New Zealand Labour Law and Dependent Contractors: time to fill the 'grey zone'

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I Introduction

New Zealand's labour law relating to employment status is inadequate and outdated. How a worker is classified forms the basis for which legal rights and protections they are entitled to. This is a crucial step in ensuring workers are adequately protected from the vulnerabilities they face in their working relationships. Unfortunately, however, "there is a growing discrepancy between the group of workers that need the protection of labour law and those who actually enjoy such protection".[1] Labour laws have not been sufficiently updated in light of dramatic changes in the labour market.[2] New Zealand's labour law framework needs to respond to these changes. This dissertation will focus on New Zealand labour law and the areas in which it is failing to meet its goals. This issue, however, is not isolated to New Zealand as many other countries are grappling with or have implemented change to address the issue. This dissertation will look to countries such as the United Kingdom and Canada which have legislated in response to this issue in suggesting a solution for New Zealand.

An employee is a person who is employed to work for some form of payment under a contract of service, and they are covered by all of the minimum employment rights and protections. An independent contractor on the other hand is a person who is considered to be in business on their own account, and the relationship is generally governed by contract law. In the past, the main difficulty has been to distinguish between these two categories. As Guy Davidov put it, "the distinction between employees and independent contractors has been described as the "cornerstone" of labour and employment laws, but proved difficult to apply".[3] This issue is still prevalent, and New Zealand's current tests to classify workers do not produce clear satisfactory outcomes. As a result, there are many individuals who are not covered by the labour laws they ought to be covered by, and similarly, employers being forced to protect employees beyond what they are needing protection from.

The way work relationships operate has also changed, creating further problems. This is largely due to the increase in utilisation of the gig economy. The gig economy is where

[1] Guy Davidov *A Purposive Approach to Labour Law* (Oxford University Press, 2016) at ch 1 at 2.
[2] At at ch 1 at 3.
[3] Guy Davidov *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection* (2002) 52 UTLJ 357 at 358.

companies contract with independent workers on a part-time basis.[4] Therefore, it is increasingly difficult for courts to analyse these relationships under the traditional employment test.[5] Furthermore, these new types of relationships mean growing numbers of workers do not all neatly fit into the employee or independent contractor category. "Many workers, who in form compromise independent contractors, but in substance function as employees, [are left] in the unsatisfactory predicament that the courts may deny them the benefit of employment protection laws".[6]

This dissertation will argue that it is time New Zealand re-aligns the labour laws and protections with their intended purposes. This dissertation will adopt Davidov's purposive approach to make this argument and suggest a potential solution to the problem. Davidov's purposive approach involves restoring the connection between labour laws and the goals behind them, to address the mismatch between the laws and what they are currently failing to achieve. This approach can assist with identifying the vulnerabilities specific labour laws are intending to protect workers from, and result in ensuring workers are being adequately protected to the extent necessary in any given relationship.

This dissertation has three parts. Part one will explain the purposive approach in further detail and explain through this lens how our current laws are not adequate to fulfil the goals of labour law. Part two will then introduce the 'grey zone' status between the employee and independent contractor categories. As will be discussed, the 'grey zone' contains individuals who have characteristics of both employee and independent contractor status in their relationship, making it unclear what to classify them as. This part will then proceed to illustrate specific issues surrounding the current framework. Part three will then engage with a comparative analysis with other jurisdictions and conclude with a law reform proposal.

Imagine you are running a business ("John's Jobs"). You contract with someone ("Bob") who has his own company and carries out work for you. Bob invoices you for this work. Bob has no employees, and you are his only client. Bob is not obliged to take on the work you offer him, and can choose when to work, where to work, and how many hours per day to work.

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[4] Ben Z Steinberger "Redefining 'Employee' in the Gig Economy: Shielding Workers from the Uber Model" (2018) 23(2) Fordham Journal of Corporate and Financial Law 577 at 579.
[5] At 579.
[6] Hugh Collins "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10(3) OJLS 353 at 355.

Now imagine you are Bob. You are completely economically dependent on the income from John's Jobs to survive. Although you are not contractually obliged to accept their work, in practice you must do so as it is your only source of income. You are not able to negotiate the terms of the contract, as you have no real ability to spread risks and negotiate for a better contract price. Declining a contract with John's Jobs is not a realistic option for you.

As the owner of John's Jobs, you would likely argue that Bob has too much autonomy and freedom to be classed as an employee of your company, and as such it would be unfair for you to be required to be subject to all employment rights and protections in relation to this individual. As Bob, you would likely argue you do not have the bargaining power and economic independence to be classified as an independent contractor and consequently receiving no employment rights and protections. If John's Jobs decides to suddenly offer you no more work, your income source will be completely cut off. Furthermore, you have no ability to bargain the terms of your contract, and therefore ensuring your contract price is high enough to cover your costs is a real challenge.

Currently in New Zealand, these individuals are forced one way or another. They are either offered full protection under labour law, and the employer suffers the burdens of that, or they are left out in the cold and treated as independent contractors as if they have more power than they realistically do. This dissertation will argue that by introducing a third hybrid category, we can find a place for these individuals which offers them the rights and protections they really need. With the increasing demand of flexible working environments, and the growing gig economy, an answer to this problem is becoming more and more essential.

II Part One

This part will introduce Guy Davidov's perspective on how the purposive approach can assist us to fulfil the goals of labour law. It will then analyse New Zealand's current labour law framework and suggest the current tests create uncertainty, and result in misclassification, therefore not fulfilling the goals of labour law.

A Purposive Approach

Guy Davidov in his book 'A Purposive Approach to Labour Law' suggests that the general goals of labour law focus on minimising the "unique characteristics of employment relationships that put the employee in a vulnerable position, for example, subordination and dependency" and preventing unwanted outcomes resulting from them.[7] This dissertation will adopt Davidov's purposive approach and argue that as New Zealand's labour law currently stands, it fails to meet this general goal.

The existence of democratic deficits, or subordination, as Davidov explains, broadly refers to the superior power of the employer and the ensuing inability of the employee to control their own working life.[8] Employees are often told when to be at work, what to do, where to do it, and retain very little control. "Employers always retain a position of power over their employees; to one extent or another, they control them".[9] This level of subordination will vary from one employment relationship to another, but some form of control is always there. Otto Kahn-Freund explains that command and subordination are:[10]

> …necessarily inherent in the employment relationship… Except in a one-man undertaking, economic purposes cannot be achieved without a hierarchical order within the economic unit. There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'.

Collins added that subordination includes three components: employees have to subordinate their wishes to the promotion of the employer's goals; the employer has practical authority over the employees, in the sense that she can issue orders that the latter have to obey; and this authority includes a discretionary power (the marginal prerogative) which is broad, though not unlimited.[11]

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[7] Davidov, above n 1, at ch 2 at 31.
[8] At ch 3 at 39.
[9] At ch 3 at 38.
[10] Otto Kahn-Freund, Roy Lewis and Jon Clark (eds) *Labour law and politics in the Weimar Republic* (Oxford Oxon: Blackwell, 1981) at 18.
[11] H Collins *Labour Is Not an Instrument: Is the Contract of Employment Compatible with Liberalism?* (draft presented at UCL Conference, June 2016) as cited in Guy Davidov "Subordination vs Domination: Exploring the Differences" (2017) 33(3) International Journal of Comparative Labour Law and Industrial Relations 365 at 372.

The other vulnerability Davidov refers to is dependency, in the way that work relations involve a relatively high level of economic dependency, in the sense of the inability to spread risks, requiring regulatory intervention and protection.[12] Employees are dependent on employers in a financial and often social sense, and are often constrained from working for multiple companies within the same industry, preventing them from spreading risks of termination, redundancy etc. The employee generally has no choice but to depend and rely on the employer, on its solvency and on the continued payment of wages.[13] Not only does Davidov refer to economic dependency however, but also social and psychological dependency. "Work provides the means to dignity, self-respect, and self-esteem; it is part of our conception of human flourishing".[14]

Therefore, if we think of an employee compared to an independent contractor, the argument Davidov is making is that these vulnerabilities exist in an employment relationship, requiring the protection of employment laws. An independent contractor, however, does not encounter these vulnerabilities due to the nature of the relationship and therefore, the contractor does not require the protections offered by employment law. In relation to dependency, Davidov explains that while independent contractors have similar social/ psychological needs, they will be able to fulfil those needs through their relationships with a number of different clients.[15] Furthermore, independent contractors are presumed to be able to protect themselves, to some extent, from work-related risks. They are generally in a position to spread their risks and thus self-insure themselves to one extent or another.[16]

The argument this dissertation seeks to make however, is that individuals do not always have both of these vulnerabilities or none at all in a relationship. This dissertation will adopt Davidov's purposive approach to explore this gap and argue that introducing a third category known as 'dependent contractors' would enhance New Zealand's position in achieving the goals of labour law.

[12] Davidov, *A Purposive Approach to Labour Law,* above n 1, at ch 3 at 48.
[13] At ch 3 at 47.
[14] At ch 3 at 44.
[15] At ch 3 at 45.
[16] At ch 3 at 47.

