The role of standards of review in Labour Law

Citation for published version:

Digital Object Identifier (DOI):
10.1093/ojls/gqz006

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Early version, also known as pre-print

Published In:
Oxford Journal of Legal Studies

General rights
Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy
The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.
The role of standards of review in Labour Law

Citation for published version:

Digital Object Identifier (DOI):
10.1093/ojls/gqz006

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Published In:
Oxford Journal of Legal Studies

Publisher Rights Statement:
This is a pre-copyedited, author-produced version of an article accepted for publication in [insert journal title] following peer review. The version of record [insert complete citation information here] is available online at: xxxxxxx [insert URL and DOI of the article on the OUP website].

General rights
Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and/or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy
The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.
Abstract

Employment rights may be expressed as (i) rules or (ii) standards of review. The insight that it is not credible that all labour laws are directed towards the correction of general labour market failures is taken as a point of entry to engage in further research into standards. This paper probes their special role in addressing the internal vulnerabilities to which employees are exposed in their individual and specific employment relationship. The principal argument is made that unlike fixed rules, standards of review of managerial behaviour police employment-relationship specific failures, rather than the labour market generally. The central claim made in this paper is designed as a rejoinder to the powerful descriptive and normative propositions that labour laws ought only to be concerned with ensuring the maintenance of a properly functioning and efficient labour market, and that any labour laws that go beyond this market-correcting role are misconceived and unwarranted.

Keywords

The Role of Standards of Review in Labour Law

David Cabrelli*

1. Introduction

Scholars have observed that not all labour laws can be reduced to, or explained exclusively in terms of, the correction of systematic failures in the labour market.¹ Instead, it is claimed that labour laws also regulate the vulnerabilities experienced by individual employees in their particular employment relationships on a case-by-case basis. This proposition is used as a springboard to conduct further research into the differing standards of review that exist in labour law.² More pertinently, this article probes the special role played by the standards of review in labour law in addressing the internal vulnerabilities to which employees are (i) exposed in their specific employment relationship and (ii) subjected as a result of managerial practices or particular factual contexts. The principal argument advanced in this piece is that employment rights crafted as standards of review of managerial behaviour can be conceived of as useful devices that police employment-relationship specific failures, vulnerabilities, problems and imperfections, rather than the labour market generally. This is in contrast to employment rights drawn up as rigid rules which it will be argued can be conceptualised as norms that are more suited to the correction of general labour market failures. Such rights include, for example, minimum wage legislation, hourly limits on weekly working time, paid

* Professor of Labour Law, University of Edinburgh. Email: david.cabrelli@ed.ac.uk. I would like to thank the following for their helpful comments on previous drafts of this paper: Rebecca Zahn, Lucas Miotto, Laura Bremner, and all those present at (a) the Edinburgh Legal Theory Group Workshop in Edinburgh in April 2017 and (b) the research seminar at Aberdeen University on 26 January 2018. The usual disclaimer applies.


holidays and holiday leave. By adjusting their inbuilt intensity of review of managerial conduct and decision-making according to the requirements of the particular case, as a regulatory instrument, standards of review are more sensitive to the particularities and dynamics of diverse employment relationships.

The significance of this insight is fourfold. The first lies in the light it can shed on the desirability and utility of proposing *universal* justifications for labour law. Such justifications stress the importance of labour law’s role in securing broader economic or public policy aims, such as the economic objective of efficient labour markets. Secondly, the analysis suggests that there may be mileage in advancing more selective goals for labour law regulation, which will entail standards of review policing the employment relationship in favour of a particular group’s interests, e.g. in a worker-friendly direction. Thirdly, it casts doubt on the purchase of concerns raised in the academic literature about divergent intensities of scrutiny associated with each of the standards of review in labour law. Finally, the link between the standards of review and the specific contracting parties’ labour relationship suggests the recognition of a model of labour law that incorporates a degree of scope for the inclusion of outcomes which treat certain workers preferentially over others in particular contexts.

Having set out in this introduction the skeleton of the argument presented in this paper, section 2 sets the scene by distilling the distinction between rules and standards generally and the diverse effects of drawing up employment rights as one or the other. Section 3 goes on to explore standards of review in labour law in greater detail by identifying and contrasting them in terms of the intensity of scrutiny which they bring to bear over managerial behaviour and decision-making. It also verses some of the anxieties raised by the existence of divergences in the degree of scrutiny associated with each of the standards. Section 4 turns to the distinction between general labour market failures on the one hand and on the other, the internal vulnerabilities and imperfections that are particular to an employee in the context of a specific employment relationship. In section 5, the juridical techniques adopted to regulate systematic failures in labour markets are assessed and contrasted with the approaches adopted to police

---

3 By the same token, the process may occasionally work to the benefit of the employer.

internal employment vulnerabilities, whilst section 6 turns to consider the centrality of this insight for labour law generally. Section 7 concludes.

2. Rules and Standards

Legal commands may be articulated as rules or standards.\(^5\) As noted by Diver,\(^6\) where a legal command is expressed as a rule, it is characterised by precision of application,\(^7\) transparency and accessibility. But from a negative perspective, it is more capable of evasion. For example, consider the statutory commands laid down in regulations 13 and 13A of the Working Time Regulations 1998 (‘WTR’)\(^8\) which enjoin an employer to provide an employee with twenty-eight days’ holiday leave in each leave year. Consider also the direction in regulation 4(1) of the WTR prohibiting workers from working in excess of 48 hours in any weekly period. Likewise, we can invoke the rule prescribed by section 1 of the National Minimum Wage Act 1999 and regulation 4 of the National Minimum Wage Regulations 2015\(^9\) that all workers of 25 years of age or over are entitled to be paid the National Living Wage and those aged between the ages of 16 and 24 have the right to payment of the National Minimum Wage at a set hourly rate. In the same vein, we can invoke the common law unrestricted reasonable notice rule which permits any employer to terminate an employment contract on providing the employee with a reasonable period of notice (subject to the statutory minimum).\(^10\) These rules are fundamentally concerned with symmetrical treatment, i.e. parity. They can be contrasted with juridical

---


\(^7\) It is recognised that there will be a ‘penumbra’ of uncertainty of application at the margins or edges of any legal command, i.e. even in the case of a rule, e.g. H. L. A. Hart’s famous example of ‘no vehicles in the park’: H.L.A. Hart, *The Concept of Law*, 2nd edn (P. A. Bulloch and J. Raz eds) 125–27. However, this does not detract from the main point that rules are generally more certain than standards of review in terms of their expression.

\(^8\) SI 1998/1833.

\(^9\) SI 2015/621.

\(^10\) See the Employment Rights Act 1996 (‘ERA’), s. 86.
directions expressed as standards of review - which signpost expectations about managerial behaviour in an open-textured and subjective manner and amount to a less compelling form of normativity. Standards ‘are optimization requirements requiring something to be realized to the greatest extent under legal and factual possibilities [and their] form of application is balancing’.11 A primary example of a standard of review is the proportionality measure applicable in indirect sex discrimination law.12 This standard proscribes employers from disproportionately applying a provision, criterion or practice (‘PCP’) to achieve a legitimate aim where it puts women and a female claimant specifically at a particular disadvantage in comparison with men. The ‘range of reasonable responses’ standard of review in the context of statutory unfair dismissal law exemplifies the same point, namely whether dismissal is one of the sanctions featuring in the band of responses which a series of reasonable employers might take in the face of the particular actions or omissions of the employee.13 Each of the standards of review share the attribute of harbouring the potential to elicit different results on their application from one employee to the next and from one employer to the next: when a court or tribunal exercise its judgment in reviewing the discretion of an employer in accordance with the proportionality and range of reasonable responses standards of review, the legal outcome in a case may vary from one employee to another.14 This point will be explored in more detail in sections 4 and 5.


