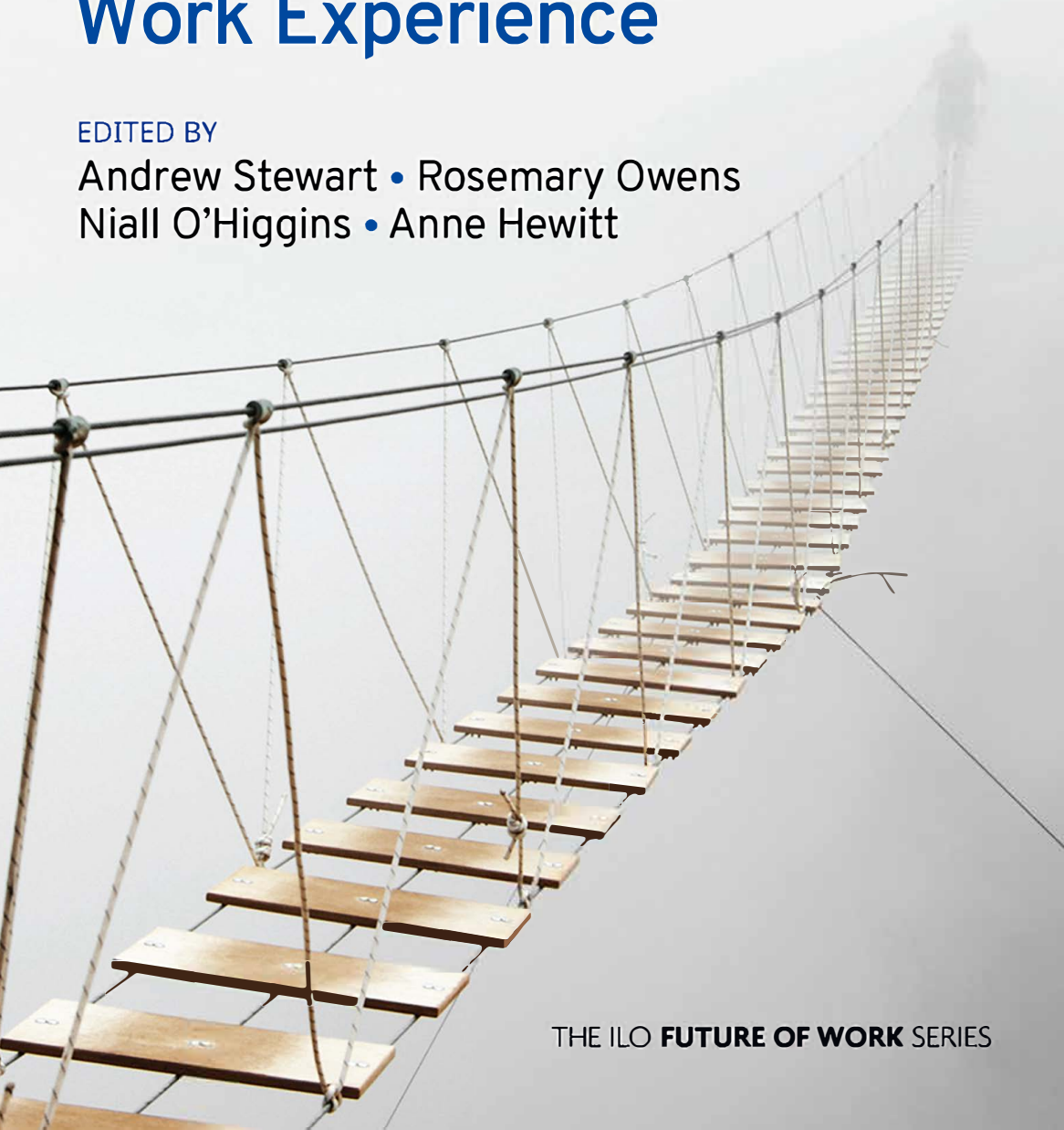


Internships, Employability and the Search for Decent Work Experience

EDITED BY

Andrew Stewart • Rosemary Owens
Niall O'Higgins • Anne Hewitt



THE ILO **FUTURE OF WORK** SERIES

Internships, Employability and the Search for Decent Work Experience

THE ILO FUTURE OF WORK SERIES

A range of new forces is transforming the world of work. These include technological advances, climate change, demographic shifts and the need for a greener and more sustainable economy. These changes pose serious challenges yet at the same time present opportunities to promote economic security, equal opportunity and social justice.

This series analyses new and emerging forms of work and examines impacts on contemporary and future workers and labour markets. Global in scope, the series focuses on developing and developed countries, and brings together leading scholars from the international research community. A major objective is to frame policy recommendations that can shape a better future of work for all.

Titles in the series include:

Telework in the 21st Century
An Evolutionary Perspective
Edited by Jon C. Messenger

Internships, Employability and the Search for Decent Work Experience
Edited by Andrew Stewart, Rosemary Owens, Niall O'Higgins and Anne Hewitt

Internships, Employability and the Search for Decent Work Experience

Edited by

Andrew Stewart

The University of Adelaide, Australia

Rosemary Owens

The University of Adelaide, Australia

Niall O'Higgins

International Labour Office, Switzerland

Anne Hewitt

The University of Adelaide, Australia



Edward Elgar
PUBLISHING

Cheltenham, UK • Northampton, MA, USA

International Labour Office

Geneva, Switzerland

© International Labour Organization 2021

First published 2021



This is an open access work distributed under the Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 Unported (<http://creativecommons.org/licenses/by-nc-nd/3.0/igo>). Users can redistribute the work for non-commercial purposes, as long as it is passed along unchanged and in whole, as detailed in the License. Edward Elgar Publishing Ltd must be clearly credited as the rights holder for publication of the original work. Any translation or adaptation of the original content requires the written authorization of Edward Elgar Publishing Ltd.

The designations employed in ILO publications, which are in conformity with United Nations practice, and the presentation of material therein do not imply the expression of any opinion whatsoever on the part of the International Labour Office concerning the legal status of any country, area or territory or of its authorities, or concerning the delimitation of its frontiers.

The responsibility for opinions expressed in signed articles, studies and other contributions rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office of the opinions expressed in them.

Reference to names of firms and commercial products and processes does not imply their endorsement by the International Labour Office, and any failure to mention a particular firm, commercial product or process is not a sign of disapproval.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

In association with
International Labour Office
4 route des Morillons
CH-1211 Geneva 22
Switzerland
ISBN 978-92-2-033813-1

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2021936651

This book is available electronically in the **Elgaronline**
Law subject collection
<http://dx.doi.org/10.4337/9781800885042>

ISBN 978 1 80088 503 5 (cased)
ISBN 978 1 80088 504 2 (eBook)

Contents

<i>List of contributors</i>	viii
<i>Foreword</i>	xiv
<i>Acknowledgements</i>	xvi

PART I BACKGROUND AND CONTEXT

1	Internships: A policy and regulatory challenge <i>Andrew Stewart, Rosemary Owens, Niall O'Higgins and Anne Hewitt</i>	2
2	The nature and prevalence of internships <i>Andrew Stewart</i>	17

PART II INTERNSHIPS AND EMPLOYABILITY

3	What makes for a 'good' internship? <i>Niall O'Higgins and Luis Pinedo Caro</i>	35
4	How do internships undertaken during higher education affect graduates' labour market outcomes in Italy and the United Kingdom? <i>Charikleia Tzanakou, Luca Cattani, Daria Luchinskaya and Giulio Pedrini</i>	55
5	Challenging the assumptions supporting work experience as a pathway to employment <i>Paula McDonald, Andrew Stewart and Damian Oliver</i>	76
6	The (non)instrumental character of unpaid internships: Implications for regulating internships <i>Wil Hunt and Charikleia Tzanakou</i>	91

PART III REGULATING INTERNSHIPS: NATIONAL PERSPECTIVES

- | | | |
|----|--|-----|
| 7 | Rights and obligations in the context of internships and traineeships: A German perspective
<i>Bernd Waas</i> | 113 |
| 8 | The law and regulation of internships in South Africa
<i>Mahlatse Innocent Maake-Malatji</i> | 130 |
| 9 | Internships and apprenticeships in Sweden, collective bargaining and social partner involvement
<i>Jenny Julén Votinius and Mia Rönnmär</i> | 145 |
| 10 | Square pegs and round holes: Shrinking protections for unpaid interns under the Fair Labor Standards Act
<i>James J. Brudney</i> | 163 |
| 11 | Work experience, the contract of employment and the scope of labour law: The United Kingdom and Australia compared
<i>Rosemary Owens</i> | 189 |

PART IV INTERNSHIPS, EDUCATION AND WELFARE

- | | | |
|----|--|-----|
| 12 | Regulating international educational internships: Opportunities and challenges
<i>Joanna Howe</i> | 208 |
| 13 | Universities as internship regulators: Evidence from Australia
<i>Anne Hewitt</i> | 223 |
| 14 | Regulating internships in active labour market programmes: A comparative perspective
<i>Irene Nikoloudakis</i> | 239 |
| 15 | Trainees – the new army of cheap labour: Lessons from workfare
<i>Amir Paz-Fuchs</i> | 255 |
| 16 | Extending social security to trainees in Spain, France and Germany: A tale of segmentation
<i>Alexandre de le Court</i> | 269 |

PART V HUMAN RIGHTS AND EQUAL OPPORTUNITY

- 17 Fundamental rights broadening the scope of labour law?
The example of trainees 285
Annika Rosin
- 18 Working at the edges of legal protection: Equality law and
youth work experience from a comparative perspective 302
Alysia Blackham
- 19 Traineeships and systemic discrimination against young workers 321
Julia López López

PART VI INTERNSHIP REGULATION: INTO THE FUTURE

- 20 Developing new standards for internships 335
*Andrew Stewart, Rosemary Owens, Niall O'Higgins and
Anne Hewitt*
- Index* 349

Contributors

Alysia Blackham is an Associate Professor at the University of Melbourne, Australia. Her research concentrates on the consequences of demographic ageing for workplaces. Alysia's monograph, entitled *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Hart Publishing, 2016), was awarded second prize in the UK Society of Legal Scholars' Peter Birks Prizes for Outstanding Legal Scholarship. In 2017 Alysia commenced the project DE170100228 'Addressing Age Discrimination in Employment', funded by the Australian Research Council as part of the Discovery Early Career Researcher scheme.

James J. Brudney is the Joseph Crowley Chair in Labor and Employment Law at Fordham Law School, USA. He joined Fordham in 2011 after 19 years at The Ohio State University Moritz College of Law, USA. Previously, he clerked for a federal district judge and a Supreme Court Justice, practised with a leading labour law firm in Washington, DC, and served for six years as Chief Counsel and Staff Director of the US Senate Subcommittee on Labor. He is co-chair of the Public Review Board for the United Auto Workers International Union and a member of the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations.

Luca Cattani is a postdoctoral Research Fellow at the Department of Legal Studies, University of Bologna, Italy, where he received his doctorate in European law and economics in 2014 with a thesis titled 'Educational mismatch in the Italian and European labour markets'. He was a Research Fellow at the Department of Economics, University of Modena and Reggio Emilia, Adjunct Professor of Economics at the University of Padua and visiting researcher at the Institute for Employment Research, University of Warwick, UK. His main research interests include graduate transitions to employment, educational and skills mismatches and the relationship between skills utilization and technical change.

Alexandre de le Court is Lecturer in Labour and Social Security Law at Pompeu Fabra University, Barcelona, Spain. A former lawyer at the Brussels Bar, he started teaching and researching those subjects as a member of greD-TiSS, the UPF Consolidated Research Group in Labour and Social Security Law, in 2010. His research focuses on comparative and international labour

and social security law, precarious work and the connections between labour law and social security. He has been a visiting scholar at the Max Planck Institute for Social Law and Social Policy and the Law Faculty of the Austral University of Chile.

Anne Hewitt is an Associate Professor in Law at the University of Adelaide, Australia. Focusing on the intersections of law and education, her publications cover topics such as legal education pedagogy, the teaching and assessment of legal skills, the regulation of education and the rights of students undertaking unpaid work in their formal education. Her research has been funded by various grants, including an Australian Research Council Discovery Project grant (DP150104516), which supported the research for her contribution to this collection. She is also passionate about curriculum design and teaching, and has won numerous local and national teaching awards.

Joanna Howe is Associate Professor of Law at the University of Adelaide, Australia, and a consultant with Harmers Workplace Lawyers. She holds a PhD in Law from the University of Oxford, where she studied as a Rhodes Scholar, and is a leading Australian expert on the regulation of temporary labour migration. Her publications include *Temporary Labour Migration in the Global Era*, co-edited with Rosemary Owens, and *Rethinking Job Security*, which provides a three country study of unfair dismissal law. She has also led significant research projects for the Fair Work Ombudsman, Horticulture Innovation Australia and the Government of Korea.

Wil Hunt is a Research Fellow at the ESRC-funded Digit Research Centre at the University of Sussex, UK. His research interests centre around higher education, the graduate labour market and the impact of new digital technologies on the world of work. His PhD research examined the role graduate internships play in transitions to employment and as a mechanism of socio-economic reproduction.

Jenny Julén Votinius is a Professor of Private Law at the Faculty of Law, Lund University, Sweden. She has wide experience of labour law research in comparative and international settings. Her work is characterized by an interdisciplinary approach, integrating perspectives from social science and political philosophy into legal analysis. She has researched youth employment as part of various projects, with publications *inter alia* with Edward Elgar Publishing and in the *European Labour Law Journal*. She serves on the European Commission Expert Legal Network in Gender Equality and has been a visiting researcher at the University of California, Berkeley, USA.

Julia López López is Professor of Labor Law and Social Security Law at the Pompeu Fabra University in Barcelona, Spain, and Senior Researcher in the

research group for labour and social security law, greDTiSS. She is the author of books and articles on comparative, European Union and Spanish labour law. Much of her work deals with multilevel legal dynamics and the interactions between protest, democratic governance and legal institutions. Her recent publications include an edited book, *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart Publishing, 2019).

Daria Luchinskaya is a Lecturer at the Department of Work, Employment and Organisation, University of Strathclyde, UK. Her research interests are in the inequalities in graduate transitions to employment, and in the role of skill development and skill utilization in relation to graduate employment. She has a background in economics, area studies and employment research, and is interested in using mixed-methods and interdisciplinary research approaches. Prior to her current role, she was a Research Fellow at the Institute for Employment Research, University of Warwick and an Early Career Fellow at the Warwick Institute of Advanced Study.

Mahlatse Innocent Maake-Malatji was born and raised in Namakgale, Limpopo Province, South Africa. After completing her Matric in 2011, she undertook a Bachelor of Laws at the University of Limpopo. She then proceeded with her studies at the University of Cape Town, completing her Professional Masters in Commercial Law in 2017. She is currently in view of her PhD in Commercial Law with the University of Cape Town. She is a Junior Research Fellow for the Department of Higher Education, South Africa (UCT) and an Ad Hoc Lecturer at Law@Work, University of Cape Town.

Paula McDonald is Professor of Work and Organisation and Associate Dean, Research in the Queensland University of Technology Business School, Australia. Paula works closely with organizations in the public, private and community sectors on collaborative research which advances social justice in and beyond the workplace. Her areas of expertise include: automation, AI and work; youth education to work transitions; vulnerable and disadvantaged worker groups; and gendered dimensions of work. She is a registered psychologist and a senior fellow of the UK Higher Education Academy.

Irene Nikoloudakis holds degrees in law (with first class honours), commerce and psychological science from the University of Adelaide, Australia. She has co-authored a report for the International Labour Organization on internships and work experience, and a report for the Consulate-General of the Republic of Korea on temporary migrant workers. She currently works as a Research Assistant at the Adelaide Law School and is admitted as a Barrister and Solicitor of the Supreme Court of South Australia.

Niall O'Higgins is Senior Economist in the International Labour Office's Employment Analysis Unit and Associate Professor of Economics at the University of Salerno, Italy. He holds degrees from Trinity College Dublin, York and Sheffield universities and a PhD from the European University Institute in Florence. His main research interests cover aspects of labour and experimental economics. Previously Lead Researcher in the ILO's Youth Employment Programme, he is one of the main authors of the ILO's biennial *Global Employment Trends for Youth* report. His recent publications include a book on youth employment policy and articles in the *European Economic Review* and the *Cambridge Journal of Economics*.