It is first necessary to consider how New Zealand's labour law currently operates, and demonstrate why this current framework is not sufficient to fulfil the goals of labour law.

B New Zealand's Current Labour Law Framework

New Zealand broadly has two employment categories, 'employee' or 'independent contractor'. Whether you are engaged as an employee or a contractor, affects the legal rights and responsibilities you have. As Christie Hall and William Fussey stated:[17]

> New Zealand's current model is binary, forcing businesses to choose between an employment model, with the minimum entitlements and termination restrictions that brings, or an independent contractor model with fetters on the degree to which the worker can be controlled or integrated.

Employee is defined under s 6(1)(a) of the Employment Relations Act 2000 as "any person of any age employed by an employer to do any work for hire or reward under a contract *of* service". This can be compared to an independent contractor who is self-employed and engaged by a principal to perform services under a contract *for* services. When determining whether a person is an employee, the focus is no longer just on the words in the agreement, but on the real nature of the working relationship.[18] This distinction, however, is not always straightforward and clear.

1 Common Law

Judge Shaw in the Employment Court in *Bryson v Three Foot Six Ltd* discussed some legal principles to assist in determining what constitutes a contract of service;[19]

(a) The Court must determine the real nature of the relationship.
(b) The intention of parties is still relevant but no longer decisive.
(c) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.

[17] Christie Hall and William Fussey "Will employees and contractors survive in the gig economy?" (2018) 916 Lawtalk 22 at 22.
[18] Employment Relations Act 2000, s 6(2).
[19] *Bryson v Three Foot Six Ltd* (2003) 2 NZELR 105 at [19].

(d) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the "fundamental" test.
(e) The fundamental test examines whether a person performing the service is doing so on their own account.
(f) Industry practice is relevant, although far from determinative.

This approach was later endorsed by the Supreme Court,[20] and has been subsequently applied by courts to determine employment status.

The control test examines the right the employer has to control the individual worker. The more control there is, the more likely the worker is to be an employee. The Court must consider "who has the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done".[21] The integration test examines whether a person is employed in an integral part of the business or organisation, or merely provides services accessory to it.[22] The fundamental test involves considering the extent to which the worker is in business on their own account. The Court will consider whether the worker hires staff; who provides the equipment used; whether the worker is responsible for investment and management; and the potential for the worker to profit from proficient management in performance of the task.[23]

There is some uncertainty in the current tests, and it is not always clear cut whether a relationship is one of employee or independent contractor. "None of the tests has always produced satisfactory solutions, nor have they resulted in clarifying the principle".[24] Courts often struggle with where to draw the line, and therefore expecting employers to get it right is extremely onerous. A lot of criticism has emerged in relation to the tests. One of the criticisms is that the tests "approach the same question from different angles".[25] As John Hughes put it:[26]

[20] *Bryson v Three Foot Six Ltd* (2005) 2 NZELR 135 at [32]-[35].
[21] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] 1 All ER 433 at 440.
[22] *Bryson v Three Foot Six Ltd* 7 NZELC 97 at 324.
[23] *Hook v JB's Contractors Ltd* (2001) 6 NZELC 96 at 212.
[24] Szakats *Law of Employment* (2nd ed 1981) 24 as cited in Stephanie Hill "The Employment Relations Act and Dependent Contractors: A Real Relationship?" (2004) 10 Auckland U L Rev 143 at 148.
[25] Peter Agnew (Ed) *Employment Law Guide* (6th ed, 2002) 113 as cited in as cited in Stephanie Hill, above n 24, at 148.
[26] John Hughes *s 6 Meaning of employee* (online ed, Lexis Nexis) at [ERA6.5.3].

> Under the "organisation test", the "organisation" is usually seen as meaning the day-to-day running of the enterprise in question, and any resulting "integration" will usually arise as the consequence of control being exercised by the employer in the context of day-to-day management. In this sense, the "integration" or "organisation" test simply reflects an extended application of the control test. Similarly, the "economic reality", "fundamental", or "business" test, is essentially a mirror image of the "integration" or "organisation" test. Whereas the "integration" test asks whether a person is part of the organisation, the "economic reality" test asks whether that person is truly independent of it.

It is unclear how much weight to put on which test, and with no overarching purpose to answer to, tests which are relatively circular and do not provide a clear outcome results in more ambiguity and uncertainty. According to Collins, the control test does not describe what type of control is required for an employment relationship to exist and is over inclusive.[27] The organisation test is indeterminate in borderline cases.[28]

2 Misclassification

As the tests do not draw clear distinctions between the categories, the result is that employers sometimes unintentionally misclassify workers, and the legal consequences can be significant. Employers who hire someone as a contractor when they are actually an employee can be later held liable for extra costs for unpaid PAYE tax, unpaid minimum wages, and holidays and leave entitlements. They may also receive penalties from the IRD and/ or the Employment Relations Authority. With such significant penalties at stake, this process should be as clear as possible. The fact that this distinction is not clear means that New Zealand's labour law is often not meeting its goals. When an individual is misclassified, they will often be experiencing vulnerabilities in the relationship that specific labour laws are intended to reduce, however they are not being covered by these protections. The purposive approach would lead us to determining that the current tests are not allowing the labour law rights and protections to fulfil their intended purposes. This is resulting in a mismatch between what the rights and protections should be doing, and what they really are doing.

[27] Collins, above n 6, at 368-369 as cited in Stephanie Hill, above n 24, at 148.
[28] Stephanie Hill, above n 24, at 148.

An example of misclassification of an employee was seen in the *Atkinson v Phoenix Commercial Cleaners* case.[29] Phoenix was a commercial cleaning company which at the relevant time had about three or four teams, each consisting of two cleaners, which had jobs allocated to them.[30] When new contracts were offered to teams, they were not obliged to accept the additional work, and would indicate their willingness to take on additional work if they were able and wished to do so.[31] Mrs Atkinson answered an advertisement for work in 2009, and began to work for Phoenix.[32] Mr Thomson the owner and Phoenix did not wish to have its cleaners engaged as employees, however, Mrs Atkinson wished to be an employee, as she had been for other cleaning companies previously.[33] In 2012, Mrs Atkinson was working about 92 hours per fortnight, largely between 5pm and 7am, at a rate of $15 per hour.[34]

In determining Mrs Atkinson's employment status, the Court looked to s 6 which requires the Court to consider, broadly and realistically rather than narrowly and artificially or legalistically, the real nature of the commercial relationship between the parties.[35] The Court noted that it was possible both in law and in practice, for Mrs Atkinson to have been either an employee or an independent contractor.[36] The Court applied the tests from *Bryson* which assist a court in assessing "all relevant matters" to determine the real nature of the relationship including control, integration and the fundamental test.[37]

Before being interviewed for the job with Phoenix, Mrs Atkinson was required to sign a "Non-Disclosure Confidentiality Agreement".[38] Her description in that document was as a "Sub Contractor", however as the court noted, that is not determinative, nor an influential factor.[39] Mr Thomson had presented Mrs Atkinson with a draft form of subcontractor agreement, however she declined to sign it, and it was not pursued by Mr Thomson.[40] The agreement noted that her days and hours of work would vary from day to day, however the Court found

[29] *Atkinson v Phoenix Commercial Cleaners* (2015) 12 NZELR 627.
[30] At [5].
[31] At [5].
[32] At [5].
[33] At [6].
[34] At [7].
[35] At [9].
[36] At [9].
[37] At [11].
[38] At [22].
[39] At [23].
[40] At [24].

in reality, her fortnightly work varied little.[41] The agreement stated the Subcontractor shall not provide the clients with her telephone number, however in practice, she did provide her cell phone number to customers to enable them to contact her directly.[42] Industry practice and taxation arrangements were a neutral factor in the determination.[43] The Court further noted there was an absence of common intention between the parties as to the relationship status.[44] The Court then looked at the relevant common law tests to determine the real nature of the relationship.

The first test the Court examined was the control test. Cleaning contracts were obtained and negotiated by Phoenix's Mr Thomson.[45] There was a degree of flexibility about the times Mrs Atkinson could undertake her work, although it was required to be outside normal business hours.[46] Phoenix prepared and required Mrs Atkinson to adhere to, a schedule of areas to be cleaned, and how to clean them.[47] If complaints were made, Mr Thomson would investigate and determine the outcome.[48] Phoenix cleaners were able to take on additional work when offered by Phoenix, however, how and when the work was to be done was dictated by Phoenix.[49] Mrs Atkinson was obliged to wear a Phoenix branded uniform when undertaking work, and cleaning equipment was provided by Phoenix, requiring her to perform the work in the manner dictated by the equipment.[50]

The next test the Court referred to was the fundamental test. Mrs Atkinson had no independent trading entity.[51] She was not GST registered and did not have an accountant.[52] She did not purchase any tools, and while she had a mobile phone, this was a personal one.[53] Mrs Atkinson used a motor vehicle supplied by Phoenix, of which the operating costs were met by Phoenix.[54] It exhibited Phoenix sign-writing and she was not permitted to use it for personal purposes.[55]

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[41] At [26]-[27].
[42] At [28]-[29].
[43] At [44]-[55].
[44] At [56].
[45] At [60].
[46] At [60].
[47] At [60].
[48] At [60].
[49] At [61].
[50] At [62].
[51] At [64].
[52] At [64].
[53] At [64].
[54] At [64].
[55] At [64].

