

The new politics of time

Emily Rose

New forms of temporal contestation are taking place in the world of work. UK employers are requiring from workers heightened levels of availability and responsiveness to work, as and when needed. These demands are playing out differently in different parts of the labour market. The overall effect, though, is an inhibiting of workers' ability to enjoy time free from work. Current regulation of work and working time that aims to limit or ensure compensation for this time do not adequately address the problem.

The article presents an in-depth sociological analysis of these temporal work patterns. This enables an evaluation of the conceptual shifts required to the categories of work and working time in order than they may encompass these new temporal trends. It is concluded that an alternative approach that specifically focuses on preventing new extreme forms of flexibility is a better strategy to ensure a fairer outcome for workers.

Keywords

Labour law, working time, work-personal life, information and communication technologies (ICT)

1. INTRODUCTION

This article makes the argument that new forms of temporal contestation are taking place in the world of work that are not adequately addressed by the present regulation of working time. Employers are requiring new levels of availability and responsiveness to work *as and when needed*. This is achieved by work's intrusion into what would normally be considered workers' personal time. Current regulation limiting and/or compensating for working time—in the form of the Working Time Regulations 1998 (WTR) and the National Minimum Wage Regulations 2015 (NMWR)—are not adequately equipped to protect workers from these new forms of exploitation.

Working time has long been a contested feature of the employment relationship. Worker protections have tended to focus on limiting the total duration of working time and ensuring adequate rest breaks, as well as seeking appropriate compensation for time spent working. In the post WWII period, the predominant means by which this was achieved was through sector-level or multi-level employer collective agreement. However regulation now takes the form of statutory protections. The WTR, introduced as a result of the European Working Time Directive,¹ offers certain protections to workers including maximum weekly working time² and requirements of rest breaks³ and rest periods.⁴ The NMWR requires that the national minimum wage be paid for time worked.

¹ Directive 2003/88/EC.

² Regulation 4 WTR.

³ Regulation 12 WTR.

⁴ Regulations 10 and 11 WTR.

Implicit in this approach is an assumed clear-cut binary division between working time and personal, non-work time. Recent drives towards the temporal flexibility of work pose a challenge to this view. It has been claimed that the temporal flexibility of work, which is facilitated through various means, such as the increased reliance on information and communication technologies (ICTs) and non-standard work arrangements, can benefit both employers and workers.⁵ However, others have identified that this blurring of working time and non-work time is at the forefront of work exploitation.⁶ These developments necessitate a rethink of present provisions.

This article presents a sociological analysis of the present working time practices of two groups of workers in different positions in the UK's bifurcated labour market. The first group are those in higher-skilled knowledge based roles. These workers can be expected to be sensitive to emerging work demands and proactively respond to these outside of standard hours, even when located at home or otherwise away from work. Higher-skilled knowledge workers have been referred to as 'third generation' teleworkers,⁷ that is, workers who rely on internet enabled devices such as smartphones and tablet computers that facilitate work to be undertaken anywhere, including outside of the office. While these workers will conduct most work in the office or other formal places of work, working outside of these locations is also embedded in the way they work, although the practice of which is not typically formally agreed upon with the employer. Data from the Sixth European Working Conditions Survey⁸ (collected in 2015) reveals that much of the working time of this group is spent over and above normal working hours and outside of formal work arrangements.⁹

The second group of workers considered in this article are those in lower-skilled service sector positions. Here, the requirement to be available for work as and when needed manifests itself slightly differently. These workers are often expected to accept and positively respond to ever-changing times of work, even when the details of which are given at short or no notice. Such requirements can occur for workers on permanent (open-ended and with fixed numbers of hours) contracts.¹⁰ However, they are increasingly achieved through engaging workers on non-standard or atypical work arrangements. The use of zero-hours contracts, for example, which are predominantly used for workers in lower-skilled service sector positions, has risen dramatically in recent years.¹¹

⁵ BIS, *Modern Workplaces Consultation – Government Response on Flexible Working* (London, November 2012).

⁶ S. Fredman, *Women at Work: The Broken Promise of Flexicurity* 33 *ILJ* 2 (2004); E. Genin, *Proposal for a Theoretical Framework for the Analysis of Time Porosity* 32 *IJCLIR* 280 (2016); G. Vallée and D. Gesualdi-Fecteau, *Setting the Temporal Boundaries of Work: An Empirical Study of the Nature and Scope of Labour Law Protections* 32 *ILCLIR* 344 (2016).

⁷ J. C. Messenger and L. Gschwind, *Three Generations of Telework: New ICTs and the (R)evolution From Home Office to Virtual Office* 31 *New Technology, Work and Employment* 195 (2016).

⁸ Eurofound and the International Labour Office, *Working Anytime, Anywhere: The Effects on the World of Work* (Publications Office of the European Union and the International Labour Office 2017).

⁹ The research identified a group of workers—defined as T/ICTM (teleworkers/ICT-mobile workers)—that used ICTs, such as smartphones, tablets, laptops and/or desktop computers, for work that is performed outside the employer's premises. The survey estimated that 26% of UK workers fit this category of workers.

¹⁰ J. Rubery and S. Horrell, *The 'New Competition' and Working Time* 3 *Human Resource Management Journal* 1 (1992); J. Rubery, K. Ward, D. Grimshaw and H. Beynon, *Working Time, Industrial Relations and the Employment Relationship* 14 *Time & Society* 89 (2005).

¹¹ Office for National Statistics, *Contracts That Do Not Guarantee a Minimum Number of Hours: September 2016* at

www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsth

I begin my sociological analysis, in section 2, by outlining *why* employers now require workers to be available and responsive to work as and when needed. My approach here is to consider the way that employers hope to achieve value from their workers. The broader context of global capitalism and neo-liberal government policies play a key role in the emerging temporality desired by employers. Also critical is the role of ICT; in the forms of production now utilised by employers and the expected role of workers in the productive process.

In section 3, I further consider the active role of employers; this time by analysing *how* it is that they are getting workers to demonstrate the new desired temporal practices. My theoretical focus here is on the normative effect of biopower and on market discipline. Biopower is a Foucauldian notion¹² that reveals power as operating not in a direct constraining manner, but rather by means of guiding the actions and choices of individuals. Employers attempt to align the values and attributes deemed necessary to the organisation's success to the worker's own through cultural change and the blurring of the distinctions between workers' professional and personal selves. Entrepreneurialism and management of risk are key motifs. The emphasis on market success (or indeed economic vulnerability) can take on more direct forms of managerial control through exploitation of workers' continued reliance to paid employment. This can be particularly the case for workers in lower-skilled service sector positions.

