margin of appreciation of the States. In this case, the applicants argued that the abolition of the remote-area supplement to wages of police officers constituted the violation of A1P1. The ECtHR noted that the applicants did not have a legitimate expectation to receive an individual wage supplement as the entitlement to it had ceased. In *Smokovitis and Others v. Greece*,[36] concerning the payment of a research allowance to teachers employed on temporary basis, the ECtHR did find the violation of A1P1, deciding that the applicants had a "legitimate expectation" to receive this supplement as the national courts had on multiple occasions stated that this research allowance applied to all staff.
In *Kechko v. Ukraine*,[37] the ECtHR found in favour of the applicant who claimed that the refusal to pay him a 20% increase in his salary, as required by law, violated A1P1. Therefore, in order to establish a legitimate expectation in remuneration claims brought under A1P1, such a claim must be supported by law or national case law, and ideally be acknowledged by decisions of the domestic courts. This approach reflects the ECtHR's general reluctance to consider remuneration claims under A1P1 unless the circumstances of the case very clearly demonstrate that a debt in favour of the applicant arose in this context.[38]
In *Lelas v. Croatia*,[39] the ECtHR considered a claim about the refusal to pay a wage supplement from a very interesting perspective. The applicant, a serviceman, was entitled to receive a wage supplement for carrying out demining work. For several years this right had been acknowledged by his supervisor. When the applicant brought a claim before the domestic courts, they found that the relevant limitation period had expired and therefore refused his claim. It found that the statutory limitation period continued to operate regardless of any acknowledgment of the debt on the part of the applicant's supervisor, as the supervisor was not an authorised person to extend any statutory limitation periods. The ECtHR considered that the refusal to grant the applicant's claim was an interference with the applicant's rights under A1P1. It further considered whether such interference was lawful and came to the conclusion that the failure of the domestic courts to refer to a legal provision justifying its finding that the debt should have been acknowledged by

[35] ECtHR, Vilho Eskelinen and Others v. Finland [GC] (63235/00) 19/04/2007.
[36] ECtHR, Smokovitis and others v. Greece (46356/99) 11/04/2002.
[37] ECtHR, Kechko v. Ukraine (63134/00) 08/11/2005.
[38] ECtHR, Van der Mussele v. Belgium (8919/80) 23/11/1983.
[39] ECtHR, Lelas v. Croatia (55555/08) 20/05/2010.

another official was incompatible with the principle of lawfulness and therefore contravened A1P1.
This judgment demonstrates that the ECtHR's approach to the protection of wage claims can expand to cover claims which have been refused by domestic courts. It is important that in such cases it seeks to establish whether such refusal corresponded to the criteria of accessibility and foreseeability as developed in the Strasbourg jurisprudence.

2.2.2. Reduction and Deductions

In all the cases concerning wage reduction or deductions from wages, the ECtHR has either explicitly or implicitly referred to the wide margin of appreciation of the States in the organisation of the labour market. It is particularly wide in respect of working prisoners when the deductions from their wages have a compensatory role, for example, because the deductions were intended to cover expenses for board and lodging while imprisoned. Thus in *Puzinas v. Lithuania*,[40] the ECtHR found that the deduction of a 25% contribution from a prisoner's salary did not violate A1P1, and in *Stummer v. Austria*[41] it noted that the deduction of 75% of prisoners' wages "appears rather high" but was not found too unreasonable overall. In *Davis v. UK*,[42] the Commission declared inadmissible the application of a prisoner who claimed that the deductions from his wage, used to provide entertainment and other facilities in prison, violated A1P1 of the ECHR.
In *Evaldsson v.Sweden*, the ECtHR established that the margin of appreciation should be limited by a positive obligation of the State to ensure the accountability of trade unions for received compulsory deductions from wages.[43]
As far as the reduction of wages is concerned, the ECtHR has tended to justify such interferences with reference to the public interest. In the last twenty years it has formed an approach to cases involving the reduction of benefits, finding violations in cases where such reductions were aimed at a limited number of individuals and decreased to such a significant extent so as to violate the

[40] ECtHR, Puzinas v. Lithuania (63767/00) 09/01/2007
[41] ECtHR, Stummer v. Austria (37452/02) 07/07/2011
[42] EurCommHR, Davis v. The United Kingdom (27042/95) inadmissible 17/01/1997
[43] ECtHR, Evaldsson and Others v. Sweden (75252/01) 13/02/2007, para. 63. The case concerned compulsory deductions from the wages of those who are not members of the union.

"safeguard against poverty for persons who lacked basic maintenance from another socially acceptable source".[44]

2.2.3. Austerity Measures

The recent case law on austerity measures demonstrates largely the same approach to the matters of reduction or deductions from wages. The proportionality exercise is the most significant part of the adjudication of applications under A1P1, and the ECtHR generally prioritises the general interest of the State in decreasing wages. In such cases, it tends to find violations if the applicant succeeds in demonstrating that as a result of the State's interference he or she has suffered from an individual and excessive burden.[45]

The estimation of the burden is very rigorous and this point, again, highlights the wide, but not unlimited[46] margin of appreciation of the State in this sphere. Let us take as an example the ECtHR's reasoning in *Koufaki and ADEBY v. Greece*,[47] which concerned cuts to pensions and salaries of public servants under national austerity measures.

It is interesting to note that, in contrast with the earlier case such as *Mihăieş and Senteş v. Romania*,[48] the ECtHR did not hesitate as to whether a salary cut might constitute an interference with possessions in the sense of A1P1; therefore it already represents a step forward. The State, justifying its interest in imposing austerity measures, noted that its goals coincided with those of the euro area Member States to ensure budgetary discipline and to preserve the stability of the euro area.[49] The ECtHR decided that the State did not, in this case,

[44] Compare, for example, ECtHR, Goudswaard-Van der Lans v. the Netherlands (75255/01) 22.9.2005 and Kjartan Ásmundsson v. Iceland (60669/00) 12/10/2004.

[45] This concept was developed in social security cases, see, for example, Kjartan Ásmundsson v. Iceland (60669/00) 12-10-2004; Goudswaard-Van der Lans v. the Netherlands (75255/01) 22.9.2005; Marija Božić v. Croatia (50636/09) 24/04/2014; Khoniakina v. Georgia (17767/08) 19/06/2012.

[46]ECtHR, Da Conceição Mateus and Santos Januário v. Portugal (62235/12, 57725/12) 08 October 2013, para. 23.

[47] ECtHR, Koufaki and ADEDY v. Greece (57665/12 57657/12)07/05/2013.

[48] ECtHR, Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02.03.2012

[49] N. Napoletano pointed out that the coincidence between the objectives pursued internally with those pursued by the European Union strengthened the position of the Government. N. Napoletano, *Estensione e limiti della dimensione economica e sociale della Convenzione europea dei diritti umani in tempi di crisi finanziaria*, Diritti umani e diritto internazionale, 2014 2(8), 425.

overstep its margin of appreciation and thus did not violate the ECHR.[50] The ECtHR did not investigate the first applicant's claims that the reduction of her wage, compounded by the rise in the price of basic essentials such as fuel and public service charges, had led to a drastic fall in her standard of living. Having found that the reduction was about 20%, the ECtHR stated that the extent of the reduction in the first applicant's salary was not such that it would place her at risk of having insufficient means to live on, and thus amounting to a breach of A1P1.[51] It also noted the observation of the Greek Court that the applicants had not claimed that they risked falling below the subsistence threshold. This observation might be interpreted as posing a "subsistence threshold" to justify the proportionality of austerity measures.

Examining other "austerity" cases permits us to ascertain with more certainty the permissible threshold by which wages may be decreased at a time of economic crisis. These cases concern both the reduction in pensions or wages and the taxation of severance payments received by public servants. It is particularly interesting to follow the ECtHR's reasoning when addressing the concept of what constitutes an excessive burden. Violation was found in a series of cases against Hungary, where the State introduced extremely high levels of taxation in respect of severance payments to be received by public servants (the level of taxation differed in these cases from 52% in *N.K.M. v. Hungary*[52] to 98% in *R.Sz. v. Hungary*[53]). In the cases concerning a decrease in pensions, the ECtHR found that the loss of 38% of a pension did not impose an excessive burden on the applicant, whilst the loss of 67% did violate A1P1.[54]

Inadmissible applications brought against Georgia, Portugal and Romania, where the pensions or other social benefits were reduced at a level less than 20% might be also referred to as, in the opinion of the ECtHR, a fair balance had been struck between the demands of the general interest and the

[50] It is interesting to note that two months prior to the ECtHR's decision, the ECSR decided that Greek austerity measures violated the ESC; its opinion, however, is not mentioned in the decision of the European Court. See ECSR, complaint No. 76/2012, Federation of Employed Pensioners of Greece (IKA–ETAM) v. Greece; ECSR, complaint No. 77/2012, Panhellenic Federation of Public Service Pensioners (POPS) v. Greece; ECSR, complaint No. 78/2012, Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece; ECSR, complaint No. 79/2012, Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece; ECSR, complaint No. 80/2012, Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece, became public on 22 April 2013.

[51] ECtHR, Koufaki and Yv. Greece, para. 46.

[52]ECtHR, N.K.M. v. Hungary (66529/11) 14/05/2013.

[53] ECtHR, R.Sz. v. Hungary (41838/11) 02/07/2013, see also similar cases Á.A. v. Hungary (22193/11), P.G. v. Hungary (18229/11) 23/09/2014.

[54]ECtHR, Stefanetti and Others v. Italy (21838/10 et al) 15/04/2014.

requirements of the protection of the applicants' rights under A1P1.[55]
This brief overview demonstrates that the violation of A1P1 was found only in cases when the decrease in payment was more than 50%; therefore, it appears that the margin of appreciation of the State is in fact very wide in this context.
The ECtHR, however, pointed out in *Steffanetti and others v. Italy* that the fair balance test cannot be based solely on the amount or percentage of the reduction suffered.[56] In this case, it took account of the average and minimum pensions in Italy[57], comparing them with the reduced pensions of the applicants. In contrast with *Koufaki*, the ECtHR referred to the related conclusions of the ECSR in respect of Italy. All these circumstances made the ECtHR conclude that the reductions at issue had imposed an excessive burden on the applicants.
Other "austerity cases" show that the ECtHR only considers an applicant's individual background as significant if the level of reduction is more than 50%; otherwise, its reasoning in these cases tends to be very brief and largely similar from case-to-case.
The ECtHR's approach to the impact austerity measures have on human rights could arguably be more rigorous; however, it would be impossible for it to take a more rigorous approach without interfering too much with States' social policies, and without invading the margin of appreciation of States. The ECtHR's decisions that reductions of wages and pensions can constitute an interference with ECHR rights is a valuable conclusion per se. It might provide domestic courts with a new perspective of such cases, by demonstrating the possibility to consider austerity measures in the light of fundamental human rights. National courts, which are in principle better placed than an international judge to appreciate what is "in the public interest",[58] might be more stringent in its assessment of the proportionality of the interference with social rights and might notice details which are imperceptible from Strasbourg.
It is remarkable that this approach has already been taken by the Estonian

[55] ECtHR, Da Silva Carvalho Rico v. Portugal (13341/14) 24/09/2015; Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02/03/2012, Da ConceiçãoMateus v. Portugal and Santos Januário v. Portugal (62235/12, 57725/12) 08/10/2013, Khoniakina v. Georgia (17767/08) 19/06/2012.
[56] ECtHR, Steffanetti v. Italy, para. 58, 59.
[57] Ibid, para. 62-63.
[58] ECtHR, Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02/03/2012

Supreme Court[59], Latvian[60] and Portuguese Constitutional Courts[61] in judging pension cuts in those States as being unconstitutional.

2.3. The Interconnection between Violations of Procedural Rights under Article 6 and Violations of the A1P1 in the context of Employment

Article 6 of the ECHR has a particular value in the context of employment relations. The ECtHR has formulated certain requirements to the procedural rights of employees in labour disputes.[62] This facet of the ECtHR's jurisprudence was intentionally left outside the scope of the present research as it merits a separate profound analysis. However, the cases considered in light of both articles 6 and A1P1 will be researched in this section so far as they complement the ECtHR's approach to the protection of wages.
The ECtHR has dealt with numerous applications concerning the non-enforcement of judgments awarding social security benefits or salary arrears and has established that if an applicant is unable to obtain the benefit awarded by the judgment then that inability constitutes an interference with the right to the peaceful enjoyment of possessions.[63] It has affirmed that States may not

[59] On the 26 June 2014 the Estonian Supreme Court declared the cuts in judges' pensions during the austerity period unconstitutional, see Representing Retired Estonian Judges in Challenge to Austerity Measures. Available at: http://www.ceelegalmatters.com/index.php/over-the-wire/legal-ticker-deals-and-cases-in-cee/item/689-representing-retired-estonian-judges-in-challenge-to-austerity-measures/689-representing-retired-estonian-judges-in-challenge-to-austerity-measures (accessed 20 October 2014)
[60]See Judgment of The Constitutional Court Of Latvia, 21 December 2009, in the case No. 2009-43-01 that held unconstitutional the reductions of pensions, referring on the judgment of the ECtHR and to the General comments of the ICESCR.
[61]See the Constitutional Court Decision No. 353/2012, that declared unconstitutional the provisions of Budget Law on salary and pensions cuts for public servants, the decision is available at: http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html (accessed 20 October 2014).
[62] ECtHR, Fogarty v. The United Kingdom [GC] (37112/97) 21/11/2001; Waite and Kennedy v. Germany [GC] (26083/94) 18.2.1999; Oleksandr Volkov v. Ukraine (21722/11) 09.01.2013; D.M.T. and D.K.I. v. Bulgaria (29476/06) 24/07/2012; Tripon v. Romania(27062/04) 07/02/2012; Mitrinovski v. "The former Yugoslav Republic of Macedonia" (6899/12) 30/04/2015.
[63] ECtHR, Mykhaylenky and others v. Ukraine (35091/02, 35196/02, 35201/02) 30/11/2004, para. 60; Fuklev v. Ukraine (71186/01) 7/06/2005; Adamović v. Serbia (no. 41703/06) 02.10.2012; Stošić v. Serbia (64931/10) 01.10.2013.

justify the non-enforcement of such judgments by reference to lack of relevant funds.[64]

Ukraine and Russia appear the most before the ECtHR as respondent states in such cases. In spite of adoptig the pilot judgments against Ukraine[65] and Russia[66] respectively, in which the ECtHR urged each of the respective States to set up an effective domestic remedy for the non-enforcement or delayed enforcement of domestic judgments, the problem has remained largely unresolved.[67]

The ECtHR recently faced another problem concerning the enforcement of judgments in favour of employees – the execution of such judgments in the course of insolvency proceedings or in case of insufficiency of the employer's property. In this series of cases, the leading positions are occupied by Russia, Ukraine and Serbia.

The inability of an employer to cover its debts, acknowledged by national courts, is the most pervasive problem. According to the well-established Strasbourg case-law, the extent of State obligations in cases of non-enforcement of judicial decisions will depend on who the debtor is, in each specific instance.

The situation is often complicated by the processes of privatisation, which meant that owners could change over the course of time. In cases where the privatisation occurred before the domestic court handed down its judgment awarding salary arrears, the ECtHR tends to refuse employee's applications alleging the lack of payment, pointing out that the State cannot be held responsible for the financial debts of a private legal entity.[68] In such cases, the State is not directly liable for debts of private actors unless it fails to act in order to enforce a judgment.[69]

If the State fails to act then the ECtHR is more likely to attribute the failure to meet its responsibilities under the ECHR to the State, particularly if it can be

[64] ECtHR, Mykhaylenky and others v. Ukraine, para. 52; Piven and Zhovner v. Ukraine (56849/00, 56848/00) 29/06/2004; The delay in payment also cannot be justified by such a reference, see Voytenko v. Ukraine (18966/02) 29/06/2004.

[65] ECtHR, Yuriy Nikolayevich Ivanov v. Ukraine (40450/04) 15/10/2009.

[66] See ECtHR, Burdov v. Russia(N1) (59498/00) 07.05.2002; Burdov v. Russia (N 2)) (33509/04) 15/01/2009.

[67] See P. Maggs, O. Schwartz, W. Burnham, *Law and Legal System of the Russian Federation. Sixth Edition*, Juris Publishing, 2015, 389; I. Ilciienko, *Pilot Judgement procedure of the European Court of Human Rights: panacea or dead-end for Poland, Russia and Ukraine*, LL.M. Human Rights Thesis Central European University, published November 29, 2013; available at: www.etd.ceu.hu/2014/ilchenko_ivanna.pdf (accessed 20.07.2015).

[68] ECtHR, Lepetyukhov v. Ukraine (5033/07) inadmissible 16/03/2010.

[69]ECtHR, Anokhin v. Russia 25867/02 inadmissible 31/05/2007; Polacik v. Slovakia (58707/00) 15/11/2005;

demonstrated that the national authorities did not ensure the procedures enshrined in the legislation for the enforcement of final judgments and for bankruptcy proceedings have been complied with.[70]
At the same time, the ECtHR has consistently held the States responsible for the non-enforcement of the judgments rendered against companies owned by the State, or where there has been a subsequent change in their respective capital share structure resulting in the predominance of the State-owned and socially-owned capital.[71] Thus in *Khachatryan v. Armenia*,[72] the ECtHR found the State liable for the breach of both articles 6 and A1P1 due to the non-enforcement of a judgment which granted damages for salary arrears against a private company, the majority shareholder of whom was the State. The same conclusion was reached in numerous cases against Serbia as far as they concerned the non-enforcement of judgments in the circumstances of on-going insolvency proceedings of state-owned companies.[73] The most important point of the ECtHR's judgments in these cases is the requirement to pay an employee the sums awarded in the final domestic judgments.[74]
Another significant point is the acknowledgment of the State's liability in cases where the employer's company lacked institutional and operational independence from the State.[75] This conclusion concerns certain types of enterprises where the State under national law retains ownership of the property of that enterprise, approves all transactions with that property, controls the management of the enterprise and decides whether the enterprise should continue its activity or be liquidated.[76]
Under Russian law, for example, such enterprises are not liable for the debts of their owners, and the owners are not generally liable for the companies' debts. In spite of such a clear national provision, the ECtHR has found Russia liable for the debts of such companies in respect of their employees.[77] In the recent case of *Liseytseva and Maslov v. Russia*,[78] the State was also found responsible for

[70] ECtHR, Fuklev v. Ukraine (71186/01) 07/06/2005, para. 91.
[71] ECtHR, Sekulic and Kucevic v. Serbia (28686/06 50135/06) 15/10/2013
[72] ECtHR, Khachatryan v. Armenia (application no. 31761/04) 01/12/2009
[73] ECtHR, Marčić and Others v. Serbia(17556/05) 30/10/2007, para. 60; Crnišanin and Others v. Serbia (35835/05 et al) 13/01/2009; Rašković and Milunović v. Serbia (1789/07 and 28058/07) 31 May 2011; Adamović v. Serbia (41703/06) 2/10/2012
[74] See also ECtHR, Janković v. Serbia (21518/09) 18 November 2014; Tomović And Others v. Serbia (5327/11 et al) 24/02/2015; Jovičić and Others v. Serbia (37270/11 et al) 13/01/2015.
[75] ECtHR, Bichenok v. Russia (13731/08) inadmissible 31/03/2015, para. 18.
[76] ECtHR, Aleksandrova v. Russia (28965/02) 06/12/2007 the same line in Veretennikov v. Russia (8363/03) 12/03/2009 see also Filshteyn v. Ukraine (12997/06) 28/05/2009.
[77] ECtHR, Shafranov v. Russia (24766/04) 25/09/2008.
[78] ECtHR, Liseytseva and Maslov v. Russia (39483/05 and 40527/10) 09/10/2014.

the non-enforcement of the judgment on the payment of salary arrears in respect of the employees of municipality-owned companies.[79]
The prerequisites of a successful claim are clearly formulated in the Strasbourg case law. The applicant is only required to file a request for the enforcement of a judgment awarding salary arrears with the competent national court or, in case of liquidation or insolvency proceedings against the debtor, to report his or her claims to the administrators of the debtor.[80]
In *Zouboulidis v. Greece*,[81] the Court touched upon another facet of rights under A1P1. The applicant, an official of the Ministry of Foreign Affairs, was refused additional payments which he was entitled to by law, as the limitation period for the claims against the State had already expired. In his application before the ECtHR, he alleged that the establishment of a reduced time-limit for claiming the debts owed by the State as well as the calculation of default interest from the date on which notice of the action was served on the State were in breach with A1P1. The ECtHR emphasised that the mere interest of a State's cash flow could not in itself be regarded as a public or general interest justifying interference with individual rights, through the application of the two-year limitation period and the granting of preferential treatment to the state in fixing the date from which default interest was charged. It found the violation of A1P1 and awarded just satisfaction in respect of the pecuniary damage sustained by the applicant in the sum of the debt calculated on the basis of general rules.
The cases considered above demonstrate that the number of the cases brought before the ECtHR under article 6 and A1P1 is growing with years. Due to the fact that the ECtHR can require the State to pay salary arrears, this body turns out to be the most effective international body in the sphere of wage protection and provides invaluable support to the realisation of the fundamental right to remuneration, even though this right is absent from the text of the ECHR.

3. The Potential 0f the ECHR in the Sphere of Wage Protection

> *"Give him food and shelter, when you have covered his nakedness, Dignity will follow by itself".*
> Friedrich Schiller (1798)[82]

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[79] See also ECtHR, Voronkov v. Russia (39678/03) 30/07/2015.
[80] ECtHR, Živković v. Serbia (63694/10) inadmissible 30/06/2015; Lolić v. Serbia (44095/06) 22/10/2013; Nikolić-Krstić v. Serbia (54195/07) 14/10/2014.
[81] ECtHR, Zouboulidis v. Greece (No. 2) (36963/06) 25/06/2009.
[82] Cited from C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*. European Journal of International Law Volume, 2008, 19, 4, 655-724.

It has already been mentioned above that the ECHR, in the opinion of the ECtHR, does not guarantee the right to acquire property. Scholars have added that currently there is no "real substantial movement" towards the acknowledgement of the right to acquire property.[83] However, as also noted earlier, the ECtHR has started to use the notion of "insufficient means to live" in the consideration of cases under A1P1. Therefore, there is a hope, that taking into account a general trend of expanding the ECHR to address social matters and the social policies of the states, the ECtHR could develop this concept of the sufficiency of the means to live even further. This concept, if further elaborated, might be used for the protection of the right for fair remuneration.
Why should the European ECtHR interfere with the issue of wages? There are already provisions in the International Covenant on Economic, Social and Cultural Rights (article 7) and in the ESC. According to the approach adopted by the European Committee of Social Rights (ECSR), fair remuneration must, in any event, be above the poverty line in a given country i.e. 50% of the national average wage.[84] This clear interpretation of the right to a minimum wage has, regretfully, a very limited practical impact. The protection of social rights through the ECSR has already proven ineffective, taking into account the peculiarities of the collective complaints system[85] and the non-binding legal status of its conclusions.[86] The same could be said in respect of the International Committee on Economic, Social and Cultural Rights (ICESCR), which only recently acquired its authority to consider individual claims.[87] None of the five claims brought before the ICESCR since the adoption of the Optional Protocol to International Covenant on Economic Social and Cultural

[83] P. Olsson, *op. cite* 14, 385.
[84] See *Digest Of The Case Law Of The European Committee Of Social Rights*, 1 September 2008. Council of Europe. available at:https://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf (accessed 30.07.2015)
[85] R. Churchill and U. Khaliq, *The Collective Complaints System of the European Social Charter: an effective mechanism for ensuring compliance with economic and social rights?* European Journal of International Law, 15,3, 2004, 417-456.
[86] See, e.g. V. Mantouvalou and P. Voyatzis, *The Council of Europe and the protection of human rights: a system in need of reform*, in S.Joseph, A.McBeth (ed.), Research Handbook on International Human Rights Law. Edward Elgar Publishing, 2010, 326 – 352; see also J. Petaux, *Democracy and Human Rights for Europe: The Council of Europe's Contribution,* Council of Europe, 2009, 263; B. Deacon, *Global Social Policy: International Organizations and the Future of Welfare*, SAGE, 1997, 83.
[87] The possibility of individual claims was highly anticipated by scholars and their necessity during times of crisis has been consistently emphasised. See O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, London and New York, NY, Routledge, 2012, 44.

Rights concern the right to a fair wage.[88]
Turning to other possible avenues of protecting the right to a decent wage, we find that "[i]t is barely hinted at in the sphere of the so-called four pillars of the Decent Work Agenda promoted by the ILO on a worldwide scale since 1999, the guarantee of an adequate wage is completely absent from the first EU formulations regarding the objective of (more and) better jobs pursued by the EU since 2000 within the so-called Lisbon strategy".[89]
In fact, the right to a decent wage was left outside the scope of the fundamental principles of ILO.[90] Although the ILO Consitution mentions the necessity of an adequate living wage, ILO Conventions on wage protection do not mention this notion.[91]
In such circumstances, the potential in any ECtHR elaboration on the concepts of "insufficient means to live" and the possibility of considering relevant claims under article 3, which prohibits (among other things) inhuman and degrading treatment, could provide employees with a new avenue by which to protect their right to obtaining fair remuneration on an international level. It could also offer interpretive support to the national courts, dealing with these matters.
The ECtHR has recently noted in its Grand Chamber judgment in *Bouyid v. Belgium*: "The prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity".[92] In the same judgment, it pointed out that respect for human dignity forms part of the very essence of the ECHR.[93] The ECtHR has already referred to article 3 in cases concerning social rights[94] and scholars predict the

[88] See the list of pending cases on the official site of the Committee: http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx (accessed on 23.09.2015).
[89] A. Lo Faro, *Is a Decent Wage Part of a decent Job? Answers from an Enlarged Europe,* WP CSDLE Massimo D'Antona, 2008, 18. Available at: http://aei.pitt.edu/13699/1/lofaro_n64-2008int.pdf (accessed 20.05.2015).
[90] See ILO Declaration on Fundamental Principles and Rights at Work (1998); Zimmer, J. Michael, *Decent Work with a Living Wage*, in R. Blanpain and M. Tiraboschi (eds.) Global Labor Market: From Globalization To Flexicurity, Kluwer Law International BV, 2008, 61-80, (the author proposed to complement fundamental principles by the right to living wage).
[91] ILO Minimum Wage Fixing Convention, 1970 (N 131); ILO Social Policy (Basic Aims and Standards) Convention, 1962 (N117). It is interesting to point out that the calculation of adequate earnings is one of thirty criteria elaborated by the ILO for the estimation of decent work, see R. Anker et al. *Measuring decent work with statistical indicators*, International Labour Review, 2003, 142, 2, 147-178.
[92] ECtHR, Bouyid v. Belgium [GC] (23380/09) 28/09/2015, para. 83.
[93] Ibid, para. 89.
[94] ECtHR, M.S.S. v. Belgium and Greece [GC] (30696/09)21/01/2011; Larioshina v. Russia (56869/00) 23/04/2002; Budina v. Russia (45603/05) 18/06/2009.

strengthening of this trend.[95] In fact, the concept of human dignity has become a very "attractive" normative concept,[96] capable of justifying the expansion of certain rights before the national and international courts. It is widely acknowledged that economic and social rights are essential to the concept of human dignity.[97] In two cases against Russia, the ECtHR stated a very important thing –a wholly insufficient amount of pension and social benefits may raise an issue under article 3 of the ECHR.[98]

Even though it is rather questionable whether the ECtHR might conclude the same in respect of a "wholly insufficient" wage, these decisions impose a new, positive social obligation on the State in the context of article 3, which, if further developed, might have a deepened impact on employment law as well.