In relation to documentation, Mrs Atkinson would only complete a fortnightly timesheet.[56] All processing of that information was taken on by Phoenix.[57]

Mrs Atkinson's income was not determined or affected substantially by the profits or losses made by Phoenix.[58] Her only ability to increase remuneration, other than by negotiating an increased hourly rate, would have been to take on additional cleaning if and when it was made available to her and other cleaners.[59] Due to the number of hours she was working and times she performed the work, including the inability to clean when premises were open, she had little if any real ability to increase her economic fortunes.[60]

The last test the Court engaged with is the integration test. Mrs Atkinson began work by turning up with the appropriate equipment, and moved between the premises to be cleaned before returning home.[61] Mrs Atkinson wore Phoenix uniform clothing and, at least for a not insignificant portion of time, drove between assignments in a Phoenix sign-written van.[62] Apart from her timesheet, all paperwork was undertaken by Phoenix or its accountants.[63]

Overall, the Court noted that standing back from all of the detail of the evidence, and the common law tests, "this is a plain case in reality of an employment relationship between these parties".[64] The Court then referred to the Authority's determination which concluded that the fundamental test indicated the existence of an employment relationship, however the control and integration tests pointed the other way.[65] The Court notes that this may be due to different evidence being presented, and that the Authority appears to have missed the significance of some factors,[66] but it does illustrate the uncertain nature of the current tests. For the Authority and the Court to engage in the same analysis and produce different outcomes, it illustrates how easily employers may unintentionally misclassify workers. Mrs Atkinson had been treated by Phoenix as an independent contractor, yet the Court found in reality, the nature of the

[56] At [64].
[57] At [64].
[58] At [65].
[59] At [65].
[60] At [65].
[61] At [66].
[62] At [67].
[63] At [67].
[64] At [69].
[65] At [70].
[66] At [70]-[71].

relationship was an employment one. She had therefore been lacking the employment rights and protections she should have been covered by whilst employed by Phoenix.

When employees are misclassified as independent contractors, such as Mrs Atkinson was, they may be in relationships facing the vulnerabilities of an employment relationship, yet not being protected by any employment rights or protections. In these kinds of situations, the goals of labour law are not being achieved and these people remain in subordinate and/ or dependent relationships with no protections. This dissertation will seek to argue that introducing a third category of dependent contractors and altering the current tests would reduce the amount of uncertainty. Currently, individuals who may have aspects of an employment and contractor relationship are being forced into one category or the other, creating uncertainty. The introduction of a third category would allow a legally recognised status for these individuals and offer the protections required to specifically address the vulnerabilities they face.

III Part Two

Following on from analysis in the previous chapter, this chapter will introduce the 'grey zone' status and the challenges that creates. It will then discuss the advantages and disadvantages to being classed in particular categories. The gig economy will be introduced, and the surrounding issues this group of workers creates for current labour laws will be explained.

A The 'grey zone'

Workers who have characteristics in common with both employees and contractors, making it difficult to classify them as one or the other, are considered to be in the 'grey zone'. These workers may, for example, work for one company only, and be totally financially dependent on the income from the company. They may, however, be able to choose when they work, and have the ability to decline work. Notably they have characteristics commonly seen in both an employment and independent contractor relationship, and providing them all or none of the employment protections would be inconsistent with the goals of labour law.

1 Advantages and disadvantages

Not all workers who are in the 'grey zone' however are in need of protection. Some are content with their place there and enjoy the flexible working style. There are advantages after all, to both being classed as an employee and an independent contractor. Employees enjoy the protections of all minimum employment rights under employment laws such as the minimum wage, and minimum code rights. Employees may take personal grievances against their employer and have access to employment jurisdictions. Furthermore, employees are able to participate in collective bargaining and industrial action. Employees are covered by vicarious liability, meaning that an employer will be liable for the negligent acts of their employee if the employee's acts are carried out in the course of employment, and bear a sufficient connection to the employee's role.[67] Employees have PAYE (pay as you earn) deducted from their wages which pays their tax, including a payment towards their ACC levies. If an employee then gets injured and is unable to work, they are paid a percentage of their wages by ACC until they are able to return to their work duties. However, employees usually have very minimal, or no control at all over their work, and can be subject to performance and disciplinary actions. Independent contractors on the other hand, have control over their own availability to provide services. They generally have more discretion in deciding when and how much time is spent at work, and have more bargaining power to negotiate a contract price. True independent contractors are assumed to have this power, enabling them to profit from their work. Independent contractors, however, are not covered by most employment related laws, and instead general civil law determines most of their rights and responsibilities. They do not get annual leave or sick leave, cannot bring personal grievances, and have to pay their own tax. Moreover, many independent contractors carry financial risk, for example if their expenses to carry out a job exceed the contract price they agreed to, they will suffer a loss on the contract.

2 Public consultation

The Government conducted a survey where contractors reported a wide range of working experiences. 74% of respondents rely on one firm for most or all of their income, with 66% saying it was likely they would rely on one firm for most or all of their income in the next year.[68] 55% of contractors were unable to negotiate any of the terms of their contract, and 52%

[67] Maria Dew and Anjori Mitra "The Vicarious Liability of Employers – worth another look?" (2018) 917 Lawtalk 24 at 24.
[68] Ministry of Business, Innovation & Employment *Better protections for contractors: Summary of public consultation* (June 2020) at 7.

self-identified as "vulnerable workers".[69] Further, 59% of contractors said that their income (after tax) was not enough money or only just enough money to meet their everyday needs.[70] On the other hand, 66% of respondents said they enjoy their independence as a contractor, and 40% of contractors said they earn enough to more than enough money.[71]

There are therefore advantages and disadvantages to both categories. However, those who are not clearly in one class or the other often miss out on the benefits of either category and are instead only subject to the burdens. Individuals under these circumstances, who are stuck in the 'grey zone' are the main subject of this dissertation. The argument being made is that many workers who are in this zone, often have characteristics in their working relationships that should afford them the protections of some labour laws. The fact that they are not employees however, and often enjoy a lot more freedom, means that they should not be covered by all of the employment rights and protections.

B Gig Economy

This class of workers who are finding themselves unsatisfactorily in the grey zone is becoming increasingly more common with the rise of the 'gig economy'. The 'gig economy' is an economy in which workers and customers are contacted through an online platform and workers are paid through the platform to perform projects for a limited time.[72] Agile business models call for a business to be able to draw in resource on an "as and when required" basis, flexing resource needs to manage client demand and current innovations".[73] Not only is the number of employers using this business model increasing, but many individuals are preferring the more flexible working arrangements it offers. Many individuals engaged in the gig economy prefer the control they have over the work hours they perform compared to being engaged on a 9 to 5 basis as an employee. Arguably however, our employment laws are not designed to accommodate these types of relationships. Our binary model envisages individuals to be engaged as employees or independent contractors, not somewhere in the middle. This issue arose in the case of *Arachchige v Raiser New Zealand Ltd*.[74]

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[69] At 7.
[70] At 7.
[71] At 7.
[72] Jimmy Frost "Uber and the gig economy: Can the Legal World Keep Up?" (2017) 13(2) Scitech Lawyer 4.
[73] Hall and Fussey, above n 17, at 22.
[74] *Arachchige v Raiser New Zealand Ltd* (2020) 18 NZELR 189.

The case involved determining whether Mr Arachchige was an employee or independent contractor. Mr Arachchige was an Uber driver in Auckland from May 2015 until June 2019.[75] His access to the Driver App was deactivated in June 2019 after Uber received a complaint from a passenger.[76] The deactivation ended his association with Uber and gave rise to the proceedings.[77]

Although the arrangement did have matters that one might see in an employment agreement, such as qualification requirements and performance expectations, the Court held the relationship operated in practice in line with a services agreement, and the parties had intended that he would operate his own business.[78] The Court held that Mr Arachchige's work was not directed or controlled by Uber beyond some matter which might be expected given he was operating using the Uber 'brand'.[79]

As the Court did note, there were elements present in the relationship which suggested Mr Arachchige was not totally independent. Notably, there was an inability for him to develop a personal relationship with customers, including to negotiate a fee.[80] He was able to charge a lesser fare than the estimate the passenger had been given on the Uber App, although the Court noted he seemed unaware of this and it seems illogical to charge a passenger less than a quote they have already accepted.[81] Moreover, after a passenger takes a trip, they are invited to rate the driver.[82] Uber operates a five-star rating system and if a driver continually falls below the average city minimum for the city they operate in, they may lose access to the Driver App.[83] At the time, the average city minimum for Auckland was approximately 4.5 and consequently, any rating below a 5 was essentially a fail.[84] Mr Arachchige also had no power to negotiate these terms.[85]

[75] At [1].
[76] At [12].
[77] At [12].
[78] At [56].
[79] At [56].
[80] At [17].
[81] At [17].
[82] At [19].
[83] At [19].
[84] At [19].
[85] At [46].