Section 4 details the implications for workers of these temporal practices requiring heightened levels of availability and responsiveness to work *as and when needed*. The intrusion of work into workers' personal time and the effect of this becomes apparent. For higher-skilled knowledge workers the almost pervasive presence of mediated communications is keenly felt. However, it is the perceived relationship workers have to their job roles that is critical to the way that workers respond to such mediated communications. ICTs also connect workers in lower-skilled service sector positions to their job roles. However, given that these workers can, typically, only undertake their jobs in formal locations of work and not at home, it is rather the variability and unpredictability of work times that proves problematic.

This sociological account of present working time practices enables me to engage in an original, theoretically and empirically informed, assessment of the utility of the present regulation of working time (section 5). Here, I consider the likely applicability of the WTR and the NMWR to protect and/or compensate workers for these new forms of temporal practices. It becomes clear that the present regulation of working time is inadequate to limit and/or compensate workers for these temporal trends. The article concludes, in section 6, by reflecting on the potential way forward to counter this situation. It examines the potential for extending the concepts of 'working time' and 'work' underpinning the WTR and NMWR to better assist workers and other alternative approaches.

2. CONTEMPORARY CAPITALISM, TIME AND VALUE

[atdonotguaranteeaminimumnumberofhours/september2016](#) (unless otherwise stated, all URLs were last accessed 6 June 2018).

¹² M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Palgrave Macmillan 2010).

This article claims that employers are requiring from workers new levels of availability and responsiveness to work *as and when needed*. Here, I address why this is so. I focus on the way that employers can achieve value from their workers in present market conditions.

The job roles of many high-skilled knowledge workers are highly dependent on the flow of knowledge and ideas through interconnected networks.¹³ Timely responsiveness to such communications is a key way in which these workers can contribute to the profitability of an employing organisation.¹⁴ Such communication is not necessarily limited to standard work times. Indeed, the very organisation of work may mean that the flow of work continues far beyond this. ICTs facilitate workers' ability to undertake work *at any time* and in almost any location. But more than this, ICTs can act as a substitute for workers' availability through their various messaging storage systems.¹⁵ A colleague or client can make contact with the worker via an ICT at any time. This message is stored and ready for receipt and response by the worker as soon as the worker checks his or her device. There is no need to stop or restrict communication with the worker for any reason, not least due to the time of their standard work hours. What is deemed to be 'timely' engagement with this communication is effectively driven by the needs of the employing organisation itself.

There are many drivers to encourage high-skilled knowledge workers to engage in mediated communication flows and other forms of work outside of standard work times. The broader context of the highly competitive state of global capitalism is critical here. UK employing organisations need to compete with producers in other countries that have large pools of readily available labour that can be utilised at lower rates of pay and with fewer labour protections. New models of production have emerged that take advantage of these price differentials. Many UK employing organisations are now involved in distributed production and various outsourcing and other contractual arrangements with entities in different geographical locations. Employing organisations also now rely on having much closer connections with market conditions. This means having greater understanding and knowledge of changing consumer demands and, indeed, influencing and creating desires for newly developed products and services.¹⁶ Equally critical is the need for fast and effective decision-making to adapt to changes in the marketplace.¹⁷ Shocks and change are more frequent in the globally interconnected environment.

Against this backdrop, it can be seen that timely communication responses are critical. This is the case for global production processes and service delivery that takes place 24 hours a day across multiple time-zones. It is also necessary in new methods of organisation, such as just-in-time inventory flows.¹⁸ Team based production processes, such as those often used in technical, problem-solving or creative tasks, require the timely flow of communication between members to ensure the

¹³ M. Castells, *The Rise of the Network Society* (Blackwell 1996).

¹⁴ D. Harvey, *The Condition of Postmodernity* (Blackwell 1989).

¹⁵ H. Nowotny, *Time: Modern and Postmodern Experience* (Polity Press 1994).

¹⁶ *Ibid.*; M. Lazzarato, *Immaterial Labor in Radical Thought in Italy: A Potential Politics* (P. Virno and M. Hardt eds, University of Minnesota Press 1996).

¹⁷ Harvey, *supra* n. 14.

¹⁸ *Ibid.*

continual development of the work.¹⁹ Efficiency is achieved when team members are on top of this flow of information and can contribute their ideas or views into the latest developments and are not held up by delays in waiting for input from those with particular technical skills or other decision-making capabilities. Some employing organisations may face demands from business customers to fit in with their timeframes and temporal demands.²⁰ Power relations between these organisations are a critical factor here. Others, who have greater control over production or service delivery, will need to consider temporal factors regarding the marketing of a product or service, the influencing of tastes and of fashions, the creation of particular niches, and the decision regarding the ‘right’ moment for release.²¹

For workers in lower-skilled service sector positions, a key means by which they are temporally organised in order to contribute to profit generation is to more closely align the supply of labour with the demand for that labour.²² These efforts by employers to reduce the cost of idle or underutilised worker time must be viewed in the context of a reduction of state funding for the provision of many services and stagnating consumer purchase power. Empirical data reveals that this scheduling to demand can happen in real time, with workers being sent home at the start of or half way through a shift with no pay.²³ Last minute changes to schedules have also been commonly observed.²⁴

As noted in section 1, employers can require workers to work as and when needed whilst on permanent (open-ended and with fixed numbers of hours) contracts.²⁵ But employers also often achieve this temporal flexibility of aligning the supply of labour with demand by using atypical work arrangements. The benefits for employers of this approach are many and include the ability to call on an available pool of workers as work demands rise and fall and reduced employment obligations to these workers, such as maternity leave or redundancy payments.²⁶

Again, the use of ICTs is important in effecting the temporal organisation of workers whereby working time aligns with work demand. ICTs provide a key means through which employers communicate with workers about the availability or requirement of work. It is assumed that workers are contactable through these devices, being both available and responsive to new communications and updates—often during their personal, non-work time. However, unlike those in knowledge work roles, lower-skilled service workers typically need to go to their formal place of work to engage in their jobs.

¹⁹ R. Batt and V. Doellgast, *Groups, Teams, and the Division of Labor: Interdisciplinary Perspectives on the Organization of Work* in *The Oxford Handbook of Work and Organisation* (S. Ackroyd, R. Batt, P Thompson, and P.S. Tolbert eds, OUP 2005).

²⁰ Rubery and Horrell, *supra* n. 10.

²¹ Nowotny, *supra* n. 15, Harvey, *supra* n. 14.

²² Rubery, Ward, Grimshaw and Beynon, *supra* n. 10. This article also notes other temporal changes including the expansion of ‘standard hours’ so that compensatory pay is not required and a general reduction in hours (bringing about an intensification of work).