Damian Oliver is an Australian labour-market researcher interested in the intersection between education and employment. His research has focused on how individuals combine education and work, the effects on future employment of participation in education and training, and the role of employment regulation in fostering skill development. He holds a PhD in industrial relations from Griffith University (Brisbane, Australia). He has held appointments at the University of Duisburg-Essen, Germany, the University of Sydney and the University of Technology Sydney, Australia.

Rosemary Owens is a Professor Emerita at the University of Adelaide, Australia. Her research focuses on workplace law, especially its impacts on marginalized groups. She has recently been working on an ARC Discovery Project, 'Regulating Post-secondary Work Experience: Labour Law at the Intersection of Work and Education'. She is a member of several editorial boards, including the *Australian Journal of Labour Law* and the *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, and a Fellow of the Australian Academy of Law. In 2010 she was appointed to the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations.

Amir Paz-Fuchs is a Professor of Law and Social Justice, University of Sussex, UK. He teaches and researches in labour and employment law, jurisprudence, social rights and social justice, and legal aspects of privatization. He has researched and published in these areas in, among others, the *Oxford Journal of Legal Studies*, the *Modern Law Review*, the *Berkeley Journal of International Law* and the *Canadian Journal of Law and Jurisprudence*. In addition, Amir is the founding Director of the Sussex Clinical Legal Education Programme and is currently working on a monograph (under contract with Oxford University Press) on unfree labour.

Giulio Pedrini is Assistant Professor in Economic Policy at the Kore University of Enna, Italy. He holds a degree in economics (University of Genoa), a Master's in law and economics (Erasmus University of Rotterdam)

and a PhD in law and economics (University of Bologna). He was Adjunct Professor at the University of Bologna, Research Fellow at the universities of Milan-Bicocca, Padua and Bolzano, and visiting researcher at the Institute for Employment Research – University of Warwick, and at the Université Libre de Bruxelles. His primary areas of research are the economics of education and training, and regional and urban economics.

Luis Pinedo Caro is a research officer at the ILO Office for Turkey. He holds a PhD from the University of Southampton, UK, and has several years of experience working on employment-related fields such as global supply chains, the gig economy and the role of internships in promoting young people's employability. He has recently developed an observatory on Syrian refugees in Turkey and has written a report on this group's living and working conditions.

Mia Rönnmär is Professor of Private Law and former Dean at the Faculty of Law at Lund University, Sweden, specializing in Swedish, comparative and European Union labour law and employment relations. She is President of the International Labour and Employment Relations Association (ILERA) and coordinator of the Norma Research Programme at Lund University. She has conducted expert work for international organizations, national governments and authorities and social partners, and has been a visiting researcher at, among others, the European University Institute, the London School of Economics and Sydney Law School.

Annika Rosin is Assistant Professor of Labour and Social Law in the Faculty of Law, University of Turku, Finland, having previously been a lecturer and postdoctoral researcher there. She is interested in international, comparative and European employment law, and she has been studying the labour law status and working conditions of different atypical workers. In her doctoral thesis she studied the labour law protection of trainees. She has published in several international peer-reviewed journals, participated and presented in various international conferences, and taught labour law at University of Tartu, Estonia.

Andrew Stewart is the John Bray Professor of Law at the University of Adelaide, Australia and a consultant with the law firm Piper Alderman. His books include *Stewart's Guide to Employment Law*, *Creighton & Stewart's Labour Law* and *Cooperation at Work: How Tribunals Can Help Transform Workplaces*. His current research includes Australian Research Council-funded projects on the regulation of unpaid work experience and the organization of work through digital platforms.

Charikleia Tzanakou is a Senior Research Fellow at the Centre for Diversity Policy Research and Practice at Oxford Brookes University, UK. Her research

interests are inequalities in higher education, with a particular focus on transitions from education to employment, gender (in)equalities and academic mobility. She uses interdisciplinary mixed methods to bring together insights from employment research, organizational studies, gender studies, education and economics. She is currently leading a cross-national collaborative project on internships in the UK and Italy. She was previously a Research Fellow at the Institute of Employment Research and Politics and International Studies at the University of Warwick.

Bernd Waas is Professor for Labour Law and Civil Law, Goethe University Frankfurt, Germany, and coordinator of the European Centre of Expertise in the field of Labour Law, Employment and Labour Market Policies (ECE). He previously coordinated the European Commission's labour law experts network and helped establish the European Labour Law Network, which is developing a Restatement of Labour Law in Europe. He is a member of the International Labour Organization's Committee of Experts, Chairman of the German Section of the International Society for the Law of Labour and Social Security, and a member of the Labour Law Research Network (LLRN) Advisory Committee.

Foreword

Internships are rapidly becoming an integral part of the school-to-work transition. Although initially originating in high-income countries, internships are now becoming more common in low- and middle-income countries. In this context, concerns have increasingly been expressed over the last decade or so regarding the ability of internships to provide an effective bridge between education and (paid) work. In the wake of the global financial and economic crisis of 2008, the ILO Resolution ‘The Youth Employment Crisis: A Call for Action’ noted that ‘internships, apprenticeships, and other work experience schemes have increased as ways to obtain decent work. However, such mechanisms can run the risk, in some cases, of being used as a way of obtaining cheap labour or replacing existing workers’.¹ Yet, to date, studies of this area are rather limited, certainly as compared with other forms of non-standard employment such as gig work and/or platform economy jobs.

This volume seeks to go some way towards redressing this imbalance. For a number of years the ILO has been active in this area, undertaking research and hosting seminars and conferences on the issue, with a view to promoting discussion globally on how to improve internship and provide genuine opportunities for young people. As of today, the ILO is in the process of discussing possible international labour standards on apprenticeship and other forms of work-based learning. Ongoing discussions of this instrument include the role of internships – or traineeships, as they are sometimes referred to – as an integral part of this process.

The book marks the culmination of these efforts to date, which have included papers by the editors of this book as well as by other colleagues inside and outside the ILO.

But this is by no means the end. I hope and believe that this book, with its many wide-ranging and constructive contributions, will serve to stimulate further research in this area, but more than that, will inspire action by national and international actors to better support young people as they seek to navigate the sometimes treacherous waters on their journey towards decent work. In particular, as the COVID-19 pandemic is causing unprecedented disruptions to

¹ ILO, ‘The Youth Employment Crisis: A Call for Action’ (Resolution and Conclusions of the 101st Session of the International Labour Conference 2012) 7.

the world of work, such action is all the more crucial to ensure a decent future for our young people; after all, young people are our future.

Sangheon Lee
Director
Employment Policy Department
ILO, Geneva
March 2021

Acknowledgements

We are grateful to the International Labour Organization for helping to publish this book, and the International Labour Office in Geneva for its assistance and support for this project. Thanks in particular are due to Sukti Dasgupta, Chris Edgar, Colin Fenwick, Germaine Ndiaye Guisse, Alison Irvine and Sangheon Lee. We appreciate as well the helpful comments of the anonymous reviewers who read over an earlier draft of the manuscript, and the hard work of the staff at Edward Elgar Publishing who have helped get it into print.

We also wish to thank Irene Nikoloudakis and Charlotte McGowan for invaluable research assistance, and Kate Leeson for her tremendous work in editing the draft papers. Their work, along with other research for this project, was supported by a Discovery Project grant (DP150104516) from the Australian Research Council.

Finally, we wish to express our gratitude to all those who have contributed to this volume. Your expertise and insights have been crucial in helping both us and the ILO to evaluate and respond to a form of work that is becoming an increasingly important (and sometimes controversial) part of modern labour markets.

Andrew, Rosemary, Niall and Anne
March 2021

PART I

Background and Context

1. Internships: A policy and regulatory challenge

Andrew Stewart, Rosemary Owens, Niall O'Higgins and Anne Hewitt

There is no single body of experts, no famed multinational corporation, no particular institution or government that is pushing the relentless global expansion of internships – a process occurring so rapidly, and at the instigation of so many different actors, that its contours seem almost impossible to gauge. The dynamics vary substantially from country to country, with particular labor laws, different industries and specific values surrounding work all coming into play, but the overall direction is clear: internships are pushing into the workplaces of middle- and high-income nations the world over. What took four decades to materialize in the U.S. has rapidly become a global fact of life: internships are at once a significant source of cheap, flexible white-collar labor and a major steppingstone to affluence and professional success. They grant access to those who can afford them, and block further progress for those who cannot.¹

1.1 INTRODUCTION

Over the course of the decade since Ross Perlin wrote the words above, little has changed to dispute his analysis. If anything, internships have become even more firmly entrenched in the transition from education to work. However, this phenomenon is still not attracting the attention it deserves. To help remedy that, this volume, the first of its kind, brings together experts from around the world in labour law, employment relations and labour economics to explain what we know about the use and value of internships, and to discuss how they are or should be regulated.

In this opening chapter, we offer some preliminary explanations for the growth of internships, highlight some of the ways in which both scholars and policy-makers have sought to analyse and respond to that development, explain how the rest of the volume is structured and briefly summarize the contributions in it. We conclude by saying something about the impact that the

¹ Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (rev edn, Verso Books 2012) 185–6.

COVID-19 pandemic has had so far on internships and what it might mean for their use in the future.

Before going on, it is necessary to say what we mean by the term ‘internships’. More is written both below and in Chapter 2 of this volume about the different types of arrangement that can potentially attract this label. For now it suffices to say that, as the editors of this volume, we take an internship (or a ‘traineeship’, as it is sometimes called in Europe) to be any arrangement for the performance of work within a business or organization which is primarily intended to provide experience, skills and/or contacts that will help the worker obtain employment or other work opportunities in the future. As we use the term, it does not matter whether the internship is undertaken during, after or as part of a formal scheme of education, training or government assistance. We also distinguish an internship from an apprenticeship, on the basis that the latter seeks in a more structured (if not always formal) way to provide *all* the skills needed to practise a particular trade or profession.

Having said that, we need to express the caution that this terminology is far from exact. It is not the subject of any generally accepted definitions, whether for legal or other purposes. Even within the pages of this volume, the terms internship and intern (or traineeship and trainee) may be used in ways that reflect different traditions or usages within a particular country, region or language. The same is true of apprenticeship and apprentice, as the International Labour Organization (ILO) has acknowledged.² Nevertheless, we have tried as far as possible to encourage our contributors either to focus on internships in the general sense described above or, where they are concerned only with particular types of internship, to be clear about that.

1.2 SEPARATING TRAINING FROM PAID EMPLOYMENT

There is nothing new in the idea of combining work and training. The traditional model of apprenticeship has always been premised on the idea of learning a particular trade or craft, while performing work to practise what has been learnt and to hone the skills involved. The modern form of apprenticeship that now predominates in higher-income countries typically requires time release from work to attend classes at an educational institution. However, on-the-job instruction still remains an integral element of these schemes, as it does in the more informal arrangements still found in many developing economies. In many professions too, whether called apprenticeships or not, licensing

² See ILO, *A Framework for Quality Apprenticeships* (International Labour Office 2019) 5–7, 15–16.

or accreditation schemes often require a period of time to be spent working under the supervision of experienced practitioners. Beyond those more formal requirements, it has long been a feature of entry-level jobs that an initial period will be spent ‘learning the ropes’, while adjusting both to the type of work involved and the demands of the employing organization.

What has been striking in recent decades, especially but not solely in developed economies, has been the steady decoupling of training from paid employment. One reason for that has been the growth of formal education programmes, whether in universities or technical colleges. Many of the placements or ‘practica’ required to practise a particular trade or profession are now undertaken as an element of these programmes – and because of that, they are often unpaid or compensated at a rate below that which an entry-level job might otherwise provide. Even where vocational or professional requirements do not make a work placement compulsory, it is now common for educational programmes to require or allow students to undertake some form of work experience as a part of their studies. For example, a student might complete a supervised and formally assessed research project both for credit in their course and (potentially) for the benefit of the agency or organization for which the project has been undertaken.

Governments too have assumed a role in facilitating or even requiring work experience, not least as part of active labour-market programmes (ALMPs) designed to assist job seekers – in particular, the long-term unemployed or those identified as being in some way disadvantaged in seeking to enter or re-enter the labour market.

In addition to hosting students or job seekers undertaking work experience as part of formal education or training programmes, many businesses, non-profit organizations and government agencies have developed internship schemes of their own. These can sometimes involve paid employment, but they are just as likely to be characterized as a form of unpaid training. Some are highly structured, while others operate less systematically. They can allow participants to gain work experience in many different ways, whether by performing actual or mock assignments, or simply shadowing more experienced workers and observing what they do. In some internships, basic or even menial tasks may be required, sometimes for the personal benefit of key employees or managers rather than the organization for which they work. In such cases, the perceived value of the internship may lie as much in what they add to the intern’s curriculum vitae (CV) or résumé, or the contacts they promise to provide, as in the acquisition of any particular work-related skills or knowledge.

There appear to be many drivers for the growth in the prevalence of this form of work-based learning.³ For example, job seekers may be eager to take every possible opportunity to improve their chances of employment, especially in fields where there is an oversupply of otherwise qualified applicants. Indeed, many are now willing to pay money to internship brokers for the privilege of doing unpaid work in the profession or industry of their choice.

Many businesses or organizations have also come to recognize the value to them of internships, thus increasing the number of such positions on offer. Taking on interns may, for example, be a useful form of pre-employment screening. More problematically, however, unpaid (or low-paid) internships can also be used to obtain productive work that would otherwise be done by paid employees, thus reducing labour costs. The more that some employers do this, the greater the likelihood that others will follow suit to remain competitive.

The rise of internships also needs to be understood in the context of a changed approach to skills development. The pressure on modern businesses to deliver returns to shareholders, and the lack of predictability in what are often now global markets, militate against long-term investment in training. The in-house training that was once part of many entry-level jobs is now far less evident, in effect shifting the costs of training from the firm to the worker – or the state, to the extent it funds the worker's education and training.

Another driver has been the embrace by higher education institutions of what is often now termed 'work-integrated (or experiential) learning'. This often flows from a pedagogical belief that there are certain types of skills or knowledge that are best acquired through trial and practice rather than classroom-based learning. However, it may also reflect an acceptance of the increasingly common demand for graduates who are 'work ready'. Governments too have been important supporters of the concept of work-based learning, especially in higher education or the types of ALMP arrangement mentioned earlier.

1.3 ANALYSING AND RESPONDING TO THE GROWTH IN INTERNSHIPS

For many years, research and writing on internships was most commonly found in educational studies on the value and effectiveness of particular forms

³ See Rosemary Owens and Andrew Stewart, 'Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern' (2016) 155 ILR 679, 682–3, from which some of the text that follows is taken.

of placement or work experience.⁴ Attention to regulatory issues was less common.⁵ However, that has changed over the past decade. One influential contribution was Ross Perlin's book *Intern Nation*, quoted at the beginning of this chapter.⁶ He drew attention to the growth of internships both in the USA and globally, highlighting the complexity of the web of interests – employers, parents, educational institutions, government agencies and interns themselves – invested in the phenomenon. Significantly, he characterized internships as a form of contingent or 'non-standard' work,⁷ a point also made by Guy Standing in *The Precariat*.⁸ The vulnerability of interns to exploitation has been reiterated in subsequent analyses.⁹ The same is true for Perlin's emphasis on the way in which requirements to undertake unpaid or low-paid internships may impose or strengthen barriers to entry to certain professions for those from less privileged backgrounds.¹⁰

Regulators and policy-makers have also turned their attention to this topic, at least in some parts of the world. Their efforts have in turn led to an upsurge in commentary from scholars in labour law and employment relations, not least some of the contributors to this volume. Argentina, Brazil and France were some of the earliest countries to pass laws specifically regulating internships,¹¹ while others have moved either to bring internships within the coverage of particular forms of labour regulation, or to exclude them.¹² In the

⁴ See eg the studies summarized in Gisela Sanahuja Vélez and Gabriela Ribes Giner, 'Effects of Business Internships on Students, Employers, and Higher Education Institutions: A Systematic Review' (2015) 52 J Employ Couns 121.

⁵ For exceptions, see eg David L Gregory, 'The Problematic Employment Dynamic of Student Internships' (1998) 12 NDJLEPP 227; David C Yamada, 'The Employment Law Rights of Student Interns' (2002) 35 Conn L Rev 215.

⁶ Perlin (n 1).

⁷ Ibid 36–41, 197–202.

⁸ Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic 2011) 16, 75–6.