It is necessary to mention the general approach of the ECtHR to the violations of this article. According to the Strasbourg case-law, degrading treatment violates article 3 if it attains a "minimum level of severity". This threshold is reached where ill-treatment involves actual bodily injury or intense physical or mental suffering or humiliates or debases an individual, showing a lack of respect for, or diminishing his or her human dignity.[99] Applying this principle, the ECtHR noted that the applicants in two cases against Russia failed to provide sufficient evidence that the low pension had caused damage to the respective applicants' physical or mental health.[100] The applications were declared inadmissible, even though the sum of the pensions were about 15 euro in Larioshina and about 50 euro in the case of Budina.

Let us imagine a civil servant residing in a remote area of Russia, where there is no employment opportunity other than with the civil service, which pays about 35% of the average national wages.[101] As a result of not having sufficient funds to pay for medical

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[95] F. Tulkens, *The European Convention on Human Rights and the economic crisis: the issue of poverty*, EUI Working papers, AEL 2013/8; N. Napoletano, *op. cit.* 48.

[96] D. Weisstub, *Honor, Dignity, and the Framing of Multiculturalist Values*, in D. Kretzmer, E. Klein (eds), Concept of Human Dignity in Human Rights Discourse, Springer Netherlands, 2002, 265.

[97] See Article 23(3) of the Universal Declaration of Human Rights, see also O. Schachter, *Human Dignity as a Normative Concept, The American Journal of International Law, 1983,* 77, 4, 85; C. Gearty, V. Mantouvalou, *Debating Social Rights*, Oxford, Bloomsbury Publishing, 2010.

[98] ECtHR, Larioshina v. Russia (56869/00) 23/04/2002; Budina v. Russia (45603/05)18/06/2009.

[99] ECtHR, Price v. The UK (33394/96)10/07/2001; V. v. UK (24888/94)16/12/1999; T.M. and C.M. v. The Republic of Moldova (26608/11) 28/01/2014, para 35.

[100] ECtHR, Larioshina v. Russia (56869/00) 23/04/2002; Budina v. Russia (45603/05) 18/06/2009.

[101] Recent reports of the Russian Federal State Statistics Service clearly demonstrate that the situation is wide-spread, thus only the possibility to commence a relevant application to the ECtHR remains hypothetical. See: The results of the federal statistical observation in the field of remunerationof certain categories of social workers in 2014 (Itogi federal'nogo statisticheskogo nablyudeniya v sfere oplaty truda otdel'nykh kategoriy rabotnikov sotsial'noy sfery i nauki za 2014 god). Available at:

treatments, the civil servant's health suffers. The civil servant, having unsuccessfully pursued domestic legal avenues, brings a claim to the ECtHR, claiming that the State violated its article 3 obligations to prohibit degrading treatment. In this hypothetical case, the applicant would bring evidence of the damage to her health and will establish an irrefutable link between the damage and the fact that her low wage directly caused her inability to obtain medical treatment that could have arrested the harm suffered to her health.

Should the ECtHR approach this case in a bold way and find a violation of article 3, or should it rather leave a wide margin of appreciation to the State in establishing the remuneration of civil servants? Obviously, the first option is less probable. However, there is an opportunity for the ECtHR to take that bolder option if it follows the tradition to refer to other international instruments (such as they did in the Demir and Baikara case). In consequence, it might find support for such an innovative interpretation of article 3 in the provisions of the ESC and any relevant conclusions of the ESCR.

4. Conclusions

It has been illustrated in the first section that the ECtHR's jurisprudence on the wage protection is rather modest, but nevertheless contributes to the protection of employees' rights. It entitles them to bring claims concerning the lack of payment before the ECtHR, alleging the reduction of wages or excessive deductions. This possibility, even if it is subject to numerous conditions, is very important as it provides an additional chance to confront the State as an employer and make it respect fundamental social rights.
Human rights litigation based on property rights has an ideological purpose, insofar as it has the potential to make workers collectively aware of and reflect upon their legal entitlements and their moral claims.[102] In addition, the ECtHR's jurisprudence urges national courts to consider the issue of proportionality where an interference with the employee's rights is justified by the state on the basis of advancing the public interests. It proposes a concept of "excessive burden" (even if it needs further elaboration), which permits one to outline the margin of appreciation of the states in the adoption of the austerity measures.
This analysis of the potential of the ECHR in this field demonstrated that the ECtHR is gradually expanding the scope of the Convention to cover certain social rights and renders the prohibition of degrading treatment applicable to the state's policy in the social field. The research of Strasbourg case law made me discover certain prerequisites for a potential claim concerning an employee's right to decent wage. This finding, although purely theoretical,

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http://www.gks.ru/free_doc/new_site/population/trud/itog_monitor/itog-monitor4-14.html (accessed 20.07.2015).
[102] T. Novitz, *Op. cit.* 31, 153.

might contribute to the contemporary perception of international instruments which might be referred to in cases of protection of the right to decent wage. I believe the protection of this right under ECHR might become real if local actors (trade unions, judges, advocates) become aware of the relevant provisions of the ECHR and ECtHR's case law in this field. Therefore there is a need to disseminate this information on national levels and to profoundly research the ways of enhancing the direct impact of the ECHR on national practice in the field of employment right protection.

Memory, Mobilization, and the Social Bases of Intra-Union Division: Some Lessons from the 2009-2010 USW Local 6500 Strike in Sudbury, Ontario

Adam D.K. King [1]

Abstract Purpose. This paper engages with workers' accounts of a strike in Northern Ontario, Canada to consider the processes through which intra-union tensions develop and to examine their implications for member involvement and mobilization.

Design/methodology/approach. The paper draws on interviews with currently employed and retired United Steelworkers miners in Sudbury, Ontario, and analyses their memories and narratives of the 2009-2010 strike at Vale (Inco).

Findings. I argue that differences in the accounts of the strike between older and younger workers result from their historically specific class positions, as well as the uneven nature of contract concessions. I suggest that generational tension could be an impediment to future broad-based member engagement.

Research limitations/implications. The research contributes to work on union renewal and social unionism.

Originality/value. The paper provides insight into the dynamics of member mobilisation and contract concessions, and asks us to consider the social bases of intra-union division.

Keywords: *Mining, Union renewal, Member mobilisation, Memory, Generational tension*

[1] Adam D.K. King, PhD Candidate, York University, Toronto, Canada. Email address: adkking@yorku.ca.

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1. Introduction

"Nobody voted for that contract." So read the headline in the *Sudbury Star* upon the conclusion of the ratification vote that ended the strike at Vale-owned mines and processing facilities in Sudbury, Ontario by United Steelworkers (USW) Local 6500 in July 2010.[2] This longest strike in the history of mining in the region followed the controversial purchase of Inco, historic mining giant and fixture of Sudbury, by Brazilian-owned conglomerate CVRD (Vale in Sudbury) in 2006.[3] With the 2008 financial crisis as a pretext, the new employer pursued an openly hostile attempt to overhaul labour relations and extract concessions from the workforce at its newly acquired operations. The strike began in July 2009, lasted nearly a year, and according to the union activist quoted above, concluded when workers begrudgingly voted in favour of a return to work and a new collective agreement containing considerable losses and givebacks.[4]

In many respects, nickel mining in Sudbury is exemplary of the economic trends and challenges facing the industrial unions formed over the period of the Great Depression and the "postwar compromise."[5] Globalization and capital concentration, growing precariousness and shrinking employment, and attacks on labour and the environment, all confront a union whose strength and strategic capacities were forged in an earlier era. In this the Steelworkers are not alone. Activists and scholars have been addressing these issues in a substantial literature on union renewal and revitalization.[6] However, this research too often neglects workers' subjectivities and the processes through which they are formed and re-formed, addressing questions of strategy, organization, and mobilization without enough appreciation for the extant places from which workers begin. Through an analysis of workers' recent experiences of a particularly trenchant labour conflict, this article seeks to draw

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2. C. Mulligan, *Nobody Voted for that Contract*, in *Sudbury Star*, July 10, 2010.
3. T. Perkins, *Inco Approves CVRD Takeover Bid*, in *Toronto Star*, September 25, 2006.
4. Vale/United Steelworkers of America Local 6500, *Collective Bargaining Agreement: Ontario Division*, July 8, 2010 - May 31, 2015; See also J. Peters, *Down in the Vale: Corporate Globalization, Unions on the Defensive, and the USW Local 6500 Strike in Sudbury, 2009-2010*, in *Labour/Le Travail* vol. 66, Fall, 2010, 73-105.
5. W. Roberts, J. Bullen, *A Heritage of Hope and Struggle: Workers, Unions, and Politics in Canada, 1930-1982*, in M.S. Cross and G.S. Kealey (eds.) *Modern Canada, 1930s-1980s*, McClelland and Stewart, Toronto, 1984, 105-140.
6. P. Fairbrother, C.A.B. Yates (eds.) *Trade Unions in Renewal: A Comparative Study*, Routledge, London, New York, 2013; C.M. Frege, J. Kelly (eds.) *Varieties of Unionism: Strategies for Union Revitalization in a Global Economy*, Oxford University Press, Oxford, 2004; R. Milkman, K. Voss (eds.) *Rebuilding Labor: Organizing and Organizers in the New Union Movement*, Cornell University Press, Ithaca, 2004.

attention to some potential constraints to union renewal and member mobilization. In particular, I show how workers' "collective memories"[7] are shaped by historically specific class identities and the material circumstances of work, and argue that future organizing and mobilization strategies will need to address how workers use social and historical references to understand their current circumstances, and the divisions this can generate. For example, the uneven ways in which difficult changes such as shrinking employment opportunities, increased use of non-union contractors, and the union's defeat impact younger and older workers play a determining role in how interviewees understand the strike. Workers place the strike and current labour relations with Vale within historical narratives that reach backward and project forward. How they integrate current circumstances into their narratives of working class history in Sudbury shapes how they remember, and importantly, the degree to which they see collective action as a remedy for individual grievances. Workers of different ages offer contrasting narratives of the strike and prescriptions about how to improve the future of work in the mines. I contend that the latter creates the bases for generational tension and poses challenges to collective identity formation and the broad-based member engagement necessary to mount impactful resistance against the company.

The twenty interviews on which this paper is based covered work histories, workplace experiences and the impacts of foreign ownership, perceptions of the companies and unions, and the strike. Informants ranged in age from 29-74, with an average age of 48.6. However, workers in the sample clustered around what I refer to throughout the article as older and younger age groupings. At one end of the sample, workers ranged in age from 29-37 (9 participants), and at the other end from 50-74 (11 participants). No interviewees were between 38-49. My sampling method likely accounts for these age clusters. Participants were recruited through a snowball sampling method that initially began with two key informants (age 32 and 74). Those sampled through contacts beginning with each of the latter two people tended to also belong to the same age grouping.[8] Five of the interviewees were retired, but still kept involved with the union in some capacity. Of the workers in the younger age group, three had previously worked for contract, non-union firms, and two had obtained their jobs through an employment service, working through a probationary period before gaining full-time, unionized employment.

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7. M. Halbwachs, *Collective Memory*, University of Chicago Press, Chicago, 1992.

8. In Dunk's classic study of male working class culture in Thunder Bay, Ontario, he characterizes the friendship networks of working class men as "informal," and notes the loose parameters of inclusion. This seems to be true in this case as well. T.W. Dunk, *It's a Working Man's Town: Male Working-Class Culture*, McGill-Queen's University Press, Montreal, Kingston, 2003, 7.

The striking differences in the responses of workers of different ages provide an interesting window through which to consider changes at the mines in Sudbury and the challenges facing labour. Moreover, the social and economic processes transforming work and community in Sudbury are quite similar to those facing deindustrializing regions generally and therefore offer lessons to unions and researchers confronting similar issues.[9] The findings from these interviews highlight the ways in which these changes are expressed as intergenerational tensions within this particular union local and represent impediments to future mobilization against the company. While I agree with those calling for high participation unions[10] and "social movement unionism,"[11] this paper suggests that barriers to such rank-and-file mobilization may arise from how particular union histories and cultures shape and constrain member activity and neglect the unique circumstances facing new workers.
In the first section of the article, I outline a brief background history of mining and unionization in Sudbury. The latter provides the backdrop against which older workers in the sample remembered and narrated the most recent strike. Next, I give an overview of Vale's purchase of Inco and the 2009-2010 strike.[12] In the subsequent sections, I trace three findings that emerged from my interviews. First, I explore the contrasting memories and presentations of the strike among younger and older workers. I argue that the differences expressed by workers of various ages are explained partly by their work histories and employment experiences. Considerable job loss in the mining industry, the increased use of contract workers, and the particularly aggressive business practices of Vale are the primary references for a picture of work life for younger workers. Older workers, on the other hand, place these developments in contrast to the victories wrenched from their previous employer, Inco, and thus maintain a stronger commitment to collective struggle. Second, I show how workers place the strike in a historical narrative, and contend that this sequencing influences the meaning workers impart to the strike. How they read

9. T. Dublin, *When the Mines Closed: Stories of Struggles in Hard Times*, Cornell University Press, Ithaca, 1998; T.W. Dunk, *Remaking the Working Class: Experience, Class Consciousness, and the Industrial Adjustment Process*, *American Ethnologist*, vol. 29, no. 4, 2000, 878-900; D. Koistinen, *Confronting Decline: The Political Economy of Deindustrialization in New England*, University of Florida Press, Gainsville, 2013.
10. J.F. McAlevey, *No Shortcuts: Organizing for Power in the New Gilded Age*, Oxford University Press, New York, 2016.
11. D. Camfield, *Canadian Labour in Crisis: Reinventing the Workers' Movement*, Fernwood, Halifax, 2011; C. Lévesque, G. Murray, S. Le Queux, *Union Disaffection and Social Identity*, *Work and Organizations*, vol. 32, no. 4, 2005, 400-422; K. Moody, *Workers in a Lean World: Unions in the International Economy*, Verso, London, 1997; S. Ross, *Social Unionism and Membership Participation: What Role for Union Democracy?*, *Studies in Political Economy*, vol. 81, Spring, 2008, 129-157.
12. See Peters, *op. cit.*

the strike into their sense of history shapes what they believe can be done to improve their personal and collective circumstances. Last, I focus on workers' evaluations of the strike and its aftermath. I argue that the unwillingness to engage with the union, and the skepticism concerning the potential of solidarity and struggle on the part of younger workers, arise from the ways in which burdens and hardships impact them uniquely, and from a more general lowering of their expectations.

2. Mining and Miners in Sudbury

The Sudbury Basin is one of the richest mineral deposits on the planet, containing some of the world's largest supplies of nickel and copper. Like many resource-rich areas, Sudbury's fate has historically been bound up in often volatile and dependent political and economic relations.[13] The International Nickel Company of Canada (later Inco) mines were originally developed by American capital, and for many decades tariffs and other measures prevented the growth of higher value-added processing and refining facilities in Canada.[14] While some processing and refining takes place in Sudbury (and at Port Colborne, Ontario), the city still largely conforms to Clement's arguments concerning the persistent international market dependence of resource extracting communities.[15] Nickel, the region's primary export, also made Sudbury quite reliant on the expansion of military power. Indeed, Inco's rapid growth and success, as well as its ability to set monopoly prices into the early 1970s, was in part a by-product of the exponential growth of the United States military and the role of nickel in armament manufacturing.[16] From the end of the Second World War through the Vietnam War, Inco's researchers and marketing personnel sought further consumer applications for nickel, but the linkages to arms and government contracts remained vital.[17]

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13. D. Leadbeater (ed.) *Mining Town Crisis: Globalization, Labour and Resistance in Sudbury*, Fernwood, Halifax, 2008; C.M. Wallace, A. Thomson (eds.) *Sudbury: Rail Town to Regional Capital*, Dundurn, Toronto, 1993.
14. W. Clement, *Hardrock Mining: Industrial Relations and Technological Changes at Inco*, McClellend and Stewart, Toronto, 1981, 43-45; J. Swift, *Inco at Home and Abroad*, Between the Lines, Kitchener, 1977, 20-24.
15. W. Clement, *Debates and Directions: A Political Economy of Resources*, in W. Clement and G. Williams (eds.) *The New Canadian Political Economy*, McGill-Queen's University Press, Montreal, Kingston, 1989, 36-53.
16. Swift, *op. cit.*, 27-31.
17. On this and other issues pertaining to Inco's growth and technological development see United Steelworkers of America, *Technological Change at Inco and its Impact on Workers*, United Steelworkers of America Local 6500, Sudbury, 1987.

After decades of struggle and several defeats, workers were able to unionize the mines in 1944 as local 598 of the International Union of Mine, Mill and Smelter Workers (Mine-Mill).[18] A militant union of international repute, Mine-Mill was also a victim of the emerging Cold War and subjected to severe repression from the company, government and local authorities, as well as central labour bodies for its ostensible Communist affiliations.[19] Following a series of raids, persistent red-baiting, and bitter inter-union fights at the local, national, and international levels, the United Steelworkers of America (USW) Local 6500 defeated and replaced Mine-Mill as the bargaining agent for workers at Inco in Sudbury after a contested Ontario Labour Relations Board vote in 1962.[20] The persistent legacy and lore surrounding Mine-Mill is matched perhaps only by the bitterness left by this dark episode in Canadian labour history. Both can be found in equal measure in books and oral histories on Sudbury,[21] as well as in the accounts of workers of various ages. It forms a piece of the complex yet proud local history that many workers in Sudbury grew up hearing and retain connections to.

With the Steelworkers as the union representing workers in Sudbury, a series of fairly substantial victories on wages, benefits and pensions, health and safety, and environmental regulation were achieved, mainly through the 1960s and early 1970s.[22] These victories were especially considerable given the longstanding resistance of Inco to collectively bargaining with unionized workers. A culture of solidarity was built not only within the union, but also more broadly in a community highly dependent on a single industry and a large, powerful employer. However, beginning in the mid 1970s both the conditions that allowed Inco to attain monopoly dominance in the nickel

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18. Mine-Mill/UAW 598 remains as the much-diminished bargaining unit at Xstrata (formerly Falconbridge) in Sudbury, having voted in the early 1960s against joining the United Steelworkers of America. See J.B. Lang, *One Hundred Years of Mine Mill*, in M. Steedman, P. Suschnigg and D. K. Buse (eds.) *Hard Lessons: The Mine Mill Union in the Canadian Labour Movement*, Dundurn, Toronto, 1995, 13-20; and B. Palmer, *Small Unions and Dissidents in the History of Canadian Trade Unionism*, in Steedman, Suschnigg and Buse, *op. cit.*, 39-49.

19. J. Lang, *A Lion in a Den of Daniels: A History of the International Union of Mine, Mill and Smelter Workers in Sudbury, Ontario, 1942-1962*, Master's Thesis: University of Guelph, 1970; Palmer, *op. cit.*

20. I. Abella, *Nationalism, Communism, and Canadian Labour: The CIO, the Communist Party, and the Canadian Congress of Labour, 1935-1956*, University of Toronto Press, Toronto, 1973; See also Swift, *op. cit.*, 55-59.

21. H. Brasch, *A Miner's Chronicle: Inco Ltd. and the Unions, 1944-1997*, United Steelworkers of America Local 6500, Sudbury, 1997; B. Miner, *A Miner's Life: Bob Miner and Union Organizing in Timmins, Kirkland Lake and Sudbury*, McMaster University, Hamilton, 1979; H. Seguin, *Fighting for Justice and Dignity: The Homer Seguin Story*, Self-Published, Sudbury, 2008.

22. G.H. Gilchrist, *As Strong as Steel*, United Steelworkers of America Local 6500, Sudbury, 1999; Seguin, *op. cit.*

market, and provided the space within which USW 6500 could win, began to change. Several factors converged that began to transform the shape of mining in Sudbury. First, emerging international competition from newly independent former colonies undermined Inco's monopoly position and sent it searching for nickel deposits in developing countries, such as Guatemala and Indonesia.[23] Though the quality and purity of the resources in these new acquisitions was poorer than in Sudbury, the power to undermine and threaten the conditions of Sudbury workers was nonetheless enhanced. Second, overzealous projections from both governments and industry experts concerning long-term world demand for nickel saw Inco make enormous capital expenditures and take on considerable debt. As the 1970s wore on, supply began to outstrip demand consistently, causing price drops and revenue shrinkage.[24] Last, and perhaps most importantly, the success of the union in extracting relatively high wages and pensions, health, safety and workplace rights, and some environmental protections, encouraged Inco to pursue strategies for containing labour and reasserting its dominance. Expanding its international footprint was one, but more important was the process of transforming the workplace through massive capital investment, mechanization and automation, de-skilling and work reorganization,[25] and the attendant reduction of the labour force from a peak of over 20,000 in 1971, down to fewer than 3,000 by the 2009 strike.[26] Added to this was early collective agreement language that opened the window for the company to utilize contract, non-union firms and workers, a practice that would later be expanded considerably under Vale.[27]

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23. Swift, *op. cit.*, 63-99.
24. United Steelworkers of America, *Technological Change at Inco.*
25. Clement, *Hardrock Mining*, 156-162.
26. The frequent layoffs and shutdowns in the industry, even through its high growth years, make exact employment numbers difficult to report. As well, the company has used attrition extensively to reduce its number of employees, on top of relying on pension buyouts and workers quitting in frustration or desperation during shutdowns or prolonged strikes. See D. Robinson, *Employment Numbers for Inco/Vale and Falconbridge/Xstrata in Sudbury (1928 to 2010)*, *Labourforce Data Network*, Institute for Northern Ontario Research and Development (INORD), Laurentian University, Sudbury; and Peters*, op. cit.*
27. R. Roth, M. Steedman, S. Condratto, *The Casualization of Work and the Rise of Precariousness in Sudbury's Nickel Mining Industry*, Unpublished paper, http://www.ilpc.org.uk/Portals/56/ilpc2015-paperupload/ILPC2015paper-Roth,%20Steedman,%20Condratto%20-%20The%20Casualization%20of%20Work%20and%20the%20Rise%20of%20Precariousness%20in%20Canada%E2%80%99s%20Nickel%20Mining%20Industry_20150225_043113.pdf

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3. Enter Vale and the 2009-2010 Strike

The processes transforming the political economy of mining described above continued into the 2000s, as Sudbury attempted to diversify its economy and unions sought to maintain conditions for members amidst major declines in employment. However, a series of takeovers and acquisitions further reorganized the industry in the mid decade. Brazilian conglomerate CVRD (known as Vale in Sudbury) and the Swiss equity firm Xstrata PLC purchased the Canadian nickel producers Inco and Falconbridge in 2006.[28] These takeovers were representative of a global pattern of large mergers and acquisitions that greatly increased capital concentration in the mining industry,[29] and saw emerging market economies move capital into wealthier nations.[30] Taking advantage of credit expansion prior to the 2008 financial crisis and the prospect of rising resource prices amid scarcity, firms such as Vale purchased mines and mining infrastructure on a global scale, including those in Sudbury.[31] Vale thus entered Canada as part of a project of economic restructuring and ownership concentration in the mining industry, coupled with neoliberal policies undertaken by both the Ontario and Canadian governments, ostensibly meant to attract foreign investment.[32] As one commentator at the time pointed out, government was encouraging foreign capital's entry into Canada under the premise that it would make national businesses more competitive and beat the "industrial retreat" common across developed nations.[33] As Stanford argues, this neoliberal policy orientation was in a certain sense a return to an older orthodoxy, namely, that rather than local

28. Vale, formally Vale-Inco and Inco Limited, was initially to be operated as a mining division apart from CVRD's other operations, according to the stipulations set down by Investment Canada, the government body responsible for overseeing foreign acquisitions. However, as of 2007 all former Inco operations, with the exception of its nickel alloy manufacturing site, are a wholly owned subsidiary of CVRD (Vale). Xstrata, which before the takeover owned twenty percent of shares, acquired the remainder of Falconbridge in a frenzy of bids, counter-bids, and withdrawals between 2005 and late 2006.

29. Leadbeater, *op. cit.*, particularly his *Introduction*, 32-36; and D. Leadbeater (ed.) *Resources, Empire and Labour: Crises, Lessons and Alternatives*, Fernwood, Halifax, 2014.

30. V. Fontes, *BRICS, Capitalist-Imperialism and New Contradictions*, in P. Bond and A. Garcia (eds.) *BRICS: An Anti-Capitalist Critique*, Haymarket, Chicaago, 2015, 27-44; V. Fontes, A. Garcia, *Brazil's New Imperial Capitalism*, *Socialist Register*, 2014, 207-226.

31. See R. Moody, *Rocks and Hard Places: The Globalization of Mining*, Fernwood, Halifax, 2007.

32. Leadbeater, *Mining Town Crisis*, 22-26; G. McCormack, T. Workman, *The Servant State: Overseeing Capital Accumulation in Canada*, Fernwood, Halifax, 2015, 51-60; Peters, *op. cit.*, 80-85.

33. D. Olive, *Canada Beating Industrial Retreat*, *Toronto Star*, May 13, 2007.

and national economic investment and regulation, foreign capital and global competition were key to Canada's economic success.[34]

Foreign acquisition and the quest for competitive advantage had nearly immediate deleterious consequences for labour relations in Sudbury. Vale in particular made it publically known that it considered labour cost reductions essential to the profitability of its new Canadian operations.[35] The onset of the 2008 financial crisis made this claim seem plausible, particularly given the debt burden Vale had accumulated in anticipation of rising resource prices. Though the crisis depressed nickel and other resource prices and seemed to pose challenges for Vale, recovery was shift. Its various efforts to reduce costs through layoffs, shutdowns and other supply reductions, as well as cuts to new capital expenditures, proved effective at weathering the recession. Indeed, as demand picked up in 2009, it appeared that "the global mining industry [was] stronger than ever."[36] However, as the collective agreement with USW 6500 expired, Vale continued to pursue extensive concessions from the union. The company sought further layoffs, increased flexibility through the use of contract firms and workers, as well as reductions in employee bonuses, and an end to the defined-benefit pension scheme for new hires.[37]

As bargaining produced no acceptable agreement, Vale settled in for a conflict.[38] After an eight-week shutdown imposed by the company as part of its strategy to remain profitable during the recession, on July 13, 2009, USW 6500 went out on a strike that would last nearly a year.

After outflanking the union in the local and national media and tying it up in court with injunctions and considerable fines, Vale emerged from the confrontation victorious. Though the Steelworkers forged international alliances beyond their North American membership base, they were unable to either mobilize broad community support or effectively counter Vale's global power and reach. Union officials' call for a "unity accord" between Vale workers globally, although a strategic step in the right direction, ultimately exemplified the difficulty of facing down a multinational corporation explicitly committed to weakening unions in Sudbury and beyond.[39]

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34. J. Stanford, *Staples, Deindustrialization, and Foreign Investment: Canada's Economic Journey Back to the Future*, *Studies in Political Economy*, vol. 82, Autumn, 2008, 7-35.
35. C. Mulligan, *Union Steels itself for Strike, as Profitable Vale Insists on Major Concessions*, *Sudbury Star*, July 9, 2009.
36. Peters, *op. cit.*, 87.
37. E. Rocha, *Sudbury Inco Miners Strike*, *Toronto Star*, July 13, 2009.
38. C. Mulligan, *Strike at Vale Inco Looms*, *Sudbury Star*, July 12, 2009.
39. H. Brasch, *Winds of Change: The Local 6500 USW Strike of 2009 to 2010*, Self-Published, Dowling, 2010; United Steelworkers of America, *Press Release*, July 22, 2009, in author's possession.