²³ TUC, *The Decent Jobs Deficit* (Trade Union Congress, 2015).

²⁴ *Ibid.*

²⁵ Rubery and Horrell, *supra* n. 10; Rubery, Ward, Grimshaw and Beynon, *supra* n. 10.

²⁶ *Ibid.*, M. Pennycook, G. Cory, V. Alakeson, *A Matter of time: The Rise of Zero-hours Contracts* (Resolution Foundation 2013).

3. EMPLOYER MANAGEMENT OF NEW TEMPORAL PRACTICES

How is it that employers are able to get workers to demonstrate temporal practices of availability and responsiveness to work as and when needed? In section 1, it was noted that workers in higher-skilled roles who use ICTs to undertake work outside of standard places of work do not typically have formal contractual arrangements outlining specific obligations in this regard. Rather they appear to be informal practices. For workers in lower-skilled roles, many are on atypical contracts where they can turn down offers of work from their employer, that is, reject some of the variable hours if they do not wish to work this way. Despite this, workers in both higher and lower-skilled roles often demonstrate flexibility in working times that meet the needs of the employing organisation.

In this section I demonstrate that employers are very active in asserting power over workers to influence these temporal patterns of work. I highlight two key forms of managerial control—both of which have a normative effect on workers' behaviour, including their temporal practices. First I consider Foucault's conception of biopower²⁷ as a theoretical basis upon which to understand how employers have sought to shape the working times of workers in recent decades. Second I consider the more coercive approach of economic rationalisation and the disciplining power of the market. These approaches can work in tandem or one may be the dominant form adopted by an employer.

Biopower does not seek to overtly constrain human action or require individuals to act in particular ways. Instead, it consists in guiding the possible courses of action taken by workers.²⁸ Workers are turned into 'subjects' through which power can operate. Employing organisations seek to create work cultures in which certain values and attributes are promoted and rewarded. Workers are encouraged to take these on board as their own and put them into practice through the way that they work. Economic security and risk are key motifs.²⁹ The self becomes its own enterprise; notions of economic rationality and cost-benefit analysis guide choices and decision making. Beyond cultural change, which has limits in its effectiveness to bring about the new desired work time discipline,³⁰ biopower can also be identified in managerial strategies that encouraged workers to 'be yourself' at work.³¹ The goal here is to bring about an alignment of the worker's work and personal selves³²—a process which lays the foundations for a temporal blurring of work and personal life.

This form of power must be viewed within the broader context of neo-liberal governance.³³ The UK policy agenda in recent decades has encouraged the values of entrepreneurialism, competition and

²⁷ See especially Foucault, *supra* n. 12, but also N. Rose, *Governing the Soul: The Shaping of the Private Self* (Routledge 1990), P. du Gay, *Consumption and Identity at Work* (Sage 1996) and P. Flemming, *Review Article: When 'Life Itself' Goes to Work: Reviewing Shifts in Organizational Life through the Lens of Biopower* 67 *Human Relations* 875 (2014).

²⁸ Foucault, *supra* n. 12.

²⁹ Flemming, *supra* n. 27.

³⁰ P. Thompson and D. van den Broek, *Managerial Control and Workplace Regimes: An Introduction*, 24(3) *Work Employment and Society*: 1 (2010).

³¹ Flemming, *supra* n. 27.

³² P. Fleming and A. Sturdy, *Being Yourself in the Electronic Sweatshop: New Forms of Normative Control*, 64(2) *Human Relations* 177 (2011); A. Gorz, *Immaterial* (Seagull Books 2010)

³³ Foucault, *supra* n. 12, M. Foucault, *The Subject and Power* 8 *Critical Inquiry* 777 (1982).

self-responsibility. Workers, once viewed as in need of particular protections given their class disadvantages, are now reconceptualised as equally able to participate in the dynamic of competition and participate in an enterprise society.³⁴ Moral value is attributed to those who contribute to the economy through their participation in the paid labour market. Those who do not effectively become demonized as ‘skivers’³⁵ and subject to the sometimes punitive social welfare practices such as fit for work tests and benefit sanctioning.³⁶ There is a mirroring, then, between these values, goals and ways of living and those encouraged by employing organisations.

Empirical evidence reveals that a form of biopower has been utilised by UK managers from at least the 1980s onwards.³⁷ Nikolas Rose mapped the changing work cultures in a range of organisations. He demonstrated how the workplace came to be perceived as a rewarding environment both personally and socially for workers,³⁸ as well as a means of self-fulfilment.³⁹ New visions of what it meant to be a successful worker emerged—an enduring theme being that workers could operate in ways that made them entrepreneurs of themselves.⁴⁰ Similarly, du Gay’s investigation of UK retailers during the latter part of the 1980s and early 1990s demonstrated how employers sought to enhance productivity and creative innovation through the ‘active engagement of “self-actualizing” impulses of all the organization’s members.’⁴¹ Workers were encouraged to develop a new sense of ownership and responsibility for the economic success of these enterprises. For example, a manager working in a national department store talked of feeling as if the store is ‘my shop ... it’s mine. And I want it to take money, and I want it to look good.’⁴² Such cultural shifts influenced temporal practices by encouraging workers to complete work necessary for the organisation’s success, even beyond standard hours.⁴³

More recent empirical evidence of biopower can be seen in managerial strategies emphasising an alignment of the self with one’s work. Gregg’s study of media and IT employees demonstrates how a lack of a boundary between professional and personal selves can render thoughts of location and time—typically key measures of whether ‘on the job’ or not—secondary considerations when faced with excessive workloads.⁴⁴ Here, workers continued to undertake work tasks in ‘personal time’ because they felt the work needed to be done. Similarly, Brannen’s study of the UK banking sector observed a blurring of boundaries between work and personal life. In describing a female call centre supervisor who frequently took work home in the evening, Brannen noted that such practices emerged as a result of management practices that focused on empowering and regulating the self.

³⁴ Foucault, *supra* n. 12.

³⁵ Z Williams, ‘Skivers v Strivers: The Argument that Pollutes People’s Minds’ *The Guardian*, Wednesday 9 January 2013, at www.theguardian.com/politics/2013/jan/09/skivers-v-strivers-argument-pollutes.

³⁶ Citizens Advice Scotland, *Sanctioned: What Benefit?* (2014) at <http://www.cas.org.uk/system/files/publications/Sanctioned%20What%20benefit.pdf>; D. Webster, *Jobseeker’s Allowance Sanctions and Disallowances* 233 *Working Brief* 6 (2013).