⁹ See eg Sabina Siebert and Fiona Wilson, 'All Work and No Pay: Consequences of Unpaid Work in the Creative Industries' (2013) 27 Work, Empl & Soc 711; Annika Rosin, 'Precariousness of Trainees Working in the Framework of a Traineeship Agreement' (2016) 32 IJCLIR 131; Owens and Stewart (n 3).

¹⁰ See eg Carl Cullinane and Rebecca Montacute, *Pay As You Go? Internship Pay, Quality and Access in the Graduate Jobs Market* (Sutton Trust 2018).

¹¹ Creacion del Sistema de Pasantias Educativas en el Marco del Sistema Educativo Nacional Ley No 26427 (Argentina); Lei do Estágio, No 11788 of 2008 (Brazil); Loi no 2011-893 pour le Développement de l'Alternance et de la Sécurisation des Parcours Professionnels (France).

¹² See the various examples provided in Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, 'The Regulation of Internships: A Comparative Study' (2018) International Labour Office Employment Policy Department Working Paper No 240, which surveys the law in 13 different countries: Argentina, Australia, Brazil,

USA, the Wage and Hour Division of the Department of Labor issued a fact sheet in 2010 that sought to provide guidance to businesses on whether interns should be considered employees.¹³ This prompted a number of private test cases by unpaid interns to establish their entitlement to minimum wages under the Fair Labor Standards Act 1938, although these have not met with complete success.¹⁴ By contrast, Australia's Fair Work Ombudsman has successfully brought proceedings against a number of firms for underpaying interns, as part of an active strategy not just to improve understanding of the legal position, but to develop 'best practice' approaches that can improve the quality of work experience programmes and reduce the misuse or exploitation of young job seekers.¹⁵ In other countries, greater emphasis has been placed on the use of 'soft law', such as codes of practice, to influence the use and content of internships in both government and non-government organizations.¹⁶

In 2014, the Council of the European Union (EU) took the significant step of formulating guidelines for its member states on how to improve the quality of what it chose to call 'traineeships'.¹⁷ The Quality Framework for Traineeships seeks, among other things, to increase the transparency of internship conditions, such as through the requirement of a formal internship agreement, although it leaves unresolved the question of whether, and if so to what extent, interns are or should be protected by general labour and social laws.¹⁸

Canada, China, France, Germany, Japan, Romania, South Africa, the UK, the USA and Zimbabwe. For a thorough (though now slightly dated) review of regulation in the European Union, see Kari P Hadjivassiliou, Emanuela Carta, Tom Higgins, Catherine Rickard,

Suzanne Ter-Minassian, Flavia Pesce and others, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report* (European Union 2012).

¹³ Wage and Hour Division, US Department of Labor, 'Fact Sheet #71: Internship Programs under the Fair Labor Standards Act' (US Department of Labor 2010). See Natalie Bacon, 'Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71"' (2011) 6 OSEBLJ 67.

¹⁴ See eg *Glatt v Fox Searchlight Pictures, Inc* 811 F 3d 528 (2016). For further discussion of the position in the USA, see James Brudney, Chapter 10 in this volume.

¹⁵ See Stewart and others (n 12) 31–2, 41–2.

¹⁶ Ibid 43–4, discussing among other things the Common Best Practice Code for High-Quality Internships developed in the UK by the Gateways to the Professions Collaborative Forum.

¹⁷ Council of the EU, Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1.

¹⁸ As to the impact of the framework, see eg Lukasz Sienkiewicz, *Traineeships under the Youth Guarantee: Experience from the Ground* (European Commission 2018).

For its part, the ILO has recognized both the role that internships can play in helping to obtain decent work and the risk that they may be used by organizations to obtain cheap labour or replace existing workers.¹⁹ At the time of writing, it is seeking feedback from its member states on the development of new international labour standards on apprenticeships and other forms of work-based learning, including internships.²⁰ More is said about these initiatives, as well as the applicability of existing international labour standards, in Chapter 20 of this volume.

1.4 THE CONTRIBUTIONS IN THIS VOLUME

In Chapter 2, Andrew Stewart explains how internships can be defined and distinguished from other forms of work-based learning and explores what is known about their prevalence. The chapter concludes by highlighting four persistent policy concerns, some already mentioned in this chapter: whether internships deliver quality training; whether they do provide the promised bridge from education to paid work; whether unpaid or low-paid internships impede social mobility; and whether these arrangements may be displacing paid employment and undermining labour standards.

The second and third of those policy issues are taken up in Part II of this volume, which presents new data and insights on the question of whether and to what extent internships have a positive effect on employability. In Chapter 3, Niall O'Higgins and Luis Pinedo Caro demonstrate on the basis of a literature review and further analysis that paid open-market internships are better than unpaid internships for young people's post-internship labour-market outcomes. The obvious follow-up question is 'Why?' Their answer lies not in the payment of interns per se, but in the fact that paid internships are, on average, of higher quality than those that are unpaid. Paid internships tend to be more structured and formalized, and consequently are characterized by elements which increase the likelihood that young interns gain skills and competencies of lasting worth.

These conclusions find resonance in Chapter 4 in which Charikleia Tzanakou, Luca Cattani, Daria Luchinskaya and Giulio Pedrini analyse the effects on graduate early labour-market experiences of internships undertaken as part of higher education, comparing the case of the UK with Italy. They find that these internships have a positive, albeit limited, effect on the early labour-market experiences of university graduates in both countries, with

¹⁹ See eg ILO, 'The Youth Employment Crisis: A Call for Action' (Resolution and Conclusions of the 101st Session of the International Labour Conference 2012) para 24.

²⁰ ILO, *A Framework* (n 2).

better internship-related outcomes in the UK. Their analysis also throws light on some more nuanced issues. As with the previous chapter, they find that paid internships are associated with better subsequent labour-market outcomes. They also highlight, however, the importance of definitional questions, which impede precise comparisons across (but also within) countries on this issue. Their results indicate a signalling role for internships, although they caution that, should internships become compulsory, this role will be diluted.

A related issue is taken up in Chapter 5, in which Paula McDonald, Andrew Stewart and Damian Oliver note that as unpaid work experience becomes more common so it must logically be harder for participants to acquire a competitive advantage in the labour market. They note also that, as other contributions to Part II suggest, the real gains in employability may come from high-quality experiences. If so, it becomes even more important to ensure that social background does not limit access to the better types of internship.

Wil Hunt and Charikleia Tzanakou take the argument one step further in Chapter 6. Their analysis of internships among creative and mass communications students in the UK confirms that paid internships are associated with increased chances of subsequently obtaining creative employment and with a significant wage premium for those who do find jobs. Unpaid internships not only do not provide any boost to the graduates' employment prospects, but those students who undertake them subsequently earn less than those who do no internship at all. Different approaches to the regulation of internships are reviewed and, while no particular regulatory approach is inherently superior to the others, details matter. In particular, whichever approach is taken needs to be based on a clear definition of the boundaries between work placements while in education, open-market internships and genuine volunteering.

Part III turns to the question of state regulation and takes a more in-depth look at how internships are being treated in six different countries, whether under existing or new laws. The regulatory regime of Germany, as outlined by Bernd Waas in Chapter 7, provides a comparatively strong example of the increasing application of labour law to internships or traineeships. However, with a framework dependent upon various different definitional foundations, its strength remains susceptible to interpretive challenges and the problem of sham employment relationships. The segmented approach to internships presented by the German model may also risk exacerbating these weaknesses. In Chapter 8, Mahlatse Innocent Maake-Malatji examines the role of internships and their regulation in providing a pathway from education to employment for black graduates in South Africa. In so doing she places the issue within the wider historical context of apartheid and its ongoing economic and social legacies, including unemployment, poverty and inequality. Her argument suggests that if the centrality of vocational skills training and development to entering, participating and remaining in a changed world of work is recognized, as it was

by the ILO's Global Commission on the Future of Work,²¹ then to be effective in practice the regulation of internships must be embedded in strategies that break the vicious cycle whereby internships simply become a path to further unemployment, poverty and inequality.

In Chapter 9 Jenny Julén Votinius and Mia Rönömar explore various forms of internships and apprenticeships within the Swedish labour law and industrial relations system. These non-traditional work relationships have been encouraged in Sweden to assist young people, and more recently immigrants and the long-term unemployed, to enter the job market. However, active and autonomous social partners, the determination of wages through collective bargaining and a presumption that the costs of labour-market inclusion should be borne by the state have, to date, minimized the potential risks of apprenticeships and internships to individuals and more broadly at the societal level.

In a forensic examination of the regulation of internships in the USA, Chapter 10 analyses the changes in judicial interpretation of the major federal labour statute in this area over the past eight decades. James Brudney argues that the current interpretive approach is in tension with the statutory text, legislative history and long-standing application of the statute by the administration. The replacement of strict criteria by increased judicial discretion in more recent decisions has diminished labour protections for interns, just at a time when empirical evidence and arguments provide little policy basis for this approach.

In Chapter 11, Rosemary Owens uses the vehicle of the common law of Australia and the UK to assess what the regulation of internships can tell us about the scope and limits of labour law. In these and most other legal systems, the employment relationship is the touchstone for the protection of labour law, and is determined by a multi-factor test usually applied to distinguish independent contractors and employees. The current world of work presents many challenges, including from new and informal forms of work, which can undermine its role in this regard. When labour law confronts the intersection of work and education, some legal systems deploy a test determining the (primary) purpose of an internship relationship. This often results in a regulatory separation of work from education or welfare, and a failure to protect those undertaking internships or traineeships. The chapter argues that what is needed for labour law to fulfil its purpose is a normative approach which both acknowledges human rights standards that must apply to all regardless of their employment status and, in all other circumstances involving work, respects the

²¹ ILO, *Work for a Brighter Future: Global Commission on the Future of Work* (ILO 2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf, accessed 30 March 2021.

fundamental principles that labour is not a commodity and that there should be decent work for all.

In Part IV, our contributors consider some of the regulatory issues that arise in the specific contexts of education and social welfare. Joanna Howe examines in Chapter 12 the emerging regulatory landscape and the regulatory opportunities and challenges created when students travel abroad to complete an educational internship. Universities have been increasingly promoting these opportunities to students, and although the COVID-19 travel restrictions have temporarily halted this growth, it seems likely to resume as restrictions ease. The chapter concludes that educational internships abroad are being promoted in the absence of policies and processes to respond to legal issues that arise as a consequence of labour and migration law, that students are often inadequately prepared for their overseas experience, and that measures to assess safety and other workplace risks and dangers, and processes for responding when undesirable situations arise, are rudimentary or non-existent.

In Chapter 13 Anne Hewitt interrogates the common assumption that the involvement of universities ensures that internships completed as a part of higher education are better regulated and of higher quality than other internships. The chapter considers the educationally focused regulation of internships in Australia, England and France, and critically examines the regulatory role played by Australian universities, in order to determine whether the educational regulation is being effectively implemented. Her conclusion is that Australian universities are failing to ensure that internships are consistently compliant with educational regulation, a conclusion which may sow seeds of doubt about the effectiveness of tertiary education providers in fulfilling their regulatory role in other jurisdictions.

Chapter 14 moves the focus from educational to ALMP internships. Irene Nikoloudakis presents a study of the uneven way in which these arrangements are regulated by seven countries: Argentina, Australia, Canada, China, Germany, South Africa and the USA. She questions the frequent choice to exclude ALMP interns from labour or social protections and calls for greater regulation to ensure they deliver useful training and skill development.

In Chapter 15, Amir Paz-Fuchs explores the commonalities between internships and other ‘workfare’ schemes which require social security claimants to perform work in order to earn or retain access to government benefits. Concentrating on the UK and the USA, he shows how the justifications for excluding workers involved from the minimum wage and other employment protections are not just similar, but mutually reinforcing. Both types of arrangement highlight a growing trend, which he argues needs to be challenged, towards the legitimacy of providing businesses with free labour.

In Chapter 16, Alexandre de le Court compares the way in which the law of three European countries (Spain, France and Germany) regulates access to

social security by interns or trainees. His analysis considers not only the more obvious risks, such as those relating to work health and safety, but also those that might be considered less obvious or important for young people, such as unemployment protection and pension rights. Although observing a promising trend in all three countries to greater protection of interns in social security systems, he also notes that some regulatory segmentation – whether relating to formal education or training, the purpose of the contractual arrangements, or the existence of payment to the interns or trainees – continues to detract from the recognition of social security as a right. Given that encouraging traineeships was a primary policy strategy of Europe’s ‘Youth Guarantee’ after the Global Financial Crisis a decade ago,²² the chapter is a salutary reminder of steps that need to be taken to protect young people against systemic discrimination in any recovery from economic recession.

Part V examines internships from the perspective of defending human rights and promoting equal opportunity in the world of work. In Chapter 17, Annika Rosin explores whether the European Union Charter of Fundamental Rights can be used to improve the protection of trainees in the EU by broadening the scope of national labour laws or EU labour directives, or by creating new labour rights directly applicable to trainees. Rosin concludes that the limitations to the application of the charter, as well as the restrictive interpretation of its provisions, reduce its ability to improve the rights of trainees. However, it remains a useful tool for the Court of Justice of the EU to broaden the personal scope of secondary EU legislation, and to contest national limitations to the application of fundamental labour rights.

In Chapter 18, Alysia Blackham considers the extent to which unpaid work experience is likely to be covered by equality law. The chapter identifies the potential relevance of equality law to work experience and canvasses the scope of equality law in Australia and the UK, and the extent to which it might protect or exclude those undertaking work experience in various forms. This analysis is timely, as equality laws are likely to have particular significance for those undertaking work experience and other forms of unpaid labour. However, Blackham concludes that, although it is likely that those engaged in unpaid work experience receive some protection from equality laws in each jurisdiction, the complexity of this legal coverage makes enforcement particularly challenging. As a consequence, those participating in unpaid work experience are unlikely to be able to access their (potential) rights without costly legal assistance – which is problematic given the unpaid nature of the work in which they are engaged.

²² Council Recommendation of 22 April 2013 on Establishing a Youth Guarantee [2013] OJ C120/1.

Julia López López examines in Chapter 19 the consequences of normalizing unpaid and low-paid work experience opportunities for young people in Spain. She argues that creating and normalizing legal opportunities for unpaid traineeships and poorly paid apprenticeships creates a dynamic of cheap labour which predominantly affects the young in the labour force. With many young people in Spain becoming trapped in a series of precarious work arrangements, López López argues that the Spanish labour laws are creating systemic age discrimination that affects the growing numbers of young people who are struggling to enter the labour market.

Finally, Part VI looks at how the regulation of internships might develop in the future. In Chapter 20 we assess the current impact and possible evolution of international or regional labour standards, briefly review the different types of state regulation found around the world, and examine the role that non-state regulators can and do play. We then conclude by outlining some principles that can usefully guide the regulation of internships and help respond to the policy challenges so thoughtfully and effectively explored throughout this volume.

1.5 COVID-19 AND THE FUTURE OF INTERNSHIPS

In 2012, the ILO drew attention to the importance of both promoting internships as a means of moving from education to work and regulating these arrangements to ensure they do not become a means of exploiting desperate young job seekers. These views were expressed in a resolution of the International Labour Conference, which painted a grim picture of the impact of the 2008–09 global financial and economic crisis on youth employment around the world and the long-lasting effects this situation was likely to have unless drastic action was taken.²³ Since then, the ILO's focus on the role and regulation of internships has continued to be grounded in its concerns to address the youth employment challenge.²⁴ The EU's 2014 adoption of a Quality Framework for Traineeships was likewise closely linked to various initiatives designed to address persistently high youth unemployment rates.²⁵

A decade on, the world is facing a new economic crisis, brought on by the COVID-19 pandemic and the restrictions imposed to curtail its spread. The ILO's analysis suggests that young people have been even more disproportion-

²³ ILO, 'The Youth Employment Crisis' (n 19).

²⁴ See eg Ana Jeannet-Milanovic, Niall O'Higgins and Annika Rosin, 'Contractual Arrangements for Young Workers' in Niall O'Higgins (ed), *Rising to the Youth Employment Challenge: New Evidence on Key Policy Issues* (International Labour Office 2017).