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4. Remembering the Strike

The strike at Vale in 2009-2010 was the longest in the history of mining in Sudbury.[40] This is all the more remarkable when considered against the typically sparse numbers of workers involved and shortness of strikes in Canada.[41] While strikes at the mines in Sudbury are fairly frequent,[42] the uniqueness and bitterness of this particular conflict was apparent from the start. The company's willingness to run operations with replacement workers, its messaging in local and national media, and its provocative use of fines and injunctions signalled that Vale was prepared to fight a considerable battle to set a new tone for labour relations in its mines and processing facilities.[43]
Workers of all ages interviewed for this study recalled what they described as Vale's bombastic arrival in Sudbury. Stories with local currency, such as Vale managers supposedly marvelling at the trucks that workers were able to afford, illustrated the company's intention to roll back the living standards of its new workforce. If workers were consistent in their appraisal of Vale's anti-labour ambitions, they were not in agreement over the memory of the strike. How and why did workers of different ages remember and talk about the strike in such contrasting ways? For older workers and retirees, the strike, though a loss in terms of some of the concessionary givebacks of the final collective agreement, was also a partial success. When older workers described the strike, 10 of 11 told particular stories about resistance or conflict on the picket line. One described taunting a truck driver crossing the picket line:

> "C'mon, get out and stand with us, if you think you got it in you!" (55 years old)

Another recalled he and other workers reminiscing about how "scabs" were handled "years ago:"

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40. H. Brasch, *Mining Then and Now in the Sudbury Basin*, Self-Published, Dowling, 2007; Peters, *op. cit.*, 74.
41. L. Briskin, *From Person-Days Lost to Labour Militancy: A New Look at the Canadian Work Stoppages Data*, *Relations Industrielles/Industrial Relations*, vol. 62, 2007, 31-65.
42. There have been seven strikes by the United Steelworkers against Inco since the divisive wildcat strike of 1966. See Brasch, *Mining Then and Now*, and Seguin, *op. cit.*
43. Estimates are that Vale ran at approximately 30 percent capacity throughout the strike, based on Peters, *op. cit.*, 74 interview with a retired mine manager. This was unprecedented. Though there is no legislation prohibiting the use of replacement workers during labour conflicts in Ontario, Inco had hitherto only sold accumulated stockpiles and performed maintenance operations during strikes or lockouts. See also T. Van Alphen, *Striking Union Outraged with Inco Vow to Start Production*, *Toronto Star*, August 26, 2009.

> "…with spray-paint on their garage doors or tacks in their driveways." (60 years old)

And one retiree, who had spent time on the picket line in solidarity, when asked what he remembered about the strike, simply replied:

> "It wasn't a bad strike, that one. We had a lot of fun on the picket line [laughing]." (74 years old)

In many of their comments, staying out and standing together represented at least a partial success.

> "You know, everybody used to just say 'we're gonna win.' They were there to stay, you know? It was long, but the workers did. Now, the company came back afterward and got stuff here and there. There were a lot of repercussions afterwards. They came out with a lot of different rules and everything else about the workplace and that…" (55 years old)

Other older workers and retirees told similar stories, representing the determination of the strikers as a form of success (staying out was even described as a vague 'win,' as above, in three instances).
For younger workers, the memory of the strike represents a considerable loss, one in which they are unsure even of the clarity or soundness of the objective. "It was brutal," remembers one worker,

> "I'm still paying off all the debt we [his family] racked up from that." (36 years old)

And another:

> "Honestly, I don't see the point. The union pumped all these guys up at Garson Arena and that. And then the strike…and they lose all this stuff. Like, they got stuff taken away last strike. Stuff that my dad fought for, that these same old timers fought for. I still don't get it. What was that?" (32 years old)

Younger workers were more likely to describe economic hardships, debts or other burdens resulting from the strike, than they were to recount picket line stories of solidarity and steadfastness.

The issue of pensions is perhaps the clearest point of contention around which memories of the strike diverge. This is understandable. The new collective agreement ended defined-benefit pensions for new hires, putting in place a two-tiered system in which younger workers will have access to a defined-contribution plan, but assume the majority of the risk for pension investments.[44] This creates a divisive, tiered system, and exacerbates generational tension as younger workers blame older workers and retirees for not protecting their futures. Compare the comments of a worker with two years on the job to that of a former union executive member:

> "To me, it seemed like a sell-out, a major giveaway. I guess it's [his pension plan] like an investment, but who knows about those, right? I guess a lot of older guys got their pensions secure and maybe that's all they cared about." (32 years old)
>
> […]
>
> "The pensions, you see, it was too expensive for the company, which I understand. When you have so many more people on a pension, you can't be profitable like that. In some ways, the new system is better. Each makes the contribution and it's there for you at the end…"
>
> "But it's also a lot riskier, no?"
>
> "It is risky, no doubt. But under the circumstances, they [the bargaining team] had to make that decision." (56 years old)

Pensions offer one example among a host of others that are representative of the growing precariousness of mining employment in Sudbury – a precariousness that is hitting younger workers much harder.[45] When older workers and retirees remember and assess the strike, they do so through a class lens, from a normative set of material conditions. Their formative work years, and the majority of their experiences of employment, unions, and labour relations took place during a period of growing union power and improving living standards.[46] The relative prosperity that incremental improvements secured for miners in Sudbury encouraged expectations of fairly high levels of

44. Vale/United Steelworkers of America Local 6500, *Collective Bargaining Agreement*; T. Van Alphen, *Vale Inco Workers End Bitter, Year-Long Strike*, *Toronto Star*, July 9, 2010.
45. Roth, Steedman, Condratto, *op. cit.*
46. G. Hallsworth, P. Hallsworth, *The 1960s*, in C.M. Wallace and A. Thomson (eds.) *Sudbury: Rail Town to Regional Capital*, Dundurn, Toronto, 1993, 215-241; Seguin, *op. cit.*

employment and material security, even in an industry plagued by cycles of boom and bust. Moreover, a strong union able to offer protection and deliver benefits to its members was an integral part of this. Workers who entered the labour force during this time faced a situation much different to the one encountered by a new generation of younger workers. Global competitiveness, downsizing, mechanization and automation, efforts by new owners to restructure and introduce insecure contractual work, attacks on pensions, and other material difficulties leave young miners vulnerable and uncertain. How class position shapes memory is thus dependent on the balance of class forces and the class relations that are characteristic of the speaker's formative work years, or what Camfield calls the "class formation."[47] In this sense, we must understand class as a set of material conditions and relations emergent in particular historical circumstances.[48] Workers in Sudbury remember the strike not as an event detached from their broader lived experiences, but as part of a story about what it means to be working class in Sudbury – a meaning which is largely dependent on the historical, material, and social conditions out of which class identities form.[49]

5. Narrating the Strike

The memory of an event is intimately tied to that which precedes and follows it. As Portelli shows in his classic study of the oral histories of Italian workers, the historical sequences into which narrators place events tell stories about how the past and future interact.[50] In our case, workers' class identities and the social circumstances out of which they were formed shape both the direction of the stories and the strike's place within them. However, to understand how this happens, class must be appreciated for its historical and institutional specificities, as a set of social relations produced under particular historical circumstances of power, contestation, and lived experience.[51] When older workers or retirees tell their stories of the strike, or when they compare it to

47. D. Camfield, *Re-Orienting Class Analysis: Working Classes as Historical Formations*, *Science and Society*, vol. 68, no. 4, 2005/2005, 421-446, 424.
48. E.P. Thompson, *The Making of the English Working Class*, Penguin, New York, 1982, 8-13; E.M. Wood, *Democracy Against Capitalism: Renewing Historical Materialism*, Verso, London, 2015, 76-100.
49. S. High, *'They Were Making Good Money, Just Ten Minutes from Home': Proximity and Distance in the Plant Shutdown Stories of Northern Ontario Mill Workers*, *Labour/Le Travail*, vol. 76, Fall, 2015, 11-36; A. Portelli, *The Death of Luigi Trastulli and Other Stories: Form and Meaning in Oral History*, SUNY Press, Albany, 1991.
50. Portelli, *op. cit.*
51. See also J. Kirk, *Class, Culture and Social Change: On the Trail of the Working Class*, Palgrave MacMillan, London, 2007.

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previous strikes, legal or wildcat, they do so from a place that allows comparative reflection. They measure the recent strike against prior ones for uniqueness or similarity.

> "Vale is a different bird altogether. We've got a big fight ahead of us. But it's not like we haven't did that before." (65 years old)
>
> […]
> "I think we've gotta stick together, that's all. Shut them down, like we used to do." (52 years old)
>
> […]
> "The last strike didn't seem like people had the fight like I remember from when I was younger." (72 years old)

The trend of their evaluations is to see the strike as a setback. Workers fought hard, and this in itself is admirable and worth celebration. But the strike represents the need to remain determined, to fight harder, and to recalibrate union strategy against changing global circumstances.
The historical narrative into which the strike fits is characterized by the upward, linear improvement of working class conditions in the mines. Whether on matters of pay, benefits and working conditions, or health and safety, older workers and the union that represents them have engaged in a determined effort to ameliorate the worst of an inevitably difficult and dangerous industry. The same narrative fills the pages of local histories and autobiographies--books that several workers proudly kept on their shelves or coffee tables.[52] The outcome of the strike is a bitter pill to swallow, and in some cases sits uneasily beside an emphasis on the admirable determination of the strikers. The company is at fault. The union, though perhaps responsible for strategic missteps, is not blamed for the shortcomings of the collective agreement, and is capable of refining its approach and meeting the challenge of Vale "next time around." If certain expectations must be adjusted, such as on pensions, the general trend is toward working class improvement, which does not preclude setbacks as part of the process. The future, implicitly or explicitly, is open insofar as workers are able to "stick together" and "fight." This is the narrative into which older workers place the 2009-2010 strike.
Younger workers' discussion of the strike's place in history can be classified as falling into two categories: for some workers the strike was a complete rupture with a past that is closed to them; in other workers' accounts, the strike

52. Brasch, *Winds of Change*; Miner, *op. cit.*; Seguin, *op. cit.*

(particularly for one worker who was hired after) was not worth it, or is a past event to which they are ambivalent.
Two workers, who had both previously worked as non-union contractors, described the conditions enjoyed by earlier generations as unlikely to return:

> "Things have changed a lot, as far as I hear. I'm happy to have secure work…but I don't think it's gonna be like the guys say it was when they started." (32 years old)
>
> […]
> "I'm just waiting to see what we lose next time [bargaining]. Honestly, since Vale, it seems like everything, health and safety, pay, everything, is going downhill." (29 years old)

In the narratives of these workers, the strike was an unsuccessful attempt to maintain the standards of those who came before them.
In young workers' accounts, the material security enjoyed by older workmates or family members is either over or unlikely to return. Rather than a linear process of incremental improvement, younger workers are beginning their work lives amid uncertainty, declining employment opportunities, and with a new employer seemingly determined to bend unions to its will. They are working during a downhill slide, and there seems to be little that they or a union they feel increasingly disconnected from, can do to stop it. The strike forms a turning point in their narratives. And, unfortunately for them, they enter this story after the turning point. Though conditions might have been worsening for some time, particularly as the increased technological efficiency of the industry diminished labour needs,[53] the strike stands as a definitive event that both confirms the general downward trend, and prevents a reversal that would benefit workers.
The second common theme in younger workers' narrative of the strike concerns what they see as its futility. In some cases, the latter appeared as a general ambivalence to the strike as an event, and toward the union in the aftermath of the strike.

> "I know that the union is there if I need it, but like, I just don't feel any connection on a day-to-day basis. Especially, after the strike, I was pissed. A lot of guys I know around the job were pissed. It was basically, like, don't talk about the union or whatever." (32 years old)

53. Clement, *Hardrock Mining*.

> […]
> "I guess on health and safety, the right to refuse unsafe work is good, but the strike was insane. I feel like guys were led into a mess. And now, like, there's an office [at work], and I don't remember the last time I saw a union guy in there." (29 years old)
>
> […]
> "The union doesn't feel like it's for me. I wasn't on strike, but I hear from guys, it was a loss. I stay away from all that [union meetings and activity]. Honestly, it seems like a bunch of whining." (31 years old)

The outcome of the strike has left them in some cases angry at, and in other cases indifferent toward, the union. Younger workers express feelings of disconnection and dismissiveness. The institution which some of them still nonetheless acknowledge is there to represent their interests, seems inadequate and uninterested in doing so. As we will see below, narrating the strike in this way, i.e. as indicative of the growing precariousness in the mining industry and the worsening conditions into which they are entering, leaves younger workers with diminished expectations.

6. Lowered Expectations

Concerns about Vale's environmental and labour records cut across age groups. This is not surprising given some of the bad press Vale received before, during, and after the strike.[54] However, the age of workers again plays a key role in explaining divergent narratives, both in terms of what can be achieved, and the means through which to accomplish change.
The question of how the union can counter Vale's global power is a particularly illustrative example of the variation in the responses of older and younger workers. Older workers stressed the need to meet the company across the global terrain where it operates.

> "We gotta take action. If they strike somewhere else, then we gotta shut 'em down here. If Vale is global, then we have to be global too." (56 years old)

54. M. Acharya, T. Yew, *Inco Strikers Bring Beefs, Nickels to Bay St.: Toronto Protest Aims to Sway Headquarters in Brazil*, *Toronto Star*, September 23, 2009; L. Diebel, *Bitter Standoff Grinds Down Company Town*, *Toronto Star*, June 6, 2010; Mulligan, *Nobody Voted for that Contract*.

> […]
> "These guys [the company] need to be shown that workers won't take it. It's no different than the way we used to do it. We have to support each other. In Brazil, Mexico, Africa, you know?" (50 years old)

In struggling against a new, global employer, unionized workers need to extend the tactics that they previously deployed regionally and sometimes nationally. While willing to acknowledge the logistical difficulties in meeting these new challenges ("We can't just go to meetings and talk all this shit… when are we gonna take action?"), ultimately, hard bargaining, striking, and solidarity constitute the standard repertoire for accomplishing working class victories. Against the backdrop of their work histories and union experiences, older miners express further expectations of material security, as well as acceptance of the need to continually struggle to maintain this. Collective action, "the way we used to do it," remains the answer to company intransigence in the narratives of these workers. What is lacking is a new, global application of these tactics.
Younger workers share their older colleagues' concerns about Vale, but they describe its actions against workers in other countries and its poor environmental record[55] not as evidence of the necessity to fight back, but instead to illustrate the potential futures of workers and the community in Sudbury. There is a sense of resignation and passivity in their accounts.

> "It's gonna be like over in China when a mine collapses and hundreds of people die. That's the mentality of Vale, it seems. 'Just bring in new guys, who cares?'" (28 years old)
>
> […]
> "Vale's health and safety, they don't care. I guess in Brazil you can pay people two dollars a day and that. This is Canada though, but they don't get that, I guess." (31 years old)

Younger workers often preclude engagement with the union and express a general disillusionment.

> "I don't pay attention to the union." (28 years old)

55. J. Marshall, *Behind the Image of South-South Solidarity at Brazil's Vale*, in P. Bond and A. Garcia (eds.) *BRICS: An Anti-Capitalist Critique*, Haymarket, Chicago, 2015, 162-187.

> […]
> “Honestly, I don’t have much to say about it [the union]. I just stay away.” (31 years old)
>
> […]
> “I don’t go to meetings or anything.” (26 years old)

These are common responses to questions about the union as a vehicle for challenging the eroding conditions at work. In one particularly contradictory response, the 26 year-old worker above, who serves as a health and safety representative, explained how he had no interest in the union.

> “I like health and safety. It’s important. We needed someone for joint health and safety, so I volunteered... A lot of times I have to walk these dummies around from Vale when they come and tell them what they need to hear. But most of the time, I feel like I’m actually making sure guys, especially new labourers, aren’t getting hurt or killed, or doing dumb stuff like sticking their head in the crusher… The union just seems like a bunch of guys whining though. The last negotiation [2015] was garbage. The wage increase wasn’t high enough. I voted ‘no.’”

In his eyes, a health and safety representative, a union position, is important. But the union is not a place for him. He did not attend meetings, and would not in the future--unless to show up briefly and vote against a subpar contract. For another worker, escape was preferable to fighting back, should things go badly in the next round of bargaining.

> “The next time we go into bargaining, I’m gonna be the first one outta town, north, finding work in the gold mines maybe or something, until it’s over.” (29 years old)

Though work in the mines remains relatively well compensated, many younger workers’ paths to secure employment have not been straightforward. Indeed, job opportunities in mining have shrunk considerably, due both to technological improvements, as well as contracting out positions to non-union firms. Younger workers see diminishing opportunities and the negative consequences at work and in the community, and they have adjusted their expectations downward. Furthermore, the union, unable to mobilize effectively against these trends, does not appear in their narratives to hold the potential to

reverse course. And importantly, none expressed a desire to become more active in the union to challenge the issues they described.

7. Conclusion

The 2009-2010 strike at Vale was a historic event for Sudbury, USW Local 6500, and the Canadian labour movement more broadly. While in many respects Vale accelerated changes begun under Inco's ownership, in other ways the former's ruthlessness and seemingly unyielding attacks on labour had a flavour all their own. John Fera, Local 6500 President during the strike, commented in exasperation, "I don't think they speak the same language as us." Alliances were strengthened with former union rival Mine-Mill 598 (still representing workers at Falconbridge/Xstrata mines), and new connections built with Vale workers from around the globe, but constraining the company proved exceedingly difficult. As one commentator remarked after the strike, it seemed as though it was "Sudbury against the world."[56]

The difficulties of the strike call for serious reflection, within the union, across its many alliances, and in the broader labour movement. Unions face new and growing challenges in a globalized economy, and a substantial literature exists attempting to identify effective strategies, tactics, and programs for union renewal and revitalization.[57] But as Turner points out, "union strategies…can be analysed both as dependent and independent variables."[58] In other words, while the types of strategies unions undertake matter in terms of outcomes, successful strategies are also dependent on factors of mobilization, solidarity, and commitment. This article has sought to highlight the challenges to member mobilization and engagement by using workers' memories and narratives of the most recent strike in Sudbury as a window onto these issues. I have argued that the differences in older and younger workers' memories of the strike result from their historically specific class identities, and that these shape the meaning workers give to the strike, their future expectations, and their assessments of the utility of collective action.

I suggest that we situate the above in relation to research on the role of union democracy in projects of renewal. If, as Ross suggests, effective and resilient social unionism requires greater membership control over their unions and

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56. J. Gray, *Nickelled and Damned*, *Globe and Mail*, March 25, 2010.

57. K. Bronfenbrenner *et al.* (eds.), *Organizing to Win: New Research on Union Strategies*, Cornell University Press, Ithaca, 1998; Fairbrother, Yates, *op. cit.*; Frege, Kelly, *op. cit.*; Milkman, Voss, *op. cit.*

58. L. Turner, *From Transformation to Revitalization: A New Research Agenda for a Contested Global Economy*, *Work and Occupations*, vol. 32, no. 4, 2005, 383-399, 385.

organizations,[59] then we must engage in critical examinations of factors which impede the level of participation necessary to actualize this. Moreover, such investigations must address the dialectal relationship between organizational forms and membership subjectivity. Local 6500 in Sudbury, a union with both a tradition of rank-and-file militancy and aspects of business union style leadership,[60] now also contains younger workers who feel shut out from the gains of their predecessors, and cast aside in an uncertain, global economy. To speak simply of increasing union democracy and member engagement without an appreciation of the perspectives and situations from which workers come may prove ineffective and counterproductive, particularly if such a strategy does not address issues of intergenerational tension. This particular union local, like many others, finds itself in an unenviable position: the union's very capacities to mobilize broad participation and engagement are undermined by the company's ability to extract concessions that divide workers. Yet its capitulation to these demands for cost reductions through a segmented labour force contributes to its inability to resist. Given the growth of such "tiered" workforces and contracts, many unions will face similar issues.[61]

Last, the union's institutional culture and history, forged through decades of struggle, while essential for building and maintaining solidarity, can also be a stumbling block insofar as it hinders innovative thinking and strategizing. As Yates argues, "unions are not mere mirrors reflecting the composition and demands of their members. Rather, they are active agents in defining the interests and shaping the world view of their members."[62] In this they are tasked with the formidable job of building and solidifying collective identities.[63] How the union can draw on its vibrant tradition and institutional capacity, while also addressing the material difficulties new members face while building solidarity, locally and globally, are questions it cannot afford to outlook.

59. Ross, *op. cit.*

60. B. McKeigan, *The Rise and Decline of Local 6500 United Steelworkers of America*, in D. Leadbeater (ed.) *Mining Town Crisis: Globalization, Labour and Resistance in Sudbury*, Fernwood, Halifax, 2008, 224-259.

61. For example, see Rosenfeld's discussion of the last contract negotiations between Unifor and the big-three automakers in Ontario. "Grow-in" wage structures and an end to defined-benefit pensions for new hires are now in place in auto as well. H. Rosenfeld, *Ford and Unifor Reach Agreement Despite Opposition to Two-Tier*, *Rankandfile.ca*, November 8, 2016. Accessed June 23, 2017. http://rankandfile.ca/2016/11/08/ford-and-unifor-reach-agreement-despite-opposition-to-two-tier/

62. C.A.B. Yates, *Unity and Diversity: Challenges to an Expanding Canadian Autoworkers' Union*, *Canadian Review of Sociology and Anthropology*, vol. 35, no. 1, 1998, 93-118, 116.

63. Lévesque, Murray, Le Queux, *op. cit.*

Videogame Developers among "Extreme" Workers: Are Death Marches Over?

Marie-Josée Legault and Johanna Weststar[1]

Abstract Purpose. The videogame industry is a work environment that is emblematic of O'Carroll's (2015) encompassing model of a 24/7/365 working time model of flexibility. We use O'Carroll's model to challenge two myths about videogame developers (VGDs): the long hours of work are in fact unpredictable hours, and *flextime* HR programs do not allow for real control.
Design/methodology/approach. We use a mixed methods approach (international online survey and 100 Canadian interviews) to analyse the case of VGDs - a different, but similar type of worker to the IT workers analysed by O'Carroll.
Findings. We can generalize O'Carroll's model based on the IT case to the VGD case. Based on these two cases, we propose that the rise of project-based work environments is a major explanatory factor of this raising trend in the 24/7/365 model of flexibility.
Research limitations/implications. More research examining project-based regimes in other sectors and settings is required to generalize further
Originality/value. Though this model can appear to fit the reality of knowledge work in general, it more accurately describes project-based work in creative environments, which is nearly always knowledge work, but the reverse cannot be inferred.
Paper type. Article.

Keywords: *videogame developers, working time, long hours, project-based work, knowledge work*

[1] Marie-Josée Legault (corresponding author) Full Professor in Labor relations at École des sciences de l'administration, Téluq-Université du Québec. Email address : marie-josee.legault@teluq.ca. Johanna Weststar, Associate Professor, DAN Department of Management and Organizational Studies, Western University (Canada). This work was supported by the Social Sciences and Humanities Research Council of Canada under Grant 435-2013-0187.

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1. Introduction

The international videogame industry is an object of unrelenting critics about its working conditions[2]. Among factors related to this negative perception, "working conditions" is the top response in a recent survey (68%), before "sexism in the games" (67%) and "perceived link to violence" (62%)[3]. In particular, the issue of working time stands out among others that besmirch the industry's image of offering *extreme* jobs[4].

This takes place in a larger debate. Workers and employers came to a *certain truce* regarding the working time issue at the beginning of the 20th century as labor organisations succeeded in getting important legal limits placed on the working day and week. But as Shor[5] argued in *The Overworked American*, a new wave in working time management marked a return to conflict over working time. Scholars debate the effectiveness of 'long working hours' (i.e., fatigue causes mistakes) amidst growing demands for better work-life balance and new government measures in Europe to tackle long working hours. The phenomenon raises ethical issues that need to be addressed, like pay fairness (when the hours are unpaid yet necessary and requested), worker health and the reduction of free time.

However, when comparing contemporary international trends in working time for European and North American countries, the case is not one of universal long hours. Rather, two important trends stand out. The first is the polarization of working time: very long and very short work weeks are common, with a prevalence of long hours among knowledge workers. The second is an increase in *flexible working time* which takes three quantifiable forms, flexibility in: the length of working time, in the organisation of working

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[2] Acton, M., *It doesn't have to suck*, *Gamasutra* Blog, December 25, 2010, http://gamasutra.com/blogs/BrendaBrathwaite/20110117/6815/Mike_Actons_quotIt_Doesnt_Have_To_Suck_gamedevquot.php, (accessed December 6, 2016); Hyman, J. *Quality of life: Does anyone still give a damn?*, *Gamasutra Blog*, 2008, May 13, http://www.gamasutra.com/view/feature/3656/quality_of_life_does_anyone_still_.php (accessed December 6, 2016); Peticca-Harris, Amanda, Johanna Weststar & Steve McKenna, "The perils of project-based work: Attempting resistance to extreme work conditions in video game development." *Organization,* 2015, *22*(4):570-587; Scott, S. R. *Maintaining Quality of Life as a Game Developer, Entrepreneur, and Parent*, *Gamasutra Blog*, 2014, October 10th, http://www.gamasutra.com/blogs/SeanRScott/20141010/227468/Maintaining_Quality_of_Life_as_a_Game_Developer_Entrepreneur_and_Parent.php (accessed December 6, 2016).

[3] Weststar, J. & M.-J. Legault, *Developer Satisfaction Survey 2014: Employment Report*, commissioned by the International Game Developers' Association (IGDA), 2014, https://www.igda.org/?page=dss2014 (accessed December 6, 2016).

[4] Burke, R. J. *Working to Live or Living to Work: Should Individuals and Organizations Care?*, *Journal of Business Ethics*, 2009, vol. 84, sup. 2, 167–172.

[5] Shor, J. *The overworked American*: *The unexpected decline of leisure*, Basic Books, New York, 1991.

time and in the duration of contracts. In other words, there is a *trend* towards a freer deployment of workers, on demand, over a 24-hour day, 7-day week and 365-day year.
Such is the model put forth by O'Carroll[6] in her analysis of the information technology (IT) sector. In a study of Irish IT workers, she highlights the flexibility of hours and demonstrates that this unpredictability introduces challenges with worker control over working time. She suggests that the 24/7/365 model and its associated challenges is germane to post-industrial knowledge work. Our article tests O'Carroll's claims, by discussing the trends and worker experiences highlighted in a report documenting 15 years of evolution in working time among videogame developers (VGDs)[7]. First, we find that O'Carroll's framework does generalize to VGDs; unpredictability is a key feature in their working time, rather than long hours per se, and they operate under a delusion of control over their working hours. However, we introduce two theoretical explanations of unpredictable working time to suggest that O'Carroll's model should not be generalized to all knowledge work. First, we claim that O'Carroll's 24/7/365 model of flexibility is made to suit the constraints of creative project-based environments such as the IT sector, the VG industry, performing arts and the general arts scene (museums, festivals, etc.), rather than knowledge work per se. Second, we claim that such a model is enduring (but not invulnerable) because of an encompassing placement system based on reputation that is common to these project-based industries.

2. Overview of Trends in Working Time

In the working time literature, there is some debate as to what constitutes 'long hours'. In this article, we will stick to the Working Time Regulations (WTR) that came into force in Europe in 1998 and defined long hours as more than 48 hours a week[8]. It is understood that a 40-hour working week is a consensual

[6] O'Carroll, A. *Working time, knowledge work and post-industrial society. Unpredictable work*, Macmillan, Houndmills, Palgrave, 2015.
[7] Legault, M.-J. & J. Weststar, *Working time among videogame developers, 2004-14. Compared results of IGDA international surveys 2004, 2009 & 2014 and of 2 rounds of Canadian interviews 2008 and 2013-14, Summary report*, 2015, http://gameqol.org (accessed December 6, 2016).
[8] Kodz J., S. Davis, D. Lain, M. Strebler, J. Rick, P. Bates, J. Cummings, N. Meager, *Working Long Hours: a Review of the Evidence. Volume 1 - Main Report*, *Summary*, Institute for Employment Studies, Department of Trade and Industry, London, 2003, http://www.employment-studies.co.uk/report-summary-working-long-hours-review-evidence-volume-1-%E2%80%93-main-report (accessed December 6, 2016).

standard[9] and that these two thresholds are used as benchmarks for comparison and not in a normative way.

As long as we consider aggregated statistics and the labour force as a whole, considerable variation in work time organisation is obvious among countries and sectors[10]. Due to variation in labour markets, it is challenging to engage in useful analysis of universal data such as multi-sector national data or international databases which mix developed and developing countries. However, if we focus on specific sectors and research questions, interesting common trends emerge.