Although the Court held that Mr Arachchige was an independent contractor, this dissertation seeks to argue that this type of relationship should fall within the dependent contractor category, and the individual should be afforded the protections of some employment rights. Stephanie Hill describes independent contractors as autonomous commercial operators who are entrepreneurs who run their own businesses, and their bargaining positions are considered equal to that of their principals.[86] Mr Arachchige does not appear to fit this description of an independent contractor as he had little to no ability to increase his profit other than by working longer hours, and was subject to many controls and performance measures. However, as he had too much autonomy to be considered an employee, he must be forced into this category. When we have labour laws to protect people like Mr Arachchige from the vulnerabilities he faced in his relationship with Uber, yet we prevent people from having access to those if they do not require all of labour laws protections, we are not fulfilling labour laws purposes. These individuals should be covered by the labour laws that reflect the specific vulnerabilities they face.

The purposive approach can assist in distinguishing between those who are in need of the protection of labour laws, and those who are not. As Davidov put it, the idea that labour laws goals are to address the "unique characteristics of employment relations: on the vulnerability of employees in terms of democratic deficits (or subordination) and dependency on the specific relationship for economic as well as social/ psychological needs (in the sense of inability to spread risks)".[87] Therefore, when these vulnerabilities exist in the relationship, the person performing the work for another appears to be in need of protection, the kind of protection provided by labour laws. When distinguishing between these categories, we should therefore be using the tests to ultimately determine whether the elements of democratic deficits and dependency are present. That would align with the goals of labour law by only protecting those who the protections were intended to cover. If democratic deficits and dependency are not present in the relationship, the person is likely not in need of labour law protections and will fall outside the employment category and in the independent contractor category. As mentioned earlier, there will not however always be none or both of these elements present in a relationship. In situations where only one of the vulnerabilities exist, Davidov explains that only some employment rights and protections should exist in the relationship.[88]

[86] Hill, above n 24, at 146.
[87] Davidov, above n 1, at ch 6 at 119.
[88] At ch 6 at 137-138.

IV Part Three

This part will discuss who should be included in the dependent contractor category. It will discuss some potential issues that have been raised in relation to introducing the category and seek to offer solutions. It will then engage in a comparative analysis with other jurisdictions and conclude with a law reform proposal.

A Dependent Contractor

A 'dependent contractor' is essentially a person who performs work for reward, but whose contract defines her or him as being self-employed while simultaneously removing much (if not all) of the autonomy that traditionally accompanies self-employment.[89] Davidov explains that the dependent contractor category aims to capture people who have some characteristics of independent businesses, but at the same time some of the vulnerabilities of employees, especially in the sense of depending entirely or mostly on a single employer/ client.[90]

As previously mentioned, New Zealand's current labour law framework has an all or nothing approach in that a person is either classified as an employee, and receives employment rights and protections, or as an independent contractor, and does not. The reality of working relationships, however, is that it is common for individuals to be in this 'grey zone' between employee and independent contractor status, and rather than forcing them one way or another, New Zealand should legally recognise this hybrid dependent contractor status.

If we accept that broadly labour law aims to protect individuals facing the vulnerabilities present in an employment relationship, yet deprive individuals who have some vulnerabilities but not enough to class them as an employee, we are faced with a group of individuals lacking any labour law protections. This results in a gap in our law from achieving the purpose labour law intends to achieve.

[89] Hughes, above n 26, at [ERA6.4].
[90] Davidov, above n 1, at ch 6 at 136.

1 Public consultation concerns

The Government has recognised this is a current labour law issue in New Zealand, and from November 2019 to February 2020 consulted the public on better protections for contractors. This involved seeking feedback on eleven options for changes. One of these options, was to introduce the dependent contractor category with some employment rights and protections. This option and the feedback received is relevant for this discussion.

Some concerns with introducing this new category were raised, such as it may result in employees being shifted to the new category, and may add to, rather than reduce uncertainty and ambiguity.[91] Although valid concerns which would need to be addressed properly, these likely can be addressed resulting in positive outcomes.

For example, one of the concerns highlighted in the summary was that it would "risk establishing a new class of workers with reduced rights and protections, thereby undermining existing workers' rights".[92] Similarly, the concern that the proposal risks "creating a middle ground between contractors and employees, rather than lifting the rights of contractors, the government may actually see employees being shifted to this new category".[93] Although the introduction of the dependent contractor category would see individuals move out of employee or independent contractor status and into this category, this would not affect those who are in the correct legal status already. By using the purposive approach to define these categories, we are able to look at the vulnerabilities present in a given relationship, and determine whether it is a relationship which requires all, some, or no employment rights and protections. Arguably therefore, those who are currently in relationships with characteristics of both employee and contractor status, are receiving more or less rights than their relationship really requires to achieve the goals of labour law. By introducing this category, it would align the protections offered by these categories with the goals of labour law as a whole. Furthermore, contractors who are considered successful in the independent contractor category and not in need of protection will not be moved into dependent contractor status. This is because intention is to remain a factor in distinguishing between categories, and these successful independent contractors will not have the vulnerabilities present in their relationship to place them in the

[91] Ministry of Business, Innovation & Employment, above n 68, at 46.
[92] At 46.
[93] At 46.

dependent contractor status. This will be explained in further detail with reference to the tests which should be used to distinguish between the three categories. The hybrid category will seek to raise protections for those currently in independent contractor status but are facing certain vulnerabilities in the relationship. The purposive approach would argue that contractors without these vulnerabilities have enough power to negotiate and spread their risks and labour law protections are not intended to cover them.

Moreover, there is a concern that it would add to, rather than reduce uncertainty and ambiguity.[94] It is possible that there may become two new grey zones between employee-dependent contractor, and dependent contractor- independent contractor status. The nature of employment relationships makes it impossible to articulate one strict test as to which category individuals fall. Moreover, any attempt to do so would likely result in employers or employees easily altering their situations to achieve their desired status regardless of what the real nature of the relationship is. Therefore, by tightening up the current tests with the ultimate question concerning what vulnerabilities are present that need to be addressed, we can likely reduce the uncertainty. Although there will still be a line to draw, and some situations may not be crystal clear, a hybrid category would likely reduce uncertainty by offering those in the grey zone a clearer status, rather than forcing them one way or the other. These uncertain cases could then be decided by reference to the purpose of the categories, and the vulnerabilities they are intending to protect.

A hybrid category would also likely reduce exploitation. As employers currently have to abide by all or no employment rights and protections in relation to work relationships, there is an incentive to categorise someone as an independent contractor to avoid these obligations. A hybrid category however, would likely result in employers being more willing to contract with dependent contractors in this status and be subject only to the protections they really require. Employers are understandably often not willing to categorise individuals as employees and become subject to all obligations when the relationship has elements often found in an independent contractor relationship. A hybrid category which only gave contractors the rights and protections truly required in the relationship would likely see employers try and avoid their obligations less.

[94] At 46.

B Film Industry

The Government has responded to this labour law issue in relation to the film industry separately to other industries. After the *Bryson* case, the makers of the Hobbit film threatened to move production from New Zealand resulting in the Government rushing through the Employment Relations (Film Production Work) Amendment Act 2010 to exclude those engaged in film productions from being classed as employees. In 2018, a Film Industry Working Group was set up and made recommendations to keep the part of the current law saying film workers are only employees if they have a written employment agreement, to allow contractors to bargain collectively at an occupation level within the screen industry, establish principles governing relationships in the screen industry including good faith, protection from bullying, discrimination and harassment, reasonable termination of contracts and fair rates of pay.[95]

The Screen Industry Workers Bill, which is currently at its second reading, would allow contractors in this industry to bargain collectively about their terms and conditions.[96] The status of the worker would be determined by the type of written agreement they have.[97] Good faith would require parties to not mislead or deceive one another.[98] They would be required to have written contracts with mandatory terms about contract termination and protection from bullying, discrimination and harassment.[99] For the purposes of this dissertation, this group of workers will not be dealt with separately. Dealing with industries separately rather than universally from a purposive approach of labour law as a whole, would likely lead to further problems, and potentially result in other industries attempting to do the same. As Gordon Anderson and John Hughes put it in a case comment on the *Bryson* case "there seems to be no substantive reason why the film industry should not be bound by the same law as other New Zealand employers and workers and be entitled to the same rights and protections as other workers".[100] As Dawn Duncan stated in her article on the proposed Bill, "[t]here was no evidence presented that the film industry could not operate under the normal laws of employment, as it had done before the Hobbit law and as every other industry in New Zealand

[95] Ministry of Business, Innovation & Employment *Recommendations of the Film Industry Working Group to the Government* (October 2018).
[96] Screen Industry Workers Bill 2020 (219-2).
[97] Cl 5.
[98] Cl 13.
[99] Cl 17.
[100] Gordon Anderson and John Hughes *[2005] ELB 9 – Recent Case Comment* (online ed, Lexis Nexis) at 14.

does"[101]. Arguably, the film industry should be protected in the same way as other industries, by looking at the real nature of each individual relationship, and classifying them in a way that affords them the required labour law protections.