²⁵ Council of the EU (n 17); and see eg Council Recommendation of 26 April 2013 on Establishing a Youth Guarantee [2013] OJ C120/1.

ately affected this time around. To the general susceptibility of youth employment to economic downturns must now be added at least three further factors that are making things worse for young people: (1) disruptions to education and training as a consequence of lockdown measures; (2) the concentration of young workers in economic sectors which have been particularly hard-hit by the economic effects of the COVID-19 pandemic and accompanying lockdown measures; and (3) the increasing concentration of young people in less protected forms of employment.²⁶ As a consequence, it is possible we may see a 'lockdown generation' who will be 'scarred throughout their working lives'.²⁷

In the early stages of the pandemic, and as a number of surveys have revealed, many internship programmes were halted or cancelled.²⁸ In both India and the Philippines, for example, three-quarters of all internships were 'completely interrupted'.²⁹ However, a number of arrangements continued on a 'virtual' basis, with interns working remotely and interacting with their supervisors (if at all) online. In the USA, for example, nearly 46 per cent of employers surveyed by the National Association of Colleges and Employers had taken that step.³⁰ A different survey specifically asked college students about being offered remote internships. While just over half were grateful for

²⁶ ILO, 'Preventing Exclusion from the Labour Market: Tackling the COVID-19 Youth Employment Crisis' (ILO Policy Brief, 27 May 2020), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_746031.pdf, accessed 30 March 2021.

²⁷ ILO, *ILO Monitor: COVID-19 and the World of Work* (4th edn, ILO 2020) 2, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_745963.pdf, accessed 30 March 2021.

²⁸ Besides those mentioned below, see eg Fair Internship Initiative, 'Impact of Covid-19-related Measures on UN Internships' (1 May 2020), <https://fairinternshipinitiative.org/2020/05/01/impact-of-covid-19-related-measures-on-un-internships/>, accessed 30 March 2021; Cartus, 'COVID-19 Impact on Internships: Pulse Survey' (10 June 2020), https://www.cartus.com/files/4315/9172/6562/Cartus-Internship_Pulse-Survey-0520.pdf, accessed 30 March 2021; CareerUp, 'Remote Internship Statistics: A COVID-19 Impact Report' (*Remote Internships*, 2020), <https://remoteinternships.com/remote-internship-statistics/>, accessed 30 March 2021; Glassdoor Economic Research, 'U.S. Internship Hiring Cut in Half Since COVID-19 Crisis' *Glassdoor* (28 April 2020), <https://www.glassdoor.com/research/internship-hiring-coronavirus/>, accessed 30 March 2021.

²⁹ ILO and Asian Development Bank, *Tackling the COVID-19 Youth Employment Crisis in Asia and the Pacific* (ILO Regional Office for Asia and the Pacific and Asian Development Bank 2020) 17.

³⁰ National Association of Colleges and Employers, 'Quick Poll: Employers Maintaining Plans for College Hiring, Holding Internships' (5 May 2020), <https://www.nacweb.org/talent-acquisition/trends-and-predictions/quick-poll-employers-maintaining-plans-for-college-hiring-holding-internships/>, accessed 30 March 2021.

the opportunity to be able to work from home, 43 per cent expressed concerns that the experience would not be as good, that they would not be able to prove they deserved a full-time role at the organization, or that they would not meet new contacts in person.³¹ Even before the coronavirus, some firms had started offering the opportunity to gain experience in this way.³² Other internship brokers, unsurprisingly, are now reorienting their businesses in this direction.³³

In the longer term, it seems likely that many policy-makers will see a role for work-based learning as part of the 'urgent, large-scale and targeted employment policy responses' that the ILO suggests are 'needed to prevent lost opportunities and greater youth exclusion'.³⁴ Some countries have already started down this path. In April 2020, the Canadian government announced that it would provide funding to support up to 20 000 post-secondary students to obtain paid work experience related to their field of study.³⁵ In Singapore, a government bailout package has assisted the National University of Singapore and the Nanyang Technological University to offer paid traineeships.³⁶ However, if social distancing and travel restrictions remain in place for an extended period some, or perhaps most, of these arrangements will need to be implemented virtually.

It is possible that some of the variations to working patterns established during the COVID-19 lockdowns may result in lasting changes to internships, together with many other features of the labour market. The ILO has highlighted the possibility for 'virtual work-based learning opportunities [to] help young people to gain valuable work experience even if movement restrictions are in place'.³⁷ However, it is also important that measures are taken to ensure the necessary access to the information and communication technologies needed to support access to online forms of work-based learning. Otherwise,

³¹ Yello, 'Virtual Internship Statistics and Trends: A 2020 COVID-19 Impact Report' (2020), <https://yello.co/blog/virtual-internship-statistics/>, accessed 30 March 2021.

³² See eg *Virtual Internships*, <https://www.virtualinternships.com/>, accessed 30 March 2021.

³³ See eg Australian Internships, 'Virtual Internship Program', <https://www.internships.com.au/virtual-internship>, accessed 30 March 2021.

³⁴ ILO, 'Preventing Exclusion' (n 26) 14.

³⁵ Department of Finance Canada, 'Support for Students and Recent Graduates Impacted by COVID-19' (*Government of Canada*, 22 April 2020), <https://www.canada.ca/en/departement-finance/news/2020/04/support-for-students-and-recent-graduates-impacted-by-covid-19.html>, accessed 30 March 2021.

³⁶ Yojana Sharma, 'University Jobs and Traineeships for Coronavirus Cohort' *University World News* (28 April 2020), <https://www.universityworldnews.com/post.php?story=20200428090338765>, accessed 30 March 2021.

³⁷ ILO, 'Preventing Exclusion' (n 26) 15.

this shift may ‘exacerbate existing inequalities for those who already face disadvantages in trying to access and engage in learning’.³⁸

More generally, the prospect of online internships becoming a new (but unpaid) form of ‘gig work’, facilitated through digital labour platforms, is more than a little concerning.³⁹ If nothing else, it underscores the importance of understanding how and why internships have come to play the role that they do, and of thinking how they might be sensibly regulated. That is what the chapters in this volume seek to achieve – and why this volume represents such an important and novel contribution to the literature on labour-market policy and regulation.

³⁸ Paul Comyn, ‘Learning in the Times of COVID-19: Can Distance Learning Become the New Normal?’ (*ILO Skills and Employability Branch*, 3 May 2020), https://www.ilo.org/skills/Whatsnew/WCMS_743434/lang--en/index.htm, accessed 30 March 2021. As to other issues that may need to be addressed to ensure the quality of virtual internships, see eg Center for Research on College-Workforce Transitions, UW-Madison, *What to Do about Internships in Light of the COVID-19 Pandemic? A Short Guide to Online Internships for Colleges, Students, and Employers* (UW-Madison 2020), http://ccwt.wceruw.org/documents/CCWT_report_COVID-19%20Internships.pdf, accessed 30 March 2021.

³⁹ For recent assessments of the scope and regulation of digital platform work, see eg Zachary Kilhoffer, Willem Pieter De Groen, Karolien Lenaerts, Ine Smits, Harald Hauben, Willem Waeyaert and others, *Study to Gather Evidence on the Working Conditions of Platform Workers* (VT/2018/032, Final Report, Publications Office of the European Union 2020); Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes, Damian Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact* (Victorian Department of Premier and Cabinet 2020), https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7315/9254/1260/Digital_Platform_Work_in_Australia_-_Prevalence_Nature_and_Impact_-_November_2019.pdf, accessed 30 March 2021.

2. The nature and prevalence of internships¹

Andrew Stewart

2.1 INTRODUCTION

There is no universally accepted definition of an internship. The term originated in the context of medical education, where it is still used to denote a period early in the postgraduate training of doctors during which they work under supervision in hospitals for relatively low pay. From the 1930s in the USA, ‘internship’ was adopted to describe programmes that gave young people the opportunity to work in government and (later) political organizations. However, the recent explosion of such arrangements, especially in higher-income countries, means that interns can now be found in a wide range of industries and occupations, working for businesses, not-for-profit organizations and government agencies alike.²

In today’s highly competitive labour market, internships may be undertaken to satisfy the requirements of education or training courses, or be offered to unemployed job seekers by employment service providers as part of active labour-market programmes (or policies) (ALMPs). They may be established by businesses to offer a taste of what work is like in a particular profession, or to test out applicants. Alternatively, they may simply be arrangements initiated by job seekers themselves, in order to gain contacts or to fill out a résumé. These last two categories are often termed ‘open-market’ internships. All of these forms of internship are ‘work-based schemes whose purpose is to provide skills and knowledge in the workplace’.³

¹ This chapter contains material originally published in the report by Andrew Stewart and others referred to in n 31. Some of that material also appears in sections 1.5 and 6.2 of the ILO report cited in n 21. I am grateful to Irene Nikoloudakis for her assistance with research for both the original and updated versions.

² Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (rev edn, Verso Books 2012).

³ Ana Jeannet-Milanovic, Niall O’Higgins and Annika Rosin, ‘Contractual Arrangements for Young Workers’ in Niall O’Higgins (ed), *Rising to the Youth*

The scale of the internship phenomenon was nicely captured by *The Economist*:

The internship – a spell of CV-burnishing work experience – is now ubiquitous across America and beyond. This year young Americans will complete perhaps 1m such placements; Google alone recruited 3,000 interns this summer, promising them the chance to ‘do cool things that matter’. Brussels and Luxembourg are the summer homes of 1,400 stagiaires, or embryonic Eurocrats, doing five-month spells at the European Commission. The ‘Big Four’ audit companies – Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers (PwC) – will employ more than 30,000 interns this year. Bank of China runs an eight-week programme (‘full of contentment, yet indescribable’, according to an intern quoted on its website); Alibaba, a Chinese online-retailing behemoth, has a global scheme. Infosys, an Indian tech giant, brings 150 interns from around the world to Bangalore each year.⁴

As discussed further in section 2.6 of this chapter, many concerns have been expressed in recent years about the role and effectiveness of internships as a bridge between education and (paid) work. These were summarized by the Council of the European Union (EU) in these terms:

Socio-economic costs arise if traineeships, particularly repeated ones, replace regular employment, notably entry-level positions usually offered to trainees. Moreover, low-quality traineeships, especially those with little learning content, do not lead to significant productivity gains nor do they entail positive signalling effects. Social costs can also arise in connection with unpaid traineeships that may limit the career opportunities of those from disadvantaged backgrounds.⁵

The Council’s response was to adopt a Quality Framework for Traineeships, with the intention of helping EU member states to ‘[i]mprove the quality of traineeships, in particular as regards learning and training content and working conditions, with the aim of easing the transition from education, unemployment or inactivity to work’.⁶

Employment Challenge: New Evidence on Key Policy Issues (International Labour Office 2017) 143.

⁴ The Economist, ‘The Internship: Generation i’ *The Economist* (12 September 2014), www.economist.com/international/2014/09/12/generation-i, accessed 30 March 2021.

⁵ Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1, preamble, para 4.

⁶ Ibid recommendation 1. For discussion of the extent to which the Quality Framework for Traineeships has been implemented by EU members, see European Commission, ‘Applying the Quality Framework for Traineeships’ (2016) European Commission Staff Working Document 324; Łukasz Sienkiewicz, *Traineeships under the Youth Guarantee: Experience from the Ground* (European Commission 2018). See also Valli Corbanese and Gianni Rosas, *Assessing the Quality Dimensions of*

In June 2012, as part of a resolution concerning the ‘youth employment crisis’, the International Labour Conference noted that ‘internships, apprenticeships, and other work experience schemes have increased as ways to obtain decent work. However, such mechanisms can run the risk, in some cases, of being used as a way of obtaining cheap labour or replacing existing workers’.⁷ The resolution invited ‘social partners’ (trade unions and employers) not just to encourage enterprises to provide more internships or apprenticeships, but to engage in collective bargaining to improve the working conditions of interns and apprentices, and indeed to ‘raise awareness’ about the labour rights of young workers.⁸

An article on the website of the International Labour Organization (ILO) subsequently warned of the dangers if internships become simply a ‘disguised form of employment’ without any of the benefits they promise, such as real on-the-job training.⁹ The importance of all forms of work experience, be they internships or apprenticeships, providing a quality learning experience and thereby a gateway to good quality and decent jobs, rather than being used to replace paid employees, has been reiterated in other global fora, including the G20.¹⁰

Against that background, this chapter reviews what is known about internships – what they are, how they can be categorized and how common they are – and summarizes some of the policy concerns that will be explored in other chapters in this volume.

2.2 DEFINING AND DISTINGUISHING INTERNSHIPS

As Perlin notes, ‘what defines an internship depends largely on who’s doing the defining’.¹¹ He says of the word ‘intern’ that it is ‘a kind of smokescreen, more brand than job description, lumping together an explosion of intermittent

Youth Employment Offers (International Labour Office 2017), a guide to quality traineeships prepared jointly by the International Labour Organization and the European Commission.

⁷ ILO, ‘The Youth Employment Crisis: A Call for Action’ (Resolution and Conclusions of the 101st Session of the International Labour Conference 2012) para 24.

⁸ *Ibid* para 27.

⁹ ILO, ‘Internships: Head Start or Labour Trap?’ (22 August 2012), www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_187693/lang--en/index.htm, accessed 30 March 2021.

¹⁰ See eg Organisation for Economic Co-operation and Development and ILO, *Promoting Better Labour Market Outcomes for Youth* (Report prepared for the G20 Labour and Employment Ministerial Meeting, OECD and ILO 2014) 11.

¹¹ Perlin (n 2) 25–6.

and precarious roles we might otherwise call volunteer, temp, summer job, and so on'.¹² The term can also have different connotations in different countries.¹³ In the UK, for example, internships are generally or primarily understood to be forms of work experience undertaken *after* completion of higher or technical education, as opposed to the 'placements' that may form part of educational programmes. In nations such as the US, by contrast, it is just as common to speak of students undertaking internships as it is graduates.

An internship is a form of work-based learning. In the most general sense, this learning can occur as a natural incident of any type of work arrangement: merely doing a job can result in new or enhanced competencies. However, the term 'work-based learning' is generally used to refer to a programme or arrangement that is *designed* to have that result. In a recent review of research on the topic, Comyn and Brewer take work-based learning programmes to be 'those which include the process of undertaking and reflecting on productive work in real workplaces, paid or unpaid, and which may or may not lead to formal certification'.¹⁴ As they note, many different typologies have been adopted. One, developed within the ILO, identifies seven broad possibilities, based on whether there is a contract between 'employer' and learner, whether the outcomes are officially recognized or certified, and whether the training is delivered on or off the job.¹⁵ But it is more common to find references to four broad categories: apprenticeships, informal apprenticeships, internships and traineeships.¹⁶

In their modern sense, apprenticeships are generally understood as 'programmes of learning that combine part-time formal education with training and experience at the workplace, and result in an externally recognised vocational qualification'.¹⁷ This reflects a 'dualist ideal: the synthesis of theory and practice, on the one hand, and of the classroom and the workplace, on the

¹² Ibid xi.

¹³ The same can be said of broadly equivalent terms in other languages, such as *stagiaire* (French), *pasante* (Spanish) or *praktikant* (German).

¹⁴ Paul Comyn and Laura Brewer, 'Does Work-Based Learning Facilitate Transitions to Decent Work?' (2018) International Labour Office Employment Policy Department Working Paper No 242, 6.

¹⁵ Ibid 4–5.

¹⁶ Hilary Steedman, 'Overview of Apprenticeship Systems and Issues' (Contribution to the G20 Task Force on Employment, ILO 2012) 3; ILO, *ILO Toolkit for Quality Apprenticeships, Volume 1: Guide for Policy Makers* (International Labour Office 2017) 6–7.

¹⁷ Paul Ryan, 'Apprenticeship: Between Theory and Practice, School and Workplace' in Matthias Pilz (ed), *The Future of Vocational Education and Training in a Changing World* (VS Verlag für Sozialwissenschaften 2012) 405.

other'.¹⁸ What distinguishes apprenticeships from even the more formal kinds of internship is the scope of the training involved. Apprenticeships are more likely to operate over longer periods, and they necessarily involve training in *all* of the competencies required to practise a particular trade or profession. By contrast, most internships tend to be for shorter periods, and to focus on gaining general experience in a type of work or offering an opportunity to practise skills already acquired.¹⁹

Informal apprenticeships, by contrast, embody an older model of training for a craft or profession. As Steedman explains:

In order to pass on skills from one generation to the next, poor societies have developed informal apprenticeship systems that are purely workplace-based. A young apprentice learns by way of observation and imitation from an experienced master craftsman, acquires the skills of the trade and is inducted into the culture and networks of the business. Apprenticeship agreements are mostly oral, yet they are embedded in the society's customs, norms and traditions ... Today, informal apprenticeship is an extensive training system in countries with large informal economies all over the world, including in South Asia, known as the *ustad-shagird* system. Variations in terms of practices are wide, yet the basic feature remains the same: the training agreement between a young learner and an experienced craftsman to transmit the skills of a trade.²⁰

As for a traineeship, this term is often used as a synonym for internship. In that vein, for example, the Council of the EU has defined a traineeship as 'a limited period of work practice, whether paid or not, which includes a learning and training component, undertaken in order to gain practical and professional experience with a view to improving employability and facilitating transition to regular employment'.²¹ However, the word can also, in some countries, denote an entire training arrangement, not just the work-based component. In Australia, for example, a traineeship is a structured, employment-based training programme that leads to the trainee gaining a nationally recognized qualification. The main differences compared with an apprenticeship are that

¹⁸ Ibid 404.