In the United States and Canada (here referred to as North America (NA)), Burger observed a macro-trend of polarization in working time: both very long and very short work weeks have increased since the 1990s. The prevalence of extreme weekly working hours (here defined as 50 hours a week) has particularly increased among employees with college degrees to include 40% of men and 20% of women[11]. Other studies of European data noticed that the standard working day and week are still prevalent in industrialized countries, with the UK being an important exception. For instance, where 65% of EU workers had fixed schedules in 1995, 61% still had these schedules in 2005[12]. That said, the working hour profile is more varied across Western European countries as they have not responded in a standard way to global economic deregulation; Scandinavian countries and France kept strong welfare regimes, while others deregulated labor markets more radically[13]. Therefore, standard hours are under pressure[14] (and many countries have been converging towards

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[9] Lee, S., D. McCann & J. C. Messenger *Working Time around the World. Trends in working hours, laws and policies in a global comparative perspective*, International Labor Organisation, Roultedge London, 2007, p. 138-139.

[10] Chung, H. & K. Tijdens, *Working time flexibility components and working time regimes in Europe: Using company-level data across 21 countries*, *The International Journal of Human Resource Management*, 2012, vol. 24, no 7, 1418-1434; Kerkhofs, M., H. Chung & P. Ester, *Working time flexibility across Europe: A typology using firm level data*, *Industrial Relations Journal*, 2008, vol. 39, no 6, 569-585; Burger, A. S. *Extreme working hours in Western Europe and North America: A new aspect of polarization*, London School of Economics (LSE) 'Europe in Question' Discussion Paper Series, Paper No 92, London, 2015, for an international comparison including Western Europe and North America, from 1970 to 2010.

[11] Burger, 2015, op. cit., p. 8-16.

[12] Morley, J., F. Sanoussi, I. Biletta & F. Wolf, *Comparative analysis of working time in the European Union*, European Foundation for the Improvement of Living and Working Conditions (EFILWC), Dublin, 2010, p. 18; Parent-Thirion, A., E. F. Macias, J. Hurley, G. Vermeylen *Fourth European Working Conditions Survey*, European Foundation for the Improvement of Living and Working conditions, Dublin, 2007.

[13] Burger, 2015, op. cit., p. 10.

[14] O'Carroll, 2015, op. cit., p. 3-4, Burger, op. cit., 2015.

the NA pattern, particularly among high-qualified-high-end jobs[15]. Extreme hours (both very long and very short) are increasing across workers' educational levels in Europe, with the most radical increase occurring in knowledge work in the form of long rather than short hours. In the 1970s, high-skilled workers enjoyed the most balanced work schedule, but the ratio of extremes in their category radically increased from the 1980s to 2010[16].
The continuous restructuring of global value chains calls for an increased flexibility in terms of contract types, assignments, and working hours. In order to adjust to increasing fluctuations in demand and to optimize their cost structure, employers look for ways to synchronize working time to market demands. Theory suggests that, as a result, fixed term contracts and very long working hours are on the rise while, at the same time, workers daily and weekly schedules are getting more de-standardized[17].
By scrutinizing this de-standardization among knowledge workers specifically, O'Carroll[18] observed a growing concern in the working time literature about an increase in *flexible working time*. This takes three quantifiable forms: flexibility in the length of working time (part- and full-time, long and short hours), in the organisation of working time (atypical work time on weekends and nights, home and tele-work, time banking, flexible time), and in the duration of contracts (temporary and permanent). In other words, the trend is not in terms of absolute increases in working time, but rather towards a freer deployment of workers, on demand, over a 24-hour day, 7-day week and 365-day year.
In this reality, workers experience standard (permanent) employment contracts coupled with working time demands that are unpredictable and irregular (e.g., no fixed hours, flexibility required, variation in starting times, short notification of changes to working time). Such a trend consists of wide individual variation instead of universal long hours, even inside the same company[19]. This is the case for a growing body of post-industrial knowledge workers, such as IT workers. O'Carroll[20] argued that this 24/7/365 model of flexibility is imposing itself as a new standard in work time organisation which gives rise to a working time culture characterised by a common understanding that boundaries between work and non-work are blurred, that non-work time can become

[15] Burger, 2015, op. cit., p. 9-13)
[16] Burger, 2015, op. cit., p. 20)
[17] Burger, 2015, op. cit., p. 12)
[18] O'Carroll, 2015, op. cit.
[19] O'Carroll, 2015, op. cit., p. 25-27; Plantenga, J. & C. Remery, *The case of Information Technologies*, in E. Mermet & S. Lehndorff (eds), *New Forms of Employment and Working time in the Service Economy (NESY) Country case studies conducted in five service sectors*, European Trade Union Institute (ETUI), Brussels, 2001, 1-59, http://www.iaq.uni-due.de/aktuell/veroeff/am/lehndorff01cc.pdf (accessed December 6, 2016.
[20] O'Carroll, 2015, op. cit., p. 135.

emergency working time, and that a public commitment to long hours is expected. These changes have harsh impacts on work/life balance.
We acknowledge here that many occupations have long adopted non-standard and unpredictable schedules because they are more or less unavoidable: senior officials and managers, agriculture, crafts, technicians, hospitality, healthcare, policing and professionals[21]. These sectors do not show longitudinal variation in the organization of working time, and therefore cannot explain the statistical increase in *flexible working time*.
This flexible working time can take the form of the zero-hour contract[22]. In these sectors, the employer simply wants to make more intensive use of capital to improve profitability[23]. It can also take the form of individualized flexible time schedules like the *flextime* model where compulsory core hours are combined with open start and finish times around the core hours. Other organizational policies geared toward worker-oriented flexibility mandate a fixed number of hours, but allow a flexible schedule in which to work those hours[24]. These models are designed to give workers some autonomy over their working hours. However, predictability is important in terms of satisfaction with work/life balance because time fragmentation leads to scheduling problems in private social life[25] which particularly discriminate against those with caring responsibilities. Plus, flexible work policies do not always deliver worker control and autonomy in practice.
As O'Carroll concluded, an important feature of the 24/7/365 model of working time is that workers operate under a delusion of control as to their flexibility and autonomy. According to European working time surveys, a fair share of workers assert that they have *control* over their working hours. However, 20% among them are paradoxically dissatisfied with work-life balance, and experience more tension in managing the unpredictable demands of work than those who report less control over their hours[26]. In the context of an unpredictable work process itself, working time is doomed to be constantly negotiated and conflicted[27]. The 24/7/365 approach is often then an employer-oriented flexibility rather than a worker-oriented one, wherein *flextime* is

[21] Fagan, C. *Gender and working time in industrialized countries*, in J. C. Messenger (ed), *Working Time and Workers' Preferences in Industrialized Countries: Finding the Balance*, International Labor Organisation, Routledge, London, 2004, 108-146, p. 122; O'Carroll, 2015, op. cit., p. 136-8.
[22] O'Carroll, 2015, op. cit., p. 141-4.
[23] Morley et al., 2010, op. cit., p. 18.
[24] O'Carroll, 2015, op. cit., p. 27.
[25] Plantenga et al., 2010, op. cit.; O'Riain, S. *Net-working for a living: Irish software developers in the global workplace*. In R. Baldoz, C. Koeber and P. Kraft (eds.) *Critical Studies of Work*, Temple University, Philadelphia, 2000.
[26] O'Carroll, 2015, op. cit., p. 9.
[27] O'Carroll, 2015, op. cit., p. 125.

claimed as a family-friendly feature but is also a trap[28]. Workers often anticipate that longer hours at the beginning of a project/career will be rewarded by shorter hours at the end. For instance, bonuses are often promised in return of outstanding contributions which are implicitly or explicitly linked to long hours, in what Perlow[29] calls "loyalty deals". Rather than bringing relief and empowerment, unpredictability and *unmet loyalty deals* ("disruptive bargains") create greater tensions in managing the unpredictable demands and cause dissatisfaction with work/life balance[30]. The promise of control never materializes.
Under flexible work time arrangements, each employee is free to negotiate their own arrangement. This way, working time arrangements are only available to the few and workers work under different and individual "à la carte" time and pay regimes. Some are advantaged vis a vis working time, but often trade progression, promotion or pay rises for this autonomy[31] because time commitment is often privileged over results[32]. As these arrangements are often unknown to other workers and the advantages and disadvantages are individualized, no one challenges the overall climate[33]. Despite much dissatisfaction, flextime persists in the IT sector.
In what follows we will investigate the generalizability of O'Carroll's findings regarding the unpredictability of working time and the delusion of control over that time by analysing the case of a different, but similar type of worker, videogame developers (VGDs). Then we will propose a new theoretical framework to explain the prevalence of the 24/7/365 model among certain

[28] Lee, S., D. McCann & J. C. Messenger, 2007, op. cit., p. 127-131; O'Carroll, 2015, op. cit., p. 144-5.
[29] Perlow, L., *Finding time: How corporations, Individuals and Families can benefit from New Work Practices*, Cornell University Press, Cornell, New York, 1997.
[30] O'Carroll, 2015, op. cit., p. 125.
[31] O'Carroll, 2015, op. cit., p. 130.
[32] Chasserio, S. & M.-J. Legault, *Strategic human resources management is irrelevant when it comes to highly skilled professionals in the Canadian new economy!*, *International Journal of Human Resource Management,* 2009, vol. 20, no 5, 1113-1131, http://www.informaworld.com/smpp/title~db=all~content=g911806569, (accessed December 6, 2016); Chasserio, S. & M.-J. Legault, *Discretionary Power of project managers in knowledge intensive firms and gender issues, Revue canadienne des sciences administratives – Canadian Journal of Administrative Sciences*, 2010, vol. 27, no 3, 236–248, http://onlinelibrary.wiley.com/doi/10.1002/cjas.147/pdf (accessed December 6, 2016); Hochschild, A. *The Time Bind. When Work Becomes Home and Home Becomes Work*, Metropolitan Books, New York, 1997; Simpson, R. *Presenteism and the impact of long hours on managers*, in D. Winstanley & J. Woodal, *Ethical Issues in Contemporary Human Resource Management*, Macmillan press, Houndmills, 2000, 156-171.
[33] O'Carroll, 2015, op. cit., p. 94-96.

groups of knowledge workers – those employed in project-based environments - as exemplified by IT workers and VGDs.

3. Methods

We use two sets of data in a mixed method approach. The first consists of cross-sectional self-report data collected in three International Game Developer Association (IGDA) surveys:

- 2004 Quality of Life survey (1000 respondents)
- 2009 Quality of Life survey (3362 respondents)
- 2014 Developer Satisfaction Survey (DSS) (2202 respondents).

This sample is international but primarily contains workers in Anglo-Saxon environments. In the 2014 data, a majority of respondents were from the United States and made up a total of 48% of the sample. Adding Canada (17%) and Mexico (0.6%) the total North American representation was 66%. Europe represented 20% of survey respondents, Latin America made up 6.7% and Asia represented 5%. It is important to note that the surveys were only released in English.

The surveys were completed anonymously online and they were advertised broadly across the IGDA member network and at its events. They were also spread through general word of mouth and at least in the case of the 2014 DSS through the professional networks of the authors and across social media. We cannot assert response rates because there is no official count of the international population of VGDs and we have no measure of how many people were aware of the surveys.

For the purpose of this paper we only use the responses from non-managerial salaried and contract developers. Specifically, the 2014 sub-sample (n=795) and the 2009 sub-sample (n=1145) used here include those who list development roles (i.e., game designers, interaction and level designers, programmers, visual and audio artists, writers, localisation experts), as primary roles and who do not have managerial roles in any capacity. The 2004 survey did not distinguish respondents by job role/discipline, so we will use all the data. In addition to articulating specific data in the article that follows, we will also refer to our comprehensive report on working time trends among video game developers from 2004-2014 which is available in open-access[34].

The second set of data consists of semi-structured in-depth interviews of 1-2 hours with Canadian developers. A first round (n=58) was conducted in

[34] Legault, M.-J. & J. Weststar, *Working time among videogame developers, 2004-14. Compared results of IGDA international surveys 2004, 2009 & 2014 and of 2 rounds of Canadian interviews 2008 and 2013-14, Summary report*, 2015, http://gameqol.org (accessed December 6, 2016).

Montreal in 2008 and a second round (n=93) was conducted in the top Canadian video game hubs of Montreal, Toronto and Vancouver[35] in 2013-14. The interview scripts differed on the whole, but both sets contained questions about experiences with working time. The two sets of interviews were analysed separately, but both with the grounded theory procedure[36]. Throughout this article we will include interview excerpts from the 2013-14 as yet unpublished set of interviews and provide citations of our previously published work when referencing the 2008 set of interviews. As a whole the interview sample excluded those in higher managerial roles.
A comparison with Irish IT workers is not problematic as VGDs show many common trends with O'Carroll's IT workers[37]. In terms of general working time statistics, Ireland has more in common with the UK and non-EU developed countries that have significantly higher proportions of people working long hours (i.e., USA, Australia, Japan) than it does to non-English speaking EU countries[38]. These are the workers most represented in our survey and interview data. As well, there is considerable similarity in the technical trades like quality testing, programming, game design and production management. A difference in the VG industry is the artistic trades which constitute a quarter of the VGD workforce in Canada[39]. But in our view the common project-based organisation of work is more important than these differences.

[35] Nordicity (2013) *Canada's Video Game Industry in 2013. Final Report*, Prepared for Entertainment Software Association of Canada, http://www.nordicity.com/media/20151210faaebhea.pdf (accessed December 6, 2016), p. 23 & 30.
[36] Charmaz, K., *Grounded theory. Objectivist and Constructivist Methods*, in Norman K. Denzin & Yvonna S. Lincoln (eds), *Handbook of Qualitative Research* (2nd ed), Sage, Thousand Oaks, 2000, 509-535.
[37] Weststar, J. & M.-J. Legault, *Developer Satisfaction Survey 2014: Employment Report*, commissioned by the International Game Developers' Association (IGDA), 2014, https://www.igda.org/?page=dss2014 (accessed December 6, 2016).
[38] Kodz J., S. Davis, D. Lain, M. Strebler, J. Rick, P. Bates, J. Cummings, N. Meager, *Working Long Hours: a Review of the Evidence. Volume 1 - Main Report*, *Summary*, Institute for Employment Studies, Department of Trade and Industry, London, 2003, http://www.employment-studies.co.uk/report-summary-working-long-hours-review-evidence-volume-1-%E2%80%93-main-report (accessed December 6, 2016).
[39] Dumais, J.-F. *L'emploi dans l'industrie du jeu électronique au Québec en 2009. Un portrait sommaire de la situation*, Techocompétences, comité sectoriel de la main-d'œuvre en technologies de l'information et des communications, 2009.

4. Do Developers Work Long Hours?

The first step in exploring the fit of O'Carroll's thesis of unpredictable 24/7/365 work with the video game industry is to analyse working time trends for the industry over the past 15 years.

A General Decrease in Regular Hours of Work

When investigating regular hours of work the international IGDA surveys distinguished between the hours developers are expected to work and those that they actually work. Regarding the former, we see a decrease in the number of hours that developers are expected to work or that are codified in contracts (Table 1). In 2014, more respondents reported that their studio management expects them to work 35-39 hours per week on regular schedule (a 'standard' week) than in 2009.

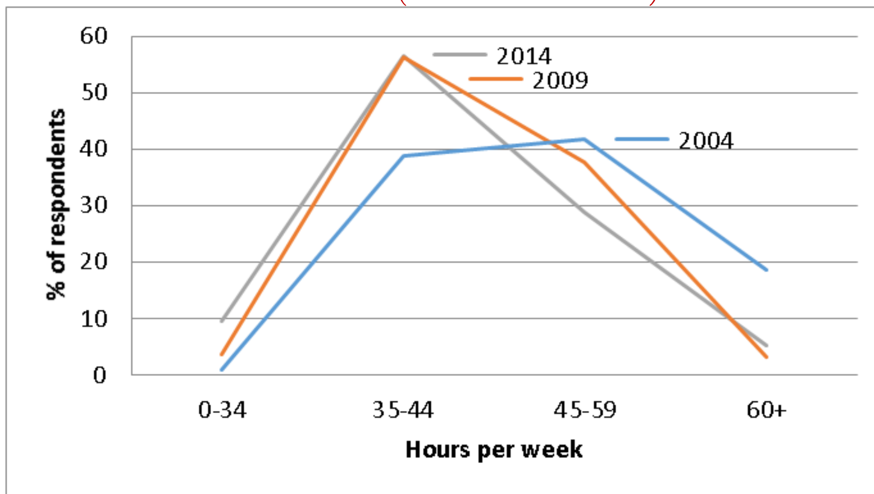
Table 1. How many hours per week on average are you EXPECTED to work when in a REGULAR schedule? (2009 – 2014)

	% of respondents	
Weekly hours	**2009**	**2014**
0-20	2	3
20-24	1	3
25-29	0	1
30-34	0	3
35-39	8	18
40-44	71	62
45-49	10	6
50-59	7	2
60-69	1	0
70-79	0	0
80 +	0	3

We also observe a general decrease of working hours regarding actual hours worked. In 2014, more respondents reported working 35-44 hours per week

instead of longer hours than in 2009 or 2004. In keeping with these results, the Canadian developers we interviewed reported working 42 hours on average in a normal week.
Mirroring the same trend, there has been a decrease in longer work hours during the same period. In 2004, 61% reported working more than 45 hours per week. This decreased to 41% in 2009 and to 34% in 2014 (Graph 1).

Graph 1- How many hours per week on average do you ACTUALLY work when in REGULAR schedule? (2004 – 2009 – 2014)



However, to fully answer the question of long hours, we have to look at the overtime work, which in the videogame industry is referred to as *crunch time*.

Crunch is decreasing, but still important

Crunch time, a project management notion

In the video game industry, *crunch* time is when a team goes into an extended period of work (beyond the regular hours) to meet milestones and deadlines to ship deliverables. This is known as *overtime* to most people outside of the industry.
Crunch time is a threefold notion that can be measured in terms of frequency, intensity and duration. VGDs could be asked to:

- engage in discrete periods of crunch over the course of a project (frequency);

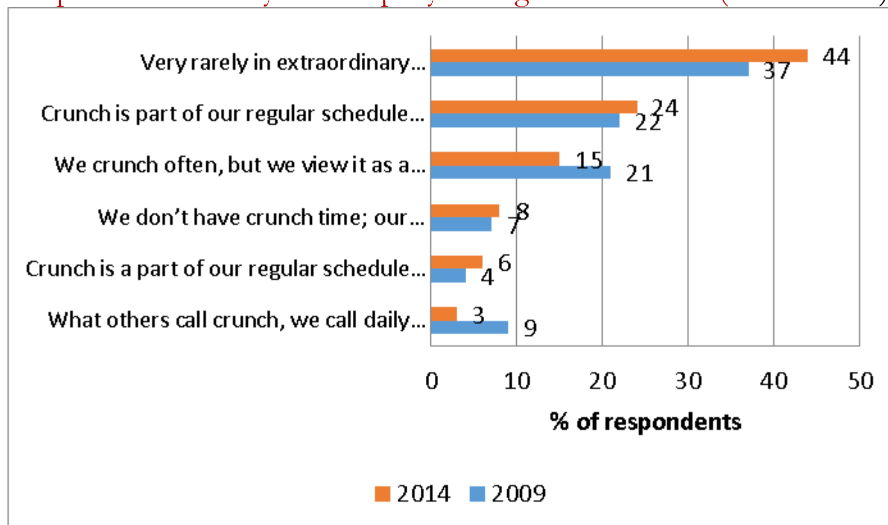
- add working hours *to the regular weekly working hours* with the resultant length of the work week varying between 45 and 90 hours (intensity);

- extend this practice over a few weeks or a few months (duration).

Frequency: The general practice is decreasing, but still part and parcel of the trade

From 2009 to 2014, the share of respondents to the international surveys who say that their studios try to avoid crunch has increased from 37 to 44% (Graph 2).

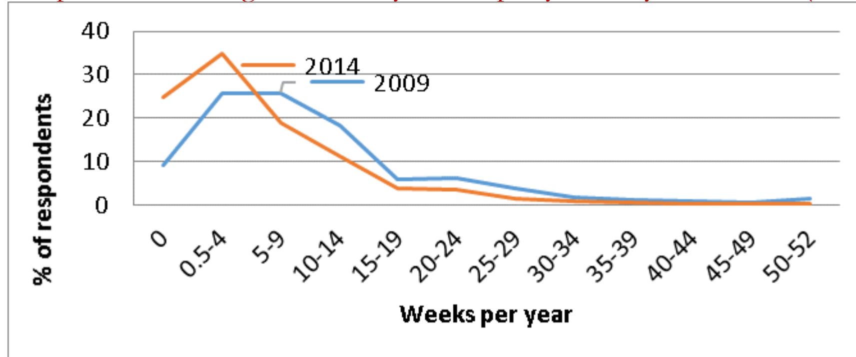
Graph 2. How does your company manage crunch time? (2009 – 2014)



Combining two answer categories (1st and 4th on Graph 2) we see that the proportion of respondents who consider the practice of crunch as exceptional in their studio has increased from 44% to 52% over a ten year span. If we combine the second, third and last answer categories, we learn that the proportion of respondents who perceive the practice of crunch to be regular has decreased from 56% to 48%. This fits with data that suggest crunch time is declining. There has been an increase in studios that work without crunch time and a general decrease in the frequency of crunch overall. In 2009, 9% of respondents reported that on average they did not work any weeks in crunch over the year. This compares to 25% in 2014. Among those who did report crunch time, 52% reported averages of fewer than 10 weeks per year and 79% reported averages of fewer than 15 weeks a year. In 2014, 54% reported

averages of fewer than 10 weeks per year and 65% of respondents reported averages of fewer than 15 weeks a year. This suggests that there is an improvement in the frequency of crunch time, largely reflecting a rise in the number of studios that do not crunch at all (Graph 3).

Graph 3. On average how many weeks per year do you crunch? (2009 - 2014)



However, that still leaves many who do experience crunch. When asked if they had crunched in the past two years, 79% of respondents said yes and 42% of those said more than twice. More, 54% of respondents felt that crunch time was expected at their workplace as a normal part of their job and a further 11% said they were "not sure". The numbers are trending downwards, but a high proportion of developers still perceive that crunch is common and even accepted.

Individualized arrangements regarding crunch

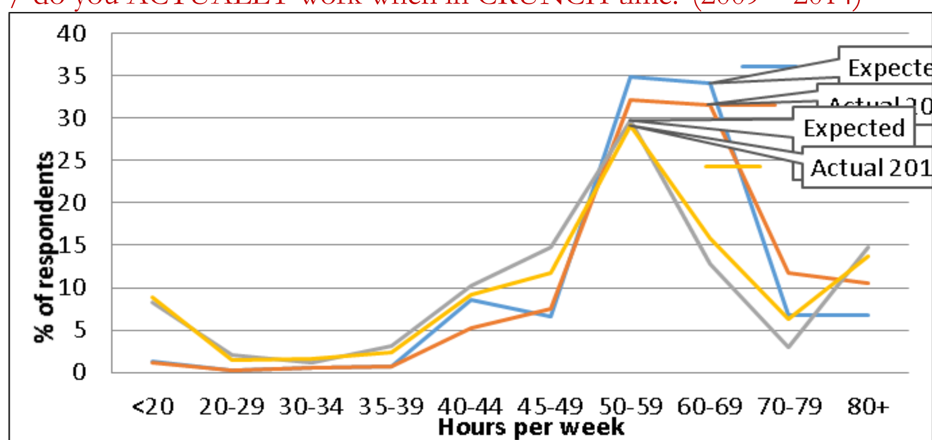
The data now present a conundrum. How can a relatively high proportion (21%) of respondents say that they have not experienced crunch in the past two years when only 8% say that their studio policy is to never have crunch and at least 54% say that it is expected as a normal part of the job? An explanation lies in teasing out the studio policy versus the experience of individual developers. Indeed, Canadian interview material indicates that the majority of studios practice crunch at some level or in some instances, but workers on *some* projects or *some* individual developers can avoid it or refuse it. In keeping with O'Carroll's observations, working time varies according to the problems met in a given project or in a given part of a project. Facing this, people negotiate individually when they need adjustments and time is managed "à la carte" instead of responding to an organisational policy.
One-quarter of the interview respondents felt they could refuse to work in crunch time, for various reasons. They either worked in studios that practiced

crunch but they individually refused, they may have had the option to refuse from time to time with a good reason, or they may have worked in studios that had a no crunch policy.
When crunch is prompted and developers explicitly refuse to work overtime, in general, their refusal has the effect of shutting them out of higher-profile projects and studios. Neither purely voluntary and freely agreed to, nor completely required and forced, overtime in the videogame industry falls under the broad category of "voluntary but expected" working hours[40].

Intensity: Hours worked on crunch time

Though the practice of crunch may not be extinct, when measuring intensity we also see an evolution in terms of how many hours developers are expected to work (Graph 4).

Graph 4. How many hours per week on average are you EXPECTED to work / do you ACTUALLY work when in CRUNCH time? (2009 – 2014)



In 2014, more respondents to the international survey reported that they were expected to work 45-49 hours per week while in crunch time compared to 2009. Mirroring this, a smaller share of respondents in 2014 reported that they were expected to work 50-69 hours during crunch. That said, and off-setting this downward trend, the percentage of respondents who felt that their

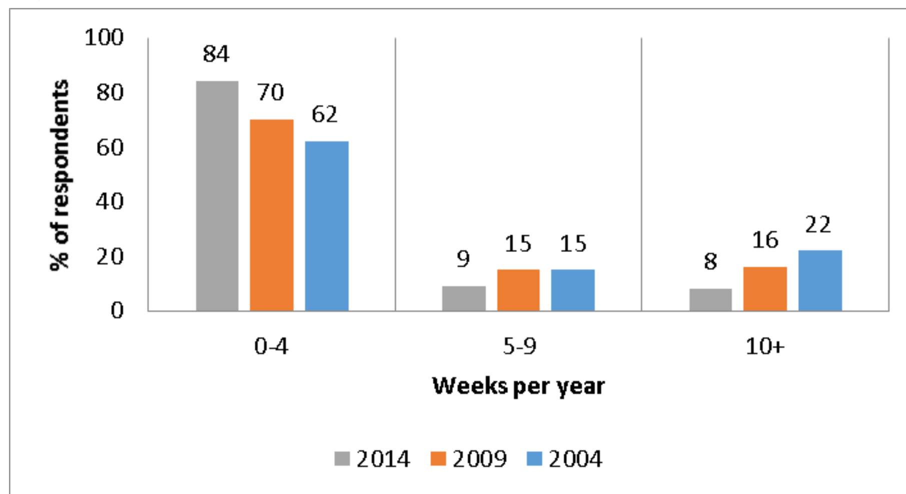
[40] Campbell, I. *Snatching at the Wind? Unpaid Overtime and Trade Unions in Australia*, *International Journal of Employment Studies*, 2002, vol. 10, no 2, 109-156; Donnelly, R. *How "free" is the free worker? An investigation into the working arrangements available to knowledge workers*, *Personnel Review*, 2006, vol. 35, 78-97.

management expected them to work very extreme hours of 80 or more per week during what they call a "death march" doubled between 2009 and 2014.

Duration: Weeks in a row of crunch time on a downward trend

The duration of an episode of crunch is also on a downward trend

Graph 5. On average how many weeks in a row do you crunch? (2004 – 2009 – 2014)



In the 2009 international survey, 79% of the respondents who worked in crunch were working doing so for fewer than 15 weeks in a row; this rose to 97% in 2014. Similarly, the percentage of respondents working in crunch for fewer than 10 weeks in a row increased from 78% in 2004 to 85% in 2009 and to 92% in 2014. The percentage of respondents working in crunch for fewer than 5 weeks shows a slight decline: 62% in 2004, 60% in 2009 and 55% in 2014.