C Comparative approach

1 United Kingdom

The United Kingdom have a third category known as 'workers'. The UK Employment Rights Act 1996 defines 'employee' as working under a 'contract of employment',[102] which is defined as a contract 'of service'.[103] The definition of the broader 'worker' category in the same legislation further clarifies a 'worker' as including those working under a contract of employment, as well as other contracts 'whereby the individual undertakes to do or perform personally any work not through a business undertaking'.[104]

Workers in the UK are entitled to certain employment rights, including getting the National Minimum Wage, protection against unlawful deductions from wages, the statutory minimum level of paid holiday and rest breaks, to not work more than 48 hours on average per week, or to opt out of this right if they choose, protection against unlawful discrimination, protection for 'whistleblowing' and to not be treated less favourably if they work part-time. Workers may also be entitled to statutory sick pay, maternity pay, paternity pay, adoption pay and shared parental pay. They are not however, usually entitled to minimum notice period if their engagement to perform work will be ending, protection against unfair dismissal, the right to request flexible working, time off for emergencies and statutory redundancy pay.

The UK Supreme Court case of *Uber BV and others v Aslam and others*[105] can be contrasted to the New Zealand Uber case. *Aslam* similarly concerned whether drivers whose work is arranged through Uber's smartphone application ("the Uber App") work for Uber under workers' contracts and so qualify for workers' rights; or whether, as Uber contended, the

[101] Dawn Duncan "Hobbit laws, human rights and the making of a bad sequel [Screen Industry Workers Bill]" (2020) 17(2) Policy Quarterly 45 at 48.
[102] Employment Rights Act 1996, s 230(1).
[103] Section 230(2).
[104] Section 230(3)(a) and (b).
[105] *Uber BV and others v Aslam and others* [2021] UKSC 5.

drivers did not have these rights because they worked for themselves as independent contractors.[106]

The Supreme Court looked at the three elements to meet the statutory definition of a 'worker' in s 230(3)(b) being:[107]

1. A contract whereby an individual undertakes to perform work or services for the other party;
2. An undertaking to do the work or perform the services personally;
3. The other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.

The case was concerned with the first of those requirements, as to whether the claimants were to be regarded as working under contracts *with* Uber London whereby, they undertook to perform services *for* Uber London; or whether, as Uber contended, they were to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London.[108]

The Court began by looking at the relationship from a contractual sense, and then widened its interpretation beyond the words of the agreement between Uber and the drivers, to looking at how the relationship actually operated. The Court looked to the purpose of including limb (b) in the definition of a worker and referred to *Byrne Bros (Formwork) Ltd v Baird* which broadly stated:[109]

> … the policy behind the inclusion of limb (b)… can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees… [W]orkers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours… or to suffer unlawful deductions from their earnings or to be paid too little. The reason why employees are thought to need such protection is that they are in a subordinate and dependent position to their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically,

[106] At [1].
[107] At [41].
[108] At [42].
[109] *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 at [17(4)] as cited in *Alsam,* above n 105, at [71].

> in the same position. Thus, the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other hand, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

Here, the Court appears to be making a distinction between independent and dependent contractors from a purposive approach. They appear to recognise the purpose of labour laws in protecting employees is that they are in a subordinate and dependent position to their employers. Therefore, workers with an element of dependency in their relationship who are not in a sufficiently arms-length and independent position as other independent contractors are, should also be protected to some extent.

The Court acknowledged there is no single definition of the term 'worker' but recognised there has been a degree of convergence in the approach adopted.[110] In *Allonby v Accrington and Rossendale College,* the European Court of Justice held that in the Treaty provision:[111]

> … there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration…

The European Court added that the term 'worker' was not intended to include "independent providers of services who are not in a relationship of subordination with the person who receives the services".[112] Baroness Hale in the *Bates van Winkelhof* case however, cautioned that while "subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker".[113] The Court stated "the correlative of the subordination and/ or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration".[114]

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[110] *Aslam,* above n 105, at [72].
[111] *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328; [2004] ECR I-873 at [67] as cited in *Aslam*, above n 105, at [72].
[112] At [68] as cited in *Aslam*, above n 105, at [72].
[113] *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32; [2014] 1 WLR 2047 at [39], as cited in *Aslam*, above n 105, at [74].
[114] *Aslam,* above n 105, at [75].

This discussion of defining a 'worker', and the purpose of including such a limb in the statutory provision, led to the Court determining that "it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'".[115]

In determining whether the drivers were 'workers', the Court stated there can, as Baroness Hale said:[116]

> … be no substitute for applying the words of the statute to the facts of the individual case… At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. The vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. A touchstone of such subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a 'worker's contract'.

By keeping the purpose of the legislation in mind when applying the words of the statute to any individual case, we are able to come to a conclusion that fulfils the goals of labour law. This is important to ensure individuals are not just put into a category because they fit the words of the statute, but that they truly require the labour protections that category offers due to the vulnerabilities they are facing in the relationship.

The Court then looked at some of the relevant findings of the Employment Tribunal that indicated the drivers were not independent contractors or employees. Notably:

1. They had in some respects a substantial measure of autonomy and independence. They were free to choose when, how much and where to work.[117]
2. Remuneration paid to drivers is fixed by Uber and the drivers have no say in it.[118]

[115] At [76].
[116] *Bates van Winkelhof,* above n 113, at [39], as cited in *Aslam,* above n 105, at [87].
[117] *Aslam,* above n 105, at [90].
[118] At [94].

3. Uber also fixes the amount of its own "service fee" which it deducts from the fares paid to drivers.[119]
4. Ubers control over remuneration further extends to the right to decide in its sole discretion whether to make a full or partial refund of the fare to a passenger in response to a complaint.[120]
5. The contractual terms on which drivers perform services are dictated by Uber.[121]
6. Once a driver has logged onto the Uber App, their choice about whether to accept requests for rides is constrained by Uber. Uber controls the information provided to drivers, including not telling them the passengers destination and by monitoring the driver's rate of acceptance. If a driver's acceptance falls below a level set by Uber, they receive warnings and if performance doesn't improve, they can be shut out from logging back on.[122]
7. Uber vets the types of cars that may be used and the technology integral to the service is wholly owned by Uber.[123]
8. There is a rating system whereby passengers are asked to rate the driver after each trip. Passengers are not offered a choice of driver with, for example, a higher price charged for the services of a driver who is more highly rated. Rather, the ratings are used by Uber purely as an internal tool for managing performance and as a basis for making termination decisions.[124]
9. Uber restricts communication between passengers and driver to the minimum necessary to perform the particular trip, and prevents drivers from establishing any relationship with a passenger.[125]

Taking these factors together, the Court found the transportation service is very tightly defined and controlled by Uber.[126] The Court ultimately found the Employment Tribunal was entitled to find the claimant drivers were 'workers' and dismissed the appeal.[127]

[119] At [94].
[120] At [94].
[121] At [95].
[122] At [96].
[123] At [98].
[124] At [99].
[125] At [100].
[126] At [101].
[127] At [119].

The United Kingdom's approach to defining and ultimately determining whether an individual is a worker is a useful starting point for New Zealand. The Court in *Aslam* is seen to take a purposive approach to the legislation to assist them in determining whether the Uber driver was a 'worker' for the purpose of the legislation. Keeping this underlying purpose of the hybrid category in the forefront of employers' and courts' minds can assist in determining who should be included in this category.

However, it could be argued that a set of factors employers and subsequently courts can adhere to would be more useful as a test, to determine who is to be a dependent contractor. The Court engaged in an analysis whereby they were looking at the relevant facts of the case to determine the existence of a relationship which required protection of some labour laws. Arguably however, listing the relevant factors in legislation and how to balance them to arrive at a conclusion would be a more suitable and straightforward approach. This would potentially allow employers to engage in the analysis more easily.

It is useful to look at the Canadian jurisdiction to see an illustration of some potentially relevant factors New Zealand could adopt.

2 Canada

Canadian jurisdictions have grappled with the dependent contractor status and the relevant factors to consider. The Ontario Legislature adopted the concept of a dependent contractor in 1975. Dependent Contractor is defined in s 1(1) of the Labour Relations Act 1995 as meaning:

> A person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

The legislation then provides that an "employee" includes a dependent contractor.[128]

The Ontario Labour Relations Board in 2020 considered whether Foodora's couriers were dependent contractors in *Canadian Union of Postal Workers v Foodora Inc*.[129] The written agreements entered into by Foodora and the couriers stipulated the couriers were independent contractors.[130] The contracts were amended by Foodora from time to time, with no opportunity for couriers to negotiate or amend the contract.[131]

The Board ultimately had to determine whether the courier drivers were dependent contractors and stated that the essential question for the Board has always been "do these individuals more closely resemble the relationship of an employee or that of an independent contractor?"[132] The Board held that this is a comparative analysis that focuses on a range of factors in the labour relations context.[133] It has been, and continues to be, a factual determination.[134]

Relevant factors which were set out in *Algonquin Tavern* and the Courts application to the current case were as follows:[135]

1. The use of, or right to substitutes.
    a. It is inconsistent with an employment relationship if the individual is able to fulfil the work obligation with someone else's labour and skill. Couriers do not use substitutes. The use of the App is personalised to the registered user.
    b. Foodora does not allow direct swaps of shifts.
    c. Restrictions on use of substitutes strongly resembles an employment relationship rather than independent contractor relationship.
2. Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials.