¹⁹ ILO, *Upgrading Informal Apprenticeship: A Resource Guide for Africa* (International Labour Office 2012) 8; Kari P Hadjivassiliou, Emanuela Carta, Tom Higgins, Catherine Rickard, Suzanne Ter-Minassian, Flavia Pesce and others, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report* (European Union 2012) 52.

²⁰ Steedman (n 16) 4.

²¹ Council Recommendation on a Quality Framework for Traineeships (n 5) para 27. See also ILO, *A Framework for Quality Apprenticeships* (International Labour Office 2019) 80, which proposes a definition of the term 'traineeship' to include an internship and to mean 'any form of on-the-job learning, which enables a person (the "trainee") to acquire work experience with a view to enhancing their employability'.

an Australian traineeship can involve part-time employment, typically lasts for one to two years (as opposed to three to four years for apprenticeships), and is generally for an occupation not traditionally recognized as involving a 'trade'.²² The 'learnerships' available in South Africa as an alternative to apprenticeships have broadly similar features, although unlike their Australian equivalents they are not considered to involve an employment relationship.²³ Both Australian traineeships and South African learnerships might well fall within a sufficiently broad definition of 'apprenticeship'.

For the purpose of this chapter, an internship is taken to be any arrangement for the performance of work within a business or organization, a primary purpose of which is to gain experience, skills and/or contacts that will assist the worker to gain employment or other work opportunities in the future, but which does not seek in a structured way to provide all the skills needed for a particular occupation.

A final concept that needs to be distinguished in this context is volunteering, which in its true form denotes unpaid work that is performed with the primary purpose of benefiting someone else or furthering a particular belief, rather than gaining experience, skills or contacts that may enhance employability.²⁴ Interns frequently 'volunteer' their services without remuneration, in the hope of gaining increased employability or a future job. And the line between volunteering and internship can become particularly blurred where the host organization is a not-for-profit body that seeks to assist others (such as a charity) or is associated with a particular cause or belief (such as a political party or a religious institution). In such cases, unpaid work may be undertaken both to increase employability *and* as an act of altruism or ethical commitment.²⁵

²² See eg Department of Training and Workforce Development, 'Apprenticeships and Traineeships' (Government of Western Australia, 2019), www.jobsandskills.wa.gov.au/training/apprenticeships-and-traineeships, accessed 30 March 2021.

²³ Erica Smith and Ros Brennan Kemmis, *Towards a Model Apprenticeship Framework: A Comparative Analysis of National Apprenticeship Systems* (ILO and World Bank 2013) 6, 120.

²⁴ Andrew Stewart and Rosemary Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Fair Work Ombudsman 2013) 5. Compare the United Nations definition of 'activities ... undertaken of free will, for the general public good and where monetary reward is not the principal motivating factor': United Nations Volunteers, *State of the World's Volunteerism Report: Transforming Governance* (United Nations Volunteers 2015) xxiii.

²⁵ See eg Pauline Leonard, Susan Halford and Katie Bruce, "'The New Degree?'" Constructing Internships in the Third Sector' (2016) 50 *Sociology* 383.

Nevertheless, the focus in this chapter is on non-altruistic arrangements for gaining work experience.²⁶

2.3 TYPES OF INTERNSHIP

In classifying internships, an obvious distinction is between those that are paid and those that are unpaid. An internship may be regarded as paid if the intern receives financial compensation, in the form of a wage or stipend, although perhaps not if they simply receive reimbursement for a very limited range of expenses (such as travel costs).

In a practical sense, there may be little reason for concern with internships that involve remuneration that at least matches the minimum wage which would otherwise apply to employees performing the same work. It is likely in this situation that the interns concerned will be treated as employees.²⁷

Generally, the internships that raise the type of policy concerns outlined in section 2.6 of this chapter will tend to be those that are either unpaid or that attract compensation below the legal minimum for employees. Nevertheless, there may still be important regulatory issues with paid interns who are not treated as employees, in relation to matters such as hours of work, safety, freedom from discrimination and so on.²⁸

A further distinction may be drawn between internships that involve ‘real’ or productive work – work that benefits the host business or organization – and those that are limited mostly to observation or mock tasks. Again, the latter type may be of less concern, in so far as the host would have no incentive to use them in place of paid employees, or (given the costs of supervision) to have the arrangement extend for a lengthy period. Indeed, interns in that category are far less likely to qualify as employees, even in countries with a broad definition of that class. Nevertheless, it may still be important to consider the regulation of these arrangements in relation to matters other than remuneration.

²⁶ Compare the more nuanced distinction drawn by Murray between ‘genuine’ and ‘precarious’ volunteer work in Jill Murray, ‘The Legal Regulation of Volunteer Work’ in Christopher Arup, Peter Gahan, John Bellett Howe, Richard Stephen Johnstone, Richard Mitchell and Anthony O’Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press 2006) 697–8.

²⁷ That is the case in the way labour-market statistics are to be gathered under current, internationally agreed standards, as discussed in section 2.5 of this chapter.

²⁸ Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 Int Lab Rev 679, 705.

Yet another way of categorizing internships or traineeships is to divide them into three categories that are based on their purpose or function.²⁹ These are (1) placements associated with formal education or training programmes run by authorized institutions or providers; (2) periods of work experience associated with ALMPs designed by governments or employment service providers to assist the unemployed; and (3) other, open-market internships.³⁰ This is an especially useful typology for legal purposes, since in many countries different rules or processes apply to each of those categories, at least for specific regulatory purposes.³¹ The reason for this is often said or assumed to lie in the different governance arrangements for the three types of internship.³² For example, the EU's Quality Framework for Traineeships is expressly stated not to cover 'work experience placements that are part of curricula of formal education or vocational education and training', nor traineeships whose content is regulated under national law and which must be completed to enter a particular profession.³³ This omission has been justified on the basis that 'traineeships which belong to these categories are in general of better quality, due to the quality assurance by the educational institutions or professional organisations involved'.³⁴ Indeed, it is common for regulatory regimes to have an exemption for educational internships.³⁵

²⁹ Compare Grant-Smith and McDonald, who conceptualize unpaid work according to two dimensions: 'participatory discretion' (whether it is mandatory or elective) and purpose (educational or productive). See Deanna Grant-Smith and Paula McDonald, 'Ubiquitous Yet Ambiguous: An Integrative Review of Unpaid Work' (2018) 20 *IJMR* 559.

³⁰ See eg Hadjivassiliou and others (n 19) 4–5. A fourth possible category covers internships undertaken as a mandatory part of professional training, as opposed to 'educational curricula': see eg Sienkiewicz (n 6) 4. But state-regulated examples of this training can usually be equated to other types of educational internships, while those which operate without official authorization will generally have the same legal status as open-market internships.

³¹ Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, 'The Regulation of Internships: A Comparative Study' (2018) International Labour Office Employment Policy Department Working Paper No 240, chs 7–9.

³² David Lain, Kari Hadjivassiliou, Antonio Corral Alza, Iñigo Isusi, Jacqueline O'Reilly, Victoria Richards and others, 'Evaluating Internships in Terms of Governance Structures: Contract, Duration and Partnership' (2014) 38 *Eur J Train Dev* 588.

³³ Council Recommendation on a Quality Framework for Traineeships (n 5) preamble, para 28.

³⁴ European Commission, 'Applying the Quality Framework for Traineeships' (n 6) 4.

³⁵ Stewart and others (n 31) 51–4.

Similarly, while the EU Quality Framework for Traineeships does cover ALMP traineeships, it often seems to be assumed that these should attract less concern than those in the open market:

In the case of open market traineeships there is no third party involved further to the trainee and the host organisation, which also means that the quality assurance of the traineeship becomes more difficult. ALMP-type traineeships, on the other hand, are offered to (young) unemployed or those at risk of becoming unemployed, and there is usually a public institution (most often a PES [public employment service]) acting as an intermediary between the host organisation and the trainee. This intermediary institution also has a supervising function in terms of traineeship quality.³⁶

This is not to say, however, that these explanations should be uncritically accepted. Indeed, it can be argued that, even if educational or ALMP internships should attract different rules or requirements, this should only be the case where specific preconditions are satisfied – and that there are some labour standards that should apply regardless of the type of internship involved.³⁷ That issue is taken up in the conclusion to this volume in Chapter 20.

A further possible distinction is between internships that are confined to one jurisdiction and those with an international or transnational element. It has become common in recent years for students or graduates to seek to undertake internships in another country. These opportunities are often considered highly prestigious, as with opportunities to work as an intern for agencies of the United Nations or other international organizations, such as the Red Cross and Red Crescent. In part, this reflects a belief that the internationalization of work-based learning can help create ‘global citizens’ who can more readily find jobs and fill skill shortages around the world³⁸ – even though the evidence suggests that only a minority of employers consider international experience when making recruitment decisions.³⁹

Reflecting this trend, there are now agencies that broker overseas internships – a service for which they demand a fee.⁴⁰ Often implicit in what these agencies offer is a promise that internships will open up not only entry to the labour market, but access to the citizenship of the destination country. Educational

³⁶ European Commission, ‘Applying the Quality Framework for Traineeships’ (n 6) 4.

³⁷ Stewart and others (n 31) 86–7.

³⁸ See eg Natalie Gamble, Carol-Joy Patrick and Deborah Peach, ‘Internationalising Work-Integrated Learning: Creating Global Citizens to Meet the Economic Crisis and the Skills Shortage’ (2010) 29 Higher Educ Res Dev 535.

³⁹ Christof Van Mol, ‘Do Employers Value International Study and Internships? A Comparative Analysis of 31 Countries’ (2017) 78 *Geoforum* 52.

⁴⁰ See eg Perlin (n 2) ch 6; Paula McDonald, ‘Open Market Internships: What Do Intermediaries Offer?’ (2020) 33 *J Educ & Work* 33.

institutions, which often encourage and facilitate exchange arrangements for students, may promote the opportunity to undertake internships in other countries as part of these arrangements. Transnational corporations and businesses may also place interns or trainees in another country, sometimes as part of the transnational delivery of contracts for specific services, or to promote or emphasize generally what are perceived to be attractive work opportunities offered by their global reach.⁴¹ International internships are a new form of temporary labour migration, sometimes facilitated by a new type of migration agent (an educational institution, a commercial broker or a transnational firm).

International internships may also be promoted by government programmes. These may seek to provide incentives to the citizens of a country to undertake work experience abroad, whether out of a belief in the intrinsic value of such arrangements, or to improve engagement with a particular region.⁴² Conversely, they may provide opportunities for foreign students or workers to come and study in the government's own country, to boost economic development either in that country or in the foreign interns' home nations.⁴³

2.4 EVIDENCE ON THE PREVALENCE OF INTERNSHIPS

The clearest data on the prevalence of internships come from Europe and Australia. In 2013, a survey conducted for the European Commission in the 27 countries that were then members of the EU found that 46 per cent of people aged from 18 to 35 had undertaken at least one (and often more than one) traineeship, understood for this purpose to mean 'a limited period of work experience and training spent in a business, public body or non-profit institution by students or young graduates'. The proportion ranged from as high as 79 per cent in the Netherlands and 74 per cent in Germany, to only 8 per cent in Lithuania and Slovakia. Fifty-nine per cent of respondents who had undertaken

⁴¹ Significantly, regulatory regimes for global trade may treat interns or trainees in ways that are distinct from other workers: Samuel Engblom, Nicola Kountouris and Åsa Odin Ekman, 'Temporary Labour Migration and the Trade in Services: European and Global Perspectives in an Age of Economic Integration' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing 2016).

⁴² As, for instance, with Australia's New Colombo Plan, which provides Australian students with assistance to undertake internships in the Asia-Pacific region: see Department of Foreign Affairs and Trade, 'New Colombo Plan' (Australian Government), <http://dfat.gov.au/people-to-people/new-colombo-plan/pages/new-colombo-plan.aspx>, accessed 30 March 2021.

⁴³ The Japanese Technical Internship Programme has been a significant, if controversial, example of this: see Stewart and others (n 31) 37–8.

a traineeship reported that their most recent arrangement was unpaid, while of those receiving some form of compensation, less than half considered that the amount was sufficient to live on.⁴⁴

A more recent study in the UK found that 46 per cent of graduates under 24 had done an internship, and the same proportion of employers reported offering internships. Seventy per cent of these internships involved no remuneration, or remuneration below the national minimum wage, although the number of these arrangements appeared to be falling. Fifty-three per cent of these unpaid (or underpaid) internships were over four weeks in length, with 11 per cent lasting over six months.⁴⁵

In Australia, a national survey of arrangements involving unpaid work experience was undertaken in 2016. It found that 34 per cent of working-age adults had undertaken at least one such episode in the last five years, with the proportion rising to 58 per cent for those aged under 30. One in five participants had undertaken five or more episodes in the past five years. A majority of episodes lasted for less than a month, although one in ten exceeded six months. Of the most recent experiences, half were associated with some form of formal education or training, whether at university (20 per cent), as part of vocational education or training (19 per cent) or at secondary school (10 per cent). Nearly one in ten (8 per cent) had participated as a requirement of maintaining access to unemployment benefits from the government, or as part of an unpaid trial while applying for a job (9 per cent). A further 4 per cent said they had been offered a paid job and the work experience was part of their training or orientation. Almost one in three (30 per cent) nominated some other reason for undertaking unpaid work experience, which would clearly cover open-market internships.⁴⁶

⁴⁴ TNS Political & Social, *The Experience of Traineeships in the EU* (Flash Eurobarometer 378, Directorate-General for Employment, Social Affairs and Inclusion, European Commission 2013). The survey was conducted by telephone and involved 12 921 respondents from different social and demographic groups across the EU: *ibid* 4.

⁴⁵ Carl Cullinane and Rebecca Montacute, *Pay As You Go? Internship Pay, Quality and Access in the Graduate Jobs Market* (Sutton Trust 2018). The data in the report are taken primarily from two online surveys: one of 1003 leaders from businesses across a wide range of industries and representative of business size in the UK, and the other of 2614 young (21–29) graduates: *ibid* 11–12.

⁴⁶ Damian Oliver, Paula McDonald, Andrew Stewart and Anne Hewitt, *Unpaid Work Experience in Australia: Prevalence, Nature and Impact* (Department of Employment 2016). In total, 3800 working age adults (18–64) were surveyed online, with the sample weighted to reflect the distribution of the relevant population by sex and age: *ibid* 4–5. Note that this survey, unlike the European survey, did not ask about paid internships. Subsequent analysis of the survey data has revealed that at least 10 per cent of unpaid work experience arrangements undertaken in Australia may be unlawful: see Andrew Stewart, Damian Oliver, Paula McDonald and Anne Hewitt, ‘The Nature

In other developed countries, firm statistics are harder to find, though it seems clear that internships have become extremely common. In the USA, for example, Carnevale and Hanson quote estimates (from 2010 and 2013) that interns represented 1.3 per cent of the labour force, with around half of all college students reporting having completed internships during their studies, around 50 per cent of which were unpaid.⁴⁷ By contrast, it is likely that there are fewer interns in low- and middle-income countries, given the prevalence there of informal employment arrangements that may fill a similar niche in the labour market.⁴⁸ Nevertheless, it is notable that countries such as Brazil and China have each passed laws in recent years to regulate internships.⁴⁹

2.5 OFFICIAL LABOUR STATISTICS ON INTERNSHIPS⁵⁰

Statistics provide the factual evidence which underpins, and so has consequences for, policy and regulation; therefore, the ways in which statisticians categorize internships and traineeships are important. An important development has been the passage of the Resolution Concerning Statistics on Work Relationships at the 20th International Conference of Labour Statisticians in 2018.⁵¹ This defines a ‘work activity’ as ‘a set of tasks and duties performed, or meant to be performed, by one person for a single economic unit’.⁵²

The resolution proposes two distinct systems of classification. The International Classification of Status in Employment (ICSE 18) identifies ten types of employed persons, one of which is ‘paid apprentices, trainees and interns’. This category covers:

employees who perform any activity to produce goods or provide services for others, in order to acquire workplace experience or skills in a trade or profession and receive payment in return for work performed. Acquiring ‘workplace experience or

and Prevalence of Unlawful Unpaid Work Experience in Australia’ (2018) 31 AJLL 157.