³⁷ Rose, *supra* n. 27.

³⁸ Rose, *supra* n. 27.

³⁹ P. Heelas, *Work Ethics, Soft Capitalism and the ‘Turn to Life’* in *Cultural Economy* (P. du Gay and M. Pryke eds, Sage 2002).

⁴⁰ Rose, *supra* n. 27, du Gay, *supra* n. 27.

⁴¹ du Gay, *supra* n. 27, at 119.

⁴² du Gay, *supra* n. 27, at 164.

⁴³ du Gay, *supra* n. 27.

⁴⁴ M. Gregg, *Work’s Intimacy* (Polity Press 2011)

She observed that: ‘These bring a semblance of autonomy to employees—about where and when to work—that is designed to increase productivity.’⁴⁵ Other strategies to induce work into personal times include structuring work organisation into teams, which brought about a form of peer pressure to get work done,⁴⁶ and managing work through targets or outputs.⁴⁷ The notion of the entrepreneurial and responsible self was present in all of these examples.

Beyond these forms of biopower, though, is the disciplining power of the market—something that has become stronger since the recession beginning 2008—which also acts as a powerful form of managerial control. Empirical evidence reveals that reference to the needs of the ‘market’ is being used as a means of shifting worker perceptions regarding the need to be temporally flexible.⁴⁸ Here the employer attempts to persuade by suggesting there is limited or no choice regarding worker flexibility if the organisation is to remain economically competitive. This form of managerial control appears to be more prevalent amongst lower-skilled service sector workers.

Workers’ own economic vulnerability is also exploited by some managers of workers in lower-skilled positions on atypical work arrangements such as zero-hours contracts. Empirical studies have highlighted the coercive practice of ‘zeroing-down,’⁴⁹ which involves the reduction or even stopping of the offer of work to particular workers. It is used as a management tool to express dissatisfaction with the behaviour, attitude or comments made by workers, such as those who turn down work offered to them, despite their being contractually entitled to do so. Of these practices, workers observe:⁵⁰

In reality there is not much flexibility because if you ever turn down hours or complain to the supervisor you simply stop getting offered work. (Female domiciliary worker, Stockton)

When I started out at my current job I did nine weeks without a single day off and I was regularly working anything up to 55-60 hours a week. Since putting my foot down and refusing to work every other weekend—I still do 12 days on with two off—my hours have dried up ... (Female domiciliary care worker, Newcastle)

These workers are being coerced into accepting work as and when needed by the threat of a reduction in hours. This is further exacerbated in some workplaces by employers having more than sufficient workers on zero-hours contracts, which creates a sense of competition between workers for any available shift.⁵¹

It can be seen, then, that employers are attempting to shift worker thinking to bring about a new time-discipline in which temporal flexibility is both valorised and deemed necessary. This can play out through positive encouragement by the promotion of certain attitudes and values within workers with a view to encouraging particular paths of action. Alternatively, especially with workers

⁴⁵ J. Brannen, *Time and the Negotiation of Work-Family Boundaries: Autonomy or Illusion?*, 14(1) *Time and Society* 113, 137 (2005).

⁴⁶ Gregg, *supra* n. 44.

⁴⁷ A. Kamp, *New Concepts of Work and Time* in *Living Labor* (M. Hoegsberg, and C. Fisher (eds) Sternberg Press 2013); R. Lucas, *Dreaming in Code*, 62 *New Left Review* 125-132 (2010).

⁴⁸ Rubery, Ward, Grimshaw and Beynon, *supra* n.10.

⁴⁹ Pennycook, Cory and Alakeson, *supra* n. 26, TUC; *supra* n. 23.

⁵⁰ Pennycook, Cory and Alakeson, *supra* n. 26.

⁵¹ Pennycook, Cory and Alakeson, *supra* n. 26.

in lower-skilled roles, it can play out with varying degrees of coercion, which exploit workers' reliance on their jobs and their wage.

4. IMPLICATIONS FOR PERSONAL, NON-WORK TIME

What does this shaping of worker subjectivities mean for workers' personal, non-work time? Empirical evidence suggests that for workers in higher-skilled job roles, at least, work can be a definite present in their personal, non-work time. For example, a study of more than 1,000 managers conducted by the Institute of Leadership & Management in 2014 revealed that 86% of managers regularly check their emails on evenings and weekends.⁵² Moreover, almost one in five (21%) typically check their work email more than ten times per day outside of office hours.

Another, smaller-scale, study of a UK based multi-national company reported in 2012 detailed findings from diaries kept by senior management, middle management and lower management/general employees, together with survey data.⁵³ This revealed that all study participants checked emails when out of the office. The phenomenon was experienced as an urge or compulsion to check their inboxes—that most workers felt 'sometimes' outside of standard hours, but for others 'often' or 'always.' The reasons these workers gave to explain *why* they engaged with emails when not at work included that checking email was 'necessary' in order to: complete work, to receive information for an upcoming meeting, to finish work that wasn't completed during standard work times, and to progress up the work hierarchy. It is important to note that the technologies that facilitate email and other mediated communications do not themselves require workers' engaging with such communication. Rather, what is critical is the particular social relationship the workers demonstrate with their jobs that makes them feel they should engage with ICTs in this way. Moreover, it is notable that workers' engagement in this work during personal, non-work times was not always initiated in direct response to a phone-call, audible inbox notification or other prompt of incoming communication. At times workers themselves self-initiated the commencement of work.

While this urge or compulsion appeared to stem for the workers in this study, I have argued (refer section 3) that this feeling does not develop unaided. Rather, this sense of wanting to do well in one's job, to meet organisational norms regarding availability and responsiveness to work, to be viewed as a good and, hopefully, upwardly progressing worker, or even simply to do what is required to hold on to one's job, are very much shaped by the efforts of employers (and through their managers). It should also be noted that the workers in this study also reported that the checking of emails outside of the office, particularly when done via a smartphone, had negative effects on their personal lives. For example, it meant that they were missing out on other things in their personal and family lives due to emails and the subsequent work generated from them.

⁵² ILM, *Workplace pressure fuels UK overtime culture*, press release dated 9 July 2014, at <https://www.ilm.com/~media/ILM%20Website/Documents/Information%20for%20media/Overtime%20press%20release%20pdf.ashx>, see also BBC *Managers 'work extra day per week in unpaid overtime'* 9 July 2014, at <http://www.bbc.co.uk/news/business-28220312>.

⁵³ A.D. Waller and G. Ragsdell, *The Impact of E-mail on Work-Life Balance* 64 *Aslib Proceedings* 154 (2012).