[128] Labour Relations Act 1995, s 1(1).
[129] *Foodora Inc (cob Foodora),* [2020] OLRD No 486.
[130] At [8].
[131] At [8].
[132] At [80].
[133] At [80].
[134] At [80].
[135] *Algonquin Tavern,* 1981 CanLII 812 (ON LRB) as cited in *Foodora,* above n 129, at [84]-[170].

a. A person can be a dependent contractor even if he owns the tools used to perform the work. The ownership of tools is not a significant factor, although is a factor to be considered.
b. Foodora couriers provide some tools without any input by Foodora: bicycles, helmets, and in some cases, cars. The courier is responsible for the maintenance and repair of the tools.
c. Several tools are provided by the courier, but under specific instruction by Foodora such as a delivery bag that must meet specific dimensions, and a smart phone that is GPS enabled with a data plan. Also, the App (and the software and algorithms that support the App) is provided and regularly updated by Foodora. Through the App, Foodora controls payment by the customer, makes payment to the restaurant, and calculates the amount earned (including tips) by the courier.
d. If Foodora makes a decision about the App, that decision can directly impact the profit/ loss of the enterprise. The App is exclusively owned and developed by Foodora and in this respect, the courier more closely resembles an employee entitled to use the company's software.

3. Evidence of entrepreneurial activity.
    a. This is a qualitative analysis, not a quantitative measurement. The focus is on the opportunity or chance of profit/ loss by virtue of the individual's entrepreneurial acumen, not a measure of how much revenue is made relative to other factors.
    b. Couriers can make more money by working harder, such as delivering food at a fast pace at key times, and therefore increasing the volume of deliveries. But this is not entrepreneurial activity. Also, couriers may perform services for more than one App. However, this also, is not entrepreneurial activity. The courier is confined to the rules and restrictions imposed by Foodora and is only permitted to increase his earnings subject to Foodora's rules.
    c. There are restrictions imposed by Foodora on the courier's ability to make a profit. A courier cannot advertise his service, skill or ability. Cannot develop individual relationships with customers or restaurants. A courier could not offer a coupon, discount or incentive to a customer in hopes of gaining loyalty. Other than a tip, a courier cannot be paid any more money than Foodora allows, and the entire transaction occurs through the App. In reality, a courier cannot

improve their chance to make a profit through the customary entrepreneurial tools.

d. The risk of loss for the courier is minimal, since the compensation scheme entitles the courier to be paid regardless of issues. Foodora bears the risk that the restaurant may make a mistake or the customer cannot be located.
e. Working multiple jobs is not evidence of entrepreneurial activity. To the contrary, it lends itself more favourably to a conclusion that there is economic dependence on different employers.
f. Foodora couriers do not have the opportunity to increase their compensation through anything other than their labour and skill. This factor supports the conclusion couriers are dependent contractors.

4. The selling of one's services to the market generally.
    a. If the individual has a long-standing relationship with one or a limited number of purchasers, he is more likely to be considered a dependent contractor.
    b. When a Foodora courier accepts a shift, he is expected to give priority to Foodora. A courier cannot sit dormant for the entire shift, or repeatedly decline orders. A courier cannot disappear for the shift or not show up.
5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.
    a. It may well be that an individual is "dependent" one more than one person. Dependence on one person however, must be distinguished from dependence upon an industry.
    b. Evidence showed that couriers were able to make deliveries for more than one company provided they do not compromise Foodora's service standards.
    c. However, Foodora controls the structure of shifts, when shifts are offered, how many people can work, the length of shifts and geographical zones. Access to the scheduled shifts is based on the courier's rating as determined by Foodora. Once a courier accepts a shift, Foodora controls how that shift can be swapped. Once a courier is assigned an order, they are expected to accept it and make the delivery. Couriers are expected to make a request if they want a break or to leave early.
    d. The Board was convinced that this factor weighs in favour of the conclusion that the couriers were dependent contractors. There were a complex system of incentives and restrictions that limit the choices of couriers.

6. Evidence of some variation in the fees charged for the services rendered.
    a. The ability to negotiate or alter fees is indicative of independent contractor status, or the inability to alter fees or presence of a uniform fee structure suggests employee status. Where fees are standardised, or the market is competitive, the factor may be neutral.
    b. All Foodora couriers share the same terms and conditions as determined by Foodora.
    c. A Foodora courier has no independent opportunity to vary his rate. A courier further cannot negotiate with the customer or the restaurant to vary the rate.
    d. The inability to vary the fee charged by the courier makes the courier more like an employee.
7. The extent, if any, of integration.
    a. Couriers are heavily, if not entirely, integrated into Foodora's business. Foodora's revenue depends entirely on the reliable and timely delivery service of the couriers.
    b. There is no opportunity, nor reason, for the Foodora courier to develop any type of relationship with the customer or restaurant.
    c. This factor points towards an employment relationship rather than independent contractor relationship.
8. The degree of specialisation, skill, expertise or creativity involved.
    a. This factor was neutral, there was no specific degree of specialisation.
9. Control of the manner and means of performing the work.
    a. Foodora has implemented numerous controls on the generation and flow of work.
    b. A GPS technology used tells couriers when they have gone the wrong way, or they haven't moved in a while.
    c. The focus is on the right and ability of the company to control how the work is performed that lends more favourably to a conclusion that the individuals are dependent contractors.
    d. Foodora couriers might work independently, but always within the parameters unilaterally established by Foodora and under the watchful eye of dispatch.
    e. The dispatcher has the discretion to issue low level strikes against a courier if the courier engages in undesirable behaviour.

f. While a courier might be able to decline an order, the courier must be responsive in a way that conforms with Foodora's expectations, or otherwise they will receive a strike.
g. This factor points towards an employment relationship.

10. The magnitude of the contract amount, terms and manner of payment.
    a. Couriers are paid on a weekly basis by way of direct deposit into their bank account based on previous weeks' earnings.
    b. Such an arrangement might also exist with an independent contractor. This factor is neutral.
11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.
    a. No submissions were made in relation to this factor.

Based on the above analysis, the Board ultimately found that the Foodora couriers were dependent contractors, as they more closely resembled employees than independent contractors.[136]

The factors the Board engaged with, and discussion as to how they applied in the particular case are very helpful to illustrate what we should be looking at when attempting to define this dependent contractor category. The discussion the Board engages in paints a picture of the type of person we are aiming to capture. However, I would argue using the factors to ultimately determine what vulnerabilities are present in the relationship, rather than whether the relationship looks more like an employment or contractor relationship, would be more beneficial and in line with the goals of labour law. Rather than engaging in a balancing exercise and forcing individuals one way or the other depending on which relationship they more closely resemble, and instead listing factors which point towards different vulnerabilities and stating what vulnerabilities we are looking for to be classed in each category, we are then more aligned with the purpose of labour law. That way, we are offering individuals the specific labour laws that aim to address particular vulnerabilities of each category.

[136] *Foodora,* above n 129, at [173].

D Law Reform

This part will discuss how New Zealand could legislate to recognise this third category of 'dependent contractors' entitling them to some employment rights and protections. This change would not operate to interfere with arrangements where there is a true employment or independent contractor relationship. As the Employment Court mentioned in *Prasad v LSG Sky Chefs New Zealand Ltd*:[137]

> … it is clear that there are instances in which a worker will be keen to be engaged as an independent contractor rather than an employee. There are other occasions where the worker has little or no choice, and the independent contractor model is essentially imposed on a "take it or leave it" basis. This tends to impact most on low-paid, unskilled workers. It tends to impact least on high paid, skilled workers. The distinction is self-evidently an important one.

The latter relationship the Employment Court refers to is the focus of this category. It is well established that true independent contractor relationships can be beneficial for both parties, there is no exploitation, and this should not be interfered with. MBIE's summary of public consultation mentions a submission that stated:[138]

> All across New Zealand, businesses are employing contract labour, and doing so in a compliant way, with full understanding from both parties. It is a standard business practice, and one that should be readily encouraged where it suits the needs of the business. The vast majority are not doing so to 'cut costs', and all agreements are entered into with both parties being fully aware of their responsibilities. This part of the market requires no change or intervention whatsoever.