⁴⁷ Anthony P Carnevale and Andrew Hanson, ‘Learn & Earn: Career Pathways for Youth in the 21st Century’ (2015) 4(1) EJCLS 76, 82–3.

⁴⁸ Niall O’Higgins, Jonas Bausch and Francesca Bonomelli, ‘The Quality of Work: Informal Employment in Low- and Middle-Income Countries’ in Niall O’Higgins (ed), *Rising to the Youth Employment Challenge: New Evidence on Key Policy Issues* (International Labour Office 2017).

⁴⁹ See eg Lei do Estágio (Law No 11788 of 2008) (Brazil); Regulations on the Management of Vocational School Student Internships, 2016 (China).

⁵⁰ This section draws on material originally written by Rosemary Owens.

⁵¹ Resolution Concerning Statistics on Work Relationships (Resolution I, 20th International Conference of Labour Statisticians in Geneva, 10–19 October 2018).

⁵² Ibid para 8.

skills' may occur through traditional, formal or informal arrangements whether or not a specific qualification or certification is issued. They are usually remunerated at a reduced rate compared to fully qualified workers.⁵³

However, it excludes workers who are 'undertaking general on-the-job training or life-long learning while in employment', or working without pay.⁵⁴

The ICSE 18 classifies employment status in two different ways. One is according to the type of authority (control) exercised. For that purpose, workers may either be independent (including employers or independent workers without employees) or dependent (dependent contractors, employees or contributing family workers). The other classification is by economic risk, with workers being employed either for profit (independent workers in household market enterprises, dependent contractors or contributing family workers) or for pay (owner-operators of corporations or employees). In both instances, paid apprentices, trainees and interns are counted as employees.⁵⁵

The other (and broader) system of classification is the International Classification of Status at Work (ICSaW-18), which at its most detailed contains 20 different categories. Paid apprentices, trainees and interns are one of those categories, and again are treated as employees, within a broader group of dependent workers. Also treated as dependent workers, but not as employees, are 'unpaid trainees', 'organization-based volunteers' and 'other unpaid workers'.⁵⁶ Unpaid trainee workers are 'persons in unpaid trainee work as defined in the most recent international statistical standards concerning work, employment and labour underutilization'.⁵⁷

This last is a reference to a 2013 resolution by the International Conference of Labour Statisticians, which has for many other purposes been superseded by the 2018 statement.⁵⁸ The earlier resolution defines persons in unpaid trainee work as 'all those of working age who, during a short reference period, performed any unpaid activity to produce goods or provide services for others, in order to acquire workplace experience or skills in a trade or profession'.⁵⁹

⁵³ Ibid para 55.

⁵⁴ Ibid para 56.

⁵⁵ Ibid paras 23–24.

⁵⁶ Ibid para 59. 'Organization-based volunteers' are defined to mean workers who perform any unpaid non-compulsory activities to produce goods or provide services for others through or for any type of organization or community group, but do not include unpaid trainees or 'workers performing unpaid compulsory activities': ibid para 71.

⁵⁷ Ibid para 70.

⁵⁸ On the general way the 2013 resolution classified forms of work, see Stewart and others (n 31) 18–19.

⁵⁹ Resolution Concerning Statistics of Work, Employment and Labour Underutilization (Resolution I, 19th International Conference of Labour Statisticians in Geneva, 2–11 October 2013) para 33.

‘Unpaid’ for this purpose means ‘the absence of remuneration in cash or in kind, for work done or hours worked’, although limited forms of support may be provided.⁶⁰ Specifically included are persons in unpaid traineeships, apprenticeships, internships or skills training or retraining schemes, when engaged in the production process of the relevant economic unit.⁶¹ However, the 2013 resolution excludes anyone undertaking a period of probation, general on-the-job learning, those in volunteer work and those learning while engaged in own-use production.⁶² The resolution also indicates that the acquisition of workplace experience or skills ‘may occur through traditional formal or informal arrangements, whether or not a specific qualification or certification is issued’.⁶³

As both the 2013 and 2018 resolutions implicitly acknowledge, work and learning are not mutually incompatible, an issue discussed further by Rosemary Owens in Chapter 11 of this volume. However, in using the fact of payment (whether in cash or in kind) to differentiate ‘learning’ from ‘work’ and learning at work, the resolutions are of no assistance in identifying the problem of sham arrangements, or in answering the normative question of whether or not this learning at work *should* be paid.

2.6 POLICY ISSUES

There is a great deal of supportive literature about internships, especially from an educational perspective. A 2015 review of 57 studies on the impact of internships completed by university students concluded that they offer a ‘win-win situation’ for students, employers and higher education institutions, in enhancing employment opportunities, improving skills and competencies, and creating a better understanding of career paths.⁶⁴ Interns themselves also tend to be satisfied with their experiences, as both the European and Australian surveys mentioned previously attest. In both cases a majority of respondents

⁶⁰ Ibid para 33(c), which suggests that ‘transfers of education stipends or grants’ may be disregarded as not constituting remuneration, as well as ‘occasional in cash or in kind support (eg a meal, drinks)’. It is not entirely clear whether something called a stipend, but doing more than reimbursing a very limited range of expenses, would be treated as remuneration for this purpose.

⁶¹ Ibid para 34.

⁶² Ibid para 35. Once again, the definition of ‘volunteer work’ excludes ‘unpaid work required as part of education or training programmes (i.e. unpaid trainees)’: *ibid* para 38. However, nothing is specifically said to help distinguish volunteering from training.

⁶³ Ibid para 33(e).

⁶⁴ Gisela Sanahuja Vélez and Gabriela Ribes Giner, ‘Effects of Business Internships on Students, Employers, and Higher Education Institutions: A Systematic Review’ (2015) 52 *J Employ Couns* 121.

who had undertaken a traineeship or work experience felt that it had improved or would improve their job prospects, even though only around a quarter found employment at the conclusion of their most recent experience.⁶⁵

There is also a substantial body of research that identifies potential problems with internships – especially (although not exclusively) those in the open market. The concerns can be grouped into four main categories.

First, some internships may not deliver on the promise of useful training and skill development. The European Commission has estimated that at least 30 per cent of traineeships are deficient in either learning content or working conditions.⁶⁶

Secondly, internships may not provide a bridge from education to paid work. There is a strongly entrenched perception that work experience enhances employability, on the basis that it ‘improves skills, knowledge and experience, assists an individual to match their human capital profile to labour-market demands and enhances their long-term marketability’.⁶⁷ Experiments have also shown that having internship experience improves a job applicant’s chances of getting an interview.⁶⁸ Yet, ‘[e]conometric analysis of the outcomes of unpaid work experience and the extent to which participation facilitates subsequent paid employment is scarce’.⁶⁹ What evidence there is suggests that paid internships are associated with better labour-market outcomes than are unpaid internships, and that there may be advantages to undertaking more formally structured programmes.⁷⁰ A study in the UK has also suggested that graduates undertaking open-market internships earn less 3.5 years after graduation than those going straight into paid work or further study.⁷¹

⁶⁵ TNS Political & Social (n 44); Oliver and others (n 46).

⁶⁶ European Commission, ‘Executive Summary to the Impact Assessment Accompanying the Document “Proposal for a Council Recommendation on a Quality Framework for Traineeships”’ (2013) European Commission Staff Working Document 496.

⁶⁷ Grant-Smith and McDonald (n 29) 566.

⁶⁸ Stijn Baert, Brecht Neyt, Thomas Siedler, Ilse Tobback and Dieter Verhaest, ‘Student Internships and Employment Opportunities after Graduation: A Field Experiment’ (2018) Discussion Paper No 12183, IZA Institute of Labor Economics.

⁶⁹ Grant-Smith and McDonald (n 29) 566.

⁷⁰ Niall O’Higgins and Luis Pinedo Caro, Chapter 3 in this volume; Wil Hunt and Peter Scott, ‘Paid and Unpaid Graduate Internships: Prevalence, Quality and Motivations at Six Months after Graduation’ (2020) 45 *Stud Higher Educ* 484.

⁷¹ Angus Holford, ‘Access to and Returns from Unpaid Graduate Internships’ (2017) IZA Institute of Labor Economics Discussion Paper No 10845. Compare the more positive wage outcomes from educational internships identified by Nils Saniter and Thomas Siedler, ‘Door Opener or Waste of Time? The Effects of Student Internships on Labor Market Outcomes’ (2014) IZA Institute of Labor Economics Discussion Paper No 8141. See also the studies noted by Sienkiewicz (n 6) 8.

Thirdly, the practice of expecting or requiring unpaid or low-paid internships may impede social mobility. The cost of undertaking these internships is likely to be harder to bear for those from less advantaged backgrounds, especially if it is necessary to travel to an expensive location to find them. For example, British graduates from a middle-class background are more likely to have taken an internship, compared with those from the working class, while the latter are more likely to have worked in a paid job to subsidize their work experience, as opposed to relying on savings or parental support.⁷² Similarly, in Australia the likelihood of undertaking unpaid work experience increases according to socio-economic status, while participation is higher for those living in capital cities, compared with smaller towns or rural areas.⁷³

Fourthly, the use of unpaid or low-paid internships may displace paid employment and undermine labour standards. Interns run the risk of being treated as ‘cheap dead-end labour, exerting downward pressure on the wages and opportunities of others who might otherwise be employed’.⁷⁴ The International Labour Conference has also specifically highlighted this problem,⁷⁵ as noted in section 2.1 of this chapter. Its resolution on the youth employment crisis called on governments to regulate and monitor apprenticeships, internships and other work experience schemes, ‘to ensure they allow for a real learning experience and not replace regular workers’.⁷⁶ The same point has been acknowledged by the ILO’s Committee of Experts on the Application of Conventions and Recommendations, in commenting that ‘problems have been raised in several countries relating to unpaid internship programmes and other similar arrangements, when they are used to evade the payment of applicable minimum wages and to curtail employment opportunities’.⁷⁷ Even some government-backed ALMP schemes may be open to criticism on this basis.⁷⁸

⁷² Cullinane and Montacute (n 45).

⁷³ Oliver and others (n 46).

⁷⁴ Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic 2011) 76.

⁷⁵ ILO, ‘The Youth Employment Crisis’ (n 7) para 24.

⁷⁶ Ibid para 26(e).

⁷⁷ Committee of Experts on the Application of Conventions and Recommendations, *Minimum Wage Systems: General Survey of the Reports on the Minimum Wage Fixing Convention, 1970 (No 131), and the Minimum Wage Fixing Recommendation, 1970 (No 135)* (Report III (Part 1B), International Labour Conference, 103rd Session, International Labour Office 2014) para 187.

⁷⁸ Eurofound, ‘Fraudulent Contracting of Work: Abusing Traineeship Status (Austria, Finland, Spain and UK)’ (*Eurofound*, 27 July 2017), www.eurofound.europa.eu/publications/information-sheet/2017/fraudulent-contracting-of-work-abusing-traineeship-status-austria-finland-spain-and-uk, accessed 30 March 2021.

The ILO has recently acknowledged these four policy concerns,⁷⁹ as part of the background to a proposal for a possible new convention and/or recommendation on the subject of ‘quality apprenticeships’. A questionnaire issued to ILO member states in late 2019 has sought feedback on whether any new instrument(s) should contain a section on traineeships (including internships). There are specific questions about the possibility of states requiring a written traineeship agreement, as well as ensuring ‘adequate remuneration’ for trainees, among other benefits and protections.⁸⁰

With all that in mind, it is surely important to learn more about the nature, value and impact of internships, to find out how they are being regulated around the world – and to consider carefully what might be done to preserve their potential benefits, while safeguarding against their misuse.

⁷⁹ ILO, *A Framework* (n 21) 68–9.

⁸⁰ *Ibid* 97–8.

PART II

Internships and Employability

3. What makes for a ‘good’ internship?

Niall O’Higgins and Luis Pinedo Caro

3.1 INTRODUCTION

New and emerging forms of ‘non-standard’ employment are coming to dominate young people’s early labour-market experiences.¹ Among these, internships are increasingly becoming an integral part of the school-to-work transition. Although initially originating in high-income countries, internships are now becoming more common also in low- and middle-income countries. In the USA, where internships originated, recent estimates suggest that around 1.3 per cent of the entire US labour force are interns and around 50 per cent of college students report completing an internship as part of their studies.²

This chapter reviews some of the evidence, such as it is, on the effectiveness of internships as an integration mechanism for young people into the world of work. It also seeks to identify which elements of internships are most useful for doing so. As well as reviewing existing studies, the chapter analyses primary data using surveys of interns undertaken by the European Commission and the Fair Internship Initiative (FII), focusing on open-market internships.

It is evident from the existing literature, and confirmed by the further analysis reported here, together with Chapters 4 and 6 in this volume, that paid internships lead – on average – to better labour-market outcomes than unpaid internships do. Less evident, however, is the extent to which this is a consequence of the payment of interns, as opposed to – or in addition to – some type of selection mechanism operating at the level of interns or firms. Possibly, for example, paid internships attract more motivated candidates with better than average job prospects even in the absence of the internship.

¹ ILO, *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (ILO 2016) ch 3.

² Anthony P Carnevale and Andrew R Hansen, ‘Learn & Earn: Career Pathways for Youth in the 21st Century’ (2015) 30(1) E-Journal Int Comp Leg Stud 76, cited in Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 Int Lab Rev 679.

Alternatively, perhaps firms who take internships more seriously both pay their interns and also run better quality programmes, leading to the acquisition of more work-related skills by participants. Although these are by no means the only possible explanations, nor are they mutually exclusive, the evidence presented here supports the latter notion that paid internships lead to better post-internship outcomes because the payment of interns also implies a series of other programme features which are associated with better, more structured programmes.

3.2 WHAT DOES THE EXISTING EVIDENCE TELL US?

While there is an extensive literature of sorts either eulogizing or condemning internships, there is relatively little solid evidence plausibly identifying the impact of internships on subsequent labour-market experiences of young people. This is especially true of open-market internships, which are arguably the form of internship most open to abuse and hence in greatest need of attention and regulation.³

In any event, in addition to the analyses included in Chapters 4 and 6 of this volume, a number of other studies are worth mentioning.⁴ Those considered here are summarized in Table 3.1. Perhaps the most studied form of internship is those undertaken as part of tertiary education courses. Surveys of employers in the UK provide evidence in favour of the notion that work experience during higher education is helpful for securing employment upon graduation.⁵ Similar results are provided by Blasko and others, who looked at British tertiary graduates in the mid-1990s.⁶ They found that work experience during university,

³ For an excellent discussion of this issue, but also a more general review of issues regarding the regulation of internships in both current practice across a range of countries as well as its appropriateness, see Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, 'The Regulation of Internships: A Comparative Study' (2018) ILO Employment Policy Department Working Paper No 240.

⁴ It is worth mentioning that the number of these studies is rapidly increasing. Inter alia, a number of Master's and (parts of) PhD theses, particularly in the past three or four years, have started to look at the (causal) impact of internships on later labour-market outcomes.

⁵ Carys Roberts, *The Inbetweeners: The New Role of Internships in the Graduate Labour Market* (Institute for Public Policy Research 2017); UK Commission for Employment and Skills (UKCES), *Employer Skills Survey 2015 of 91,000 Employers* (UKCES 2015).

⁶ Zsuzsa Blasko, Brenda Little and Alan Woodley, *UK Graduates and the Impact of Work Experience* (Centre for Higher Education Research and Information 2002).

in particular study-related work experience, positively affects employment outcomes and entry salaries.

Häkkinen in Finland and Joensen in Denmark showed that students with work experience benefit from subsequent better employment prospects and higher wages, even if the effect seems to vanish some years after graduation.⁷ Róbert and Saar analysed the effect of work experience on post-graduation occupational outcomes in six Central and Eastern European countries.⁸ Their analysis showed that study-related work experience reduces the duration of job search and improves employment prospects. However, non-study-related work experience negatively affects these outcomes.