12 Equality Act 2010, s. 19(2)(d).


A point of some importance is that standards and rules can be conceived of as legal commands that are capable of being plotted along a spectrum with certainty/determinacy (of outcome of application) and accessibility at one end of the axis and flexibility, adaptability and discretion at the other. As such, the form that a particular legal direction takes can be modified by adjustment and the content of a rule can be filleted and finessed to such an extent that the legal command loses the texture of a rule and is transformed into a standard. By the same token, a standard may also be converted into a rule by a measure of fine-tuning. For example, a variation on the theme of Regulations 13 and 13A of the WTR could be taken by expressing matters in terms of a standard. This might entail a legal command that all employers must ensure that their employees take a ‘rational’, ‘reasonable’, ‘appropriate’ or ‘proportionate’ amount of leave in any successive annual period. Where the legal command is conveyed as a standard, it is thus less precise in nature in comparison with the rule amounting to a tangible and quantifiable differential in formal and substantive terms. Being subjective, standards confer discretion on courts to adjudicate on the depth and breadth of their content over a period of time, and involve a judicial evaluation of a person’s conduct or decision-making. Seen from this perspective, where an employment right is crafted as a standard, the exact nature of its content is deferred to a court to adjudicate upon at a later date.

However, so far we have not broached the additional dimensions of the purpose of employment rights drawn as standards of review, as opposed to rules. In response to this question, we may invoke various commentators who have explored the demerits and merits of standards of review in the abstract, such as Schauer, Scalia, Guttel & Harel and Feldman et al. The main weaknesses are claimed to be their indeterminacy and lack of predictability, the extent to which they channel adjudicators towards motivated reasoning and the application of personal self-serving biases, as well as the illegitimate significance afforded to irrelevant

---


'anchors’ in the adjudication of standards of review, which leads to them all too often function erratically.\textsuperscript{18} As for the virtues of standards of review, in light of the inability of Parliament to foresee all conceivable future circumstances, Sunstein points towards their inescapable and indispensable role in ensuring that the most appropriate result is reached in every case that comes before an adjudicator.\textsuperscript{19} In a similar vein, Braithwaite cites their utility in securing certainty in legal outcomes in the face of complex and evolving economic or social phenomena.\textsuperscript{20} Meanwhile, Davidov has also provided a helpful summary of the function of standards of review, which he cites as their main strength. He perceives their function to be the ability to permit ‘ongoing adaptation and response to new problems in line with the goals of the law’.\textsuperscript{21} In favour of this proposition, Davidov identifies four key elements that may be attributed to standards of review. First, standards are sufficiently flexible to ‘cover unforeseen situations’.\textsuperscript{22} Rules, however, are too blunt since they are not elastic enough to cover the complete band of eventualities that may occur in the future.\textsuperscript{23} Bearing in mind that the employment contract is inherently incomplete,\textsuperscript{24} this feature of standards is particularly useful


\textsuperscript{22} G. Davidov, A Purposive Approach to Labour Law (Oxford, OUP, 2016) 161.

\textsuperscript{23} P. Alon-Shenker and G. Davidov, “Applying the Principle of Proportionality in Employment and Labour Law Contexts” (2013) 59 McGill Law Journal 375, 409. For example, consider a rule in a statute passed in 1930 to the effect that ‘all machines used in factory premises must be registered with the British Government’. If a child wanders around a factory with her mother on a tour, would the word ‘machine’ include the child’s smartphone?

as well as appropriate in this context. Secondly, and on a closely connected note, standards are ’much better suited to accommodate change’ insofar as they can be retained as they stand without constant updating and as such are impervious to ’obsolescence’.25 Employee and managerial demands and expectations will inevitably evolve, in what is an ostensibly open-ended and potentially permanent relationship. Thirdly, it has been argued that standards tend to be better at achieving altruistic and socially just or redistributive objectives, whereas rules tend to achieve or secure fewer social purposes.26 Finally, standards are ideally suited to achieving the objectives underpinning the law and limit the scope for employers to harness their managerial powers to engage in avoidance or circumvention techniques.27

So far, so good when we consider the four key virtues of standards of review, which we can refer to as ‘flexibility’, ‘adaptability to change’, ‘altruistic potential’ and ‘anti-avoidance’. However, a separate but equally interesting, question is whether there any additional features of standards of review which we may have overlooked and which might be of particular importance, especially in the context of labour law? And, if so, what exactly might that relevance be? More on this point later in section 5 below, but first we turn to a taxonomy of standards of review.

3. Differing Intensities of Scrutiny and Features Associated with the Standards of Review

A. Introducing the Standards of Review in Labour Law

Before enquiring whether and how certain features of standards of review are relevant to labour law, we must first say more about them, for example, by providing specific illustrations. Of course, it is undoubtedly the case that subjective standards of review are ubiquitous in UK labour law. The precise number is open to debate, but in this article, for the sake of argument, four specific standards are identified, namely the good faith, proportionality, rationality and range of reasonable responses standards.

---


B. The Four Standards of Review in Labour Law

The first standard we can evoke is the implied term of mutual trust and confidence which is steeped in the open-textured notion of good faith.\(^{28}\) This term is implied into every contract of employment governed by English or Scots law and enables a court to evaluate the conduct and decision-making of an employee or an employer on a broad-brush basis. According to this term, good faith conduct is equated to behaviour that does not destroy or severely undermine the other party’s trust and confidence in the employment relationship, without proper or reasonable cause.\(^{29}\) As such, the destruction or severe undermining of trust and confidence is a breach of the good faith requirement. Admittedly, the nature of this good faith standard is complex and can be portrayed as possessing a sophisticated amalgam of rule-like and standard-like features. This can be demonstrated if we divide it into its five constituent strands. First, there is the broad strand which focuses on the control of the employer’s express or implicit discretionary powers.\(^{30}\) Second, the implied term of good faith is concerned with ensuring the consistent treatment of workers.\(^{31}\) The third strand enjoins employers to provide various forms of disclosure to workers or prior consultation in advance of decisions which directly affect them.\(^{32}\) Fourth, the implied term protects the legitimate expectations of workers.\(^{33}\) The final strand addresses the provision of reasonable notice in certain contexts, e.g. where an employer invokes a mobility clause to force a worker to relocate.\(^{34}\) As will become apparent in section 5, what distinguishes the first three strands from the fourth and fifth is the former’s preoccupation with the consistent treatment of workers in the abstract, whereas the abiding


\(^{30}\) For example, in *Gogay v Hertfordshire County Council* [2000] IRLR 703, *TFS Derivatives Limited v Morgan* [2005] IRLR 246 and *Land Securities Trillium Ltd. v Thornley* [2005] IRLR 765, where the exercise of suspension, garden leave and flexibility clauses in employment contracts were regulated.


\(^{33}\) *French v Barclays Bank plc* [1998] IRLR 646.

\(^{34}\) *United Bank v Akhtar* [1989] IRLR 507.
concern of the latter seems to be to differentiate between workers in a manner which achieves a more substantive form of equality,\(^{35}\) i.e. what amounts to ‘reasonable’ notice will vary from case to case, as will an employee’s ‘legitimate expectations’.