Unpredictable working schedules as opposed to long hours

The following discussion is based on the international survey data on VGDs summarized above and supplemented by our Canadian interviews. Overall, the data suggest a reduction in regular hours worked as well as in the practice of 'crunch'. In light of the Working Time Regulations (WTR) definition of long hours (more than 48 hours a week), VGDs seem to progressively escape the "long working hours" universe on regular days, across the multiple dimensions of crunch: frequency, intensity and duration.

However, the way overtime is managed is a source of enduring and significant dissatisfaction that interviews help us to understand. Unpredictability is a salient feature, as workers are often "asked" on very short notice, even if that implies a weekend. Calls for overtime work often takes the form of a simple request to order take-out food, but there can also be no call at all, just an *autonomous* decision from the developer.

> It was basically my boss will be like: "OK we're redoing something. Let me know what your dinner order is by this time" [...] So Tuesday comes along and we were waiting cause normally we know when there is overtime when we get asked to order a dinner. Basically they will go to a restaurant website or whatever and be like: "order anything you want from here" so that's our clue to know that there's overtime. (F-11-20-V-H-27-11-13-14-26-JL-MSO)
> [Studio] is very informal about their hours - like my start times, end times - so it's more of: I see the tasks that I need to have done by this day, and I see that I can't do that in a normal 9 to 5, so I just know that I have to work overtime. (F-18-07-T-Z-28-04-14-04-11-JT)

When discussing this issue, most Canadian respondents say that managers implicitly ask. Rather than asking directly, they suggest an emergency, complain that the job is due yesterday, or give a dirty look (or comment) about the progress of work or about leaving for the night.

> My current studio, our president will often make remarks [like]: they came in on the weekend and they didn't stay long enough, or "This project is due soon, so why are people going home on time?"… Usually passive-aggressively complain about it to one of us … but not talking to those employees. Yeah, there's definitely huge pressure. (F-03-07-V-F-12-19-13-14-26-LT)
> There was a weekend where we needed to do crunch, and it was being pressured in that - like, this was a very important, this is a very critical weekend... And my lead got a message from my boss angrily-worded - or it sounded like that - saying that if we're not coming in on the weekend, he wants an explanation why. (M-07-19-T-B-24-03-14-04-11-JT)
> So here's an example: one of my colleagues left at 6 and then he received an email saying: "Why did you leave at 6?". So he started early in the morning, maybe 8, because he lives far away and he will leave at 6. [...] (Who sent the email?) The studio lead. (Did you get paid for this extra time?) Not at [this studio]. (F-13-11-M-W-10-10-13-13-19-15-MSO)

In interviewing developers, we unveiled the same working time culture as in the IT sector, in which non-work time becomes a reserve of emergency time where the emergency is defined by external deadlines, demands or changes[41]

[41] E.g., from publishers or console manufacturers; see O'Donnell, C. *Developer's dilemma: The secret world of videogame creators*. MIT Press, Cambridge, MA, 2014.

and working hours are tailored to meet them[42]. VGDs share the aforementioned commitment culture characterised by the common understanding that boundaries between work and non-work are blurred and the working day is as long as it takes to have the task done. Their contracts require flexibility as a working condition. Like IT workers, VGDs also show both a high commitment to the work and a growing discontent regarding working time.

5. The Illusion of Control over Working Time

Never a dull moment...

Likewise, unpredictability is built into the work organisation of game development as in IT more broadly. Any claim of workers' control over time management is, in fact, nullified by the responsibility for the client's satisfaction. As with O'Carroll's IT workers, VGDs rely on *loyalty deals* but end up in *disruptive bargains*.
Several studios offer *flextime* and the developers experience a similar tension in managing the unpredictable demands of work and high dissatisfaction with work-life balance[43]. Decisions regarding time management are assumed to be autonomous moves, but are in fact heavily influenced.

> It's mostly controlled by me. If we have a big deadline coming up or something like we wanted to get stuff done for GDC or we had a project [...] that we had to kind of push out the door... Even then, my boss doesn't usually ask. Sometimes he'll be all like: "Oh. Well, if you don't mind, you can do a little weekend work." But usually, it's kind of just: "Well, all this stuff needs to be done - for Monday" (F-05-19-T-L-19-03-14-04-11-JT)

As in O'Carroll's study, developers explain and justify the pressure they feel from managers or peers by the urge to solve any bug at the immediate moment of its occurrence. It means that, as every specialised person is holding a part of the project on her shoulders, everyone has to be there in case there was a problem regarding their specific field. However, what can be seen as a "self-driven" propensity to crunch might actually stem from an internalization of the

[42] Legault, M.-J. & K. Ouellet, *So into it they forget what time it is? Video game designers and unpaid overtime*, in D. Jemielniak et A. Marks, *Managing Dynamic Technology-Oriented Business: High-Tech Organizations and Workplaces*, IGI Global, coll. Information Science Reference, Hershey, 2012, 82-102.
[43] Peticca-Harris, A., J. Weststar & S. McKenna, 2015, op. cit.; Weststar, J. & M.-J. Legault, 2014, op. cit.

general career progress system enforced in creative project-based environments.

> I feel obligated to do it sometimes because I always feel like it's a team thing. Everyone else is staying ... I'd feel guilty if I went home and then just rested and did nothing. [...] Unless of course all my work is done but even then, if it was crunch and we were gonna ship the game in the next week and everyone is just really stressed out, I would want to help, I wouldn't want to go home. (F-11-20-V-H-27-11-13-14-26-JL-MSO)

Here we discuss videogame projects with external as well as internal clients, as some studios are integrated to publishers, some are contracting with different publishers and some sell a finished product to publishers[44]. Although these differences impact on a clients' power over the organisation of work and HR management it is out of scope of this paper to analyse each separately.

Disruptive bargains regarding time management

Studios seldom have formal policies that would apply the same standards and rules to everyone for crunch time compensation. Like among Irish IT workers, overtime is "the classic flexibility instrument" in this sector because it is free[45]. Developers seldom receive any formal wages for the overtime hours worked, whether at the regular rate or at a premium rate, and compensation is never guaranteed.

Producers or project managers can grant time off as compensation at the end of the project; these implicit or explicit promises can be the grounds for the O'Carroll's abovementioned "loyalty deals." Developers work hard and are loyal under the assumption of a reward (whether time-off or promotion or positive re-assignment, etc.) that may never come. However the attribution criteria for time off are rarely explicit; more often it is discretionary and with no guaranteed proportionality to the overtime hours. Acting further against accurate compensation for overtime, studios often lack a system to track developers' hours (a different system is enforced for testers, who are hourly salaried workers and paid at the premium rate). As well, and as we will discuss more below, in practice, there are very few lulls in studio schedules and developers are actually restricted in their time off. In 2009, 46% of the survey respondents had experienced pressure to cancel vacations or been denied a vacation and in 2014, 36% did.

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[44] O'Donnell, 2014, op. cit.

[45] Legault, M.-J. & K. Ouellet, 2012, op. cit.; Legault, M.-J. & J. Weststar, 2015, op. cit.; Plantenga and Remery, 2002, op. cit., p. 476.

Some studios grant money instead of time compensation. At the end of the year, an amount is allocated to project team members on the basis of sales profits. This is then divided up among developers and paid out as bonuses. Their share is determined by their contribution to the final product, as estimated by the team leads and the producers. The criteria are wholly at the discretion of the superiors. Bonuses reliant on sales profits also introduce the risk that there may be none. Worse, studio management can refuse to distribute any bonus because the project has cost more than planned, without having to prove it. Still worse, the new model of online sales and digital downloads no longer means that sales are tightly clustered in the three months following the launch of the game (i.e., when the games would feature prominently on the shelves of game retailers), but can stretch out for years thereafter. With the high mobility of developers, the likelihood of reaching out to the members of a crew by the time a game has paid out is even lower.

> It is also common that promised compensation whether a bonus or time off, never materializes (32% of respondents reported this in 2014). Developers often have to strongly advocate to get promised compensation and this may explain why some people will drop the matter.
> If you worked 3 days of overtime, you'd get a day of vacation time, and I think you actually had to really push to get that. Otherwise, it wouldn't happen, unless you keep bugging them for it. The only other compensation you get is free dinner. (M-14-13-T-G-18-02-14-04-11-DK)

This causes "disruptive bargains" – where the assumed loyalty deal is broken on the part of the employer. It also causes resistance strategies to emerge in the form of individual arrangements. Some may get satisfying arrangements to meet their current circumstances, but in return for opting out of the prevalent culture they must forget any progression, promotion or pay rises[46].

6. A Project-based Work Pattern more than Knowledge Work

To this point we have achieved the first objective of our paper. We see that the work environment of VGDs fits with that articulated by O'Carroll for IT workers. We have similarly documented unpredictable and arbitrary hours ostensibly at the control of workers rather than constant long hours in employment contracts or explicitly required by employers. However, we diverge from O'Carroll regarding the reach or scope of this 24/7/365 model. She linked these features of the IT work process to knowledge work, but we argue that they better reflect the ethos of the project-management regime. This

[46] Legault, M.-J. & K. Ouellet, 2012, op. cit.

regime is gaining predominance as a means to organize work and work time in many knowledge work sectors, particularly those making original, one-of-a-kind products, with rapidly changing technology, for markets constantly seeking innovation[47]. While project-based work aimed at innovation is nearly always knowledge work, the reverse cannot be inferred.
In a project-based organisation, the design of each product (custom software or application, game, maintenance and customer service) gives rise to a contract. Budget conditions, deadlines and product specifications are the key risk factors; they are well-known as the *iron triangle* of PM. If the first two are too restrictive with regard to the third, they could lead to project failure[48]. Among the main sources of uncertainty and risk is certainly the ghost of 'failing to ship' or deliver the product on time and budget, regardless of the constraints attached to the evolving scope of the order[49]. The client will take part in the management of project tasks and largely influence project managers' HR decisions[50]. Uncertainty and risk inherent to any project echoes in the work process because contracts negotiated with tight budget and time conditions entail insufficient staffing and create a pervasive sense of crisis and required flexibility. In the 2004 international survey 42% of respondents complained about understaffed studios, unrealistic timeframes and overburdened developers. Half of the respondents in 2014 felt they had more work to do than time to do it. Indeed, working time is task-oriented instead of clock-oriented; in other words, the working day is as long as it takes to have the task done. Project contracts require flexibility as a working condition.
Our respondents describe the pressure of high international competition on studios to settle very demanding contracts where they must plan the production of sophisticated products in a short timeframe and with a low budget. Then, to reduce costs, they overwork their understaffed teams. The

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[47] Singh, V. and S. Vinnicombe, *What does "commitment" really mean? Views of UK and Swedish engineering managers*, *Personnel Review*, 2000, vol. 29, no 2, 228-258; Simpson, R. *Presenteeism, power and organizational change: Long hours as a career barrier and the impact on the working lives of women managers*, *British Journal of Management*, 1998, vol. 9, no 1, 37-50.
[48] Hodgson, D.E. *Project Work: The Legacy of Bureaucratic Control in the Post-Bureaucratic Organization*, *Organization,* 2004, vol. 11, no 1, 81–100.
[49] Legault, M.-J. IT firms' working time (de)regulation model, *Work, Organization, Labour and Globalisation,* on line, 2013, vol. 7, no 1, http://www.jstor.org/stable/10.13169/workorgalaboglob.7.issue-1 (accessed December 6, 2016).
[50] Chasserio, S. & M.-J. Legault, Strategic human resources management is irrelevant when it comes to highly skilled professionals in the Canadian new economy!, *International Journal of Human Resource Management,* 2009, vol. 20, no 5, 1113-1131, http://www.informaworld.com/smpp/title~db=all~content=g911806569, (accessed December 6, 2016); O'Carroll, 2015, op. cit., p. 43.

very fact that crunch is an option that is supported by labor laws in many jurisdictions is an affordance that perpetuates the practice of crunch.

> Everyone, I mean we were all painfully aware that the industry lobby at the BC government changed tech law so [employers] didn't have to pay overtime. (F-10-12-V-I-04-12-13-14-26-MSO)

In US and Canada, professionals are rarely unionized and legislation often allows for the existence of "exempt" positions in which employees are exempt from working hour regulations[51]. Specifically in the excerpt above, the VGD refers to the Employment Standards Regulation of her province (similar to the California State regulation), stating that the hours of work provisions of the Act, as well as the overtime and statutory holiday provisions, do not apply to "high technology professionals" (including video game developers and IT workers).

In fact, respondents blame studios for what they describe as the planned part of crunch, the part that can be predicted from the onset because it is based on the conditions of the contract between the studio and the publisher (who funds, markets and distributes the game). Studios negotiate unrealistic contracts with publishers and immediately transfer the burden of such a risk to developers who will necessarily have to crunch and suffer the consequences in their private life, or lower their ambitions[52].

The HR practice of *flextime*, as defined above, is put forward as a managerial innovation that empowers the workers and allows for control over working hours. However, workers are rarely able to exercise the full autonomy that the flextime system suggests. In the project-based environment the loyalty deal of being rewarded for putting in the hours frequently ends in disruptive bargains because in a project-based environment, longer hours at the end of a project are rarely matched with shorter hours during lull periods[53]. There are many reasons for this that stem from the project-based nature of the work.

First, there is a fixed deadline, but no designed process. Because of the innovative nature of the product, the pace and direction of any individual's labour process is undetermined[54]. There is no planned procedure to create innovation and uncertainty is part and parcel of the process. Nevertheless, the three conditions of (limited) budget, (limited) timeline and (high) desires/needs of the client or order need to be respected. Production time frames are based on the needs of clients instead of work process requirements per se. The only

[51] Burger, 2015, op. cit., p. 11.
[52] Legault, M.-J., 2013, op. cit.
[53] O'Carroll, 2015, op. cit., p. 54.
[54] O'Carroll, 2015, op. cit., p. 127.

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way to accommodate deadlines that are too short and accede to the publically legitimated *market time* of the client is by adding to the working day[55]. As such, overtime is used as a "the classic flexibility instrument" and is rarely compensated because of a normative void.
Second, permanent workers are attached to many projects or immediately allocated to a new project when theirs ends. This means that lost time is limited and intensity is increased[56]. Multitasking ensures that workers always have something to do that can fit between two bigger tasks[57]. Therefore, workers are never really on their own schedule. As well, in some cases employees are laid off at the end of a project and therefore do not recoup any rewards from the loyalty deal.
Third, there is an ethos of peer-to-peer helping, because workers are interconnected in a complex network of coordinated tasks and depend on each other for micro-decisions, training and problem solving[58]. This connectivity is both an asset and a plight in the workplace; the ideal "flow" of uninterrupted creation is juxtaposed against the expectation of instant help that keeps individuals moving on in their tasks. As a result, control over time is mostly a fiction[59].
Fourth, in every emergency context, managers ask for solidarity and commitment to the loyalty deal. This mobilizes the project teams such that peers will in turn ask solidarity from less committed peers. The pressure to stay at work is made obvious with interpersonal cues such as reactions and gazes. At best, workers are left with a "constrained autonomy"[60].
Last but not least, the employer's part of the "loyalty deal" that is said to include a right to claim back extra hours or to balance past long hours when the workload lightens is more of a legend. On the contrary, employee demands for the consummation of this deal may give the bad impression of an uncommitted worker and be held against him/her[61].

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55 O'Carroll, 2015, op. cit., p. 44.
56 O'Carroll, 2015, op. cit., p. 128.
57 O'Carroll, 2015, op. cit., p. 63.
58 Causer, G. & C. Jones, *Management and the control of technical labour*, *Work, Employment and Society*, 1996, vol. 10, no 1, 105-123; Huws, U. *Expression and expropriation: The dialectics of autonomy and control in creative labour*, *Ephemera: Theory and Politics in organizations*, 2011, vol.10, no 3-4, 1-18; McGovern, P., *Trust, discretion and responsibility: The division of technical labour*, *Work, Employment and Society*, 1996, vol. 10, no 1, 85-103; O'Carroll, 2015, op. cit.; Thompson, P. & C. Warhurst, *Hands, hearts and minds: Changing work and workers at the end of the century*, in P. Thompson & C. Warhurst, *Workplaces of the future*, Macmillan, London, 1999, 1-24.
59 O'Carroll, 2015, op. cit.
60 Perrons, D., C. Fagan, L. McDowell, K. Ray & K. Ward, *Work, life and time in the new economy: An introduction*, *Time and Society*, 2005, vol. 14, no 1, 51-64.
61 O'Carroll, 2015, op. cit., p. 77.

The inherent pressures the iron triangle imposes on production largely contribute to explain this 24/7/365 model of flexibility in such a context:

- Each project is directly tied to a contract with a precise client that is constantly connected to project managers and is given a say in many HR decision making processes. Project teams are held accountable to clients and investors in a highly competitive environment. The length of the working day will vary depending on project manager's estimation of the risk of delay in a given project. There is a pervasive sense of crisis, real or artificial, when a project falls behind and even when it is on schedule, due to regular planning meetings with the client.
- The desires of the client/customer/external stakeholder are subject to frequent changes as the constraints of reality unfold.
- In the VG industry, a majority of projects end up as commercial failures and the high level of risk leads to funding by venture capital. This funding, in return, leads to very tight control of the iron triangle which is transferred to developers, through the project manager, as intensive use of time.
- Workers have to plan their moves from one project to another, as appointments are short-term. As a result, projects cannot always count on the precise human resources that are required, either because one has left or none could be hired.

From this, we argue that O'Carroll's model of unpredictable working time can be generalized to the group of workers who experience project-based work organisation in creative environments. However, we would not generalize this model to all "knowledge work", as she does, because much knowledge work takes place in bureaucratic or industrial environments with repeated daily operations that do not share the same constraints as PM. For instance, in his meta-analysis of working time trends Burger[62] puts forth a number of contributing factors to extreme, polarised and flexible hours:

- Looser labor regulation allows employers to lower their total compensation costs by pressuring their full-time employees to put in unpaid overwork.
- Countries and/or sectors with a high degree of global production show higher ratios of extreme hours, because global value chains and internationally traded services call for an increased flexibility in terms of contract types, assignments, and working hours, as a consequence of international competition. This affects knowledge work more than low skilled work.
- Free trade and globalized competition favor employers; faced with highly mobile capital, less mobile workers are more likely to accept compromises on employment practices such as working hour norms.

[62] Burger, 2015, op. cit., p. 17-26.

These contributory factors are highly salient in many project-based environments; however, their impact is lessened in bureaucratic knowledge work environments such as teaching or health which do not face the same pressures of the private international product market. As well, these factors cannot have the same effect in environments that rely on domestic labor markets, operate in the public sector and/or have union representation. Therefore, when knowledge work takes place in large bureaucratic environments, more research is required to determine the trends in work hours and the applicable contributory factors.
We have shown that O'Carroll's flexibility model based on the IT case can easily be generalized to the VGD case. We have also argued, based on these two cases that this rising trend in the 24/7/365 model of flexibility stems from the rise of project-based work environments and is based on its inherent conditions, but is not necessarily tied to all forms of knowledge work. Let us now see how the inherent pressures that projects impose on production contribute to create environments in which the 24/7/365 model and its associated challenges will likely endure.

7. The Importance of Reputation

Why do game developers seem to accept unpredictable extra hours given their associated challenges with work/life balance and health? Project management is used in contexts where the commitment towards the success of the project and the client are paramount to get a good performance assessment and advantageous placement in subsequent career moves.
One particularly salient feature of this regime is the high mobility context due to the discrete and short-termed nature of the project itself. At the end of each project the team breaks up and the experts are free to work on other projects, either with the same employer or a competitor[63]. Within these nomadic careers a strong portfolio, a solid professional network and a safe reputation (as determined through good performance reviews and positive peer regard) drive career success. These in turn hinge upon client satisfaction and project success and reinforce a commitment to the project where its demands must be fulfilled. This has been observed in Canada's IT sector[64].
Game developers negotiate their working conditions individually, and their individual negotiating power is based on their reputation. This reputational system is built on a trade-off (or "loyalty deal") between a propensity to work in crunch time and benefits that foster good conditions for mobility and

[63] O'Riain, 2000, op. cit.
[64] Chasserio, S. & M.-J. Legault, 2010, op. cit.; Legault, M.-J. & K. Ouellet, 2012, op. cit.

contribute to career progress (i.e., training opportunities, attending important events, good evaluation, enhanced remuneration, promotion or assignment to high-profile projects)[65]. Refusing when the rest of the team works overtime is not a negligible fact in a project-based organisation because it violates the demands of the project and breaks the assumption of commitment. Managers reward those who accept "loyalty deals" and play by the rules, but so does the peer group. Exclusion from the peer group can hinder professional mobility, as networking is a critical vector of placement. Caught in the net of job hopping and reputation building, no doubt developers fall prey to an encompassing working time culture and commit themselves to extra working time in the name of the project.
Moreover, in this trade-off system, refusing overtime can mean that a developer is denied those benefits through informal sanctioning processes[66]. In some studios, the benefit to engage in crunch is nothing more than the privilege to save your job, instead of being sacked.

> That's why they did not keep me […]. At [studio], when the project ended up, they sacked nearly everybody. We were around 30, they kept around 12 who stayed on board [...] He told me : "the 12 I keep, I know there will be overtime, so I have to make sure I'll have people to work overtime. So if you never want to work overtime I can't keep you on board". (M-06-19-16-M-R-18-09-13-13-19-15-MSO)

Some even refer to the "dark side" of the industry, a rampant threat of exclusion for those who consider refusing crunch time work. Some studios are quite blatant in sending the message that there is an obligation to stay:

> First trick I did at [studio] was saving an email that says: "Goddam, it's midnight and we don't even see you, where the f… are you…" "If you don't take your job seriously, we're gonna find someone else". I kept it and always swear to myself, if ever that guy's looking for me, I'll send it to [game media] or else. This studio's policy is: "work you into the ground". (M-13-01-03-M-U-30-10-13-13-15-19-MSO)

According to our international survey data, respondents in 2014 were more likely to feel that the time they spent with family lessened their chances of promotion or advancement than respondents to the same question in 2009[67]. As well, Canadian interviewees discussed the threat of firing or another form of reprisal, all of which reinforce the work ethos of the ideal autonomous creative worker, or the "honour code" of the trade that prompts respondents to accept "loyalty deals". These observations are wrapped up in an ongoing

[65] Legault, M.-J. & K. Ouellet, 2012, op. cit.
[66] Legault, M.-J. & K. Ouellet, 2012, op. cit.
[67] Weststar, J. & M.-J. Legault, 2014, op. cit.

coercive storytelling that is powerful enough to become normative[68]. The omnipresent demands of the project arouse self-discipline and makes managerial discipline superfluous.
This is not to say that there is no collective agency; indeed we have documented forms of individual and collective resistance[69]. However, they are isolated and have not had a systematic effect.
Overall, the system of (informally and indirectly) rewarding the propensity to crunch and punishing the reverse, under the guide of project demands, appears to be a very effective and enduring means of driving employees to put in a lot of overtime, because most developers go along with it.

8. Conclusion

This paper has contributed to the discussion of the evolution of working time regimes and their drivers.
First, we have shown that O'Carroll's 24/7/365 model of flexibility and unpredictable working time among IT workers can generalize to and account for most of the key features in the work environments of videogame developers (VGDs), a cognate sector. VGDs still suffer from long hours, but we can see a downward trend in many key measures: weekly hours in regular and crunch schedule, number of weeks in crunch, number of weeks in a row. More prevalent, as in the IT sector, are unpredictable work hours, which can be long, that are built into project-managed work environments. If we go back to the title of this paper, we must observe that death marches are not over, but spread over the course of a project and subjected to the project manager's control.
Any flexibility in time management that is claimed as a managerial innovation is in fact a downloaded responsibility towards the project and the client's satisfaction. This responsibility relies on the commitment to use leisure time as emergency work time and ends up in a loss of control over private time.
Second, we attempted to clarify the scope of O'Carroll's model by presenting the most salient features of the project-based environment. Though the 24/7/365 model can appear to fit the reality of knowledge work in general, we argue that the still amorphous concept of knowledge work is too large for this attribution. Specifically, we should avoid confusing knowledge work with project-based work, because the former takes place in bureaucratic, industrial as well as project-based environments and the latter, in some instances, can involve work not typically included in discussions of the knowledge economy

[68] Peticca-Harris, A., J. Weststar & S. McKenna, 2015, op. cit.
[69] Legault, M.-J. & J. Weststar,, 2015, op. cit.

(i.e., construction). Indeed, we require studies of the contemporary constraints of health professionals, teachers and professors, scientists and technicians in industry or bureaucracy, managers, finance analysts and so forth who may not share the pressure of constant mobility and need of a reputation at the same level. Though project-based environments clearly experience unpredictability and delusionary control over working time, it is not clear that knowledge workers in general do.

Third, we articulated the enduring ability of project-based regimes to regulate working time pointing specifically to the reputation system of job placement. The reputation system is an astonishingly powerful tool in creative project-based work which is wielded in the name of the project to achieve compliance with unpredictable hours. Though *flextime* is claimed as part of good HRM practices, we must argue that managerial control over time allocation is impossible in the context of projects, so what looks like employee empowerment is merely a shift of the burden to the employees to reckon with[70] coupled with a heavy penalty for non-compliance. However, and returning to the second argument, the same cannot be said of the knowledge work universe a priori. Future research on the existence and efficiency of working time patterns and their drivers in other industries, project-based and knowledge-based, is required.

[70] Peticca-Harris, A., J. Weststar & S. McKenna, 2015, op. cit.

Competences and European Framework: Which Critical Approach in front of The Great Transformation?

Giuditta Alessandrini [1]

Abstract Purpose. Competence is the ability of people to implement knowledge, skills and attitudes to achieve higher levels of performance, and knowledge for one's development. A wide range of pedagogical literature has been produced on competence, but we think an additional and more dynamic definition of competence is needed.
Design/methodology/approach. Considering the results of a European project – SMEQUAL – and its theoretical insights, the paper discusses the issues of competence considering authors like Salling, Olesen and Weinert.
Findings. The paper reaches the following conclusions: the notion of competence is relevant for both technical knowledge and in terms of relations and ethics concerning people's behaviour. We agree with Olesen's views that there is a need for a new language of competence which moves towards a more relational and holistic view.
Research limitations/implications. This research provides a critical debate about the concept of competence.
Originality/value. The paper underlines some opportunities for a more extensive concept of competence drawing on the capability approach of Sen and Nussbaum.
Paper type. Issues paper.

Keywords: *ECVET, Competence, Work-based learning, Capability approach.*

[1] Full Professor of General Pedagogy, Università Roma Tre, Italy. Email address: giuditta.alessandrini@uniroma3.it.

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1. The Notion of Competence

Competence is the human ability to implement knowledge, skills and attitudes to achieve, not only higher levels of performance, but also values and knowledge for individual development[2]. It is – in other words – a "combination of proficiencies" (technical, theoretical and methodological skills; procedural and operational abilities).
What do we mean by "competence"? On competence, there is vast and varied pedagogical and psychological literature in many countries[3]. Beyond the theoretical approaches, it is important to deal with ECVET's models to compare a conceptual framework with research in other competence domains.
What is the essence of competence? It is the individual ability to combine different proficiencies (emotional and valuable experiences) while promoting the willingness to develop "learning outcomes" as expected results and "competence"[4]. It also denotes the capability to use these learning outcomes. Also aligned with these process related terms is "qualification", which denotes the requirements of a certain work or function
The concept of competence generally covers the combination of the following attributes[5]:
– The ability to act successfully;
– A complex context;
– The mobilization of psycho-social prerequisites (cognitive and non-cognitive);
– Results related to the requirements of a professional role or personal project.
In this view, competence is functional, performance-oriented and pragmatic, and defined in terms of external social demands that need to be mastered[6].