Weiss and others examined the effect of early work experience upon labour-market entry among German graduates, concluding that only study-related work experience positively affects labour-market outcomes, while non-study-related or mandatory internships have either no or negative effects on job search duration, wages and occupational position.⁹ Their findings suggest that employers value voluntary internships more than mandatory internships, as they are seen as signals of non-cognitive traits such as perseverance and motivation that are positively valued by prospective employers. In the USA, Nunley and others found a positive effect of internship experience during higher education on reducing underemployment after graduation and increasing employment prospects.¹⁰ Graduates who underwent internship saw the probability of being interviewed for a job they had applied for increase by 14 percentage points, with larger returns for non-business majors and graduates with high academic ability.

⁷ Iida Häkkinen, 'Working While Enrolled in a University: Does It Pay?' (2006) 13 *Lab Econ* 167; Juanna Schröter Joensen, 'Academic and Labour Market Success: The Impact of Student Employment, Abilities, and Preferences' (2009) Social Science Research Network Working Article No 1352077.

⁸ Péter Róbert and Ellu Saar, 'Learning and Working: The Impact of the "Double Status Position" on the Labour Market Entry Process of Graduates in CEE Countries' (2012) 28 *Eur Sociol Rev* 742.

⁹ Felix Weiss, Markus Klein and Thomas Grauenhorst, 'The Effects of Work Experience during Higher Education on Labour Market Entry: Learning by Doing or an Entry Ticket?' (2014) 28 *Work, Empl & Soc* 788.

¹⁰ John M Nunley, Adam Pugh, Nicholas Romero and Richard Seals, 'College Major, Internship Experience, and Employment Opportunities: Estimates from a Résumé Audit' (2016) 38 *Lab Econ* 37; John M Nunley, Adam Pugh, Nicholas Romero and R. Alan Seals, 'The Effects of Unemployment and Underemployment on Employment Opportunities: Results from a Correspondence Audit of the Labor Market for College Graduates' (2017) 70 *Int Lab Relat Rev* 642.

Table 3.1 Summary of findings on internships

Type of internship	Study	Effects	Methodology
Educational internship	NACE (n 18)	Paid internships have positive employment outcomes in the USA, while unpaid internships have less positive outcomes	Qualitative analysis
	Fair Internship Initiative (n 21)	Paid internships have positive employment outcomes in international organizations, while unpaid internships have less positive outcomes	Descriptive statistics
	Crain (n 20)	Unpaid internships correlate negatively with salary, employment outcomes, job search duration and job satisfaction in the USA	A combined analysis of survey responses and first-destination data
	Roberts (n 5)	Internships are critical to secure a graduate job in the UK	A combination of qualitative and quantitative data
	UKCES (n 5)	Internships are critical to secure a graduate job in the UK	Qualitative analysis
	Saniter and Siedler (n 11)	Graduates with internship experience are likely to have better employment prospects and higher wages five years after graduation in Germany	Ordinary least squares and instrumental variable regression
	Nunley and others, 'College Major' (n 10); Nunley and others, 'The Effects of Unemployment' (n 10)	Internships reduce underemployment and increase employment prospects in the USA	Experimental data from a résumé audit
	TNS Political & Social (n 16)	Internships have a mostly positive impact in the European Union	Qualitative analysis

Type of internship	Study	Effects	Methodology
Type of internship	Passaretta and Triventi (n 15)	Internships lead to increased employability prospects, higher wages and reduced skills mismatch in Spain and Italy. Internships have a less positive, if any, impact in Germany and Norway	Multinomial logistic regression, ordinary least squares regression and probit models
	Le Saout and Coudin (n 14)	A full-year internship mostly negatively affects students of engineering schools in France	Ordinary least squares and instrumental variable regression
	Róbert and Saar (n 8)	Study-related internships reduce job search duration and increase employability prospects in six Central and Eastern European countries. In contrast, non-study-related internships or mandatory work experience negatively affect job search duration and employability	Regression analysis
	Weiss and others (n 9)	Study-related internships have a positive effect on labour-market outcomes in Germany. However, non-study-related internships or mandatory work experience have no effects or negative effects on labour-market returns	Propensity score matching
	Blasko and others (n 6)	Work experience during higher education, and in particular that related to study, has a positive effect on employment outcomes for graduates in the UK. Work experience unrelated to study appears to have a negative effect on employment outcomes three and a half years after graduation	Descriptive statistics

Type of internship	Study	Effects	Methodology
Postgraduate internship	Häkkinen (n 7)	Students with work experience benefit from higher wages and better employment opportunities in Finland, even though the effects seem to vanish some years after graduation	Regression analysis
	Joensen (n 7)	Students with work experience benefit from higher wages and better employment opportunities in Denmark, even though the effects seem to vanish some years after graduation	Regression analysis
	Holford (n 24)	Unpaid internships have detrimental effects on employment prospects, career satisfaction and salaries in the UK	Descriptive statistics
	Cerulli-Harms (n 25)	Internships have detrimental effects on employment prospects, earnings and work satisfaction in Germany	Propensity score matching
	Schmidlin and Witmer (n 26)	Internships lead to less stable employment prospects in Switzerland	Descriptive statistics
	Kopečná (n 22)	Internships lead to an increase in incomes and 'economic status' of participants one and a half years after programme completion	Propensity score matching and difference-in-difference methods, but with limitations owing to choice of unsuccessful applicants as control group
	McKenzie and others (n 23)	Internships have a moderately positive post-programme impact on overall employment outcomes in Yemen	Randomized controlled trial

Note: Note numbers in brackets, eg (n 23), indicate the footnote in which full publication details of the study can be found.

The analysis of Saniter and Siedler stands out for the effort the authors put into identifying causality.¹¹ The authors examined the impact of student internships at German universities on labour-market choices and wages later on in life. Using an instrumental variable approach to identify the causal effect, they found that participation in a student internship programme increased an individual's wages by 6 per cent, five years after graduation – that is a clear and sustained increase in wages arising from participation in an internship. However, this increase in wages was largely driven by an increased propensity to work full-time as well as by a lower likelihood of being unemployed during the five years after graduation, than by an increase in hourly wages. The positive returns to internships were particularly pronounced for individuals studying subjects with weak labour-market orientation. The increased propensity of ex-interns to subsequently work full-time has also been found in Swiss research. Ruey and others report, using a simple logit framework, that participating in an internship is associated with an increase in the probability of an individual being employed full-time, but not with finding work *per se*.¹²

Gault and others, using a propensity score matching design, found that educational internships reduce the duration of job search for the first job, and increase job satisfaction and wages.¹³ Similarly, Le Saout and Coudin analysed data for graduates from engineering schools in France; looking at the labour-market outcomes for students who undertook an optional full-year of internship, they found that the return is significantly lower than the return from the first year of postgraduate work experience, but the internship experience reduces the job search duration when the graduates enter the labour market and it is appreciated by prospective employers as a signal of ability.¹⁴

Passaretta and Triventi examined the relationship between work experience during higher education and post-graduation occupational returns in terms of employability, wages and skill mismatch in a cross-national perspective

¹¹ Nils Saniter and Thomas Siedler, 'Door Opener or Waste of Time? The Effects of Student Internships on Labor Market Outcomes' (2014) IZA Discussion Paper No 8141.

¹² Julien Ruey, Emilie Rosenstein, Rita Gouveia and Eric Widmer, 'Le devenir professionnel des diplômés en sciences sociales entre 2005 et 2015' (2016) Institut de Recherches Sociologiques Sociograph No 29, 99, http://www.unige.ch/sciences-societe/socio/index.php/download_file/view/2320/931/, accessed 30 March 2021. The coefficient is positive in this case too, but not statistically significant. In any event, the framework adopted does not allow for endogeneity in the participation decision.

¹³ Jack Gault, Evan Leach and Marc Duey, 'Effects of Business Internships on Job Marketability: The Employers' Perspective' (2000) 52 *Educ & Training* 76.

¹⁴ R Le Saout and E Coudin, 'How do Internships Improve Student Major Choices and Early Labor Market Outcomes?' (SOLE-EALE Conference, Montreal, June 2015).

covering four European countries: Germany, Norway, Italy and Spain.¹⁵ In the Southern European countries, they found strong evidence that any type of work experience during higher education increased future employment probabilities four to five years after graduation, while only long-term work experience had any (positive) effect on post-graduation wages and job–skill (mis)matches. The occupational benefits of student employment are greater in Spain and Italy than in Germany and Norway, with only a slightly positive impact on future employment chances in Germany and no impact on labour force participation in either Germany or Norway. Their analysis supports the notion that employers particularly value student employment in those countries where the education system produces graduates who lack practical skills, as is often the case in the Mediterranean countries.

Descriptive analysis of Eurobarometer data regarding the experience of internships (named traineeships by the European Commission) in the European Union suggests that internship experiences were perceived as useful and/or did support entry into a regular job by the majority of trainees surveyed, especially those involved in work experience in large companies lasting for more than six months.¹⁶ There is significant cross-country variation, with trainees from Romania, Ireland, Belgium, Spain and Portugal benefiting more from work experience in labour-market outcomes than those from Poland, Cyprus, Lithuania and Germany.

A number of studies – many of these based on purely descriptive statistics and/or subjective outcome information¹⁷ – suggest that there is a relationship between the payment of interns and their subsequent labour-market outcomes. For example, the USA-based National Association of Colleges and Employers' *Student Survey Report* provided evidence based on descriptive statistics that paid internships lead to significantly better employment outcomes than do unpaid internships; the latter being associated with less success in job offers and salary after graduation.¹⁸ Of possible relevance to explaining the positive link between payment of interns and post-internship outcomes, an Intern Bridge report shows that the relative likelihood of obtaining a paid internship

¹⁵ Giampiero Passaretta and Moris Triventi, 'Work Experience during Higher Education and Post-graduation Occupational Outcomes: A Comparative Study on Four European Countries' (2015) 56 *Int J Comp Sociol* 232.

¹⁶ TNS Political & Social, *The Experience of Traineeships in the EU* (Flash Eurobarometer 378, Directorate-General for Employment, Social Affairs and Inclusion, European Commission 2013).

¹⁷ Similar to that used below, including questions such as 'Was the internship useful for finding work?'

¹⁸ National Association of Colleges and Employers (NACE), *The Class of 2016 Student Survey Report: Results from the NACE's Annual Survey of College Students* (NACE 2016).

increases with family income.¹⁹ The implication here is that a third factor – family connections and/or access to networks – may enhance the chance of both finding a paid internship and subsequently finding (good quality) employment, without there being a causal link between the two phenomena.

Crain looked at the association between participation in unpaid internships and job search success in the USA.²⁰ On the one hand, he showed that unpaid internships are negatively correlated to student salary, employment outcomes, job search duration and job satisfaction. On the other, unpaid internships were reported as helpful as regards confirming career interests, setting career goals and networking. According to a report published by the Fair Internship Initiative, undertaking a paid internship plays a positive role in future career outcomes in international organizations.²¹ In contrast, despite the positive educational impact, unpaid internships are not perceived as favourably in relation to future recognition in the job market.

There have also been a few studies of internship programmes undertaken as part of active labour-market programmes (ALMPs). Kopečná found that an internship programme in the Czech Republic implemented as part of that country's youth employment policy, and later integrated into its Youth Guarantee programme, led to an increase in the incomes and 'economic status' of participants one and a half years after programme completion.²² In this instance, the usage of unsuccessful applicants as the control group is surprising – despite the implementation of propensity score matching and difference-in-difference methods to identify the effects. McKenzie and others, using a more convincing randomized controlled trial design, found that an internship programme in Yemen – for tertiary or vocational graduates – had a moderately positive post-programme impact on an overall employment outcome index, which was driven primarily by an increase in the weekly hours worked by participants.²³

¹⁹ Phil Gardner, *The Debate over Unpaid College Internships* (Intern Bridge 2011) 7. This is calculable directly from table 1. The report does not remark on this finding.

²⁰ Andrew Crain, 'Exploring the Implications of Unpaid Internships' (*NACE Journal*, 1 November 2016), <https://www.nacweb.org/job-market/internships/exploring-the-implications-of-unpaid-internships/>, accessed 30 March 2021.

²¹ Fair Internship Initiative, *2017 UN Internships Report* (Fair Internship Initiative 2017).

²² Vědunka Kopečná, 'Counterfactual Impact Evaluation of the Project Internships for Young Job Seekers' (2016) 10 Central Eur J Pub Pol 48. One criterion for participation was that participants were registered students, so arguably this programme was a combination of educational and ALMP-type internships, although it is classified as the latter in Table 3.1. 'Economic status' presumably means probability of employment, although this is not explained in the article.

²³ David McKenzie, Nabila Assaf and Ana Paula Cusolito, 'The Demand for, and Impact of, Youth Internships: Evidence from a Randomized Experiment in Yemen' (2016) 5 IZA J Lab & Devt 1.

The effects of open-market internships have also been investigated by a few studies which have focused on the generally detrimental effects of non-educational unpaid work experiences, particularly when compared with young people who enter directly into paid employment. Holford examined the factors determining access to, and estimated returns from, unpaid internships after graduation for a sample of graduates from universities in the UK between 2003 and 2009.²⁴ He estimated that, on average, former interns face significant penalties in relation to permanency of employment, career satisfaction and salary, compared with those graduates who go straight into paid work or further study. Former interns gain only a small benefit in career satisfaction compared with those who were out of the labour force six months after graduation. Moreover, echoing the idea hinted at previously, the results suggest the existence of a segregated market in which unpaid graduate internships are divided into desirable positions, which are competitive to access and usually taken by graduates from socially privileged backgrounds or graduating from elite institutions, and less desirable positions, which are usually taken by graduates from disadvantaged backgrounds who need to gain experience or have no better option.

Cerulli-Harms examined the impact of postgraduate internships on early labour-market performance.²⁵ Her research suggests that internships have significant detrimental effects on the probability of finding employment one year after graduation, on post-internship earnings and on work satisfaction. However, the negative effects vanish within five years. Her findings suggest that internships are badly perceived by prospective employers owing to asymmetric information and negative signalling. Employers assume that postgraduate interns were unable to find jobs after graduation, accepting an internship as a substitute for further job search. The author concludes that short-term mandatory internships during higher education could be more beneficial than postgraduate internships.

Schmidlin and Witmer found that the majority of graduates with postgraduate internship experience in Switzerland are in employment five years after graduation, but their situation is not as stable as those who go straight into permanent employment.²⁶ Interestingly, they showed that a postgraduate

²⁴ Angus Holford, 'Access to and Returns from Unpaid Graduate Internships' (2017) IZA Discussion Paper No 10845.

²⁵ Annette Cerulli-Harms, 'Generation Internship: The Impact of Internships on Early Labour Market Performance' (2017) IZA Discussion Paper No 11163.

²⁶ Sabina Schmidlin and Christiane Witmer, *Génération précaire – mythe ou réalité? Une analyse empirique des enquêtes auprès des nouveaux diplômés de 1991 à 2005* (Office fédéral de la statistique 2007).

internship is of more benefit to graduates who are looking for employment opportunities in the public sector than in the private sector.

To summarize:

1. Internship programmes are sometimes associated with an improvement in post-programme employment prospects as broadly understood.
2. Paid internship programmes are clearly associated with better post-programme outcomes than are unpaid internship programmes.
3. The causal impacts, or more generally underlying causal mechanisms, remain less clear since evidence involving a convincing attribution of causality is rare.
4. The existing evidence on open-market internships suggests that these do not compare favourably with direct entry into paid employment.

3.3 ANALYSIS OF SURVEY DATA

This section analyses data from two sample surveys of interns: a sample survey of young Europeans who have participated in at least one internship²⁷ and an Internet-based survey of interns primarily in international organizations undertaken by the Fair Internship Initiative (FII).²⁸ We have seen that paid internships are clearly associated with better post-programme outcomes; an important, perhaps the important, follow-up question is, why? The analysis here suggests some plausible responses, but not yet any definitive answers. This analysis is primarily concerned with open-market internships which, as noted previously, are the least studied but arguably the most important in that, given the relative lack of regulation,²⁹ this is precisely where exploitative and/or discriminatory internships are most likely to arise.

²⁷ Or 'traineeship' as the European Commission has it. Details on the survey and its main results can be found in TNS Political & Social (n 16).

²⁸ For details of the initiative as well as more details and findings from the survey, see Fair Internship Initiative, fairinternshipinitiative.wordpress.com, accessed 30 March 2021.