Likewise, we encounter the proportionality standard of review in the context of discrimination law, to which we referred in the previous section 2. According to this standard, an employer must not disproportionately apply a PCP or policy in order to achieve a legitimate aim if it puts or would put employees of a particular protected characteristic (such as sex, race, disability, etc.) and the employee claimant specifically, at a particular disadvantage.

This particularly intensive proportionality standard of review can be contrasted with the more forgiving (from the employer’s perspective) rationality and range of reasonable responses standards. First, the concentration of review of the employer’s conduct or decision-making in the case of the rationality standard is somewhat lax, since it requires an adjudicator ‘to put [its]elf in the shoes of those making the decision’\(^{36}\) and directs it towards an enquiry as to whether no rational employer would have exercised its discretion in the way that it did, i.e. whether the outcome/decision/conduct was irrational.\(^{37}\) As such, if the employer is able to point to even at least one actual or hypothetical rational employer who has or would adopt the same decision or action as the employer, the claimant will fail to discharge the rationality standard of review. As for the range of reasonable responses standard, this is encountered where the evaluation of an employee’s dismissal for fairness or unfairness is in play in terms of section 98 of the ERA. It entails a (slightly) more exacting concentration of review of managerial conduct and decision-making than the rationality standard insofar as it enjoins an adjudicator to enquire whether the employer’s decision or conduct is one falling within the band of reasonable responses that reasonable employers might take. If the employer’s decision features on the list of responses that a range of reasonable employers would have taken, then the employee will fail to meet the standard of review.


\(^{36}\) *Horkulak v Cantor Fitzgerald International* [2004] IRLR 942 at 950 at para. 51 per Potter LJ.

\(^{37}\) *Commerzbank AG v Keen* [2007] IRLR 132, 136 at paras. 59 – 60 per Mummery LJ.
C. Distinguishing between the Four Standards of Review in Labour Law: Intensity, Fixed/Fluctuating Nature and Determinacy of Outcome

Each of the four standards of review can be distinguished in three ways: first, in terms of the intensity of managerial scrutiny that they entail; secondly, in terms of whether that intensity of review is fixed or fluctuates according to the context; and finally, the extent to which the application of the standard of review gives rise to less or more predictable results in practice.

(i) Intensity of scrutiny

Turning to the first distinguishing feature, it is self-evident that some of the standards of review demand a more concentrated degree of review of managerial action than others. Take the rationality standard, for example. Here, the intensity of scrutiny of managerial conduct and decision-making is relatively forgiving, since the test is whether no rational employer would have acted in the way that the employer did in the case in hand. It is incomparable to the level of interference in the employer’s prerogative powers exerted by the range of reasonable responses standard of review which is much deeper and context-dependent, varying in accordance to the weight attached to certain objective and subjective considerations. Likewise, whilst the proportionality standard does not empower adjudicators to substitute their own judgement for that of employers, it does invite them to engage in a more intrusive review of the employer’s practices than that of the ‘range’ and the irrationality standards. The degree of intrusion associated with the proportionality standard is protean and depends on a number of variables, including the relative strength of the legitimate aims of the employer, the extent to which the challenged managerial policy or practice is appropriate and necessary to achieve that legitimate aim, or whether a less restrictive alternative could have been adopted, as well as the concomitant harm suffered by the employee. In this regard, a hierarchy of standards of review

38 For example, the following criteria will be taken into account pursuant to the range standard: whether the employer is small or large in size, whether the employer has access to a broad or limited range of financial and other resources, whether the employer is situated in the public or private sector, whether it recognises a trade union or does not, etc., on which, see the reference to the size and administrative resources of the employer in section 98(4)(a) of the ERA.
can be constructed according to the relative intensities of scrutiny of managerial conduct and decision-making.\(^3^9\)

(ii) Fixed and fluctuating intensity

As for the second distinguishing attribute of standards of review, we should keep in mind that the depth of scrutiny associated with each of them is not always uniform; some standards will involve the application of a fixed intensity, whereas the intensity applied by others will vary on a context-dependent basis. There are a variety of reasons for articulating this caveat, one of which – as will become clearer – is that the latter fluctuating standards are more complex and potentiality piercing in their operation and penetration. For example, if we take the rationality standard, this is without doubt, fixed: either there is at least one actual or hypothetical rational employer who has or would adopt the same decision or action as the employer, or there isn’t. As such, the application of the rationality standard will point to a single identifiable threshold for employer liability and admits of no self-modulation pursuant to fact-specific factors. An unwavering threshold for liability obtains in all cases which is operative irrespective of the context or the concrete vulnerabilities or peculiarities of the employer and/or the employee.\(^4^0\) However, this is not so in the case of the proportionality standard, which is


\(^4^0\) It should be stressed that the rationality standard of review is not ‘fixed’ in the sense of a rule. Rather, it is fixed in the sense that the intensity of scrutiny associated with that standard of review will always be the same, irrespective of the case. The distinction can be drawn by an illustration. For example, consider a rule that the dismissal of an employee will be unfair if an employer dismisses for the reason that the employee has thrown a paper aeroplane at the Chief Executive of the employer. The operation of this rule is such that the employer is liable for unfair dismissal if the evidence shows that a paper aeroplane was launched at the Chief Executive, and it is not liable if the evidence reveals the opposite to be true. A particular trait of a rule is its ex ante precision and the lack of judicial discretion in its application. It is for that reason that we say it is ‘fixed’ or ‘rigid’ in the sense that it involves a binary choice: whether the first or second variable will prevail in a competition is dependent on the facts. Standards of review, however, are drawn at a more peremptory level of normativity, with language such as ‘rational’, ‘proportionality’, ‘reasonableness’ and ‘good faith/trust and confidence’ in play. If we modify the illustration, consider a law which provides that an employee’s dismissal will be unfair if no rational employer
characterised by a fleet of foot that allows it to internally adjust itself to impose variable depths of scrutiny of management depending on the context. Where the ‘range’ and proportionality standards part company from the rationality standard is that they both entail a context-dependent and fluctuating intensity of scrutiny of the managerial prerogative. In the case of the proportionality test - which is two-dimensional in the sense that having established a rational connection between the managerial policy and the employer’s legitimate aim and that a least drastic means of achieving that aim was not available to the employer, an adjudicator must evaluate the harm done to the claimant employee as well as the criticality of the requirements of the defendant employer - the more harmful the experience suffered by the claimant employee (or the constituency or group of which the employee forms part) as a result of the employer applying a PCP in the workplace, the more pressing it must be for the defendant employer to apply the PCP in order to achieve a legitimate aim or objective. Thus, in each case, the greater the harm caused to the employee, the more intense the court’s scrutiny will be. Generally, where fundamental and human rights are at stake, the employer’s justification for the PCP must

would have dismissed the employee for the reason that the employer invoked for the dismissal. If the employer cites the employee’s conduct in throwing a paper aeroplane at the Chief Executive, the court must exercise a value judgment ex post facto in adopting the rationality standard of review: would no rational employer have responded with dismissal in such a case? However, the discretion afforded to the court in adopting that judgment is not as limited as in the case of the rule, but it is fixed in the sense that the question is always whether no rational employer would have decided to dismiss in the way that the employer did in the same set of circumstances. Of course, the facts of the case may change, but the level of scrutiny associated and brought to bear on the rationality of the dismissal will not.