By legislating to recognise a third category, these relationships which are compliant with the law, and there is no exploitation going on, should not be interfered with. The legal test should therefore involve a set of factors to assist in ultimately determining whether the vulnerabilities are present in the relationship, requiring legal intervention to protect the worker. Davidov proposes that the distinction between employees, dependent contractors and independent

[137] *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] 15 NZELR 178 at [39].
[138] Ministry of Business, Innovation & Employment, above n 68, at 6.

contractors focuses ultimately on the existence or non-existence of subordination and dependency in the relationship.[139] He notes that employees will have an intersection of both vulnerabilities, whilst dependent contractors have a common vulnerability of dependency, but often not subordination.[140]

1 Potential Factors

Davidov looked to the International Labour Organisation's Employment Relationship Recommendation to identify relevant indicia that could be used to identify subordination or dependency in a relationship. He ultimately proposed a three-step process to distinguish an independent contractor relationship from an employment relationship. By combining Davidov's proposal, with the factors considered in the Canadian case *Foodora*, we can come up with a set of factors that could assist employers in distinguishing the three categories.

Firstly, factors identifying whether there is dependency in the relationship could be analysed. An inability for an individual to spread risks would indicate dependency. *Foodora* drew a distinction between dependence on one person, to dependence upon an industry.[141] An individual may be 'dependent' upon more than one person, but the existence of a single/ main employer is an indicator of dependency. This analysis may include whether the individual has the ability to reject job opportunities or contract with another company. Davidov proposes it would be useful to introduce presumptions about what it means to be dependent, such as 75% of total income.[142] This may then be rebutted if factors in the individual case provide evidence the situation falls outside the presumption.

If the tools, materials, equipment etc. are provided by the employer, this indicates dependency. As mentioned in *Foodora* however, a person can still be a dependent contractor even if he owns the tools used to perform the work.[143] The ownership of tools is not a significant factor, although is a factor to be considered.[144]

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[139] Davidov, above n 1, at ch 6 at 137-138.
[140] At ch 6 at 137-138.
[141] *Foodora*, above n 129, at [115].
[142] Davidov, above n 1, at ch 6 at 138.
[143] *Foodora*, above n 129, at [92].
[144] At [92].

If the individual has little to no opportunity to make a profit or risk encountering a loss, this is an indication of dependency. This can be referred to as in the *Foodora* case as evidence of entrepreneurial activity. As the Board noted, this should be a qualitative, not a quantitative measurement.[145] The focus should be on the opportunity or chance of profit/ loss by virtue of the individual's entrepreneurial acumen.[146] Working harder at a faster pace is not evidence of entrepreneurial activity. Evidence that may be relevant are an ability to advertise, upskill, develop personal relationships and a good reputation leading to repeat business. Whether the individual has the opportunity to develop any type of personal relationship to improve future business prospects will be relevant. Furthermore, whether the individual has any risk of loss or whether the company encounters all loss will be a relevant factor. Further, if the individual has no real ability to negotiate or alter fees, this suggests dependency. This may look like individuals being forced to accept terms on a take it or leave it basis.

After assessing whether there is any dependency in the relationship, we would want to consider whether there are any democratic deficits by way of subordination present in the relationship. Indications of subordination may be that the individual is unable to use substitutes and get someone else to perform the work. Furthermore, if the individual is unable to choose when/ where to work. An obligation to be available or an inability to refuse work indicates the existence of democratic deficits. Also relevant is whether an individual is under direct day to day control, and/ or is subject to performance checks and disciplinary measures.

Intention between the parties should still be a relevant factor. This would ensure parties who always had a common intention to create an independent contractor relationship for example, are able to engage in the relationship in that way. The purposive interpretation would argue that the law should intervene to prevent exploitation when the vulnerabilities described are present in the relationship. Therefore, parties in a relationship where there is no exploitation and they are both intending to create an independent contractor relationship are able to do so.

An example of this was seen in the *Noble v Ballooning CanterburyCom Ltd* where the Employment Court had to determine whether Mr Noble was an employee or independent contractor.[147] Mr Noble worked as a pilot-in-command for Ballooning Canterbury.com Ltd

[145] At [101].
[146] At [101].
[147] *Noble v Ballooning CanterburyCom Ltd* (2019) 16 NZELR 850.

for two and a half months.[148] The Court ultimately decided that up to the point where the relationship was terminated, Mr Noble had not said he wanted to be treated as an employee; rather, his expressed preference was for a payment arrangement which would apply to an independent contractor.[149]

The intention test should remain relevant but not determinative. The amount of weight the intention test should be given, should depend on whether there appears to be an element of exploitation in the relationship. If it appears the worker has been exploited by a business and the relationship does not have any real commercial advantage for the worker, the apparent intention of the parties may carry lesser weight. If, however, it appears there was an agreement which the worker was happy with, and has been rather successful in, the ending of the relationship and subsequent unhappy worker should not be a ground for claiming the relationship was other than intended. The intention of parties in situations where the worker has enjoyed being engaged as an independent contractor should carry more weight.

An employee would therefore be someone who has both strong elements of dependency and subordination in their relationship. They are the most vulnerable and therefore require the full protection of all labour laws. They do not have to tick every single factor, but on a balancing scale, have enough of each vulnerabilities to require labour law protections. Davidov would then argue that we should not demand any level of subordination for the group of dependent contractors.[150] Subordination should not be required to be in this category, but potentially it may exist in some cases and the individual should still fall within the group. For example, an individual may very well be under a relatively high level of control whilst at work, but still not be an employee. An Uber driver for example, when they are logged on to the App and once they accept a ride, are required to pick that person up, usually take the suggested route, and drop the customer off. Furthermore, when they are logged on to the App, their acceptance rate is monitored, as are their ratings from customers. This may indicate a level of subordination. However, they are still able to work as and when they desire, or choose not to work. It is only once they decide to work that they are subject to these controls. In this situation, to say that because an element of subordination is present in the relationship that they are an employee would likely be extending the category too far. Therefore, a dependent contractor potentially

[148] At [1].
[149] At [81].
[150] Davidov, above n 1, at ch 6 at 140.

should be someone who has a strong element of dependency in the relationship, but may also have slight elements of subordination. This would be a balancing exercise by keeping in mind the purpose of the legislation. Independent contractors on the other hand, will have little to no vulnerabilities of either subordination or dependency.

These factors are essentially asking a lot of the same questions as our current control, integration and fundamental tests, but may lead to a clearer picture of what vulnerabilities are present in the relationship, allowing an easier distinction between categories. By distinguishing between vulnerabilities of dependency and subordination, we can more clearly identify individuals who require all labour law protections, and those who only require protections relating to dependency. The current tests as highlighted often do not result in a clear indication of what category an individual should fall in. By using these tests as factors to ultimately determine the existence of certain vulnerabilities and classing individuals based on what vulnerabilities are present, the picture should become much clearer.

Where there are cases that the line is hard to draw and it is not clear which category the individual should fall in, the purpose of the legislation should assist. As the UK Supreme Court in *Aslam* recognised, the purpose of including a hybrid category must be to extend benefits to workers who are in the same need of that type of protection as employees.[151] A purposive approach can assist in borderline cases to think about what vulnerabilities are present in the relationship, what protections each category offers, and then what result would be most in line with the purpose of labour laws.

2 Potential protections

Next it must be determined what employment rights and protections dependent contractors should receive. Moreover, whether the Employment Court or common law should have jurisdiction to enforce them. The rights and protections that dependent contractors receive should be determined by reference to the vulnerabilities they face in the relationship. If we agree that a dependent contractor in the relationship suffers from dependency on the employer, and either a small or zero element of subordination, the protections they are covered by should be those that address substantially the vulnerability of dependency. As Davidov put it, setting

[151] *Aslam*, above n 105, at [71].

minimum wages, permitting collective bargaining, requiring advance notice before termination, and ensuring that wages are paid in time and in cash (wage protection laws)- all regulations that address, at least for the most part, economic dependency.[152]

One of the employment rights and protections this category should be entitled to is a minimum wage to reflect their economic dependency. These individuals will likely have a single/ main employer, and/ or no real ability to make a profit or negotiate a better rate, and therefore should be protected by minimum wage laws. As the Court noted in *Idea Services Ltd v Dickson (No 2)* "[r]ecognising the inequality of bargaining power in the employment relationship, the minimum wage legislation forms part of what has been described as the "minimum code" aimed at protecting employees from exploitation".[153] Davidov refers to Arthur M Okun on the topic who stated "[a]rguably there is a minimum of compensation below which employment is not very different from slavery, and is therefore illegitimate".[154]

There is debate however, as to what this rate should be set at. If their minimum wage is set at the current minimum wage rate for employees, that may not be sufficient in all scenarios. As contractors have to pay their own tax and may have to provide tools, equipment etc, the minimum wage may not be sufficient once factoring these associated costs in. The living wage may also be a consideration, although there are arguments against this also. Wages should be set in competitive markets by reference to particular industries, and this wage might not be realistic in all scenarios. Some employers may prefer to engage someone on an employee basis if they are going to be forced to pay the living wage if they contract someone as a dependent contractor. A middle ground between minimum wage and living wage may need to be set as the rate which dependent contractors cannot be paid below.

Dependent contractors should also be covered by wage protection laws to recognise their economic dependency. As they are often dependent on one main source of income, ensuring they are being paid in time and in cash is important for many in this category. They often do not have the ability to be earning income from multiple sources and therefore not be affected

[152] Davidov, above n 1, at ch 6 at 124-125.
[153] *Idea Services Ltd v Dickson (No 2)* (2009) 6 NZELR 666 at [39].
[154] Arthur M Okun, *Equality and Efficiency: The Big Tradeoff* (Brookings Institution, 1975) 20, as cited in Davidov, above n 1, at ch 5 at 83.

if one company pays their bill late. A delay on a dependent contractor receiving their payment could place them in significant financial difficulties.