[2] G. ALESSANDRINI & M.L. DE NATALE, *Il dibattito sulle competenze. Quale prospettiva pedagogica?*, Pensa Multimedia, Lecce-Brescia, 2015.
[3] M. MULDER, *The competence construct in educational practice: A critical review of global critiques*, Paper presented at the WERA Conference, Washington (DC), April 2016.
[4] G. ALESSANDRINI, *Manuale per l'esperto dei processi formativi* (*Handbook of educational processes*), Carocci, Roma, 2016; K. ILLERIS (Ed.), *International Perspectives on Competence Development*, Routledge, London, 2009.
[5] D.S. RYCHEN & L.H. SALGANIK, *Defining and Selecting Key Competencies*, Hogrefe & Huber, Seattle/Toronto/Bern/Göttingen, 2001; F. WEINERT, *Concept of Competence: A conceptual Clarification*, in D.S. RYCHEN & L.H. SALGANIK (Eds.), *Defining and Selecting Key Competencies*, Hogrefe & Hube, Seattle/Toronto/Bern/Göttingen, 2001.
[6] H. SALLING OLESEN, *Some contradictions in the concept of competence as they appear in competence assessment/validation of prior learning*, Paper for Singapore Conference, December 2015.

2. Main Questions of this Paper

– Can the Qualification Framework (ECVET) support the mapping and assessment of competences in a perspective of lifelong guidance without being bureaucratic?
– To what extent does the development of training programs for adults – together with learning in a work context (Work Based Learning) – encourage individual experience of cultural or life growth of competence?
– Is it possible to implement a notion of competence with the concept of capability approach (A. Sen, M.C. Nussbaum)?
– Are there many differences and/or similar meanings?
– What is the potential benefit for educators, and for the academic debate, to compare these two concepts?

3. Qualification Frameworks and Validation of Prior Learning

In European policy development, there are two technical tools that play a key role in implementing the *policies for lifelong learning* as Sulling Olesen *says*[7].
The first tool is the development of a *qualification framework*, which allows for comparison across national systems and among qualifications obtained through formal education and non-formal/informal activities[8]. The second tool is the *validation of prior learning and competence assessment* that encourages the recognition of specific (individual) competences in new environments.

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[7] I participated in the 9th International Conference on Researching Work and Learning (RWL9) "*Work and Learning in the era of Globalisation: Challenges for the 21st Century*" in Singapore in December 2015 and discussed with Sulling Olesen about the issue referred to in this paper. H. Salling Olesen, *Some contradictions in the concept of competence as they appear in competence assessment/validation of prior learning*, cit.

[8] On the issue of the role of informal knowledge, there is very interesting doctoral dissertation by Claudio Pignalberi. The research project doctoral entitled "*Digital Habitat and Communities of Practice: emerging paradigms of learning and knowledge construction*" involved students and former students of the educational-training chain who were invited to reflect on the impact of the formal, informal and non-formal learning approaches in the process that has marked their college experience. The model of the Q-Sort of learning (IQA) shows the student (or former student) dimensions of learning prove complementary and converging with each other, thus it is meant as an educational proposal to train and to improve professionalism of the subjects. The type considered as "central" is informal learning, which informs us that this type of learning has primarily developed the critical side and logical reflection of the respondents' parties, so that we can promote an internal and autonomous maturation process. The problem, in the logic of lifelong learning, is the interaction of the formal and informal types- to make sure that there is no separation or discontinuity between the different occasions and modes of learning.

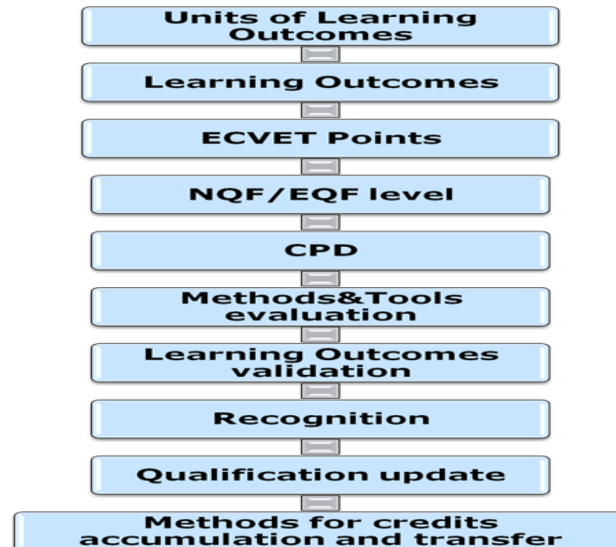
The PIAAC, Programme for the Assessment of Adult Population Skills, fully adopts a lifelong and life-wide learning perspective and focuses on the skills considered essential for growth, economic development and work, thus enlarging the evaluation to all competences gained during adulthood.
The *qualification framework* in Europe is sometimes seen as a bureaucratic burden to link the labour market with educational institutions. For this reason, it has been most criticized[9]. Generally, it has been seen as a bureaucratic tool for connecting the labour market with education institutions, and in Europe it has actually been used in a top-down approach aimed at creating more uniformed governance in education.
For two years, we worked in the Leonardo Project, SMEQUAL, on the competences of HR Professionals in some countries of Europe[10]. The project aimed to *improve the quality of training systems for SMEs* by incorporating the ECVET provisions foreseen in the Recommendation of the European Parliament and of the Council establishing the ECVET system. In particular, the project provided the European operational guidelines and methods for the implementation of ECVET provisions in VET programmes for SMEs.
The project set the following concrete objectives:
– Analyse the existing experiences and good practices in designing trans-sectoral qualifications for SMEs, in units of LOs and with the attribution of ECVET points, in three partner countries (BE, IT, PL).
– Develop the "European Handbook for LO-based Qualifications for SMEs", which would include operational methods and guidelines for defining trans-sectoral learning outcomes based on qualifications for the SMEs.
– Test the "European Handbook for LO-based Qualifications for SMEs"' on a qualification prototype, for example, an HR Planning & Recruitment Expert (HR Professional) in three partner countries – Belgium, Italy, Poland.
– Define and test quality standards for the ECVET implementation ("The 10 ECVET Quality Standards") within trans-sectoral SMEs qualifications.
In order to reach these objectives, 8 work packages and a strong collaboration between the different institutions have been developed (The SMEQUAL Handbook website can be reached at https://www.ceforc.eu).

[9] H. SALLING OLESEN, *Certification and Validation of Competences and Prior Learning*, World Bank, Washington, 2004.
[10] SmeQual Project (Project Number: 538534-LLP-1-2013-1-IT-LEONARDO-LMP). The partners of the project: Roma Tre University – Depart. Of Education (Italy), Effebi association (Italy), Scienter CID (Spain), AIDP (Italy), EUROCADRES (Belgium), CONFAPI (Italy), PAIZ Konsulting Sp.z.o.o. (Poland), The Portuguese Bank Training Institute (Portugal). Associate Partner – Cà Foscari University (Italy). In the testing phase (6th work package) the leader is Roma Tre University. Its supporters are EAPM, PAIZ, Scienter CID.

This work package produced the main Handbook's objective, increasing the awareness on ECVET provisions and the benefits of its implementation. During the project, we tested the applicability and efficiency of the Handbook in VET programmes for SMEs and provided a concrete example of qualifications in line with ECVET technical specifications, designed according to the Handbook and developed within the (HR Professional) project. The following figure reports a methodology example on how professional qualifications can be developed (*Figure 1*).
During the project (as a paper at the Bremen Conference)[11], it was possible for me and my colleagues to reflect on the following question: how we can improve our vision of competence and work on new methodologies to analyse skills and attitudes of a professional qualification without making use of a bureaucratic language?
We see two main opportunities for competence recognition[12]. One is work-life competence applied to the work environment and school assessment of knowledge, while the second is intellectual skills applied to the formal education institutions.

[11] International VET Conference, *Crossing Boundaries in Vocational Education and Training: Innovative Concepts for the 21st Century*, University of Bremen (ITB), Bremen, November 2015.
[12] In this field, interestingly is the doctoral dissertation of Valerio Massimo Marcone entitled "*The Formativity of Work-Based Learning*". The issue of validation and certification of competences skills within "dual paths" training and work is ever more present in apprentices' experiences. In fact, the quality of Work-Based Learning is central to improving the quality of education and vocational training. Innovations and good WBL practices developed in recent years are a significant route, even within trial VET. The WBL also enhances the benefits of alternation between classroom learning and learning in the company. In Italy, we have now new opportunities of implementation of "*alternanza*" (see the new Law "Buona Scuola") in connection with instances underlined by the European Union. The work was developed and tested with a qualitative research about educators, tutors and scholars in Taxonomy, inspired by the capability approach of Nussbaum to assess the quality of training in apprenticeship experiences.

Figure 1. Methodologies for the Development of Professional Qualification



Considering the scenarios in education and the pedagogical and theoretical reflection, we believe it is important to analyse all the previously mentioned questions that represent a critical approach to competence. We also believe that it is necessary to discuss competence issues deriving from authors comprising Sulling Olesen, Weinert and Malder among others.

4. A "Critical" Approach to Competence Issues

Milana, in a recent study about the evolution of the life-long learning concept applied to main documents of the European Commission, demonstrates that «the concept of lifelong learning today is primarily associated with economic growth and the global competition of nations and geopolitical regions»[13].
The Resolution on Adult Learning stresses the need for policies on this topic (2008). While personal development is mentioned as one of the goals of life-long learning, primary attention is paid on worker's employability, adaptability and vocational mobility.
The Council of European Union (2008) in Conclusion recognizes: «The key role which adult learning can play in meeting the goals of the Lisbon Strategy

[13] M. MILANA, *Political globalization and the shift from adult education to lifelong learning*, in *European Journal for Research on the Education and Learning of Adult*, vol. 3(2), 2012, 113-117.

by fostering social cohesion, *providing citizens with the skills required to find new jobs* and helping Europe to better respond to the challenges of globalization»[14].
I agree with Milana that there is a general trend in Europe to *reduce adult education to vocational and work-related education*.
«Trying to understand the rationale beyond this trend, it becomes apparent that in Europe increased political attention has been paid since the early 1980s to competence development sustained by a convergent view of learning processes as a central asset, regardless of whether the context is formal, non-formal or informal (…), this increased focus may be also explained by the diminished role of the state in securing job creation and citizen protection in relation to that of the market».
This approach is also shared by other authors[15] and it is, in my opinion, a very important point of discussion. Mulder recently argued that "*Critics state that the notion of competence is useless*", be it contextualized or not.
«Those critics often stick to the first generation of competence-based education programs which were dominated by behaviouristic functionalism. Others point at the issues encountered in the implementation of competence-based education practices and start off from more recent developments»[16].
These remarks by Mulder demonstrate the notion that generalization in competence frameworks is in contrast with contextual diversity (at professional and at country level) and is a very important argument on this critical issue.
The concept of competence – for a pedagogical framework – is not only relevant to the technical knowledge, *but also to the relational, emotional and ethical level of people's education* (as the classic concept of "Bildung"). We agree with Sulling Olesen that there is a need for a *new language of competence*.
«The use of these concepts is not very clear or consequent – but together they form a new discourse about education, training and learning in everyday life. This new discourse reflects a new material dependency of capital(ism) on the concrete quality of work and workers. On the one hand this circumstance implies a total program of learning for work, which is inferred not only for education and learning but also everyday life – a new level of economic organization. On the other hand, this request for competence development in which the subjectivity of working people occupies an important role, constitutes a new arena of political struggle over the directions of learning processes and the range of subjectivities required for the participation in work

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[14] CEU (2008), P.C1140/11.
http://www.ptsd.va.gov/professional/continuing_ed/find_a_course.asp.
[15] G.J.J. BIESTA (2006), *Beyond learning: Democratic Education for a Human future*, Paradigm Publisher, Boulder, Colorado, 2006.
[16] M. MULDER, *Professional Competence in Context: A Conceptual Study*, Paper presented at the AERA, Chicago (USA), April 19, 2015.

and in society. Diverse as they are, the elements and interests of these policies can only be held together in a rather abstract discourse, open to quite diverse interpretations and connotations. In the practical implementation of lifelong learning policies, however, some of the hidden ambiguities and contradictions appear as technical difficulties and/or conflicts»[17].

Taking a pedagogical view, the concept of competence in Europe plays a significant role as a change paradigm in education emphasizing the role of human resources. Nevertheless, we think a *further dynamic concept of competence is needed*.

Sulling Olesen suggests that an individual creates competence in processes of *active* and *situated* engagement. These may be gendered and class-based, but they are always mediated by the *individual experience*[18]. The issue of *situational learning* is very important in the theoretical approach of Wenger and Lave[19] as well as in the Engstrom's "Theory of Activity" (see Alessandrini)[20].

Therefore, *we need a system allowing for an extensive, detailed mapping and recognition of competences*. The model of lifelong learning has changed across the years, so the relationship between societal requirements and the individual knowledge necessary cannot be stated in terms of a *general formula*. Thus, it should be thought of as a new model of competence that is more dynamic and sensitive to specific factors.

Evans recognises the complexity of the contextual interplay of work-based and workplace learning experiences. The intersection of the formal, informal and contextual learning, and the consideration of cultural and power relations, and micro interactions of workplace activity generate a *new theoretical perspective of innovative approach* to learning at, for and through work[21].

Etelapelto explores the role of work identity as an object of negotiated interdependence and separation from the formal and informal. How is it possible to «implement the agentic identity construction»? The framework

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[17] H. SALLING OLESEN, *Beyond the current political economy of competence development*, in *European Journal for Research on the Education and Learning of Adults*, 4, 2013, 153–170. doi:10.3384/rela.2000-7426.rela9013.

[18] H. SALLING OLESEN, *Some contradictions in the concept of competence as they appear in competence assessment/validation of prior learning*, cit.

[19] J. LAVE & E. WENGER, *Situated Learning: Legitimate Peripheral Participation*, Cambridge University Press, Cambridge, 1990.

[20] G. ALESSANDRINI, *Manuale per l'esperto dei processi formativi* (*Handbook of educational processes*), cit.

[21] K. EVANS, *Developing the creative potential of the workforce: rethinking the part that work-based learning can play*, in H. BOUND and P. RUSHBROOK, *Towards a New Understanding of Workplace Learning*, Institute for Adult Learning, Singapore 2015.

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consists of the following concepts: the idea of self, professional knowledge and competences and work history and competence[22].
Billet elaborates in his research on the role individuals can play in *mediating their learning* in workplace settings through reflections on the contribution of physical and social settings[23]. The focus is on the social world's norms and practices and how individuals shape and influence perceptions of workplace capability.

5. Around the Scenario of the Challenges of Work Today: Collaborative Competence, Quality and New Relevance of Skills

Jyrki Katainen, Vice-President responsible for Jobs, Growth, Investment and Competitiveness, said recently «A competitive European economy requires innovation, be it in the area of products or services. Europe's next unicorn could stem from the *collaborative economy*. Our role is to encourage a regulatory environment that allows new business models to develop while protecting consumers and ensuring fair taxation and employment conditions»[24]. The European Commission supports businesses and public authorities to engage the collaborative economy. These new business models can make an important contribution to jobs and growth in the European Union. Which is the best combination of mindset and educational experiences useful in implementing collaborative competences?
In my opinion, another very important framework is the Agenda UNESCO Education 2030. This document will make historic progress in education as it is a commitment to bold, innovative and sustainable actions to ensure *that education truly transforms lives in the world*. Estimates from multiple sources suggest that 500 million to *900 million people will join the online* ranks by 2017, while Microsoft estimates that the online population will reach 4.7 billion users by 2025.
The last Davos Report, the Fourth Industrial Revolution, urges us to think creatively about the manufacturing process, value chain, distribution and customer service processes. The future of education emphasizes the immense

[22] A. ETELAPELTO, *The role of work identity and agency in workplace learning*, in H. BOUND and P. RUSHBROOK, *Towards a New Understanding of Workplace Learning*, Institute for Adult Learning, Singapore 2015.
[23] S. BILLET, *Positioning personal mediation as being central to workplace learning*, in H. BOUND and P. RUSHBROOK, *Towards a New Understanding of Workplace Learning*, Institute for Adult Learning, Singapore 2015.
[24] EUROPEAN COMMISSION, *A European agenda for the collaborative economy*, Brussels, 2 June 2016.

need to look beyond these areas to *prepare the coming workforce for the challenges ahead*.
There are different opportunities available that will shape the role which can be undertaken by higher education in the Fourth Industrial Revolution. Academic debate has emphasized universities' roles in shaping future technology by being the testbeds for innovation and educating future generations.
Which kind of education? Which kind of competence or capabilities will be generated for the future? The key words to answering these questions are "disruptive" "innovative", but also increasingly, "inequality" (for example, about digital divide effects, and see for example Deaton, Moretti, and Stiglitz).
A new skills agenda for Europe Working together to strengthen human capital, employability and competitiveness (Strasburgo COM 2016381/2) supports «a shared commitment and works toward a *common vision about strategic importance of skills for sustaining jobs grows*»[25] and strengthens *three points*: the issue of *quality* and *relevance* of skill formation, the need for qualification that is more visible and comparable, and improvement of skill intelligence for better career choices. One of the main goals is to implement a *political awareness of the critical importance of skills in Europe*.

6. The *capability approach* of Sen and Nussbaum: skills or capabilities?

What is *capability approach*? The key idea is "development as freedom" (the title of one of the Sen's most known books of 1999)[26] which states that economic growth can be achieved by means of democratic growth – that is, participation for every individual, not only for the elites – and developmental opportunities of one's capabilities through educational and formative experiences[27].
From this point of view, there are different research questions that become important for Educational Science. Two research streams are of interest: 1) to what extent can the Capability Approach[28] be turned into a theory of education that can be applied in different environments and topics such as schools, teacher training, and lifelong learning; 2) what educational policies at local, national and international level grant the individual's capabilities during the precarious transition period from school to work.

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[25] EUROPEAN COMMISSION, *A new skills agenda for Europe Working together to strengthen human capital, employability and competitiveness*, Strasburgo, COM 2016381/2, 2016.
[26] A. SEN, *Development of freedom*, Oxford University Press, Oxford, 1999.
[27] G. ALESSANDRINI, *La pedagogia di Martha Nussbaum. Approccio alle capacità e sfide educative* (*The pedagogy of Martha Nussbaum. Capability approach and educational challenges*), Franco Angeli, Milano, 2014.
[28] M.C. NUSSBAUM, *Not for profit. Why the Democracy Needs the Humanities*, Princeton University Press Princeton, Princeton, 2010.

In a nutshell, there are some basic conditions in making a set of recommendations (a position paper for scholars interested in the capability approach), as studied from an educational point of view.
These conditions are:
1) focusing on *the anthropological issues* such as individuals' wellbeing, freedom and development of their potential rather than on productivity and economy;
2) *overcoming the economic individualism* centred on instrumental rationality, and enlarging the horizon on the *person's value* and *dignity*;
3) concentrating on *a formative welfare* concerned not only with the conditions for employability, but also with the defence and *promotion of the individual's opportunities for development;*
4) widening the *idea of innovation*, not only as seen from the functionalistic and technical point of view, but also *as a social participated dimension*;
5) focusing on the *idea of social responsibility* as leverage for a shared and effective process of growth.

7. Concluding Remarks

The idea of competence is linked to a *potentially acting* subject who is able *to mobilize* various prerequisites in a manner relevant to the situation. It should be pointed out that the *social requirements are not well-defined and known in advance*; it is more of a question of having the ability to take the appropriate action in unpredictable and relatively complex situations.
"Competence" is thus not a (new) canon of knowledge and skills, but a potentiality whose realization is conveyed through the subject's knowledge and will. In this way, it is correct to say that *a person can be competent and can realize competencies* in specific situations.
Sulling Olesen says that «In the context of the issue of legal recognition, "competence" is supposed to serve as a "general equivalent" of *human capability*»[29]. To do so, we believe it is important to analyse the theoretical and practical differences among the models of competence (as well as the model in the New Skills Agenda 2016) through the *capability approach* of Sen and Nussbaum. We think that this debate can implement a very new and interesting *vision of the complexity involved in the concept of competence*.
The Commission's strategy, in front of the challenges issued by recent decades' scenarios, requires «a notion of competence which is able to understand the latent or potential interest of learning, and link it with a level of "objective"

[29] H. SALLING OLESEN, *Some contradictions in the concept of competence as they appear in competence assessment/validation of prior learning*, cit.

and societal reference where legal, institutional or economic recognition can rule, an imagination of a new potential career»[30].

Schwab, President of Global Forum, calls for leaders and citizens to «together shape a future that works for all by *putting people first*, *empowering* them and constantly reminding ourselves that all of these new technologies are first and foremost tools made by people for people»[31].

[30] H. SALLING OLESEN, *Some contradictions in the concept of competence as they appear in competence assessment/validation of prior learning*, cit.

[31] K. SCHWAB, *The Fourth Industrial Revolution*, World Economic Forum, January 11, 2016.

The Admissibility of Arbitration Proceedings in Labour Law Disputes in Slovak Republic

Andrea Olšovská and Marek Švec [1]

Abstract Purpose. This analytical paper focuses on the possible use of arbitration proceedings in individual labour relations.
Design/methodology/approach. The paper presents an analysis of the present legal landscape and opportunities to use legal qualifications, to deal with individual labour law disputes.
Findings. Arbitration proceedings as an alternative form of dispute resolution are generally considered as a faster and less costly form of dispute resolution. However, the public perceives the practices of many arbitration tribunals as unfair.
Research limitations/implications. The scientific paper contributes to the discussion on the use of alternative forms of dispute resolution for labour law.
Originality/value. The scientific contribution provides further theoretical and practical information for discussion of obstacles related to out-of-court settlement of labor disputes
Paper type. Issues paper.

Keywords: *Labour law dispute, mediation, arbitration proceedings, employee, employer.*

[1] Assoc. prof. JUDr. Andrea Olšovská, PhD.; Dean, Faculty of Law, University of Trnava in Trnava, Kollarova 10, 917 02 Trnava; e-mail: aolsovska@gmail.com; Chairperson and Board Member of Labour Law Association / Asociácia pracovného práva (www.laborlaw.sk). JUDr. Marek Švec, PhD.; Faculty of Mass Media Communication, University of SS. Cyril and Metodius in Trnava; Nám. J. Herdu 1; 917 01 Trnava; e-mail: marek.svec@ucm.sk / svectt@gmail.com. Secretary-General and Board Member of Labour Law Association / Asociácia pracovného práva (www.laborlaw.sk).

1. Introduction

Recently there has been an increase in interest, especially by employers, to include an arbitration clause in employment contracts to allow for the possibility to resolve future employee-employer disputes resulting from employment relation before an arbitration tribunal rather than before a general court. In that regard the question arises whether labour law disputes can be handled in arbitration proceedings. Quite often the opinion is encountered that this form of dispute resolution is possible since the current legislation does not ban this procedure. This possibility is concurred with even by the arbitration tribunal alone.2 This analytical paper focuses on the possible use of arbitration proceedings in individual labour relations in Slovakia.
For the area of individual labour disputes in Slovak law system are three acts for resolution: Act No. 244/2002 Coll. on Arbitration Proceedings Act, Act. No. 160/2015 Coll. on Code of Civil Procedure and Act No. 335/2014 Coll. on Consumer Arbitration Proceedings. The correlation between the three acts mentioned above in Slovak legal system is not grounded, therefore it can lead to different legal uncertainties in practical use.
Drawing from the currently effective legislation (1 July 2016) we suggest that labour law as well as other legal regulations do not permit arbitration proceedings in labour relations. There are opinions claiming the admissibility of these proceedings in the area of labour law; the inadmissibility can be justified by protection of the weaker party and employees certainly are considered to be the weaker party. To protect the weaker party, the legislators, for example, adopted a new act on consumer arbitration proceedings (effective since 1 January 2015) and a new Code of Civil Procedure (Act No. 160/2015 Coll. Civil Dispute Procedure Code, effective from 1 July 2016). A specific type of court proceedings has been included in the Code of Civil Procedure, namely "disputes with protection of the weaker party". In the instance of labour law disputes the existing actual and legal inequality between an employee and the employer will be confirmed. Equal status will not be achieved through a more advantageous position of the weaker party vis-a-vis the other party but through debilitation of certain formal requirements for proceedings of the parties to the dispute and through strengthening of powers of the court alone. Disputes with protection of the weaker party and their formal procedural terms and conditions will present certain exemptions from the general legal regulation governing the dispute proceedings and will primarily apply to disputes concerning labour, consumer and equal treatment issues.

[2] Accessible at: E.g. *http://www.cash-global.sk/rozhodcovsky-sud* [quote of 30 June 2016]

2. Disputes that can be Resolved in Arbitration Proceedings

Act No. 244/2002 Coll. on Arbitration Proceedings as amended (hereinafter only as "Arbitration Proceedings Act") stipulates which disputes can be resolved in arbitration proceedings. The Arbitration Proceedings Act regulates that within this alternative dispute resolution mechanism disputes shall be resolved that have arisen from domestic and from international commercial and civil law relations if the site of the arbitration proceedings is in the Slovak Republic (§ 1 paragraph. 1 subparagraph a) of the act). Subsequently, paragraph 2 of this provision stipulates that in arbitration proceedings all disputes can be resolved that are related to legal relations on which a settlement agreement can be concluded (under § 585 of the Civil Code; note: a settlement agreement with regard to *numerus clausus* of contract types in the Labour Code; also taking account of the subsidiary scope of the Civil Code, cannot be concluded in labour relations) including disputes over designation whether there is or is not a law and legal relation. Since this provision follows up paragraph 1 of § 1 of the Arbitration Proceedings Act, paragraph 2 also covers only commercial and civil law relations. For that reason it is obvious that no disputes resulting from labour relations are to be heard in arbitration proceedings.[3]
Simultaneously, the Arbitration Proceedings Act, § 1 paragraphs 3 and 4 specifies which disputes cannot be resolved in arbitration proceedings[4] and does not list disputes resulting from labour relations.

[3] ŽUĽOVÁ, J. (2015) Legal issues associated with nepotism in the workplaces in the Slovak Republic. In *European Scientific Journal.* Special edition. Vol. 1, pp. 10-17.
[4] Provision of § 1 of the Arbitration Proceedings Act (effective since 1 July 2016):
"(1) This act regulates
a) deciding over disputes derived from domestic and international commercial law and civil law relations if the arbitration takes place in the Slovak Republic,
b) recognition and enforcement of domestic and foreign arbitration decisions in the Slovak Republic.
(2) Arbitration proceedings can be applied to decide over all disputes related to legal relations that can be concluded through a settlement agreement including disputes over determining whether law or legal relation does or does not exist.
(3) Arbitration proceedings cannot be used to decide disputes
a) over creation, change or cessation of ownership titles and other substantive titles for real estate,
b) over personal status,
c) related to compulsory enforcement of decisions,
d) that arose in the course of bankruptcy or restructuring proceedings.
(4) Under this act, arbitration proceedings cannot be applied to decide disputes between supplier and consumer derived from, or related to, a consumer contract that can be decided through consumer arbitration proceedings."