41 See Eweida v BA [2010] ICR 89 where the Court of Appeal held that where an employee complains of indirect religious discrimination, the harm may be minimal where the employee was the sole victim of the managerial policy or practice, e.g. where the employee is a sole believer and the general constituency of adherents to the same religion do not share that belief, on which, see N. Hatzis, ‘Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination’ (2011) 74 Modern Law Review 287 and Mba v Merton London Borough Council [2014] 1 WLR 1501, 1513-1514 per Elias LJ.

42 Barry v Midland Bank plc [1999] 3 All ER 974 at 984h–j per Lord Nicholls of Birkenhead and R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, 3246B–3251E per Mummery LJ.
be extremely pressing.\textsuperscript{43} Therefore, the proportionality standard of review is an illustration of a legal concept where the particularities of, and impact on, the employee is taken into account to dictate the liability or non-liability of the employer.

We can make exactly the same point in the case of the ‘range of reasonable responses’ standard of review in the law of unfair dismissal, which specifically enjoins employment tribunals and courts to take into account the size of the employer and administrative resources available to it when evaluating whether its decision to dismiss was reasonable in the circumstances.\textsuperscript{44} Although the range test is a fluctuating standard of review and also self-modulating in terms of the intensity of review of managerial conduct, unlike the proportionality standard, it is one-dimensional in its focus, since it generally ignores the effect of the employer’s decision to dismiss on the employee and instead concentrates on the practices of the employer and reasonable employers generally.\textsuperscript{45} The same ‘self-modulating norms’ point can be made about the aforementioned good faith standard applied pursuant to the implied term of mutual trust and confidence inasmuch as its ‘bite’ will vary according to the employment relationship concerned, rather than by reference to the labour market in general, e.g. the ‘legitimate expectations’ and ‘reasonable notice’ strands of the good faith standard discussed at (C) (ii) above.


\textsuperscript{44} ERA, s. 98(4)(a).

\textsuperscript{45} However, where the consequences of a dismissal are severe for the employee, e.g. where it has or is likely to result in the employee being disbarred or disqualified from practising a profession, the range standard is sufficiently flexible to accommodate a two-dimensional approach to enjoin adjudicators to take into account the added dimension of the gravity of the implications of a dismissal. For example, see Moncrieffe v London Underground Ltd. (EAT, 20 January 2017), A v B [2003] IRLR 405, Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 and Turner v East Midland Trains Ltd. [2013] ICR 525, 541C-F per Elias LJ where it was decided that the severity of the harm to, and severe consequences for, the employee may be taken into account in deciding whether the decision to dismiss fell within the range of reasonable responses.
(iii) Determinacy of results

The final differentiating factor between standards of review concerns the relative determinacy of the outcome of their application in any given case. Whilst it is trite to point out that rules are more predictable in their application than standards of review, it is also true that we can hazard a much more intelligent guess as to the result of applying some standards of review over others. If we turn to the rationality standard, its small print enables us to estimate how it will generally play out in the majority of cases where it is in issue. In light of the improbability of a court ruling that no real or hypothetical employer would have acted in the same manner as the employer in the case, we can predict that most employees who have to negotiate this standard of review are unlikely to succeed in their legal claim. However, not so in the case of the proportionality standard of review. The lack of certainty associated with the proportionality standard is compounded by its two-dimensional functional operation: not only does the guesstimator have to evaluate how pressing the employer’s need to apply the PCP in issue must be, but he/she must also assess the harm caused to, and the impact of the PCP’s application on, the employee. In this way, it is possible to sense how more indeterminate in outcome the engagement of the proportionality standard can be in comparison with the rationality standard.

D. The Hierarchy of Standards of Review in Labour Law

Each of the standards of review can be charted in terms of a hierarchy in the abstract, e.g. with proportionality exerting the most searching degree of scrutiny of managerial conduct, followed by the good faith standard, then the range of reasonable responses test, with the rationality basis of review at the bottom. One of the questions is whether it is desirable and feasible for an area such as employment law to apply such a broad variety of differing standards of review. For example, there is a concern that in certain factual contexts:

(1) a standard that ought to be fixed in its intensity may instead be treated by the courts as one that oscillates, and that

---

46 Commerzbank AG v Keen [2007] IRLR 132, 136 at paras. 59 – 60 per Mummery LJ.
(2) different standards of review may be conflated on occasion,\textsuperscript{47} including in circumstances where more than one standard is invoked in a single legal claim.\textsuperscript{48}

This gives rise to the anxiety that the law can be applied:

(a) inconsistently, e.g. with the conduct of larger or better resourced employers reviewed on the basis of heightened intensities of scrutiny;

(b) incoherently, e.g. inasmuch as the law imposes adverse mental gymnastics on the courts and tribunals and sends mixed signals to employers about the expectations it has regarding the applicable and appropriate level of scrutiny of their conduct and/or decisions; and

(c) without impartiality, e.g. that the application of each of the standards of review in an inconsistent manner leaves the law open to the accusation that it is biased and partial in its operation.

However, rather than make the case for various reform options, e.g. for (1) a limited amount of alignment, according to the similarity of the employment rights attracting the standards of review, or (2) the wholesale assimilation of standards, e.g. to the proportionality (or some other) standard,\textsuperscript{49} this debate is parked at this juncture and will be revisited later in the

\textsuperscript{47} See for example, the view advanced by Lord Justice Elias that the range of reasonable responses standard could fluctuate in the same two-dimensional manner as the proportionality standard, which was used as a justification to reject the application of the latter standard in a particular case: \textit{Turner v East Midland Trains} [2013] ICR 525, 541C-F per Elias LJ. Contrast this with \textit{Hardy & Hansons plc v Lax} [2005] EWCA Civ 846; [2005] ICR 1565, where the Court of Appeal was critical of the attempt by counsel to conflate the range of reasonable and proportionality standards of review.

\textsuperscript{48} For an overt example of the conflation of the proportionality and range of reasonable responses standards in a single claim, see \textit{Bolton St Catherine’s Academy v O’Brien} [2017] EWCA Civ 145; [2017] ICR 737, 756A-G per Underhill LJ.

discussion. Instead, first, we focus on the dual role of labour law in addressing (i) labour market failures and (ii) concrete vulnerabilities and imperfections in the operation of specific employment relationships.

4. Systematic Failures in the Labour Market and Internal Vulnerabilities in Employment Relationships

One of the insights to be drawn from recent debates concerning the relative importance of concepts such as ‘subordination’ and ‘domination’ to labour law, has been the elevation of the significance of the distinction between group/economic subordination and the structural dependency of the worker/employee on the one hand, and the latter’s individual subordination and dependency on the other. Group/economic subordination and structural dependency encompass the reliance of employees on wage labour for subsistence and a living and the entrenched disparity in the distribution of resources between employers and employees in the marketplace. This can be contrasted with the latter two variables of individual subordination and dependency which embody the internal and customised vulnerabilities experienced by employees pursuant to their specific labour relationship. Whilst the two features of group/economic subordination and structural dependency are present in every employment arrangement struck between an employer and an employee, they are 'external' to their private law bargain in the sense that they are invariably integrated into every relationship at more or less the same level of intensity, i.e. as a numerical 'constant', and a kind of 'background

---


52 See section 5 for a detailed explanation.
noise’. An additional feature is the plural nature of these two variables, which lies in stark contrast to the individualistic nature of the subordination and dependency elements. That is to say that in the abstract, both of these elements apply universally to all employment relationships.