Various other studies echo this mixture of workers apparently positively wanting to engage in work (via ICTs) during their personal, non-work time, with some perceived downsides of doing so.⁵⁴ A US study of knowledge workers in the fields of law, finance and banking revealed a prevalence of checking for new information via smartphones and responding as needed.⁵⁵ A senior manager spoke of his smartphone use as follows: 'I think you keep in the flow more if you're able to keep in touch. If I'm on vacation and I see what's happening with a project, I can write back and question their thoughts.' Yet a lawyer from this same study detailed how he became preoccupied with work issues outside of work: 'I was just on it [his Blackberry] all the time. Not because I had more work to do. I was bringing my work home with me more, even if work wasn't actual legal work. I was just on this thing more, so my brain was working more. I wouldn't sleep as much and was having trouble sleeping.'⁵⁶ Similarly, a French study of the smartphone use of workers in a financial institution highlights the potential for negative reactions from family members.⁵⁷ One participant observed: 'My wife and son absolutely hate it ... I find myself upstairs secretly looking at the BlackBerry and putting it away before anyone finds me.'⁵⁸

It is notable from the smaller-scale UK based study (detailed above) that a young female worker observed that she might find it less attractive to engage in work activities during her personal, non-work time if she had a family. This highlights the strong gender and life stage dimension that will affect workers' experiences of work entering their personal lives. Feminist scholars have observed that a moral economy of time exists in the household context in which carers are expected to give of their time freely to those in their care.⁵⁹ Attempts to attend to work matters in the home can go against expectations of simply being available for others,⁶⁰ and thus be experienced as stressful and difficult to combine.

This intertwined relationship of the benefits of undertaking work tasks at home and the downsides of doing so has also been observed in debates regarding work life balance. A large-scale review of national based studies from various countries around the world highlights the ambiguity surrounding the role of ICTs in work life balance.⁶¹ It is noted that although workers can use ICTs to work remotely and improve work life balance, these workers are also at greater risk of working in their free time and thus blurring paid work into times associated with attending to personal commitments and family responsibilities. The European Working Conditions survey 2015, which includes data from

⁵⁴ These other studies tend to be from outside of the UK and include. See also the Australian study of Greggs, *supra* n. 44.

⁵⁵ M. Mazmanian, W. J. Orlikowski and J. Yates, *The Autonomy Paradox: The Implications of Mobile Email Devices for Knowledge Professionals* 24 *Organization Science* 1337 (2013).

⁵⁶ *Ibid.*, at 1347.

⁵⁷ C.H. Besseyre des Horts, K. Dery and J. MacCormick, *Paradoxical Consequences of the Use of Blackberrys: An Application of the Job Demand-Control-Support Model in New Ways of Organizing Work: Developments, Perspectives and Experiences* (C. Kelliher and J. Richardson eds, Routledge 2012).

⁵⁸ *Ibid.*, at 24.

⁵⁹ K. J. Daly, *Families & Time: Keeping Pace in a Hurried Culture* (Sage 1996); J. Fudge, *A New Gender Contract? Work/Life Balance and Working-Time Flexibility in Labour Law, Work, and Family* (J. Conaghan and K. Rittich eds, Oxford University Press 2005); N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford 2011).

⁶⁰ C. Everingham, *Engendering Time: Gender Equity and Discourses of Workplace Flexibility* 11 *Time & Society*, 335 (2002).

⁶¹ Eurofound and the International Labour Office, *supra* n. 8.

the UK, reports that there is a higher potential for work to home interference in the case of workers who use internet enabled devices for work outside of the employers' premises compared to purely office-based workers because a substantially higher percentage of them work in their free time to meet work demands.⁶²

For workers in lower-skilled service sector positions, the influence of work entering personal, non-work times can have more distinctly negative implications. Empirical research suggests that these workers experience their employers as having a significant hold over their lives beyond the work for which they are paid.

Many of these workers have limited certainty over when and for how long they will have personal, non-work time. Forty-two per cent of those on zero-hours contracts, for example, only receive up to 12-hours' notice of when work is available and nearly half (46%) receive little or no notice or find out at the start of a shift if work has been cancelled.⁶³

This variability of the timing of shifts means that it is difficult for these workers to fully enjoy their non-work time. Their ability to plan their personal lives and participate in various non-work activities is limited. There is a sense held by some that they should remain available for work, should they be called upon by their employer.⁶⁴ Empirical studies reveal such feelings:

I cannot plan anything. Sometimes they let me know only half an hour before [my] shift.⁶⁵ (A male agency worker, working in food processing)

Don't know my rota before the new week therefore I can never make plans. I always miss out on family events and rarely see friends because of it.⁶⁶ (Male zero-hours contract worker doing two jobs in hospitality and food processing)

[It's] stressing the rest of the family.⁶⁷ (Male cleaner on a zero-hours contract)

These accounts suggest that supposed non-work time is not fully the worker's own, nor can it be fully harnessed by workers for their own purposes.⁶⁸

The unpredictability regarding the number of hours given to those on zero-hours contracts and some other atypical work arrangements creates variation in take-home pay, which further contributes to workers' inability to enjoy and plan their personal, non-work, time.⁶⁹ This is particularly problematic because these jobs are strongly associated with low pay,⁷⁰ and can result in debt.⁷¹ Expenditure on childcare is also a key issue for those workers with young children.⁷² In addition to being expensive,

⁶² Eurofound and the International Labour Office, *supra* n. 8.

⁶³ CIPD survey cited in TUC, *supra* n. 23, at 13.

⁶⁴ TUC, *supra* n. 23.

⁶⁵ TUC, *supra* n. 23, at 13.

⁶⁶ TUC, *supra* n. 23, at 37.

⁶⁷ TUC, *supra* n. 23, at 37.

⁶⁸ These findings have been echoed in the US context. See, Working Washington, *Inflexible and Out of Balance: Unpredictable, Insecure Schedules in Seattle's Service Industry* (Working Washington 2016).

⁶⁹ TUC, *supra* n. 23 and Pennycook, Cory and Alakeson, *supra* n. 26.

⁷⁰ TUC, *supra* n. 23.

⁷¹ Pennycook, Cory and Alakeson, *supra* n. 26.