3. Labour Law Disputes and Arbitration Proceedings

Certain authors deduce *the possibility to resolve labour law disputes in arbitration proceedings since the act does not exclude these disputes from arbitration proceedings* under the provisions § 1 paragraphs 3 and 4 of the Arbitration Proceedings Act.
If the legislators envisioned the application of arbitration proceedings also for the area of labour law, we suggest that they would have included this possibility directly in § 1 paragraph 1 subparagraph a) of the Arbitration Proceedings Act since it makes a difference between civil law and commercial law relations (the act does not use the more general concept of "private law").
Civil law as well as commercial law belongs to the area of private law that undoubtedly also includes labour law (although in the instance of labour law rather its hybrid nature may be considered because it includes also the public law standards). The Arbitration Proceedings Act explicitly reckons with proceedings in the areas of civil law and commercial law relations. If labour matters were also to be heard within these specific proceedings, § 1 paragraph 1 subparagraph a) of the Arbitration Proceedings Act would so state. For these reasons claiming that *labour law*, especially taking account of the subsidiary scope of the Civil Code vis-a-vis the Labour Code (under § 1 paragraph 4 of the Labour Code), *can be considered as an integral component of civil law, and thereby labour relations are civil law relations thus allowing arbitration proceedings to also be applied in labour relations,* fails to stand the proof.
If this conclusion is acknowledged, the question arises why the Arbitration Proceedings Act explicitly mentions commercial law relations as a possible matter for arbitration proceedings since the subsidiarity principle also holds for the relations between the Commercial Code[5] and the Civil Code. It could be said the relation to the Commercial Code includes subsidiarity application of the Civil Code to a larger extent than the relation between the Labour Code and the Civil Code, in which only general provisions of the Civil Code[6] are used for labour relations (in simple lay terms it can be said that there is a tighter relation between the commercial and civil laws than between the civil and labour laws).
The difference made between civil law and commercial law relations within the Arbitration Proceedings Act alone, in our opinion, overcomes the assumption

[5] Provision § 1 paragraph 2 of Commercial Code: Legal relations under paragraph 1 are governed by provisions of this Code. If certain issues cannot be resoled according to these provisions, they shall be considered according to trade usage (commercial practice) and, in the absence of this, according to the principles upon which this Code is based.
[6] Provision § 1 paragraph 4 of Labour Code: Unless stipulated otherwise by the part one of this Act, the general
provisions of the Civil Code shall apply to legal relations according to paragraph 1.

that arbitration proceedings can be applied also to labour relations; specifically because even though the Arbitration Proceedings Act does not mention labour relations, the interpretation of this act "has to seek assistance in legal theory and draw from the purpose of the act". The Slovak arbitration practice and judicature have so far not had an opportunity to take a stance in this matter. There is no doubt that *voluntary arbitration in general, and also under the Arbitration Proceedings Act in a broader sense, covers legal relations and disputes in the area of private law. This includes primarily civil law relations and commercial law relations that are not explicitly mentioned in the Arbitration Proceedings Act.* A relevant delineation of the private law area can be found in the publication Základy Občianskeho hmotného práva (The Basics of Civil Substantive Law)[7]. *The authors suggest that the private law area partially includes also the labour law* as a specific private law, in particular that part of it which is called individual labour law while the so-called collective law falls into the area of public law. The area of private law also includes labour law as one of its fundamental branches. For that reason, parties to labour relations can, in our opinion, be parties to arbitration proceedings. This conclusion is underpinned also with argument from the contrary (*argumentum ex contrario*). Judicial conciliation matters may include also a worker's claim for wage compensation and a company's claim for damage compensation under the Labour Code just like any other monetary claim. In this way another condition for arbitrability has been met under the Arbitration Proceedings Act, namely the possibility to end a dispute in a judicial conciliation, including in cases of labour relations. Yet, the admissibility of arbitration in labour law disputes is limited only to individual property rights under these relations; collective rights-related disputes cannot be subjected to arbitration.[8] This opinion was presented at the time of legislation that dealt with *property* disputes that have arisen from domestic and international commercial law and civil law relations if the site of the arbitration proceedings is in the Slovak Republic.

Arbitration proceedings in labour relations were also perceived as admissible especially with regard to legal regulation in § 1 paragraph 1 subparagraph a) of the Arbitration Proceedings Act effective until 31 December 2014 under which this act regulated decisions over *property* disputes that had arisen from domestic and international commercial law and civil law disputes if the site of the arbitration proceedings was in the Slovak Republic (at present the concept of

[7] LAZAR, J. et al. *Základy občianskeho hmotného práva (Fundamentals of Civil Substantive Law).* 2nd Edition. Vol. 1. IURA EDITION, Bratislava, pp. 9 - 11.

[8] HRIVNÁK, J. Základy arbitráže. Prvá časť (Arbitration Basics. Part One) [Systém ASPI] BSA. In *Bulletin slovenskej advokácie* [cit. 30.6.2016]. ASPI_ID LIT34083SK. Available in Systém ASPI.

"property" is not laid down) and the labour relations should be of a proprietary nature.
Considering the above, we suggest that labour relations cannot be dealt with in arbitration proceedings because even though the act does not explicitly exclude these from its scope (§ 1 paragraph 3 of the act), it does not mention them either (§ 1 paragraph 1 subparagraph a) of the act). If the act directly makes a difference between civil law relations and commercial law relations and does not mention labour law relations at all (the question of admissibility of arbitrability for labour relations could be assessed differently (more broadly) only if § 1 paragraph 1 subparagraph a) of the act specified that the act regulates arbitration proceedings for disputes that have arisen from private law relations; yet, that legal regulation does not exist). We suggest that the arbitration agreements (clauses) included in labour contracts are invalid.
Another argument underpinning the impossibility of laying down the arbitration clause is also the principle of restriction for contract types laid down in labour law in § 18 of the Labour Code.
In general, judicial protection is regulated in article 9 of the Fundamental Principles of the Labour Code. Under this provision, employees and employers who sustain damage due to breach of obligations arising from labour relations may exercise their rights in court. Employers may neither disadvantage nor damage employees based on employees exercising their rights stemming from labour relations.[9]
Next, § 14 of the Labour Code (settlement of disputes) stipulates that disputes between an employee and employer over claims deriving from labour law relations shall be heard and decided by courts. Current Slovak legislation does not spell out specific court proceedings for the area of labour relations and for that reason it draws from the general civil procedure law. The applicable provision does not stipulate which courts shall hear labour law-related issues and for that reason this provision cannot be interpreted too broadly, meaning that labour law disputes can be heard also in arbitration tribunals. It could be said that it is generally accepted that the Labour Code reckons with general courts dealing with disputes. This can be derived also from § 7 paragraph 1 of the Code of Civil Procedure under which within civil procedure the courts hear and decide disputes and other legal matters that result from civil law, labour, family, commercial and economic relations, unless those are heard and decided by other bodies under the relevant law.
Besides § 14 of the Labour Code, the possibility of judicial protection is also laid out in § 13 paragraph 6 of the Labour Code. Under this provision, an

[9] BARANCOVÁ, H. (2013) *Employment conditions of business in Slovakia*. 1st ed. Peter Lang, VEDA; Frankfurt am Mein, Bratislava, p. 50.

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employee who believes that his/her rights or interests protected by law were aggrieved by failure to comply with the principle of equal treatment or by failure to comply with the principle that enforcement of the rights and obligations arising from labour relations must be in compliance with good morals and that nobody can abuse such rights and obligations to the damage of another participant in a labour relation, may have recourse to a court and a claim of legal protection stipulated by the Antidiscrimination Act. The procedure regulated in the Antidiscrimination Act shall be used for proceedings related to discrimination issues as well as to issues related to assessing whether the rights and responsibilities are in compliance with good morals and abuse of rights.[10]

The question whether an arbitration proceeding is authorised to decide over a labour law dispute has already been dealt with by courts. The Supreme Court of SR[11] dealt with this in its ruling, inter alia, of the question whether property-related disputes that arise between an employer and an employee from labour relations are or are not excluded from arbitration proceedings (the court was also dealing with the matter of overruling the arbitration decision). The arbitration decision of 7 November 2008 awarded the obligation to the employee to pay a certain amount, including delay-based interest, as compensation for damages (the employment contract agreed on 1 April 2007 also included an arbitration clause) to the employer. Both the district court (ruling of 28 October 2010) and the regional court (ruling of 24 May 2011) ruled in accord that the arbitrator did not have enough authority to decide over this dispute in arbitration proceedings and the Supreme Court of SR then confirmed the finding of these courts. *"The appeals court also pointed out that not all property-related disputes can be heard in arbitration proceedings; the concerned property dispute between the parties was judged by the Supreme Court in accord with the first instance court as a property dispute between the former employer against the former employee, as a labour relation-related dispute. Taking account of the nature of the dispute, again in accord with the first instance court, it considered that the concerned dispute was excluded from the scope of authority of the arbitration tribunal; hearing and deciding over this kind of dispute falls under the scope of authority of a court in civil proceedings (§ 14 of the Labour Code). If, in spite of exclusion of the matter from jurisdiction of an arbitration tribunal, the matter was decided, that fact is a ground for annulation of the domestic arbitration ruling..."* The Supreme Court SR wrote in its ruling: *"The lower courts have established in this matter that in a property-related dispute between the proceedings' parties, which was decided in arbitration proceedings on 7 November 2008, the arbitrator JUDr. M.H. in arbitration*

[10] BARANCOVÁ, H. (2016) Labour law in the Slovak Republic during the post-crisis period. Selected issues. In *Forum iuris Europaeum*. Vol. 4, n. 1, pp. 5-21.
[11] Ruling by the Supreme Court SR, sp. zn. 1 Cdo 156/2011.

ruling No. RK 20/2008, the issue was a claim derived from labour relation between the parties to the proceedings: compensation for damages or surrendering the unjust enrichment. Subsequently, they concluded the lack of jurisdiction for the arbitration tribunal to hear and decide in the concerned property-related dispute between the parties, drawing from the legal opinion that disputes between employees and employers over claims derived from labour relations fall under the jurisdiction of general courts, and such disputes are excluded from decision-making in arbitration proceedings; this opinion has been considered as correct also by the admissibility-related appeals court.
The authority in general is understood as the competence of a certain body to hear and determine matters that are entrusted (fall under) its scope of activities.... Arbitration proceedings, as an alternative dispute resolution to a ruling by general (state) courts with undoubtedly growing importance, obviously exceeds its original purpose as an instrument for traders to resolve their mutual disputes. The fact that under Act No. 244/2002 Coll. on Arbitration Proceedings the arbitration proceedings are not limited only to property-related disputes resulting from commercial relations, as was the case of the regulation under Act No. 218/1996 Coll. on Arbitration Proceedings (§ 1, § 2 paragraph 1 of the quoted act), but can now be applied to property-related disputes resulting from civil law relations (§ 1 paragraph 1 of the act), does not mean that it can be applied to (that it covers) also a property-related dispute resulting from labour relations; there is no relevant ground for this kind of extension (extensive interpretation). It clearly results from the procedural standard that in the case of authority to handle property-related disputes the decision was to specify just two partial areas when, out of the scope of jurisdiction of civil courts (§ 7 paragraph 1, Code of Civil Procedure) the legislators gave the authority to decide property-related disputes resulting from commercial and civil relations in proceedings in front of an arbitration body. The legal system of the Slovak Republic at the time when Act No. 218/1996 Coll. became effective, and currently, does not give the possibility to hear and determine employee-employer disputes over claims resulting from labour relations to bodies other than courts.
Under the fundamental principle laid out in Article 9 of Act No. 311/2001 Coll. (Labour Code) employees and employers who sustain damage due to breach of obligations arising from labour relations may exercise their rights in court. Employers may neither disadvantage nor damage employees for reason of the employees exercising their rights resulting from labour relations. The Labour Code, § 14 on dispute resolution governs that disputes between an employee and employer over claims deriving from labour relations shall be heard and decided by courts. This regulation continually follows up the previous legal situation where the Labour Code, Act No. 65/1965 Coll. as amended, § 207 stipulated that disputes between employers and employees over claims deriving from employment relations shall be heard and decided by courts. Admissibility of the subject-matter of the arbitration proceedings shall be always judged under the Arbitration Proceedings Act (compare § 5 paragraph 1 last sentence of the act) and the arbitration tribunal, meaning a single arbitrator or several arbitrators, (§ 7 paragraph 1 of the Act), shall handle the issue whether the cumulative conditions stipulated in § 1 paragraphs 1, 2, 3 of the Act have been met. If they have decided over a property-

related dispute between an employee and the employer that resulted from labour relation, this is grounds to file a lawsuit for annulment of the arbitration decision under § 40 subparagraph a/ of the Act (although the reference in parenthesis in this ground, where only § 1 paragraph. 3 of the Act is mentioned, does not correspond to the wording-based limitation of the concerned ground that is broader: "an arbitration ruling was issued in a matter that cannot be the subject-matter of an arbitration proceeding"). That much about the question whether property-related disputes between an employee and the employer derived from labour relation are excluded from decision-making in arbitration procedures. [12]
Deciding labour law disputes only in general courts can also be underpinned with another ruling by a general court that dealt with the issue of permissibility of arbitration proceedings in labour relations with regard to an invalid termination of employment where the employer objected that the court had insufficient authority to hear and decide over a dispute over invalidity of termination of employment on grounds of conclusion of an arbitration clause. The court examined whether it was or it was not authorised to deal with the case determining whether the termination of employment was invalid and issued a resolution in the matter. The court stated in the resolution that once it becomes valid, it will continue the proceedings for the submitted proposal (for invalidity of the termination of the employment relation).
The court examined whether it did have or did not have the authority to determine if the termination of the employment relation was invalid. According to the court, "*labour relations in their essence are property-related relations*[13] *(both parties conclude a contract for the purpose of a reward; the employer to gain profit generated by the employee, and the employee to get a wage or remuneration). They are not spelled out as included in the list of disputes that shall not be decided in arbitration proceedings (§ 1 paragraph 3 of the Arbitration Proceedings Act). The non-specific word "courts" (§ 14 of Labour Code) could also mean everybody that carries out an independent judicial performance. Despite that it needs to be pointed out that applying the Arbitration Proceedings Act also to labour relations is excluded because there is no legal regulation that explicitly allows resolving disputes grounded in labour relations in front of arbitration tribunals. Moreover, arbitration proceedings have been developed for the needs of entrepreneurs. It is supposed in commercial relations that the contractual parties are formally in equal positions and have technical prerequisites for agreeing to their contractual terms and*

[12] Ruling of the Supreme Court SR, sp. zn. 1 Cdo 156/2011.
[13] Legal regulation of § 1 of Arbitration Proceedings Act valid till 31 December 2014 related to § 1 paragraph 1 subparagraph a):
This act regulated deciding over *property-related disputes* derived from domestic and international commercial law and civil law relations if the arbitration proceedings take place in the Slovak Republic,
(author's comment: law effective from 1 January 2015 has abandoned the concept "property-related".

conditions including an arbitration clause. To the contrary, employers and employees are not in equal positons and the employee, as the weaker party[14] *may be substantially disadvantaged. It is to the factual and economic inequality of the parties to the contract that labour law responds to and provides judicial protection of violated or jeopardized rights through courts. Under the Arbitration Proceedings Act arbitration proceedings may be used to handle "disputes derived from commercial and civil relations" meaning that in the Slovak Republic handling certain kinds of labour law disputes, property disputes derived from family relations or property disputes derived from economic relations (compare the wordings of § 7 paragraph 1 of the Civil Procedure Code where labour relations are not identical to civil relations) are excluded. The effective legal regulations exclude subjecting labour relations, including certain disputes derived from labour relations of a property nature (such as disputes over payment of unpaid wages, disputes over severance pay, over compensation for damages grounded in the employment relation, over surrendering a thing entrusted by the employer to the employee for performance of the work, over payment of financial claims resulting from material responsibility) to arbitration proceedings. A similar approach is applied also to other civil law areas (civil relations) in the area of consumer protection. The court has also noted that the arbitration clause... of the employment contract... is in writing but its content is directed at the complainant as an employee waiving her/his rights in advance and this is in conflict with § 17 paragraph 1 of the Labour Code. The complainant waived a labour law dispute to be dealt with at a court other than an X arbitration tribunal and as a result her/his right to court or other legal protection under article 46 of the SR's Constitution may have been violated because a doubt has been cast over the equality of the parties to the proceedings. [..] Since the arbitration clause is related to a labour relation which, in the court's opinion, cannot be heard and decided in arbitration proceedings, and also the complainant, as an employee, has waived her/his rights in advance, the clause is invalid and the objection concerning the authority of the district court in BB that was raised by the adversary, was rejected by the court as ungrounded under § 106 paragraph 1 of Civil Procedure Code."*[15]

[14] It can be noted that the regulation responds to the issue of protection of the weaker party also in relation to arbitration proceedings and a regulation was adopted for consumer protection. Under § 1 paragraph 4 of Arbitration Proceedings Act, this law cannot be applied to decide disputes between suppliers and consumers derived from or related to a consumer contract that can be decided in consumer arbitration proceedings. Specific proceedings related to consumers are regulated in Act No. 335/2014 Coll. on Consumer Arbitration Proceedings as amended (effective from 1 January 2015).

[15] Ruling of District Court Banská Bystrica, sp. zn. 8 Cpr/1/2015 (legal regulation relevant to application of court decision: creation of labour relation under employment contract of 14 September 2011, termination of employment relation by agreement of 4 February 2013; case filed on 2 March 2015).

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4. Other Possibilities for Alternative Resolution of Labour Law Disputes

Mediation, another form of resolving disputes outside a courtroom, has not been used much recently. Mediation is governed by a special act No. 420/2004 Coll. on Mediation as amended (hereinafter only as the "Mediation Act") and its § 1 paragraph 2 explicitly envisions that the Mediation Act also covers disputes derived from labour relations.[16] Under this provision the Mediation Act applies to disputes derived from civil law relations, family law relations, commercial liability relations, and labour law relations. This act also covers cross-border disputes derived from similar legal relations with the exception of those rights and responsibilities that cannot be handled by the parties under the legal system that governs the concerned legal relation under specific regulations.[17]
From the Mediation Act it follows that the *legislators have made a difference between civil law relations and labour law relations* and for that reason the argument mentioned also (above) in relation to admissibility of arbitration proceedings for labour law disputes that claims that these disputes are civil law disputes does not hold.
Opinions appear in specialized discussions that ask whether mediation is at all possible in labour law relations if we draw from just the legal regulations in the Labour Code (Act No. 311/2001 Coll. as amended). The Labour Code, within the individual labour law disputes, spells out the form of handling disputes between employees and employers when it entrusts them primarily to the competence of general courts. The § 14 of the Labour Code is not of a dispositive nature and does not allow entities in a labour law relation to choose between an alternative dispute resolution and settlement of the dispute in a court because the authority to hear and decide disputes between employees and employers over claims deriving from labour law relation fall only under the authority of courts. Just the same, inadvertence on the part of the legislators needs to be pointed out when they failed to more specifically outline the nature of a dispute that can be handled through mediation in the Mediation Act; a situation that may result in multiple problems in practical application. Labour law protection, presenting the foundation of the existence of labour law, is manifested through a high proportion of cogent provisions that constitute the

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[16] §1 ods. 2 of Mediation Act: *"This act applies to disputes derived from civil law relations, family law relations, commercial liability relations, and labour law relations. This act also covers cross-border disputes derived from similar legal relations with exception of those rights and responsibilities that cannot be handled by the parties under the legal system that governs the concerned legal relation under specific regulations."*

[17] BULLA, M. (2012) Collective redress of posted workers' claims. In *CLR news*. Vol. 5, n. 1, pp. 17-29.

fundamental labour law standard that cannot be departed from. A general statement could be made that in the instance of individual labour law relations it may seem that presently there is no other possibility to reach a final and binding dispute resolution than using § 14 of the Labour Code, meaning through a court trial. Regardless whether the employee or the employer did or did not use a mediator during the bargaining process, whether they did or did not follow the Mediation Act, the question is whether their dispute resolution must in all instances be decided through court proceedings. The disadvantage can be mentioned that the mediator does not issue a binding decision for a labour law dispute (and the frequent problem of non-enforceability of the decision).

Yet, it can be stated that if the specific Mediation Act admits mediation for disputes derived from labour law relations, it is a special regulation that is valid alongside the Labour Code and for that reason mediation is admissible for labour law disputes, in contrast with the issue of admissibility of arbitration proceedings in the labour law area.

5. Conclusion

Arbitration proceedings as an alternative form of dispute resolution are generally considered as a faster and less costly form of dispute resolution than resolution in trials in general courts. However, the public perceives the practices of many arbitration tribunals as unfair (cases are known where the arbitration tribunals failed to proceed in compliance with legal standards or good morals and their decisions resulted in the existential jeopardy of natural persons) and for that reason we consider that if arbitration proceedings could be applied also to labour law relations in which the employee is the weaker party, the position of the employee would be deteriorated in the end.[18] Alternative forms of dispute resolution for labour law disputes could be considered if there were a different legal culture.

Acknowledgements

The paper was drafted under the project of the Research and Development Promotion Agency (APVV-14-0061): "Extension of the social role of Slovak private law in application of the European law principles" (project leader doc. JUDr. Monika Jurčová, PhD.).

[18] ZAUŠKOVÁ, A. – MADLEŇÁK, A. (2014) *Communication for open innovation. Towards technology transfer and knowledge diffusion*. Dom Wydawniczy Michal Kolinski, Ksiezy Mlyn, pp. 13.

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Brazil's Labour Reform: Flexibility at What Cost?

Diogo Silva [*]

Abstract Purpose. The study presented here consists of an analysis of the latest labour law reform in Brazil as a response to the crisis that affects this country.
Design/methodology/approach. The analysis considers some key alterations across in order to highlight the principal scope of the labour law reform, in individual, collective and procedural labour law.
Findings. Although the main purpose of the reform was to incentivize the labour market, it is questionable that these particular reforms will be able to fulfill such a scope. Without prejudice, it can be recognizable as an important modernization of the labour law regulations, considering the former law dated from 1943 (notwithstanding the minor alterations along the years).
Research limitations/implications. The research is part of a debate adding a perspective from a Southern-American country.
Originality/value. The paper consists of further material for an ongoing discussion on the impact of a crisis in the labour market and the adequacy of reforms as a response to them.
Paper type. Issues paper.

Keywords: Brazil, Labour law, Flexibility, Reform, Constitutionality.

[*] PhD candidate in Human Capital Formation and Labour Relations, University of Bergamo. ADAPT Junior Fellow. Email address: diogo.silva@adapt.it.

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1. Introduction

The Law nº 13.467 of July 13th 2017[1] deeply affects the structure of labour force regulation in Brazil that dates back, albeit with amendments and changes adopted over time, from the fundamental law of 1943 ("*Consolidação das Leis do Trabalho*"). The intervention of reform can be explained, at least in the intentions of the Government, with the need to counter a situation of deep economic crisis, characterized by high levels of unemployment (from 5.2% in February 2012 to 8.2% in February 2016, according to the IBGE data on employment level). The stated objective of the labour reform, which we will describe briefly in the following paragraphs, therefore, is to stimulate economic recovery through a process of liberalization of the rules governing the matching of the demand and supply of labour[2-3].
In order to render an analysis of the labour rules in a transversal way, the present contribution has been divided into three major sections (individual, collective and procedural labour law), with the aim of analysing the way, with respect to each of them, that the flexibilisation goal can be extracted from the legislative act.

2. Flexibilisation of the Rules on Individual Employment Relationships

It must firstly be said that, out of the numerous changes made by this law in employment relations, only those deemed most relevant will be analysed, namely those which clearly show the greater flexibility that the reform introduced with respect to certain legal rules and provisions related to institutions and specific work contracts.

2.1. Pregnant Women

A first aspect where this trend towards flexibility can be found – and probably the most controversial of all[4] – is related to the protection of pregnant women

[1] Published on Diário Oficial da União in 14th July 2017, having a *vacatio legis* of 120 days.
[2] It is undeniable the impact of economic crisis on labour markets, check T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1385.
[3] This flexibilisation restructure was already being developed since the beginning of the early 2000's. But since the macroeconomic scenario was highly positive, regulation also expanded social rights, more specifically, on matters of minimum wage and social security, etc. Check A. GAMBIER CAMPOS, *Breve historia de los cambios en la regulación del trabajo en Brasil*, Revista de Trabajo, 2014, a.10, n.12, 64-65.
[4] R. SIMÃO DE MELO, *Reforma erra ao permitir atuação de grávida e lactante em local insalubre*. Reforma Trabalhista, 2017, 181.

who work in places that may carry risks for the health of women and babies. With the new article 394-A of the CLT, women can take advantage of a special leave provided for in these cases, if the unhealthy environment is of the greatest degree of risk with respect to the classification set out in special legislation. If the risk of impact is medium or minimum, the workers can take advantage of the leave only upon presentation of a medical certificate that does not recommend the continuation of the work.
In the case of breastfeeding workers, the condition of access to such leave through medical certificate applies regardless of the degree of risk in the production context[5].

2.2. Working Time

With regards to working time, the flexibility of the rules takes many forms. Among the primary goals was the possibility by employers to increase working hours. Thus, for example, if in the previous law the working time in part-time contracts was limited to 25 hours per week, with the new writing of the CLT emerge two possibilities: on the one hand, to raise the limit to 30 hours a week without the possibility of overtime or secondly, to fix the limit at 26 hours per week, but with the possibility of adding 6 hours of extra work, paid for with an increase of 50%.
It also introduced, by means of individual agreement between the company and worker, a 12x36 working day, making reference to the hypothesis of uninterrupted work for 12 consecutive hours per day, which, however, must be followed by 36 hours of uninterrupted rest, which can be met or compensated. Case law had already welcomed this possibility in the previous law, provided that there was a prior agreement between the union and employer in this sense.
A greater flexibility is also recognized with reference to the enjoyment of holidays, admitting - provided that there is the workers' accordance - that their duration is divided into three periods, one of which must be at least 14 uninterrupted days[6] and the others are of at least 5 consecutive days. Enhancing the scope of this flexibility on holiday leave, the legislator also

[5] However, some authors have contested the adequacy of this medical certificate to the effect pretended by the law, as the medical professional might not have the specific knowledge to determine the risk of the workplace environment that the female worker is inserted in. Check R. SIMÃO DE MELO, *Reforma erra ao permitir atuação de grávida e lactante em local insalubre*. Reforma Trabalhista, 2017, 180.
[6] This 14-day minimum limit is to maintain accordance with the ILO's Convention 132, ratified by Brazil in 1999 by the Decree 3.197 of 5 of October. See H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São Paulo: Editora Revista dos Tribunais, 2017, 57.

abolished the prohibition of vacation leave fractioning for teenagers and people over 50, although maintaining the right for family members and teenagers to schedule their vacations in the same period of time.
The reform also affects the classification of time *in itenere* as working time. As a result of this new paradigm, the time taken for travel to the workplace is now being removed from the calculation of working hours and is therefore unpaid. This is in contrast to the prior regime, in which the worker's travel was considered working time if transport was provided by the employer in the event of a workplace with difficult reachability and not served by public transport (article 58 of the CLT).
In addition, and in order to increase flexibility in the negotiations, the banking hours' regime and compensatory arrangement of rest days can now be determined by agreement between the employer and the employee, without prejudice to the already existing possibility of collective agreements to this end.

2.3. Termination of the Employment Relationship

With regard to termination of the employment relationship, the main changes are aimed at reducing to a minimum the bureaucracy, in order to achieve a simpler procedure. While in the past, the termination of an employee with more than a one-year service contract with the same employer had to be ratified by the unions or ministerial authority, as a result of the reform the employers' communication of the renunciation to the competent bodies is now sufficient, followed by the compensation payment to the worker within ten days of the termination.
With the same aim of simplification, collective redundancy, up to now, was prohibited without authorization and/or negotiation with trade unions, and is now treated as an individual waiver which, therefore, does not require a prior authorization by the respective trade union.
Finally, the reasons that may give rise to termination of the employment relationship with just cause were extended, which now also encapsulates the scenario in which a worker loses their status or legal requirement for the exercise of a certain function, such as the case of the driver who loses their driving license.

2.4. Types of Employment Contract

Another important new feature of the reform respects the regulation, for the first time, of teleworking[7], so far only taken into account by the jurisprudence. In the CLT, there is now regulation of various aspects of telework (article 75-A and following of the CLT), including the ability to modify the labour contract into telecommuting as a result of the agreement between the parties, or the return to physical presence with a notice of 15 days. It is also predicted that the parties will establish in the employment contract the respective responsibility in terms of acquisition, maintenance and/or provision of equipment and tools needed for the teleworking performance.
Next to teleworking, the intermittent employment contract – which must be stipulated in written form and is defined by law as work characterized by the discontinuation and alternation of periods of work and idle (the latter not paid), the duration of which can change in hours, days or months – is also predicted. The regulation also predicts several aspects of this type of relationship, for example, the establishment of the maximum time in which the worker is not assigned any work or the prohibition of an exclusivity requirement in the contract[8].