The group/economic subordination and structural dependency factors are closely connected to routine failures or imperfections experienced by employees in the labour market: like all markets, the labour market is subject to general systematic failures. We can evoke five of these imperfections which we discuss in turn, namely (i) informational imbalances, (ii) labour market entry and exit barriers, (iii) transaction costs, (iv) coercive or opportunistic employer behaviour, and (v) bounded rationality:

(i) Labour relationships are routinely marred by informational imbalances with employers enjoying greater expertise and access to and understanding of the mechanics and operation of the relevant labour market, as well as the information and knowledge available relative to that market. For obvious reasons, this places the employee in a disadvantaged position relative to their employer;

(ii) Likewise, entry and exit barriers to labour markets, such as eligibility, qualifying and probationary conditions, lengthy notice periods, garden leave and non-compete clauses, etc. tend to impact negatively on employees in comparison with analogous provisions (if any) binding employers. The negative effects on employees can be attributed to the latter’s greater resources;

(iii) As for transaction costs – such as the search costs of bringing the employer and employee together, the costs of the contract negotiation, writing and adjustment

53 Of course, the group/economic subordination and structural dependency characteristics are not unique to employment and it is uncontroversial to assert that they can also be found in consumer, franchising and other private relationships. For example, franchisees are generally structurally dependent on the franchisor and subordinate as a group in economic terms to the latter as a constituency.

54 In the sense that they impact upon workers as a group in the abstract.
processes and the costs of contractual monitoring and enforcement\textsuperscript{55} – these tend to adversely affect the employee much more than the employer. Whilst the searching process and acceptance of employment terms may seem to cost the employee nothing, they will do so in the long run insofar as the employer will pass them on indirectly to the employee in terms of reduced pay or benefits, deferred promotion, etc. And as a matter of course, employers will have access to greater resources which can be brought to bear on the negotiation process to elicit the contractual terms most favourable to their managerial interests;

(iv) As repeat players in the labour market and monopsonistic hirers of labour,\textsuperscript{56} employers are also prone to engaging in coercive or opportunistic behaviour to the detriment of their employees. Such coercive or opportunistic conduct can involve the inconsistent treatment of workers, e.g. where colleagues enjoy enhanced payments for a form of leave, but an employee is refused the same enhancement on arbitrary grounds;

(v) As demonstrated by behavioural economics, the average employee will labour under a tendency to make irrational decisions based on the limited amount of time available for decision-making, the inability to make future plans owing to the fallibility of past experience and the general lack of awareness caused by inherent limitations in human cognitive functions.\textsuperscript{57} This phenomenon is


referred to as ‘bounded rationality’. One recent example of a legal response to ‘bounded rationality’ in the workplace is the ‘default’ requirement for employees to contribute to an auto-enrolled pension scheme set up by their employers. This statutory measure is directly justified by the tendency of employees to act irrationally and not save for their retirement unless ‘nudged’ to do so.58

In many ways, these systematic failures are not unique to labour markets, and are equally present in consumer markets. But the fundamental point about each of them is that although they may be depicted as factors that tend to show that labour markets are not perfectly competitive59 or functioning properly, they are not unique market characteristics and are ‘external’ to particular labour relationships in the sense that they are not attributable to, or a by-product of, personal interactions between an employee and employer in terms of a specific employment contract.

Unlike structural dependency and group/economic subordination, the two variables of individual subordination and dependency are internal to the relationship of the parties. The degree of individual subordination and dependency experienced by the employee will vary according to the particularities of the employment contract, including the sort of relationship they have with their line manager or other management. Hence, it will be conditioned by the unique behavioural traits of the parties, managerial personalities and the terms and conditions agreed upon, as well as the workplace context within which the relevant management practices are applied and the two parties contract. Unpacking this observation, we can identify two main points:


First, we can contrast the abstract and systematic labour market imperfections with the tripartite categorisation of concrete employment-relationship vulnerabilities and failures put forward by Davidov. Whilst not intended to be exhaustive, we can evoke the (1) democratic deficits experienced by employees in the sense of the varying degrees of inability to influence, shape or exert voice in respect of managerial decisions which affect their terms, conditions and the performance of their work,60 (2) the social and psychological reliance of the worker on the work offered by employers for personal relationships, e.g. the social sense of well-being and societal participation and belonging that comes from work61 and (3) the economic dependency personal to each employee insofar as they have no ability to spread their risks and invariably have ‘placed all their eggs in one basket’ in having relied financially on one employer.62 This trio of vulnerabilities will be present in most employment contracts but it is a matter of degree how deep or intense they will be in any single case. Where a labour relationship is characterised by one or more of these factors, there is an argument that an authority or power ought to step in to police matters.

Labour laws not only regulate for vulnerabilities in identifiable individual employment relationships but also act directly on informal and formal practices of the employer and certain contextual situations. The collective wisdom of society has accepted that certain workplace practices, situations or contexts ought to be controlled or scrutinised more strictly than others. For example, discriminatory practices, infringements of human rights, redundancies, forced relocations, etc. are treated by labour laws as giving rise to the potential for great harm to employees and deserving of special attention and stricter regulation.

The task of policing employment relationship-specific vulnerabilities and particular managerial practices and factual contexts can be distinguished from the regulation of general labour market imperfections. Both of these regulatory undertakings form an integral part of the function of

labour laws. But, of course, one of the key questions is ‘how’?  

This takes the discussion back to the various forms in which legal directions or commands may be expressed, e.g. rules or standards of review and in section 5, we go on to discuss the benefits and utility associated with differing standards of review in tackling concrete vulnerabilities and imperfections in the operation of specific employment relationships.

5. Tackling Systematic Failures in the Labour Market and Internal Vulnerabilities in Employment Relationships: The Role of Labour Law

A. The Role of Rules and Standards of Review in Labour Law

The starting point for this discussion is the observation that, like all markets, the labour market is subject to systematic failures. Labour laws are occasionally justified by economists in such general terms. In other words, that labour law is designed to ‘cure’, eradicate or curtail such market imperfections. Indeed, that is one of the premises underpinning the ‘law of the labour market’ account of labour laws.  

This formulation points to the claims made by successive governments to the effect that the function of labour law is labour market regulation, e.g. that it has an essential role in addressing the adverse market and social costs produced by the systematic market failures identified in section 2. These labour market failures map on smoothly to the two features of group/economic subordination and structural dependency of the worker/employee that we noted in section 4 are present in every employment relationship between an employer and an employee, and are ‘external’ to their contractual arrangements.

Indeed, it is true up to a point that labour laws can be conceived in such abstract terms, whereby only general market failures are the target of its focus. But it does not capture the full picture, since it is ‘very difficult to make a more concrete connection between existing

63 [Specify what we mean by the ‘function of labour laws’ here.]

64 Another question is ‘why’? However, space does not permit us to engage in a discussion about the normative justifications for labour laws, whether moral, economic, social, or political in nature.

[specific] labour laws and concrete market failures’. Davidov argues this point by reference to labour legislation which gives workers the benefit of ‘ten vacation days’ and a nine-hour limit on daily working time. In other words, why ten days and not fourteen days, and why nine hours instead of ten hours? That is to say that we cannot guarantee that ten holidays or a nine-hour daily limit on working time will produce a perfectly competitive market in the case of every employment relationship, which is exactly what we must assume would be the outcome if all labour laws can be conceived of as having the limited purpose of correcting general market imperfections.