Further, requiring the parties to both act in good faith would likely be beneficial and enable parties to engage in good faith discussions around workers status. Hill suggests that any reform should make mediation compulsory for any disputes that arise between contractors and principals.[155] This, she argues, would address any concerns that vulnerable contractors do not have the same access to the court system as their well-resourced principals.[156] Ensuring parties must act in good faith and making mediation the first compulsory step in a dispute, would enable vulnerable workers more access to justice, to question their relationship status. Further, it would require parties to act in good faith when negotiating the terms of the relationship. This would aim to level the playing field due to the power imbalance and element of dependency between dependent contractor and employer.

Dependent contractors should potentially be permitted to bargain collectively about their terms and conditions. Currently, independent contractors are prevented from bargaining collectively as doing so would amount to anti-competitive behaviour prohibited by the Commerce Act 1986. By extending the right to bargain collectively from only employees to dependent contractors, this would allow them to bargain collectively without being in breach of the Commerce Act. As Davidov mentions, by bargaining collectively, employees are able to gain some bargaining power – 'countervailing power' to the power of their employer.[157] Davidov argues that collective bargaining laws can be justified on the grounds of workplace democracy, redistribution and efficiency.[158] This would allow dependent contractors to engage in collective bargaining to better the terms of their contracts where they have often been unable to do so. There is however, an argument against allowing dependent contractors to bargain collectively. Dependent contractors have more autonomy than employees and potentially should not have the ability to join together with other contractors to better contract terms. The concern is that it may undermine competition, innovation and freedom of contract. Moreover, that these workers are more individualised and independent than employees and are competing against other similar contractors for work. Therefore, they may not wish to join together to

[155] Hill, above n 24, at 172.
[156] At 172.
[157] Davidov, above n 1, at ch 5 at 86.
[158] At ch 5 at 86.

bargain collectively, and they should not be able to do so. However, due to the vulnerability of dependency in dependent contractors' relationships, these concerns are likely not justified. From a purposive approach, collective bargaining laws aim to give workers an avenue to better their terms and conditions. As established, dependent contractors are often in relationships of dependency, with little to no bargaining power to negotiate contract terms. An Uber driver for example, with no right to bargain collectively, has no ability to better their contract terms. Uber drivers in the past have threatened to participate in strike action, however they have been prevented from doing so due to being classed as independent contractors and prohibited by the Commerce Commission. They have been left to rely on a court ruling declaring them as employees to take any action against the terms and conditions they are subject to. Therefore, collective bargaining laws should apply to cover this inherent vulnerability in a dependent contractor's relationship, to fulfil its purpose. Practical considerations however, such as how many workers are needed to initiate the bargaining, to what extent good faith should apply, and so on would need to be considered.

The Government has announced the proposed framework for a new fair pay agreement system in New Zealand. This would require employers and employees to agree on minimum terms and conditions of employment such as wages, leave entitlements and overtime rates in an entire industry.[159] This will have wider implications for industries than collective agreements currently do, as they only apply to union members. Although intending to increase bargaining power for employees to improve pay and conditions for essential workers, this framework currently does not cover contractors. This initiative therefore currently would not better the conditions of workers such as Uber drivers who are currently classed as independent contractors.

Davidov argues that those who require the protection of unjust dismissal laws are the workers who depend upon a specific relationship.[160] He argues that the unique attribute of dependency in a relationship plays a crucial role in explaining the purpose of 'just cause' laws.[161] Further however, he justifies 'just cause' regulations on the basis of the existence of democratic deficits in the way of subordination of the employee to the employer.[162] Although as suggested,

[159] Ministry of Business, Innovation & Employment *The proposed Fair Pay Agreement system* (May 2021).
[160] Davidov, above n 1, at ch 5 at 103.
[161] At ch 5 at 103.
[162] At ch 5 at 103.

dependent contractors have a strong element of dependency in the relationship, and only a minimal to zero existence of subordination, they arguably should be treated differently than employees in relation to dismissal laws. As dependent contractors often have the freedom to accept or reject job opportunities, employers should similarly have an ability to offer these workers no further work without 'just cause'. If dependent contractors are given freedom to decide they no longer wish to provide their services, an employer should be offered the same ability. It would be unjustified to allow dependent contractors to choose when they want to work, if at all, but to not allow employers to decide to no longer require their services without good cause. If a dependent contractor decides they do not want to work for a month, or they only want to work one day a week as they contractually can, an employer should have the ability to decide that is not sufficient and they wish to engage someone else.

Dependent contractors should, however, be entitled to reasonable notice their contract is coming to an end. As they are economically dependent on the contract with the employer, notice there will be no more work offered rather than a complete cut of their main/ only income stream would likely be appropriate. Rather than setting a timeframe of how much notice is required, allowing 'reasonable notice' would allow for each contract to determine what would be reasonable based on their individual circumstances. Similarly, dependent contractors should be required to give reasonable notice to the employer that they will no longer be available to provide their services. The Privy Council in *Australian Blue Metal Ltd* noted that reasonable notice is intended to serve a common purpose of the parties, being that "both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements of a sort similar to those which are being terminated".[163] Dependent contractors are going to suffer a larger blow from the termination of a contract than an independent contractor, due to the element of dependency in the relationship and therefore, should be given reasonable notice their contract is ending.

Minimum rights that dependent contractors potentially should not be protected by include annual leave, sick leave, and bereavement leave. The purpose of annual leave, sick leave and bereavement leave is set out in s 3 Holidays Act 2003. Annual holidays are to provide the opportunity for rest and recreation.[164] Sick leave and bereavement leave are to assist employees

[163] *Australian Blue Metal Ltd v Hughes* [1963] AC 74 as cited in *Hunter Grain Ltd v J Swap Contractors Ltd* BC201163932 at [309].
[164] Holidays Act 2003, s 3(a).

who are unable to attend work because of sickness, injury or a bereavement.[165] Dependent contractors are not under the same controls a typical employee is, as noted they suffer little to no subordination in the relationship. Therefore, these workers often have the ability to not work a day if they wish to go on holiday, or if they are sick, without requiring approval from the employer/ company. They are merely able to, in the case of an Uber driver, just not log onto the app that day. It would be extending the categories protections too far to allow them paid leave when they do not suffer subordination in the relationship to the extent an employee does.

3 Jurisdiction

The Employment Relations Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.[166] The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.[167]

The High Court referred to s 161 in *Sawyer v Vice-Chancellor of Victoria University of Wellington* noting the authorities jurisdiction to make determinations including:[168]

> … disputes about the interpretation; application or operation of employment agreements; matters related to the breach of an employment agreement; personal grievances; matters related to the good faith obligations imposed under the Employment Relations Act; and any other action that arises from or is related to an employment relationship or the interpretation of the Employment Relations Act.

A party dissatisfied with an Authority determination can elect to have the matter decided by the Employment Court.[169]

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[165] Section 3(a) and (b).
[166] Employment Relations Act 2000, s 157(1).
[167] Section 161(1).
[168] *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2019] NZHC 2149 at [38].
[169] Employment Relations Act 2000, s 179(1).

As the Authority and Employment Court are more equipped with specific expertise in the area of employment, it would likely be suitable for them to have jurisdiction over dependent contractors rather than the common law. The Authority and Employment Court have more experience with employment relationships, and how to analyse specific cases to determine the real nature of a relationship. As dependent contractors have elements present in their relationships which are found in an employment agreement, and subsequently should receive some rights and protections, the Authority should have jurisdiction over disputes. This would allow dependent contractors access to the Authority and Employment Court who have special expertise over these matters. Furthermore, this would logistically allow for the legislation to be amended to expand the specific protections to include cover for dependent contractors. This would allow for the inclusion of the right to bargain collectively to be expanded to dependent contractors without infringing on the anti-competitive behaviour the Commerce Commission prohibits.

V Conclusion

In summary, New Zealand's current labour law framework is inadequate to fulfil the goals it seeks to achieve. There are many labour laws which purport to protect workers from specific vulnerabilities but are not doing so because the workers are being forced into the independent contractor category. To fulfil the goals of labour law, New Zealand should legislate to legally recognise a third class of workers known as 'dependent contractors'. This will allow workers who currently find themselves in relationships with characteristics of both employment and independent contractor relationships to be properly categorised. These workers are then able to be protected by the specific employment rights and protections that reflect the vulnerabilities they face by way of being a dependent contractor. To distinguish between the three categories, the legislation should list a set of factors which can be worked through with reference to any particular case. These factors will identify whether the worker is experiencing vulnerabilities of subordination and/ or dependency in the relationship. The employer/ company is then able to contract with the worker and become subject to the employment rights and protections that truly reflect the vulnerabilities the worker is facing. This will aim to realign the goals of labour law as a whole and specific labour laws to allow them to fulfil their purposes.

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