3. Incentives to Collective Bargaining

As mentioned above, another area which the reform deeply affects is industrial relations. In this context, collective agreements are becoming increasingly important, as the continuing effect of widening the scope of collective

[7] The Brazilian legislator predicted teleworking as a new form of employment contract as stated by H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São Paulo: Editora Revista dos Tribunais, 2017, 56. For the prediction of teleworking, two major systems can be identified: a) teleworking is predicted as an employment contract, like the case of Brazil; b) teleworking as a modality of the employment contract execution. This last system is identifiable not only in Latin America (for example, in Peru – check E. T. LÓPEZ, *Ley de Teletrabajo en el Perú*, Revista de Direito do trabalho, 2016, v. 42, n.168, 273 – and Argentina – G. M. ZAMORA, *Teletrabajo: opinión y somero análisis del tema en Argentina*, Juris: Revista da Faculdade de Direito, v. 22, 2014, 185), but also in Europe (for instance, Italy – check G. SANTORO-PASSARELLI, *Lavoro eterorganizzato, coordinato, agile e il telelavoro: un puzzle non facile da comporre in un'impresa in via di trasformazione*, in Diritto della Relazione Industriali, n. 3/2017, 771-790).

[8] Even if referring to the Law Proposal n.º 4.787/2017, the Brazilian doctrine already pointed the significance of the establishment of such parameters, arguing that a lack of such regulation would translate into an assimilation to autonomous workers, transferring to them the risks of the employment contract. Such is the case of V. BOMFIM CASSAR, *Limites da liberdade individual na relação de trabalho e na reforma trabalhista*. Revista do Tribunal Superior do Trabalho, 2017, vol. 83, n. 2, 290-292.

bargaining and the stronger presence of unions among workers and within companies.
This reduction of the prescriptive value of the law, accompanied by an increase in the regulatory space in favour of the social partners, inevitably leads to questions about the fate of the principle of *favor laboratoris* inside the renovated Brazilian legal system, even if considering that the legislature still banned collective bargaining on some matters, for reasons of public interest, such as health and safety or social security (called peremptory norms or even public order standards)[9].
It should be highlighted that the reduction of legal regulation in favour of individual and collective agreements tendency is not restricted to the Brazilian paradigm[10], as even across Europe there are examples of this movement[11].
In a general perspective, the justification of this development has been predominately attributed to three key factors: an increase in workplace democracy (on one hand, it limits the employers discretionary power on some aspects and to a certain extent by a private agreement, and on the other hand, it gives voice to workers, involving them in the governing of the workplace); progressive redistribution of power to workers; and economic efficiency[12].

3.1. Collective Bargaining Agreements

a) Derogation by Collective Bargaining

More specifically in Brazil's case, the increased importance of collective agreements is clearly seen in the extension of the application of collective agreements, which can now intervene in a pejorative sense of what the law determines, being able to overcome limits that until now were impassable.

[9] R. SIMÃO DE MELO, *Os limites da negociação colectiva para o sistema jurídico brasileiro*, Reforma Trabalhista, 50.
[10] Check J. ZENHA MARTINS, *As transformações do direito do trabalho e a redefinição das relações entre fontes*. Revista de Direito do Trabalho, 2017, n.º 175, 165-168.
[11] Such is the case of Germany, Spain, France, Italy, Portugal and Greece, check A. T. RIBEIRO, *Recent Trends of Collective Bargaining in Europe*, in: K. STONE ET AL. [eds.] – *Labour in the 21st Century: Insights into a changing world of work*, Cambridge Scholars Publishing, Newcastle, 2017, 190-208. On the French system, it has long been acknowledged: JEAN-EMMANUEL RAY, *Du tout-État au tout contrat? De l'entreprise citoyenne à l'entreprise législateur?*, Droit Social, 2000, n.º 6, 578-579, already alluding at that time to the trend, going as far as claiming as predicting that at a certain point "*tout le Code du travail (ou presque: hygiène/sécurité) serait dérogable, voire supplétif de la volonté (pour l'instant) collective des partenaires sociaux*".
[12] As argued by G. DAVIDOV, *A purposive approach to labour law*, Oxford: Oxford University Press, 2016, 85-97.

As a result, collective agreements are now enabled to overlap the law in regards to a number of aspects, such as augmenting working time (for a working day of eight hours can be added up to 2 hours a day and up to 44 per week) having in consideration the constitutional limitations, reducing the length of the pause (up to a minimum of 30 minutes if the working day is 6 hours or more), or changing aspects of the methods used to record presence in the workplace, teleworking, the performance bonuses, etc. (check article 611-A CLT).
Without prejudice of this increased possibility of *in pejus* derogation, the Brazilian legislator made some matters available only to *in melus* derogation, for matters of public interest like health (for example, the reduction or suppression of the number of days of vacation of the employee is prohibited) and safety (prohibiting regulation on the grounds of hygiene regulated by law or regulatory standards emitted by the Labour Ministry) – check article 611-B CLT.

b) Conflict between Agreements of Different Levels

The logic of this reform, which, as mentioned, has as the objective to increase flexibility at every level, is also visible in the prediction that the collective agreements at company level efficacy prevails over sectorial collective agreements, even where the latter are more favourable to the employee.
This means that the Brazilian legislator adopted the criteria of specificity as criteria to solve a conflict between different levels of bargaining[13]. Previously, the determination of the prevailing instrument would not be between one or the other in terms of hierarchy, but what would be better for the worker (principle of *favor laboratoris*)[14].

[13] Some Brazilian doctrine points out the advantages of this criteria, as is the case of H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São Paulo: Editora Revista dos Tribunais, 2017, 126-127. The Author highlights that company level agreements allow for a bigger adequacy towards the company's framework, for example, allowing enterprises with poor financial conditions to negotiate some clauses that may no longer be suitable.
[14] Which was always in the centre of the debate as it was deemed confusing and created problems separating the single benefit from the global benefit. Check H. B. MATEUS DA SILVA, *Comentários à Reforma Trabalhista: Análise da Lei n. 13.467/2017*. São Paulo: Editora Revista dos Tribunais, 2017, 126.

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3.2. Trade Unions Contribution

The improved role of work councils in the enterprise means that the model of exclusive representation by trade unions has been abolished[15].
In order to maintain the membership levels in trade unions, the mandatory nature of the payment of trade union fees, both for employees and for companies, was abolished. In the case that the worker still wishes to pay his fees, he must state whether he wishes to have this contribution deducted from his pay check.

3.3. Workers' Representatives in the Company[16]

With reference to the representatives of workers in the company, the incentives of this co-managerial method have been vindicated as a necessity to maintain employers' compliance to the rule of law[17]. The continuous decrease of levels of trade union membership has led to an investment in the importance of the so-called work councils[18].
It should be stated that Article 11 of the Brazilian Constitution of 1988 already established that companies with more than 200 employees must elect an employee representative, who will be in charge of direct negotiations with the employer on a strict number of points (in conjunction with Article 7, Paragraph XI of the Brazilian Constitution). However, up until now there was no regulation on the organization or competences of the elected representatives[19].
As such, it was determined that in companies with more than 200 employees, they can elect a council whose composition, in terms of numbers, varies

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[15] Paraphasing G. DAVIDOV, *A purposive approach to labour law*, Oxford: Oxford University Press, 2016, 221-222, "*in legal systems that created a model of exclusive representation by unions, a duty to pay agency fees is common*".
[16] For a general study on the forms of employee representational participation in the workplace or at enterprise level, check M. BIAGI, M. TIRABOSCHI, *Forms of Employee Representational Participation*, in: R. BLANPAIN [org.], *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 10th ed., Netherlands, 2010, 523-576.
[17] G. DAVIDOV, *A purposive approach to labour law*, Oxford: Oxford University Press, 2016, 241, highlights this message of improving compliance to the diverse sources of labour law, being that "*the idea is to allow employers some degree of self-regulation, on the condition that representatives of the employees will be given power to monitor compliance with it*".
[18] L. MENEZES LEITÃO, *Direito do Trabalho*. 3rd ed. Coimbra: Almedina, 2012, 497-498.
[19] For an overview of trade unions and work councils' framework across the world, check BAKER & MCKENZIE – *Worldwide Guide to Trade Unions and Works Councils*, Cornell University ILR School, 2009, available at: http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/09/global_tradeunions_guide_2009.pdf.

depending on the company size. The CLT, then, establishes the criteria for the election of workers' representatives and their security measures.

4. Changes on the Procedural Rules

Finally, the law in analysis has changed some aspects related to the Labour court procedures, not so much, in this case, as a function of greater flexibility, but in order to clarify some procedural rules[20].

4.1. Deadline Computations

In order to be in congruence to the Civil Procedural Code of 2015, the CLT reform act had to intervene on the counting mode of deadlines, transforming it from the type of continuous counting to one that takes into account only working days.

4.2. Out-of-court Settlement Procedure

This law also introduced a new procedure for the conclusion of a court settlement, the request for which has to be filled by both parties, who must be assisted each by a different lawyer, considering the express prohibition that the lawyer is the same for both (check article 855-B of the CLT).
This new procedure provides an alternative to judicial litigation, having as a main purpose the reduction of judicial litigation, being that these agreements attribute juridical security to the parties and can be used for judicial enforcement later on without the need of filing a normal judicial action.

4.3. Procedural Costs

The CLT has finally intervened on procedural costs. For example, the upper limit for the court fees is now equal to four times the maximum limit for the fee of the general social security system that was established (R$22.125,24), in accordance to article 789 CLT. Previously, according to this law there was only a minimum fee of R$10,24.
The lawyer's fees, as determined by the law, are now established between 5% to 15% of the sum attributed to the winner or, in the event that this is not measurable, calculated with respect to the estimated value of the cause[21].

[20] As noted by T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1393, the legislator gave clear indications of adopting the theory of economic analysis to the procedure.

a) Constitutional Conformity of the Law

The topic of balance between procedural law, judicial costs and the restriction of the constitutional guaranty of access to justice is not restricted to the Brazilian framework[22].

In Brazil, this reform proves to be a new weight on the balance between these three measures. Having this as a background, the General Attorney of the Republic filed a request to the President of the Federal Supreme Court[23] for a constitutional conformity revision proposing a freezing of effects before they are proposed to come to fruition.[24]

Claiming that the balances are no longer on the same level, the General Attorney of the Republic asserts that citizens without financial resources shall not be forced to comply with the payment of the procedural costs (mentioned in the point 4.3.) and expert fees if they have obtained, even if in a diverse process, the possibility to bear the expense. Citizens shall also not be forced in to the payment of judicial costs if they have requested the termination of the action due to lack of attendance to the hearing, and not by conditioning the filing of a new action to the payment of such previous action fees. The General Attorney thus evokes the constitutional guaranty of a free justice for those without financial resources, present in article 1, 3, 5, 7 to 9 of the Brazilian Constitution, to argue that there is an impairment of the right of access of workers to the judiciary system, through an unequal and disproportionate treatment of the poorest.

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[21] J. A. DALLEGRAVE NETO, *(In)aplicabilidade imediata dos honorários de sucumbência recíproca no processo trabalhista*, Reforma Trabalhista, 2017, 44-45, claims that these costs will only apply to actions judged after the enforcement of the law as they impact on complex procedural acts with deferred effects, notwithstanding standard processual rules have an immediate appliance to current actions, like the case of deadline computes rules.

[22] In fact, one should also consider the very recent UK case of abolishment of employment tribunal fees, that were introduced in July of 2013 and declared unlawful by the Supreme Court in July of 2017, claiming, in short, that "*fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable*", thus posing an unlawful restriction to the constitutional guaranty of access to the courts. The decision is available here.

[23] According to article 102 of the Brazilian Constitution, the Federal Supreme Court has the competence to ensure the Constitution enforcement and judge the (un)constitutionality of laws or normative acts.

[24] The initial request can be consulted here (Action n.º ADI 5766).

5. Conclusions

Firstly, it must be highlighted the importance of the scrutinized legislative reform on the Brazilian scenario, as it constitutes an update to previous law from 1943, which dictated the regulations in labour and that was out of touch with the new realities of the market.

The analysis of any labour market reform must surpass four key indicators: 1) regulation of standard and non-standard employment; 2) unemployment benefits; 3) wage and collective bargaining regulation; 4) active labour market programs (also known as ALMP's)[25].

On the first point, the introduction of new types of employment contracts might be able to reduce the number of informal employment positions, which not only has an implication on the unemployment rate, but also serves as an indicator of a decent work[26], considering that only certain forms of work were considered by the jurisprudence[27].

Notwithstanding this, and on the side of the regulation of standard employment, the reduction of bureaucratic procedures without any effect on working conditions, are to be encouraged – such are the cases of the termination of the employment contract or extrajudicial agreement – as this will allow the rationalization of the intervention of the judicial system and allow resources to be better utilized.

However, many questions rise from the constitutionality of the procedural standards altered by the CLT reform. Nonetheless, it should not come as a surprise if this reform is declared unconstitutional, as the Ministry of Labour had already published four technical notes accusing the draft law of containing some norms that lacked constitutional conformity[28]. Some of the controversial points were revised for the final draft, but some were maintained despite all the recommendations[29].

On the third key indicator, the reform has a mission of encouraging a shift to a more decentralized collective bargaining on the Brazilian paradigm, one that

[25] D. CARDOSO, R. BRANCO, *Labour market reforms and the crisis in Portugal: no change, U-Turn or new departure?,* Instituto Português de Relações Internacionais Working Paper n.º 56/2017, available here: http://www.ipri.pt/images/publicacoes/working_paper/2017_WP/WP_IPRI_56-2017.pdf.

[26] D. KUCERA, L. RONCOLATO, *Informal employment: two contested policy issues*. International Labour Review, 2008, vol. 147, n.º 4, 325.

[27] However, T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1387, claims that the parcial regulation of some institutes like the intermittent contract and part-time working contract might generate more doubts that the ones it intended to solve.

[28] Click here to check the Note 1, Note 2, Note 3, Note 4.

[29] Check here to check the request to veto the reform proposal.

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will increase flexibility in standard determination of employment terms and conditions. This is a clear sign of liberalization of the labour market: the predominance of enterprise level agreements over sectorial agreements and the mandatory constitution of work councils on enterprises with over 200 employees will provide businesses with more adaptability towards the elasticity of market demands and simultaneously increase the democracy in the workplace.
The last key indicators which are discussed above include unemployment benefits and active labour market programs. Even though the first falls off the scope of the legislative reform (as unemployment benefits are regulated by diplomas other than the CLT), a criticism can be made on the second key indicator, as the reform seemed to have despised the latter's, considering that these policies are especially lenient at reducing imbalances and fighting inflexibilities present in the labour market and its accessibility[30].
Finally, one has to question whether the measures abovementioned even have the appetence to fulfil their initial goal: incentivise employment and increase enterprise competition levels on the international market in order to attenuate the effects of the economic crisis that Brazil has plunged into[31]. Even though flexible labour market regulation can constitute an incentive to job creation, especially in times of recession[32], this is a fallacious argument, since an increase in the levels of employment will only succeed if there is an improvement of the country's economy and greater investment in public policy fostering workers' insertion in the labour market[33].

[30] V. ESCUDERO, *Are active labour market policies effective in activating and integrating low-skilled individuals? An international comparison*, Research Department Working Paper No. 3, available here: https://mpra.ub.uni-muenchen.de/55319/1/MPRA_paper_55319.pdf.
[31] M. B. BIAVASCHI, *A reforma trabalhista no Brasil de Rosa: Propostas que não criam emprego e reduzem direitos.* Revista do Tribunal Superior do Trabalho, Vol. 83, n.º 2, 2017, 195-203, highly disagrees with the argument that this legislative reform is going to serve as an incentive to employment levels, among many other authors.
[32] O. VAN VILET, H. NIJBOER, *Flexicurity in the European Union: Flexibility for Outsiders, Security for Insiders*, MPRA Paper n. 37012, 2012, 2.
[33] T. CHRISTINA NAHAS, *A reforma trabalhista brasileira no marco da economia globalizada*, Revista Jurídica Luso-Brasileira, 2017, a.3, n.4, 1387-1388.

The Evolution of the Industrial Relations System in the Italian Shipbuilding Industry, by Alberto Sasco. A Review.

Allissa Wade [1]

1. Introduction

The shipbuilding industry in Italy has undergone significant changes regarding industrial relations in the last 60 years and the industry itself is an appropriate illustration of the general state of affairs in Italy. Fincantieri, a global leader in the shipbuilding sector, demonstrates the countless positive effects – business development at a level previously implausible – stemming from heightened importance placed upon innovation, quality, and collaboration with trade unions. As such, *The Evolution of the Industrial Relations System in the Italian Shipbuilding Industry*, by Alberto Sasco, serves as a brilliant summary of these changes and considers this evolution in the specific context of Fincantieri, due to its prominence in the industry.
This work is of high-quality as evident by the great attention to detail and research prevalent throughout each section. The author provides us with a solid analysis of this evolution in the industry as a whole and in the specific context of Fincantieri. However, the relevance of the text does not apply exclusively to the shipbuilding sector as discussion throughout of the overall Italian economy sheds light on similar situations facing other market segments. It is evident that this text should be of great importance to those in management in the shipbuilding sector as its analysis shows that the best path forward is the one the industry is currently on.

[1] ADAPT Intern, Ca' Foscari University, Venice (Italy). Email address: wadeallissa@gmail.com.

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The work is divided into three separate parts following a chronological order with each section carrying equal importance. Part one describes the relationship between trade unions and state majority-owned companies beginning around 1965 and progressing through to present day – with the latest agreement occurring in January 2014. The second and third parts focus more specifically on the changes befalling Fincantieri during this same time-period with part two concentrating on the development of relations between the late 1970s through the mid-2000s while the third part focuses on relations from the mid-2000s through to present day. However, it is my opinion that part one is not structured as well as parts two and three as it lacks the fluidity of the other sections, thus making the first part a bit hard to follow. What follows is a brief summary of the work and my conclusions.

2. Summary

The book begins by examining industrial relations of the shipbuilding sector through the 1960s, 70s and 80s with a focus on major events and the attempt to seek dialogue throughout this period. The industrial relations system in place during the 1950s in Italy did not distinguish between public and private sector employers; therefore, many doubted the ability of a single employer association (Confindustria) to effectively represent different companies (p. 1). Consequently, Act no. 1586 of December 1965 was enacted that allowed state-owned companies to choose their own representation – enabling the concept of "effective and actual pluralism for the first time (pp. 1-2).
Battles over wages and increased pressure by unions on employers to engage in "articulated" bargaining led to the INTERSIND ASAP Protocol of July 1962 which marked INTERSIND's autonomy from Confidustria and introduced guidelines and a range of provisions on collective bargaining (pp. 6-7). The effects of this protocol were seen for years to come and resulted in (specifically) state-owned companies seeking greater cooperation and collaboration with unions (p. 8). However, externally, Europe was dealing with an economic crisis and the shipbuilding industry was struggling against Far-East competitors (p. 8). Thus, leading to an industry-wide restructuring plan introduced in November 1967, which, although it failed, was the first restructuring plan to be approved by trade unions shoring up the increases in collaboration (pp. 8-9).
Government measures enacted during the economic downturn 1970s were still lacking results into the early 1980s and the need for solutions to

boost productivity were increasing (pp. 12-13). These factors combined to encourage greater levels of dialogue among all actors and resulted in the conclusion of a new agreement in December 1984 – between IRI, INTERSIND, and, CGIL, CISL, and UIL – that enacted a participatory and shared approach in relations throughout state majority-owned companies (p. 17).
The author notes that during this same time period, companies represented by INTERSIND promoted a cooperative and collaborative approach with trade unions, while companies with Confindustria tried their best to avoid working alongside trade unions especially regarding managerial decisions (p. 22). The 1984 Protocol experienced organizational and implementation issues due to it being the first protocol of its kind – considering that unions generally made their demands through industrial action versus dialogue (p. 23). As such, a new protocol was signed in July 1986 clarifying the ambiguities of the previous agreement (pp. 25-26). In an attempt to become more competitive, INTERSIND, ASAP, and trade unions concluded a new agreement in February 1990 enacting a new collective bargaining system encouraging maximum participation between employers and trade unions and setting a new national level requirement for collective bargaining at every four years with the option to engage in decentralized bargaining every two years (p. 29).
In July 1992 a Protocol was developed around the "tripartite system" (government, employers, trade unions) and focused on reviewing income policies and reducing inflation by introducing "the special remuneration item", a monthly flat rate, as an alternative to the wage indexation system (*scala mobile*) (pp. 30-31). These measures resulted in the signing of the July 1993 Protocol aimed at supplementing economic reform and implemented a "two-tier" bargaining system consisting of national-level collective bargaining and company-level bargaining (p. 31).
The battle between Confidustria and INTERSIND concluded in 1998 when the amalgamation process was completed and Confidustria became the representative for all IRI companies (p. 32). However, without INTERSIND's quest for innovation, participation, and collaboration, industrial relations in Italy would be vastly different than they are today (p. 33). While no significant changes were made at the national level from 2000 to 2009, the parties (government, employers' associations, and some unions) introduced a new agreement in 2009 reforming contractual arrangements by linking remuneration to the cost of living with the Consumer Price Index and allowing decentralized bargaining to amend terms from national collective agreements for the first time (p.33). The

latest legislation mentioned by the author regards the Consolidated Text on Representation of January 2014 which reviewed trade unions' representation power and introduced special cooling-off procedures to prevent industrial actions (p. 34).
Moving in to part two of the book, the author summarizes the main events characterizing Fincantieri's organizational structure and industrial relations throughout the 1980s and in to the mid-2000s. The global economic crisis relating to increases in oil prices affected the shipbuilding sector in Italy from 1970-1980, as a gap between supply and demand made evident the serious shortcomings of the industry in terms of efficiency and technology (p. 36). Following a failed attempt to implement a "sector plan" and insufficient changes regarding ship demand, Fincantieri was struggling to stay afloat (p. 40). Thus, beginning in 1983 and coming to fruition on 30 June 1984, Fincantieri introduced a restructuring plan to drastically overhaul its organizational structure by prioritizing productivity, efficiency, and competitiveness, and forever altering its relationship with trade unions (pp. 41-43). Furthermore, to become leaner, the agreement created one central operating society from the acquisition of eight operating societies in the industry and had an overall focus on becoming more advanced and productive by focusing on innovative technologies (pp. 43).
To deal with concerns throughout the company, Fincantieri, INTERSIND, and trade unions concluded a new agreement in October 1986 that ensured continuity regarding the restructuring process and had a central focus on high-level skills training as a proactive solution to workers facing possible dismissals (pp. 45-47). Additionally, this agreement introduced the first attempt at performance-based remuneration in Italy as it implemented a two-component remuneration system: 1) fixed amount base pay for all workers; and 2) variable pay linked to productivity and efficiency (p. 49).
The agreement of September 1988 further aimed to recoup losses from the economic crisis by prioritizing value-added production, becoming more international, and increasing productivity through outsourcing (p. 51). This agreement shored up the variable pay scheme for 18 months and encouraged increased productivity by granting bonuses based on six-levels of productivity targets (pp. 53-54).
The previous agreements and restructuring began to shed light on positive effects regarding Fincantieri's reputation and financial situation; therefore, the agreement of April 1992 solidified past measures and introduced the "Total Quality" project, which further increased worker accountability and participation as Fincantieri noted that this was crucial to international

competitiveness (pp. 60-61). The early 1990s saw great achievements in levels of growth and productivity thanks to the restructuring plans and the focus on innovation and efficiency (p. 63).

Despite increases throughout the early 1990s, high-levels of new orders significantly strained Fincantieri's resources (p. 67). Thus, a new Protocol was introduced in October 2000 that promoted greater information exchange to facilitate social dialogue out-of-court, reducing costs by transferring noncore activities to outside companies (though ensuring labour legislation compliance), and slightly revising the variable pay scheme to promote economic growth (pp. 67-70). Decisions to invest in new technologies and focus on value-added markets greatly increased Fincantieri's reputation and financial situation – resulting in it being one of the few companies reporting a profit in this time (pp. 70-71). Accordingly, Fincantieri worked alongside trade unions to ensure continuity of dialogue and efficiency by reaching a new agreement in June 2004 focusing on collaboration (p. 71).

Concluding with part three, the author discusses supplementary collective bargaining at Fincantieri from 2008 through present day, with the most recent agreement occurring in June 2016. During this period, Fincantieri implemented several initiatives regarding research and innovation to further increase overall productivity and turned their core business to the cruise industry as it is a high value-added segment (p.78). These new endeavors (along with the decision to partner with international markets in their military ship building department) lead to Fincantieri becoming the leading shipbuilding company in Europe (pp. 78-79).

However, this "golden age" would not last as the global economic crisis hit the shipbuilding industry particularly hard beginning in 2008 and lasting until roughly 2013 (p. 80, 93). Fincantieri struggled significantly as a severe drop in demand for cruise ships (16 orders in 2007 to just 1 in 2009), resulted in long-standing problems returning to the spotlight. The agreement reached in April 2009 was crucial in ensuring continuity of operation by consolidating production and enacting measures to boost flexibility, international competitiveness, and efficiency by cross-training to increase the skills of current staff (p. 83). The agreement placed further importance on occupational health and safety as another way to reduce overall costs (p. 87).

Fincantieri's decision to enter international markets regarding the production of warships helped sustain them through this time as the U.S. government was constantly upgrading their fleet (p.90). Nonetheless, Fincantieri once again developed a massive restructuring scheme in December 2011 to reorganize into specialized 'hubs" of production, use

facilities in alternative ways, and adjust the functions of staff to meet this new model (pp. 90-91). The plan also called for the use of temporary unemployment benefits as an alternative to massive employment reductions (p. 90).
Societa Fincantieri was listed on the Milano Stock Exchange in July 2014 as another way to renew relations and raise resources to reinvest in increasing efficiency, productivity, and quality (p. 94). Though market conditions were improving, it was agreed that the existing agreement would be renewed and new talks would not begin until conditions further improved (p. 95).
The two parties (Fincantieri and trade unions) first met in December 2014 and the new agreement was not signed until June 2016. This gap in time is marked by a breakdown in talks due to differing demands on both sides and disagreement regarding the best way forward (pp. 95-97). As a result, in an unprecedented move, Fincantieri announced to workers in March 2015 that the terms agreed upon in the 2009 agreement were no longer applicable, which led to strikes, and ultimately in Fincantieri agreeing to better cooperate with unions (pp. 97-98). Finally, the agreement was concluded and resulted in a new system of variable pay (making it more straightforward) (p. 98); better forms of occupational welfare (e.g. a "social bonus") (p. 99); greater emphasis on training (e.g. vocational and language courses) (p. 99); increasing insourcing and use of limiting external services (p. 100); and the establishment of a "joint technical body" (p. 100).
The book concludes by reaffirming the importance of sharing and cooperation between parties as essential to growth and development of companies (p. 101). We see that the use of Fincantieri as a case study shows the evolution of collective bargaining and industrial relations in Italy and the great importance of collaboration to ensure international competitiveness (p. 102).

3. Conclusion

As seen, the shipbuilding industry in Italy has encountered momentous transformations regarding industrial relations in the last 60 years. As such, Fincantieri provides an excellent example of the numerous benefits achieved through cooperation and active engagement with trade unions as the company would not be as successful as it is today without this collaboration. While down times should always be anticipated, having the appropriate measures in places to counteract negative periods will lead to greater prosperity for all.

The Evolution of the Industrial Relations System in the Italian Shipbuilding Industry, stands as a quality piece of work that should be enjoyed by a wide audience. Obviously, it is a work to be experienced by management in the shipbuilding industry (and those desiring to become management), additionally it could be enjoyed by those in an array of sectors as the book also frequently discusses the general state of affairs in Italy.

As previously stated, the first part was a difficult read and if it were not for the other two parts, my perception of the work would be quite different than it is. However, considering the text as a whole, I believe it stands as a thorough examination of the evolution of industrial affairs in the shipbuilding industry and sheds light on the development of a global leader in the industry. I do believe that those in the specific industry stand to benefit the most as it should be used as an example of ways to govern in the future using examples from the past.

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