This article makes the argument that there is a marked relationship between fixed and rigid rules of labour law and abstract market imperfections. Take, for example, the rules of labour law enjoining employers to disclose information to employees, such as the reason for an employee’s dismissal (ERA), the fact that the employer is exercising its right to terminate/dismiss, details of opportunities for promotion or permanent recruitment, or the reason for a particular monetary figure chosen as a bonus payment, etc. These fixed disclosure rules are designed to track the general market failure of information asymmetries in the employment relationship and attempt to offset natural informational imbalances capitalised upon by employers. These rules achieve this by providing employees with enhanced knowledge and understanding of management decisions. However, they only go so far, since they assume that all employees – no matter how vulnerable, dependent or subordinate to their employers – will benefit from such information, when in reality, such disclosures are likely to be of marginal benefit to employees in more precarious relations. Likewise, take the example of the implied good faith term of mutual trust and confidence, part of whose remit is to insist on consistent treatment in like cases in a rule-like manner, e.g. the breach of that term where an employer fails to give the employee new contractual terms affording an enhanced redundancy package which has been offered to all other permanent employees.


67 ERA, s. 92.


69 *Visa International v Paul* [2004] IRLR 42.


71 *Commerzbank AG v Keen* [2007] IRLR 132, 136 per Mummery LJ.

However, many labour laws are also concerned with the reduction of employment relationship-specific failures or managerial practices and workplace contexts or situations. In other words, case by case factors such as employee vulnerabilities, dependencies or the degree of subordination that are/is particular to specific employment relationships, including the resources and size or sophistication of the employer and the practices of management which may give rise to the arbitrary treatment of workers in connection with managerial decisions, e.g. redundancy, demotion, dismissal, promotion, forced relocations, hiring, etc. To recap, Davidov pinpointed three illustrations of such employment-specific vulnerabilities, namely the psychological and social reliance of employees on their job, their inability to spread their risks across a number of employers and the democratic deficits and economic dependency they experience. It is in respect of such specificities that we can recognise a tangible connection with the standards of review and in particular, the oscillating and self-modulating standards of review discussed in section 4, such as the proportionality, range of reasonable responses and good faith standards. This point can be illustrated if we invoke the implied trust and confidence or good faith contractual term.\(^{73}\) The open-textured character - in its content and operation – of the standard of review associated with this implied term suggests that it harboirs an abiding preoccupation with specific employment contracts: if the degree of arbitrariness in discretion enjoyed by the employer in a relationship 1 is greater than that available to an employer in the context of a relationship 2, the content of the controls exerted by the implied term in the case of these two employment contracts will vary, with a higher weighting in the case of 1. In such a case, the potential for employer abuse in the labour market generally or in the abstract is not the specific target of the implied term of mutual trust and confidence. Instead, it is the particularities of the relationship, such as the imbalances in the contractual terms, the employee’s relationship with management and the impact of certain workplace practices, that are controlled by the good faith term. Likewise, the same point applies in the case of the ‘reasonableness’ strand of the good faith standard in those cases concerning its regulatory role in respect of mobility clauses and forced relocation, where what is ‘reasonable notice’ to

\(^{73}\) For a much broader discussion of ‘fairness’ in the common law of the employment contract, see A. Sanders. “Fairness in the Contract of Employment” (2017) 46 Industrial Law Journal 508.
relocate will vary from one employer to another. The same can be said about what constitute the ‘legitimate expectations’ of an employee. All of this simply drives the point home: that the ‘good faith’ standard in labour law, just like all standards of review, will govern and act directly upon the particularities of an employment relationship to produce a legal outcome.

So far, so good, but what is the significance of these observations? The answer is that the point made in passing in the preceding paragraph about the ‘open-textured character’ of labour laws crafted as self-modulating standards of review – and their role in acting directly on the particular vulnerabilities experienced by the employee to generate tailored outcomes – rather gives the game away. That is to say that unlike standards of review, legal commands that adopt fixed and rigid rules to confer employment rights can be conceived of as acting directly on the aforementioned ‘external’ factors of structural dependency and group/economic subordination. They do so by attempting to dislodge or minimise the informational advantages wielded by the employer over the employee, e.g. via duties of disclosure. Other labour market imperfections of a general nature will also be curtailed by rigid rules of labour law, as follows:

(1) part of the explicit transaction costs associated with negotiating, writing and enforcing employment contracts are addressed by the statutory obligation imposed on employers to provide employees with the main particulars of their employment and the common-law default rule that the contract is of open-ended duration.

---


76 ERA, ss 1-3.

77 De Stempel v Dunkels [1938] 1 All ER 238, Richardson v Koefod [1969] 1 WLR 1812; and McClelland v Northern Ireland General Health Services Board [1957] 1 WLR 594. C. L. Estlund, “Why Workers Still Need a Collective Voice” in C. Estlund and M. L. Wachter, (eds), Research Handbook on the Economics of Labor and Employment Law (Cheltenham, Edward Elgar, 2012) 474. If the default rule was the ‘annual hiring’ (as it was historically), the employer would incur search, negotiation, writing and enforcement costs every year in respect of the fresh supply of labour.
(2) the bounded rationality of the parties by rules prescribing disclosure and other mandatory norms of a paternalistic hue such as mandatory legal or trade union advice on signing a settlement agreement on dismissal, redundancy, etc;\textsuperscript{78}

(3) barriers to admission to, and exit from, the labour market by measures such as anti-discrimination laws,\textsuperscript{79} the common law ‘freedom to quit’ rule\textsuperscript{80} and the ‘unrestricted reasonable notice’ rule;\textsuperscript{81}

(4) the potential for opportunistic or coercive behaviour on the part of management will be minimised by just cause dismissal laws\textsuperscript{82} and statutorily imposed contractual terms and conditions in the guise of, for instance, the National minimum wage,\textsuperscript{83} restrictions on working time\textsuperscript{84} and the right to equal pay.\textsuperscript{85}

However, unlike the employment rights listed above that are cast in the form of rules, standards of review involve the application of disparate intensities of scrutiny of managerial decision-making, from more heightened to lower concentrations of review. In particular, the standards of review that are configured in a self-modulating way – such as the proportionality, range of reasonable responses and good faith standards – are optimally designed to act as a form of legal command that addresses such special dependencies, subordination and vulnerabilities. This is both a descriptive and prescriptive claim to the effect that standards with fluctuating intensities of review do as a matter of actual fact, and ought to in terms of the pursuit of certain values, subject such vulnerabilities to scrutiny even in spite of market

\textsuperscript{78} ERA, s. 203(3), (3A), (3B) and (4).

\textsuperscript{79} Equality Act 2010.

\textsuperscript{80} \textit{Nokes v Doncaster Amalgamated Collieries Ltd.} [1940] AC 1014, 1018–1033 per Viscount Simon and Lord Atkin.


\textsuperscript{82} ERA, Parts X and XI.

\textsuperscript{83} National Minimum Wage Act 1998, s. 17.

\textsuperscript{84} Working Time Regulations 1998 (SI 1998/1833) reg. 4(1).