⁷² TUC, *supra* n. 23. For US examples see: Centre for Law and Social Policy, Retail Action Project & Women Employed, *Tackling Unstable and Unpredictable Work Schedules: A Policy Brief on Guaranteed Minimum Hours*

formal systems of childcare are generally rigid in the sense that they don't allow for changes to the timing at which the care is provided. If work schedules change, workers can find that they are paying for childcare they do not need. Longer terms planning and investment, such as when or whether to have a family or whether to pursue further study, can also be jeopardised.⁷³

From this examination of the experience of workers' personal, non-work, time the unequal power relations at play between employers and workers is laid bare. There are many negative repercussions for workers resulting from temporal practices that demand flexibility as and when needed, especially for those in lower-skilled roles. Any benefits of such flexibility for workers themselves are distinctly limited in comparison to the gains experienced by employers. Moreover, workers lack complete autonomy over this time. To interrupt family life for work can be difficult to organise, disruptive and stressful.

5. 'WORKING TIME' IN THE WTR AND NMWR

Is the present regulation of working time—in the form of the WTR and the NMWR—adequately equipped to protect workers against the exploitation inherent in these new temporal trends? This section outlines the relevant provisions and then considers their likely applications with respect to workers in higher-skilled roles and those in lower-skilled roles.

The WTR define 'working time' in relation to a worker as: '(a) any period during which he is working, at his employer's disposal and carrying out his activity or duties, (b) any period during which he is receiving relevant training and (c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement; and 'work' shall be construed accordingly.'⁷⁴ In relation to part (a) above, all three elements are required for a period to be counted as working time.⁷⁵ However, the last limb—carrying out his activities or duties—is fulfilled by the worker being present and available at the workplace with a view to providing their services.⁷⁶

There has been a spate of case law emerging at the European level regarding whether on-call work constitutes 'working time' and thus whether it is subject to the protections offered under the Working Time Directive.⁷⁷ In a review of these cases, McCann observes that the CJEU has adopted a unitary model, which embraces the expanse of activities that make up the job, periods of activity

and Reporting Pay Policies (2014) and L. Ben-Ishai, H. Matthews and J. Levin-Epstein, *Scrambling for Stability: The Challenges of Job Schedule Volatility and Child Care* (Centre for Law and Social Policy 2014).

⁷³ G. Koessl, *The Temporalities of Working Lives: Orientations to Time in Career Portraits and in the London Banking Industry*, (Thesis submitted to the Department of Sociology, Goldsmiths, University of London, 2013).

⁷⁴ Regulation 2(1) WTR.

⁷⁵ *Case C-303/98 Sindicato de Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] IRLR 845.

⁷⁶ *SIMAP* (n 6) at p968, para 48, as noted in Rodgers, *supra* n. 17, at 80.

⁷⁷ *Case C-303/98 Sindicato de Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] IRLR 845; *Case C-151/02 Landeshauptstadt Kiel v Jaeger* [2003] ECR I-08389; *Case C-14/04 Dellas and Others V Premier Ministre and Another* [2005] ECR I-10253; *Case C-437/05 Jan Vorel v Nemocnice Gýy Krumlov* [2007] ECR I-00331; *Case C-151/02 Nicușgigore v Regia Națională a Pădurilor Romsilva—Direcția Silvică București* [2011] ECR I-00020.

and episodes of availability.⁷⁸ However, certain requirements must be met. Of note is the continued importance of the worker being present at the employers' place of work. If the presence of the worker is not required by the employer then it is assumed that the worker is free to manage their own time and pursue their own interests. It is also notable that there needs to be an obligation on the part of the worker to be at the employer's disposal. This is typically evidenced by a formal arrangement between the two parties regarding the worker's availability or duties.

An important feature of the WTR is that it contains certain derogations. These include regulation 20, which relates to 'unmeasured working time.' Many of the protections of the WTR will not apply 'in relation to a worker where, on account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined or can be determined by the worker himself, as may be the case for (a) managing executives or other persons with autonomous decision-taking powers; (b) family workers; or (c) workers officiating at religious ceremonies in churches and religious communities.'⁷⁹ The Working Time Regulations 1999⁸⁰ inserted a new paragraph (2) into regulation 20 of the WTR which reads: 'Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do work the duration of which is not measured or predetermined or can be determined by the worker himself, regulations 4(1) and (2) and 6(1), (2) and (7) shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself.' This paragraph extends the effect of regulation 20 somewhat, although the parameters of how much are not particularly clear.

Another, critical, derogation to the WTR is contained in regulation 4(1) which allows the employer (via regulation 5(1)) to obtain a worker's written agreement that the maximum weekly working time will not apply. Research conducted in 2002 reveals that this exclusion was widely used in the UK.⁸¹ This is likely to still be the case.

Unlike the WTR, the NMWR do not specifically define 'working time.' Instead regulation 17 refers to the 'hours of work' treated as worked for the purposes of payment of the minimum wage to be determined separately for 'time work,' 'salaried hours work,' 'output work' and 'unmeasured work.'

Regulation 32 of the NMWR refers to situations regarding workers being available to work. Paragraph 1 states: 'Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.' Paragraph 2 further articulates that this only includes time when the worker is awake and available for the purposes of working (i.e. if they are not sleeping, even if sleeping facilities are provided). A body of case law has emerged that clarifies that regulation 32 only applies when workers are

⁷⁸ D. McCann, *Travel Time as Working Time: Tyco, the Unitary Model and the Route to Casualisation* 45 ILJ 244 (2016).

⁷⁹ WTR, reg 20(1).

⁸⁰ By virtue of reg 4.

⁸¹ C. Barnard, S. Deakin and R. Hobbs, *Opting out of the 48-Hour Week: Employer Necessity or Individual Choice? An empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK* 32 ILJ 223 (2003).

available for work but are not actually working.⁸² Workers will be working if there is a formal arrangement for work to be undertaken or if there is a formal requirement for the worker to be in a particular location. Similarly, those undertaking ‘salaried hours work’ are entitled to payment of the NMWR for ‘hours a worker is available at or near a place of work for the purposes of working, unless the worker is at home’⁸³ but, of these times, only that when a worker is awake for the purposes of working.⁸⁴ Again, there is the requirement that the worker being awake and available for work.⁸⁵ Thus, the NMWR is clear to exclude time workers are at home—when they are not ‘working’ but simply on-call—from working time that would require payment of the national minimum wage.

Is the heightened level of availability and responsiveness demonstrated by many workers in higher-skilled roles outside of standard hours when at home or otherwise away from work captured by the WTR and NMWR (although the latter is far less likely to be relevant to these workers)? On one level, it would seem that if these workers are actively engaged in work outside of standard hours when at home, for example, they are indeed working, as per the definition in the WTR. However, any period of their being available and ready to respond to work, i.e. on-call work, is more problematic in terms of the protective and compensatory provisions.