\textsuperscript{85} Equality Act 2010, s. 66(1) and (2).
stability. These fluctuating norms are crucial in demonstrating the match in the normative connections between standards and the internal vulnerabilities and particular factual contexts. The emergence of these normative propositions may be attributed to the inherent flexibility and in-built sensitivity of these standards of review – as noted by Davidov in the first and second characteristics of ‘flexibility’ and ‘adaptability to change’ discussed in section 2 above - as well the degree to which they may be finely attuned to the characteristics of employment relationships. The application of standards of review enable adjudicators to customise judicially prescribed normative solutions to the factual context and vagaries of each contractual engagement. In effect, we can compare the parity-enhancing consequences of the application of rules of labour law with that of standards of labour law that ensure the unequal treatment of workers. To put the point more forcefully, standards have the capacity to generate disparities in the treatment of workers, and thus confer preferential treatment, particularly, but not exclusively in the case of workers’ human or fundamental rights. For instance, other significant workplace contexts such as alleged discriminatory behaviour, unfair dismissal, forced relocation or arbitrary managerial conduct will also be covered. In essence, the conclusion can be drawn that standards of review are an inherently relational and contextual form of regulation of managerial behaviour.

B. Testing the Hypothesis with a ‘Notional Quantification’ Thought Experiment

Some may dismiss the argument advanced in this paper that only rules will have an impact on (i) the general imperfections present in the labour market, whereas standards will also regulate (ii) the specific dependencies and vulnerabilities experienced by employees. At the root of this objection is the proposition that both rules and standards will have a behavioural impact on employers generally in the labour market and particular employees and employers more specifically, and to argue otherwise is nonsensical. There is the additional counter-argument that we can always re-characterise how standards of review are applied to argue that even when they look like they are regulating concrete vulnerabilities, they are in fact performing the func-

86 For a discussion of the importance of clarifying whether a proposition is descriptive or normative, or both, see A J Kolber, “Ten Commandments for Legal Scholars” (Paper on File with Author).

87 This is not to argue that only standards of review serve some function other than correcting market failures, as it is accepted that other labour law norms may also do so.
tion of correcting general labour market failures. In particular, it could be argued that the proportionality standard was recognised as part of labour law to incentivise workers to accept jobs and keep the market stable. The question is whether and how the central claim advanced in this paper can be defended by providing an explanation why this sort of intellectual move is unfounded.

Although possessing the attraction of simplicity and cogency, careful analysis suggests that these points are likely bankrupt. In order to substantiate this observation, we have to do two things: first, accept the point that rules and standards can be clearly distinguished depending on the accessibility, adaptability and determinacy of a legal command. Secondly, we must also engage in an exercise involving the ‘notional quantification’ of the costs associated with (i) general imperfections arising in the labour market and (ii) the individual vulnerabilities experienced by employees in their particular employment relationship. We can then examine how employers are likely to respond to comparatively accessible rules on the one hand, and inaccessible standards on the other, that are intended to suppress such costs. For example, we have noted that general labour market failures consist of transaction costs, which we will call (A), informational deficits (B), opportunistic behaviour (C), bounded rationality (D) and entry/exit barriers (E). If we assume that the costs attributable to each of these imperfections (A) to (E) can be expressed as a mean figure in a particular sector of the economy, e.g. financial services, then we can aggregate each of (A)+(B)+(C)+(D)+(E). The product of this calculation, which we will call (Y), are the costs associated with the general level of market failure in the financial services industry articulated in approximate numerical terms. The same exercise can be repeated for other sectors of the economy, e.g. construction, tourism, etc. until a figure (Y) is calculated for the costs imposed by the failures in an entire labour market in a given geographical territory. The costs experienced by employees in their specific relationship with their employers can then be contrasted against this general cost index (Y) and expressed as (X). It should be stressed that the costs of (X) will track the general index (Y), but this will not necessarily always be the case, i.e. the value of (A) to (E) in the case of a particular employment relationship may be higher than (Y).

Turning to the relevance of rules and standards in this context, let’s imagine that Parliament adopts a rule which is of universal application to all employers. Given its inherent precision, accessibility and determinacy of outcome, most employers in the financial services
market in the UK understand the rule and adjust their practices *ex ante*\(^{88}\) so that the rule acts directly on one or more of the variables (A) to (E), depending on the context. The end result is that (Y) will reduce in value. An illustration will suffice. If we imagine that (Y) is valued at the figure 30 and the rule imposed provides that every employee must be given 20 days’ paid annual leave, this will minimise the scope for the employer to engage in opportunistic behaviour (C) and perhaps mitigate the transaction costs (A) and informational deficits (B) experienced by the employee. Thus, most employers in the labour market will modify their behaviour *ex ante* and (Y) will lower, say to the figure of 29.8. Of course, some employers may fail to comply, but they are unlikely to be numerous. If non-conforming employers are sued after the adjustment of (Y) from 30 to 29.8, lose the case, and then modify their practices to comply *ex post facto*, this isolated case is unlikely to have any effect on (Y), as it involves a single employer.

We can repeat this exercise for a standard of review, but what is striking is the degree to which the outcome will likely differ. When standards are introduced into the law, the extent to which they will have a depressive impact on transaction costs (A)-(E) in the labour market will be unknown: such is their relative inaccessibility, open-textured nature and indeterminacy of outcome. Seen from this perspective, at their inception, the scope for employers to change their behaviour *ex ante* on the coming into force of standards of review is attenuated at best, or negligible at worse. Instead, the standard’s direction of attention is oriented naturally towards the regulation of the behaviour of specific employers in a particular context, which is an exercise that will be deferred *ex post facto* to a court or tribunal. The self-oscillating nature of standards of review such as the range of reasonable responses, proportionality and good faith standards underscores this point, in the sense that the extent of their regulatory impact cannot be quantified very easily in the abstract *ex ante*. In contrast with rules, the rigour of their application may be more or less acute *ex post facto* in any given case of adjudication. For example, an employee \(\Omega\) working for an employer \(\theta\) in the financial services labour market may labour under specific vulnerabilities, such as democratic deficits (F), economic dependency in terms of an inability to spread his risks (G) and social and psychological reliance on the job (H). In this event, although the value of (Y) is 30 generally in the labour market in financial services, the total costs (X) experienced by the employee \(\Omega\) (to recap, the value of (A) to (E) in the case of \(\Omega\) and \(\theta\), and as such (X), may track, or be higher than (Y)) will be higher

---

88 The term ‘*ex ante*’ is used here in the sense of ‘prior to any legal claim’.
than (Y) valued at 30, e.g. say θ’s (X) is the figure of 34. If employee Ω raises legal proceedings in a court or tribunal which invokes an employment right entailing the application of a standard of review and succeeds *ex post facto* in her legal claim, we can envisage that standard functioning in a unique way on θ to suppress the value of (X) *ex post facto*. For example, employee Ω succeeds in her claim and (X) falls to the value of 31 owing to an accompanying suppression of democratic deficits (F), economic dependency (G) and social and psychological reliance (H) in that particular relationship, which remains higher than the value of (Y) which is 30. But, the nub of the matter is that notwithstanding the reduction in (X), of itself, this is unlikely to have any mitigating effect on (Y). It is only θ that the standard of review has impacted upon. There will be no effect on the structural and systemic labour market imperfections: Ω’s achievement in changing θ’s behaviour is a drop in the ocean in comparison with the entire financial services labour market. Even in the face of Ω’s victory and the provision of court guidance on the features and operation of the standard of review in that case, other employers will nonetheless be cautious in adjusting their conduct to account for the standard of review. It will only be where the stage is reached that the court’s jurisprudence on the functioning of the standard of review achieves such a degree of clarity that it is finally transformed into a rule and employers across the industry respond accordingly to change their behaviour. At that point, (Y) will adjust in a downwards direction.

6. *Significance of the observation that standards of review are ‘relational-specific’*

There are four significant points which emerge from the fundamental observation that self-modulating standards such as range of reasonable responses, proportionality and good faith (i) act directly on certain vulnerabilities and dependencies that are particular to employees in their own employment relationships and consequently (ii) confer a licence on employees to demand disparate and preferential treatment in certain circumstances. Two of them operate at the level of the justificatory criteria for labour law as a discipline, whilst two function at a less abstract level.

A. *Universal and Selective Justifications for Labour Law*

The first implication of the principal point made in this article lies in the light it can shed on the utility of *universal* justifications for labour law, i.e. justifications that include pluralist concerns, such as the rights of the public, consumers, economic efficiency by regulating the labour market, etc. Take the ‘law of the labour market’ account as one illustration. If it is accepted that labour law norms in the form of standards of review serve to – and ought to serve
to – tackle the scope of, and opportunity for, special employee vulnerabilities to arise in the context of employment relationships or to control certain workplace practices or circumstances where the potential for harm to be done to employees is great, then we can chip away at the some of the strength associated with the claim that this branch of the law functions, and ought to function, to promote societal, public, political and economic interests in utility and welfare that are much broader than those of workers alone. This argument, of course, also requires us to distinguish the actual function that labour law performs from its proclaimed or intended function of ‘labour market regulation’ that has been articulated by successive UK governments, and it is the former with which we are concerned in this context. But how do we get from the point that labour law in actual fact performs a relational-particular regulatory role to the proposition that this calls into question the normative claims of universal theories? Are we not making the fundamental error of taking a descriptive proposition – to the effect that the existence of standards of review in labour law demonstrate that labour law, in reality, operates to regulate something more than general market failures – to make a normative claim that universalism may be suspect? No, because our claim is prescriptive as well as descriptive, which can thus justify the separate normative claim that the purchase of universalism rests on shaky grounds.

If it is accepted that claims in favour of a universal justification have been shorn to some degree by this argument, then it may be warranted to advance more selective goals for labour law regulation that further such narrower sectional concerns. If we recognise that a greater intensity of review of management conduct or decisions that are associated with a standard of review – such as the proportionality or range of reasonable responses standards – is justified where the fundamental or human rights of a worker are at stake (as opposed to his/her economic or political interests), then the commercial freedoms of the employer and the

---


wider efficiency gains connected with the exercise of such freedoms must give way. Once again, here we can see that labour law restrains the economic prerogatives of the public and wider society.

The relationship between standards of review and case by case factors also offers up useful insights into some of the variables that any general justification for labour law – descriptively and normatively – ought to take into account. Any search for a univocal justificatory theory for the discipline\(^\text{92}\) – insofar as that is an achievable objective\(^\text{93}\) – must factor in the relational and contextual nature and role of standards of review. For that reason, theoretical explanations of labour law that are based on notions such as individual subordination and dependency,\(^\text{94}\) personal capabilities\(^\text{95}\) and relational-particular domination\(^\text{96}\)

\(^\text{92}\) Some of the reservations associated with quests for the discovery of an abstract justification for a discipline are versed in B Bix, “The Promise and Problems of Universal, General Theories of Contract Law” (2017) 30 Ratio Juris 391.

\(^\text{93}\) The author is agnostic as to the possibility of ever being able to identify a general justificatory theory for labour law.


hold a greater degree of promise as descriptive and normative accounts of the field, since their internal grammar and constituent variables are nuanced enough to cater for the sensitivities of the diverse range of employment relationships, including the variety of contexts and environments within which such relationships can operate. This can be used to distinguish more structural-based justifications for the subject, which instead emphasise its part in breaking down market-generated inequalities.

B. Other Insights

The role of standards of review set out in this paper casts doubt on the concerns raised by some commentators about the divergent intensities of scrutiny associated with each of the standards identified in labour law. As noted in section 3, the principal concern with a hierarchy of scrutiny of standards of review is that they can give rise to confusion on the part of management, employees and courts. This is particularly germane where differing standards are invoked in the same claim by an employee. Likewise, there is a fear that the very existence of such differing standards betrays an overall degree of incoherence in the law, as well as an anxiety over the inconsistent handling of the standards by the judiciary (e.g. the unjustifiable exchange of a fixed for floating (or vice versa) standard, or the conflation of standards). However, seen in the light of the propositions and perspective advanced in this article, this concern can be dispelled as the case for divergent concentrations of review is arguably a strong one. Whilst there may be some indeterminacy of outcome in their application, the disadvantages are outweighed by the positives associated with tailored regulation. Moreover, as acknowledged by Davidov, when coupled with rules, standards of review in labour law can be concretized into harder patterns on an incremental casuistic basis, giving rise to substantive illustrations and guidance over time.


An additional insight that can be drawn from the preceding discussion is that it provides a justification for the proposition that not all labour laws are, or ought to be, concerned with the equal treatment of workers, i.e. formal equality.\textsuperscript{99} Whilst rules of labour law secure consistency of treatment of workers across the board irrespective of any disparate adverse impact they might have suffered, standards of review secure a measure of substantive equality by sanctioning redistributive arrangements that tailor outcomes to the individual contexts of workers. If we peer at this claim from the particular angle of employment equality/discrimination law, this is perhaps unsurprising since such laws purport to protect the dignity and fundamental rights of individuals. However, when examined from the perspective of traditional labour laws such as unfair dismissal, redundancy, protection of employees on the transfer of their employers’ businesses, maternity leave, etc., this point is much more insightful. It suggests that labour laws configured around a parity of treatment model may be insufficient at best, or inadequate at worst. For example, statutory norms regulating part-time work, fixed-term work and agency work in the European Union adopt the equal treatment model of protection whereby such workers must not be treated any less favourably than permanent, full-time workers who are directly employed. If labour law is a story about achieving something more than simple parity in worker treatment, then an argument can be made that enhanced protection for workers in certain contexts is warranted via legal measures such as standards of review that are particularly attuned to securing preferential outcomes.

7. Conclusion

This article explores how standards of review act directly on certain individual factors that are particular to employment relationships. It seeks to make the point that the actual and normative function of labour laws is to achieve something much more than general labour market regulation. Reflecting on the academic literature that discusses the hallmarks of standards of review in the abstract, Davidov versed the following four special features: ‘flexibility’, ‘adaptability to change’, ‘altruistic potential’ and ‘anti-avoidance’. This article makes the case for a fifth attribute, namely the ‘relational-particular’ nature of standards of review. As a characteristic, it is especially useful in an instrumental branch of the law concerned with the vindication of social rights such as labour law, insofar as it provides a degree of legitimation

\textsuperscript{99} See R (E) v Governing Body of JFS and another (United Synagogue and others intervening) [2009] UKSC 15; [2010] 2 AC 728, 757B per Baroness Hale for a definition of ‘formal equality’.
for the preferential treatment of certain workers over others in specific workplace contexts where this is justified. Indeed, this relational-particular feature teaches us that the claims made in favour of universal theories of labour law may lack a degree of purchase. Moreover, the evidence for ‘relational-particular’ employment laws pushes back against two powerful descriptive and normative claims: first, that labour laws are only – and ought only to be – concerned with ensuring the maintenance of a properly functioning and efficient labour market by eliminating or minimising general failures in that market; and secondly, that labour laws that attempt to go beyond this market-correcting role are misconceived and unwarranted insofar as they impose costs on business, leading to inefficiency in the productive economy and a net reduction in overall societal welfare.