First, the issue arises as to whether the workers are *required* to undertake these tasks. An important feature of the WTR’s conception of working time in such circumstances (and also that of the NMWR) is that there is an obligation on the worker to be at the employer’s disposal. As noted in section 1, it is unlikely that higher-skilled knowledge workers will have formal arrangements with their employer by which they agree that the worker be available or engage in work outside of standard work times. It would seem that it may be difficult to demonstrate that these workers are required to be available and/or responsive to work. However, through my analysis of new managerial strategies that involve the exertion of influence and pressure in the form of biopower or economic threat, it can be seen that employers are imposing something akin to an obligation on workers to act in such ways during their personal, non-work time. The obligation to do so is not explicit. But this does not mean that the pressure does not exist.

Second, there is the issue of the location of the worker when ‘on-call’. The WTR (and the NMWR) require the worker is present and available at the place of work—otherwise they are considered ‘free’ from work. However, internet enabled ICTs make this need to be in a particular location for work rather redundant. These higher-skilled knowledge workers can undertake most of their work tasks from any location. Moreover, the notion of these workers feeling completely ‘free’ from work during these periods is not backed up by empirical evidence (refer section 4).

Beyond this, though, the derogations contained in the WTR may preclude these workers from protection. The derogation relating to ‘unmeasured working time’ assumes that managers and others who may engage in unmeasured working time have a degree of autonomy regarding when

⁸² *British Nursing Association v IRC* [2003] ICR 19; *Scottbridge Construction Ltd v Wright* [2003] IRLR 21; *Whittlestone v BJP Home Support Ltd* [2014] ICR 275; *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172; *Esparon (t/a Middle West Residential Care Home v Slavikovska* [2014] IRLR 598.

⁸³ NMWR, reg 27(1)(b).

⁸⁴ NMWR, reg 27(2).

⁸⁵ NMWR, reg 27(2).

and how many hours they work and can thus manage their own working time.⁸⁶ However, as noted above, this assumption appears problematic. Moreover, these higher-skilled knowledge workers are also likely to fall into the category of worker who is asked to enter into an opt-out agreement with their employer stating that the maximum weekly working time will not apply to them.⁸⁷

If we consider the position of those in lower-skilled service positions, the situation is somewhat worse. By virtue of the contractual arrangements that these workers enter into with their employers they are typically only paid for the time that they spend working, i.e. they engage in ‘time work’ as per the NMWR. Time spent in activities such as waiting and being available for work, preparing to go to work and being told that there is no longer any work, or similar periods, will simply be deemed to fall outside of what constitutes ‘work’ and thus will not be paid. Lower-skilled service sector workers may very well feel obligated to be available and responsive to calls of work by their employer, particularly given any economic pressure exerted over them act in such a way. But, yet again, it is difficult to see that they are ‘required’ to be available, especially so for those on zero-hours contracts who are contractually entitled to turn down the offer of work. In effect, the activities of waiting, being available and preparing for work are viewed as outside of the realm of production. Yet the non-payment of these times is detrimental for the very ability of these workers to ensure their livelihood. This conception of such times will be problematized in section 6 below.

It is clear that the present regulation of working time contained in the WTR and NMWR is inadequate to limit and/or compensate workers from these new temporal trends. However, the insights gained from the sociological analysis of these trends can assist in determining a potential way forward.

6. REFLECTIONS ON REGULATING THE NEW TEMPORALITY OF WORK

Is there a way to move beyond the present situation of new exploitative working time patterns and inadequate regulation to protect against them? In this final section, I drawing on the insights gained from the sociological analysis of these temporal trends to consider whether it is possible to extend the concepts of ‘working time’ and ‘work’ underpinning the WTR and NMWR to better protect and/or compensate workers. I conclude that an alternative regulatory approach is the most appropriate response.

Beginning by focusing on workers in higher-skilled knowledge based roles, a key conceptual shift that would need to take place concerns the relevance of location in the categories of working time and work. Much of the work of these workers has been effectively decoupled from formal locations of work due to the technical features of ICTs. It is no longer relevant whether the worker is at the employers’ premises or other formal location.

New understandings of what it means for workers to be *required* to work also need to be developed. As noted in section 5, above, these workers do not typically have formal arrangements requiring

⁸⁶ See also D. McCann, *The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Work Debate* 23 *Law in Context: A Socio-Legal Journal* 127 (2005).

⁸⁷ WTR, reg 4(1). See Barnard, Deakin and Hobbs, *supra* n. 81.

them to work outside of standard hours, but they do experience a strong pressure (in the form of biopower and economic control exerted by employers) encouraging them to do so. There are certain difficulties, though, in extending the notion of the requirement to work to capture these pressures. Fundamentally, it would be difficult to determine whether or not there really existed a requirement to work out of standard hours. There may well be pressures upon workers and these workers may feel a sense of obligation. Yet workers will respond differently to such pressure. Some workers may resist this pressure at certain times or decide themselves how and when they will consider attending to work matters during their personal time, such as setting timeframes or time limits for doing so. Others may resist it entirely by refusing to attend to work outside of standard hours. Any negative consequences that result from this worker resistance, such as a failure to be promoted, will be difficult to directly attribute to such acts. The matter does not become any clearer if effort is made to try and understand whether the worker is subordinated to the employer during these periods or even at the employer's disposal.

Related to the difficulties in identifying whether workers are *required* to work is identifying the temporal parameters of such requirement. Implicit in the notion of on-call work is the assumption that it relates to a set duration and starts and ends at particular times. However, from my analysis in section 4 it can be seen that these workers can feel the obligation (or desire) to engage in work tasks outside of standard work times at any time and this engagement in work is not limited to a fixed duration. Matters start to become problematic if all personal, non-work, time, perhaps apart from that when the worker is sleeping, is potentially on-call time.

For workers in lower-skilled service sector positions the contractual arrangements that allow for time worked to be paid and other times simply excluded need to be addressed. I suggest that at a fundamental level there needs to be a broadening of thinking around what constitutes a productive activity, and thus what can potentially be included in the notion of work. Specifically, productive work could be extended for these workers to include the times in which they are ready and available for work, albeit not undertaking actual work tasks. I made the point (in section 2) that employers' temporal organisation of these workers as and when needed, be it through zero-hours contracts or other atypical work arrangements, form an integral part of the production process of the employing organisations. The alignment of work demand with labour supply is a key means of achieving value in production. It rests on the assumption and, indeed, completely relies upon, a ready availability of workers.

However, to conceptualise the ready availability of these workers to engage in work a productive activity may give rise to other types of activity being claimed as productive and thus, potentially, 'work.' For example, the arguments long made by feminist scholars regarding the vital role that reproductive work plays in the on-going ability of employing organisations to function may need to be revisited.⁸⁸ This, of course, may not be a bad flow-on effect of any shift in conceptual thinking.

⁸⁸ K. Weeks, *Life Within and Against Work: Affective Labor, Feminist Critique, and Post-Fordist Politics* 7 ephemera 233 (2007); K. Rittich, *Feminization and Contingency: Regulating the Stakes of Work for Women in Labour Law in an Era of Globalization: Transformative Practices & Possibilities* (J. Conaghan, R. M Fischl and K. Klare eds, Oxford University Press 2000).

If the ready availability of these workers to engage in work is considered a productive activity, it is possible that certain periods of time may be considered on-call work. However, the issues identified above for workers in higher-skilled roles become relevant again. Both the WTR and NMWR, require workers to be present at their place of work. While the workers in lower-skilled roles do typically need to go to the formal place of work to engage in work tasks, their ready availability for work occurs outside of this location. Moreover, there is the issue that the parameters of the on-call period, such as the start and end times, are not clear. These workers may be potentially called in to work within a wide range of time periods. Empirical data suggests these periods are not necessarily set or predetermined. Beyond this, there is also the issue of whether these workers can turn down an offer for work or whether they are required to accept the work offered. On-call work is usually that which the worker cannot turn down. While many are contractually entitled to decline work, for example if they are on zero-hours contracts, these workers may still experience a very real obligation to positively respond to their employer's request—not least because they may experience negative repercussions if they fail to do so.

It can be seen, then, that there are quite a few conceptual difficulties if attempt were made to extend notions of work and working time to encompass the temporal trends experienced by workers in both higher-skilled knowledge based roles and lower-skilled service sector work. Perhaps the most fundamental issue lies in the way that the legal conceptions of work and working time are based on an assumed binary distinction between work and non-work.⁸⁹ Implicit in this analytical division is the idea that each category is discrete and can be easily distinguishable from each other.⁹⁰ Yet attempting to extend these categories dramatically may render their value worthless. The concept of working time, for example, may lose any analytical utility if nearly all time could potentially be included within it.

Other difficulties can arise if the concepts of work and working time are deemed to have varying features or qualitative forms within the categories. By this I mean that a range of periods of time may be deemed to be working time, but there are different types or classes of working time within the broader category. The possibility of treating such periods differently in terms of protections or compensations was considered by the CJEU in its decision of *Tyco (Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL)*⁹¹ and was subsequently commented on by McCann.⁹² This case questioned whether the travelling time of a group of peripatetic workers with no fixed or habitual workplace should fall within the Working Time Directive conception of working time. It was decided on the facts that the time spent travelling between the workers' home and their first and last clients of the day did constitute working time. But the court suggested that some types of working time, while being protected under the Working Time Directive, may be subject to different or no minimum wage requirements. McCann noted that this suggests 'a brand of fragmentation increasingly familiar from a range of techniques that drain

⁸⁹ J. Conaghan and K. Rittich, *Introduction: Interrogating the Work/Family Divide in Labour Law, Work, and Family* (J. Conaghan and K. Rittich eds, OUP 2005); Rittich, *supra* n. 88; E. Rose, *Workplace Temporalities: A Time-Base Critique of the Flexible Working Provisions* 46 *ILJ* 2 (2017).

⁹⁰ See also McCann, *supra* n. 86, E. Genin, *Proposal for a Theoretical Framework for the Analysis of Time Porosity* 32 *IJCLLR* 280 (2016).

⁹¹ Case C-266/14, Judgment of 10 September 2015.

⁹² McCann, *supra* n. 78.

waged-time from the working day' and concludes that all hours that are deemed to constitute working hours should be protected and remunerated in the same way.⁹³

An alternative approach to dramatically adapting concepts of work and working time, and one which I consider to have merit, is to introduce interventions aimed specifically at avoiding the extreme forms of temporal flexibility altogether—or at least the worst variants of them. This could be achieved through separate means for workers in higher-skilled knowledge based positions and those in lower-skilled service roles.

The 'right to be disconnected' is one means of directly challenging the apparent limitless contact and engagement faced by many workers in higher-skilled knowledge based roles.⁹⁴ The focus here is on protecting workers from the intrusion of work into their personal lives. There have been limited national efforts in this direction to date, notably in France and Germany. In the French case, an article was recently introduced into the French labour code that obliges employers and employees in companies with more than 50 staff to negotiate the use of ICT.⁹⁵ The goal of this negotiation is to ensure respect for workers' rest and holiday periods and workers' family lives.⁹⁶ More examples of the adoption of the right to be disconnected can be seen at company/workplace level in employing organisations, again in France and Germany.⁹⁷ Car manufacturing businesses, such as Renault, BMW and Daimler have introduced variants and include strategies such as placing limitations on sending emails in the evenings and weekends, encouraging workers to agree upon fixed times of reachability, and introducing email software that deletes all incoming messages when workers are on holiday with an automatic message sent to the sender inviting them to contact the worker when they return.

In terms of workers in lower-skilled service sector roles, there are various ways in which the downsides of unpredictable work schedules could be addressed—notably by introducing positive duties.⁹⁸ This could include the requirement for contracts for work to guarantee minimum hours of work and controls regulating scheduling practices, such as rights to advance notification of schedules, the right to compensation for last minute cancellation or change to schedules, and the prohibition of discriminatory or abusive scheduling practices.

Adopting legislation that specifically aims to eliminate, at least to some degree, the very temporal trends that are causing difficulties for workers seems would seem a better approach. It is highly problematic to extend present notions of work and working time to encompass these new work patterns. Indeed, doing so may render them effectively useless. Of course in thinking through a possible introduction of new legal protections, it is important to consider why the issue developed in

⁹³ *Ibid.*, at 249.

⁹⁴ For a useful summary of the use of the approach, refer: Eurofound and the International Labour Office, *supra* n. 8.

⁹⁵ Article L2242-8, modified by Law No. 2016-1088 of 8 August 2016, article 55 (v).

⁹⁶ Eurofound and the International Labour Office, *supra* n. 8.

⁹⁷ Eurofound and the International Labour Office, *supra* n. 8.

⁹⁸ Debates on this topic have been going on in the US where unpredictable schedules are a widespread problem. See Centre for Law and Social Policy, Retail Action Project and Women Employed, *Tackling Unstable and Unpredictable Work Schedules: A Policy Brief on Guaranteed Minimum Hours and Reporting Pay Policies* (2014).

the first place. Employing organisations are operating in highly competitive times and managing the available flow of labour is critical in achieving success (refer section 2). However, fairer solutions for workers are needed.