²⁹ The extent to which internships are regulated by law varies greatly across countries. See eg Ana Jeannet-Milanovic, Niall O'Higgins and Annika Rosin, 'Contractual Arrangements for Young Workers' in Niall O'Higgins (ed), *Rising to the Youth Employment Challenge: New Evidence on Key Policy Issues* (International Labour Office 2017). However, broadly, internships are still much less regulated than other more formal forms of work-based learning, such as apprenticeships.

3.3.1 The Fair Internship Initiative Survey

The FII online survey was undertaken during 2016. The questionnaires asked current and former interns in international organizations about their most recent internship experience (support from supervisors, and tasks), their working conditions (wages, hours worked and insurance coverage) and whether the internship caused financial distress, and concluded with some socio-demographic questions, including the highest degree achieved, age, gender, nationality and parental education.

Only around one-third (34.1 per cent) of the surveyed interns were paid. A common argument – used *inter alia* by the FII – to support the payment of interns, is based on considerations of fairness. In this view, paying interns would reduce the exclusion of young people from internships because they cannot afford to work without pay. However, we illustrated in an earlier paper that there is a clear positive association between country of origin income and participation in a paid (as opposed to unpaid) internship; the richer the country, the more likely the applicant is to obtain a paid internship.³⁰ Similarly, although the relationship is weaker, there is also a positive correlation between parental education and the likelihood of participating in a paid internship; young people with more highly educated (and thus, on average, more wealthy) parents are more likely to access a paid internship. Hence, the issue is not so much – or not only – one of fairness in young people from poorer countries and backgrounds being unable to access internships because they are unpaid. Young people from higher-income countries and from more privileged (and more educated) families evidently find it easier to access paid internships than do the young from less privileged backgrounds.

This is entirely in line with the findings reported previously on internship programmes in the USA and suggests that network connections are more important than the permissive effect of parental income and/or education (or its lack). This is significant in that, if factors determining participation in a paid internship are correlated with outcomes, for example through access to beneficial (parental) networks which increase the chances of both accessing paid internships and finding a good job at the end, then part of the measured impact of paid internships may pick up this network effect.

The 2016 FII survey does not include objective post-internship outcome measures *per se*;³¹ however, it does have detailed characteristics of the intern-

³⁰ Niall O'Higgins and Luis Pinedo, 'Interns and Outcomes: Just How Effective are Internships as a Bridge to Stable Employment?' (2018) ILO Employment Working Paper No 241.

³¹ At our suggestion, questions on current status were added to the FII's subsequent surveys on internship.

ship itself. Table 3.2 reports the results of a simple two-equation model of weekly hours worked, on the one hand, and the (linear) probability of holding a second job while being an intern, on the other. Weekly hours worked in the internship – the variable of primary interest here – are important in that, together with being paid, they have been found to be strongly positively associated with the employment impact of internships.³² They may consequently be thought of as an interim proxy for the impact of internships. Results are reported for ordinary least squares (column 2 in Table 3.2) as well as maximum likelihood estimation of a structural model (columns 3 and 4). Several points are worthy of note.

First, the positive relationship between paid internships and a number of hours worked is similar to the one found by Jackel.³³ Second, as we might expect, hours worked are positively associated with measures of the seriousness of the internship in providing significant work experience (in particular, undertaking real tasks, not making coffee and photocopying) and the attention organizations pay to it (as measured by the support provided by the intern's supervisor).

Perhaps of most interest, being paid is also positive and statistically significant but the impact does not change (significantly) with the amount paid (the interaction of wage and the dummy variable paid). Controlling for the endogeneity of holding a second job suggests that the effect of payment on hours cannot be accounted for simply by the easing of the monetary constraint implied by being in a paid internship, but is more reasonably to be attributed – albeit not unequivocally – to the characteristics of the internship itself.

3.3.2 The Eurobarometer Survey

Analysis of data from the Eurobarometer 'traineeship' survey,³⁴ undertaken in 2013, allows us to take the analysis a little further. The survey randomly sampled 12 921 young people aged between 18 and 35 living one of the EU28 countries.³⁵ The survey asked all respondents for some basic information about their characteristics (for example, age, gender and educational level) and current situation – including labour-market status – as well as whether they

³² Daniel Jackel, 'Evaluating the Effectiveness of an Internship Program' (MA Thesis, Western Kentucky University 2011) 45, table 2.1.

³³ Ibid. Even though Jackel did not test for the effect of the amount paid.

³⁴ Recall that the European Commission uses the term 'traineeships' to refer to what are more commonly termed 'internships'.

³⁵ The survey was also implemented in Croatia, although strictly, at the time it was carried out, April–May 2013, Croatia had not yet formally joined the European Union (EU); this occurred on 1 July 2013.

Table 3.2 *Determinants of hours worked (and possession of a second job), FII survey*

Variable	Regression coefficients		
	Linear regression	SEM direct effect	SEM indirect effect
<i>Reg on weekly hours worked</i>			
Tasks (coffee/print job = 0)			
Absorbing excess workload	6.49*** (1.819)	6.42*** (1.808)	
Day-to-day operations	5.76*** (1.807)	5.75*** (1.795)	
Tailored goals and tasks	5.28*** (1.824)	5.22*** (1.814)	
Support from supervisor	1.50** (1.501)	1.51** (0.759)	
Paid	1.59* (0.820)	1.60** (0.817)	0.09 (0.104)
Paid*wage	0.00007 (0.0004)	0.00010 (0.0004)	0.00003 (0.00003)
Education of intern (bachelor = 0)			
Master's degree	1.02 (0.696)	1.03 (0.694)	
PhD	2.14 (1.560)	1.71 (1.573)	
Second job	-0.66 (0.658)	-0.61 (0.655)	
Constant	30.77*** (1.841)	30.73*** (1.830)	
<i>Reg on second job</i>			
Paid	-0.16*** (0.043)	-0.15*** (0.043)	
Paid*wage	-0.00004* (0.00002)	-0.00004* (0.00002)	
Parents' education (<= high school = 0)			
Bachelor's degree	-0.03 (0.044)	-0.03 (0.044)	0.02 (0.033)
Master's degree	-0.11*** (0.043)	-0.12*** (0.043)	0.07 (0.082)

Variable	Regression coefficients		
	Linear regression	SEM direct effect	SEM indirect effect
PhD degree	-0.15*** (0.050)	-0.16*** (0.050)	0.09 (0.106)
Constant	0.49*** (0.037)	0.44*** (0.037)	

Notes: Column 2 shows estimates from a linear regression. Columns 3 and 4 show direct and indirect effects from a two-equation structural equation modelling (SEM). Significance level: *** at 1%, ** at 5%, * at 10%. Standard errors in parentheses.

Source: 2016 Fair Internship Initiative Interns Survey and authors' own calculations.

had, in the past or currently, held at least one student job, apprenticeship and/or internship. For those who had not participated in at least one internship, the interview terminated there. The full interview was then carried out among the 5484 young people who reported participating in at least one internship now or in the past. For those young people completing the full interview, detailed questions were asked about various aspects of their internship(s).

The information collected on interns included several post-internship outcomes: two subjective – whether the person learned useful things for their professional life and whether the internship helped them to find a job – and two factual – whether the company offered to extend the person's traineeship and whether they received a job offer in the same company on completion of the internship.

Using this information, Table 3.3 reports the results of estimating four simple dichotomous probits on whether:

1. The respondent learned useful things during their internship (agree/disagree).
2. The internship was useful to later find a regular job (agree/disagree).
3. The company offered to extend the internship on its completion (yes/no).
4. The company offered the intern a job after completion of the internship (yes/no).

The explanatory variables used included: gender; the duration of the internship; the size of the company offering it; whether the intern had access to health insurance; whether the intern had a mentor within the company; whether the company offered a certificate on completion; whether the work and working conditions were similar to those of a regular employee; and, crucially, whether the intern was paid during the traineeship and whether this pay was sufficient to live on.

Looking at column 2, observe that structured formal internships, which included provision for a mentor, health insurance, offered a certificate and in

Table 3.3 *Probit estimates of the determinants of four internship outcomes*

Independent variable	Dependent variable			
	Helpful to learn professionally useful things	Helpful to find a job	Internship extension	Job offer
Certificate awarded	0.153** (0.0677)	0.099 (0.0673)	0.139* (0.0719)	-0.0495 (0.0700)
Insurance cover	0.150** (0.0715)	0.262*** (0.0725)	0.235*** (0.0821)	0.216*** (0.0736)
Mentor available	0.761*** (0.0694)	0.543*** (0.0712)	0.236*** (0.0781)	0.173** (0.0724)
Same working conditions	0.340*** (0.0663)	0.266*** (0.0648)	0.0026 (0.0704)	0.222*** (0.0669)
Paid internship	0.0678 (0.0845)	0.0540 (0.0823)	0.397*** (0.0870)	0.525*** (0.0822)
Sufficiently paid internship	0.0310 (0.0102)	0.206** (0.0958)	0.0826 (0.0973)	0.136 (0.0950)
Firm size (0–9 workers = 0)				
10–49 workers	0.157* (0.0816)	0.103 (0.0823)	-0.129 (0.0896)	0.0190 (0.0854)
50–250 workers	0.168* (0.0981)	0.0417 (0.0964)	-0.0141 (0.101)	0.0610 (0.0979)
+250 workers	0.220** (0.0918)	0.256*** (0.0872)	-0.0077 (0.0907)	-0.0488 (0.0906)
Internship duration (0–3 months = 0)				
3–6 months	0.145 (0.0898)	0.166* (0.0863)	0.0805 (0.0907)	0.266*** (0.0833)
+6 months	0.401*** (0.0917)	0.480*** (0.0888)	0.329*** (0.0913)	0.619*** (0.0913)
Female	0.116* (0.0659)	0.007	0.0154 (0.0692)	-0.151** (0.0648)
Constant	-1.077*** (0.135)	-1.314*** (0.0640)	-1.397*** (0.154)	-1.374*** (0.142)
Pseudo R ²	0.1057	0.0819	0.0502	0.0982
Observations	5026	4988	4963	4970

Notes: Significance levels: *** at 1%, ** at 5%, * at 10%. Standard errors in parentheses.

Source: TNS Political & Social (see footnote 16) and authors' own calculations.

which real work was performed (as opposed to photocopying and making the tea or coffee), are associated with better learning outcomes. The probability of learning useful things also increased with internship duration and company size. It was not associated at all, however, with whether or how much the intern was paid. There is weak evidence that young women were more likely to learn useful things in internships than young men ($p < .10$).³⁶

Turning to the (subjective) usefulness of the internship in subsequently finding work (column 3), a number of the results are similar to those of column 2. As before, the usefulness of the internship in finding a job is related to the structured nature of internships, including insurance cover, mentorship and working conditions, although certification was not seen as important in this context. Also, as before, the helpfulness of the programme increased with the programme duration and with firm size. Again, as in column 2, being paid – whether inadequately or adequately – does not influence the perceived usefulness of the programme in obtaining a job.

As regards more objective criteria – being offered an extension or a job afterwards³⁷ – internship structure remains important, but company size becomes less so. However, the biggest difference between columns 4 and 5 on the objective outcomes and 2 and 3 on subjective outcomes concerns the relevance of the payment of interns. Young interns who received payment were more likely to receive an offer of an extension of the internship or a job offer from the firm. However, in neither case does the size of payment seem to matter much.³⁸ This echoes the findings outlined above from the analysis of the FII survey.

It is also worth noting that the positive effects of programme structure and duration echo more general findings reported on work-based learning by Comyn and Brewer, and Jeannet-Milanovic and others.³⁹ These report that structured work-based learning programmes, such as traineeships and internships, which 'look' more like short-term apprenticeships are associated with better post-programme labour-market outcomes than those that do not. Bördős

³⁶ We also estimated the equations separately for young women and men, which produced slightly different results. These are not reported in full here; however, it is worth noting that almost invariably the coefficients had the same sign, although some factors were more important (ie had larger coefficients) for women than men, and vice versa.

³⁷ Note that these are largely mutually exclusive; typically, either the intern was offered an extension or a regular job with the firm.

³⁸ That is, the estimated difference between the 'effect' of being paid and that of being paid enough to live on is positive but is not statistically significant.

³⁹ Paul Comyn and Laura Brewer, 'Does Work-Based Learning Facilitate Transitions to Decent Work?' (2018) ILO Employment Working Paper No 242; Jeannet-Milanovic and others (n 29).

and others examined factors influencing the effectiveness of wage subsidies and found that, *inter alia*, programmes lasting less than six months without a formal training element were not effective in the longer term.⁴⁰

Taken together, the results are consistent with paid internships being indicative of a firm's commitment to internships as part of its personnel policy. Training content – independent of whether an internship is paid or not – seems to be the determining factor in whether individuals perceive the programme as being useful in enhancing their chances of finding work after the programme in general. However, variables which might reasonably be interpreted as reflecting a firm's commitment to the internship programme are the key factors in determining whether specific companies keep their interns on (either by extending or by offering them a regular job) once internship is complete. This is reflected in the importance of intern pay, but also in the importance of the formalization of the programme through the provision of health cover and mentorship.

Also worth mentioning is that being female reduces the probability of receiving a job offer with the same firm on completion of the internship, and this gender difference is statistically significant. It might be worth investigating further the cause of the lower likelihood young women have of receiving a job offer.

3.4 CONCLUSIONS

Evidence of the impact of internships – in particular, open-market internships – remains limited. There is a need for more investigation into the factors determining the effectiveness of internships in order to deepen our understanding of what makes for a 'good' internship in its effectiveness as a mechanism for integrating young people into decent work. Although we cannot claim to have solved the causality issue with the analysis in this chapter, we have sought to add substance to the discussion by investigating a little further which factors underlie the success or failure of internships, in their ability to promote the integration of young people into employment.

More specifically, from the literature, we know that:

1. Under certain conditions, participation in an internship is associated with positive post-internship labour-market outcomes.

⁴⁰ Katalin Bördös, Márton Csillag, Niall O'Higgins and Ágota Scharle, 'Active Labour Market Programmes: The Role of Wage Subsidies' in Niall O'Higgins (ed), *Rising to the Youth Employment Challenge: New Evidence on Key Policy Issues* (International Labour Office 2017).

2. By implication, internships can potentially contribute to the integration of young people into the labour market, although very clearly some internships do a better job of it than others.
3. In particular, paid internships are associated with better post-internship labour-market outcomes than are unpaid internships.

The review and analysis presented here has primarily addressed the question of why paid internships lead to better post-internship labour-market outcomes than do unpaid internships. Our analysis suggests:

1. A number of internship design features are associated with better post-programme outcomes. These primarily reflect a more structured and formalized approach to internships and include, in addition to the payment of a stipend, the presence of a mentor, access to health insurance, similar working conditions to those of regular employees and sufficient internship duration to allow significant work-related competencies to be acquired.
2. The notion that it is programme structure, not pay in itself, which underlies 'good' internships is strengthened by the finding in both the empirical exercises presented here that it is the fact of being paid, rather than the size of payment, that is the main determinant of post-internship positive outcomes.

More work is needed in this much under-studied area. Indeed, this volume is intended as a contribution to this. In our view, we especially need more analyses making serious attempts to identify the causal effects of internships. The results of the analysis presented here, despite making no claim to the identification of causality, are both intuitively plausible and consistent with findings in the internship-related literature, such as it is. They also find further support in other contributions to this volume. Perhaps most importantly, they are also consistent with findings from other more widely studied areas, such as work-based learning (for example, apprenticeships) and ALMPs (for example, wage subsidies).

Our ongoing research in this area, reported elsewhere, supports the notion that internships tend to have modest impacts on longer-term employment prospects⁴¹ – a finding which is also consistent with the conclusions of others referred to previously. Of more specific relevance here, it also finds that being offered a job with the firm in which the internship is undertaken is a strong determinant of longer-term internship 'success'. This result reaffirms the relevance of the shorter-term outcomes studied here and strengthens our belief in

⁴¹ Niall O'Higgins and Luis Pinedo Caro, 'The Long and the Short of It: Factors Underlying Post-internship Outcomes in Early Career' mimeo, ILO.

the importance of structured internships. The obvious implication – of direct relevance to many of the other contributions to this volume – is that more and better regulation of internships is likely to be a crucial element in ensuring that internships by firms are structured and do meet some basic standards, thereby increasing their chances of providing something of lasting worth to young people seeking to navigate the complexities of entry into the current labour market.

4. How do internships undertaken during higher education affect graduates' labour market outcomes in Italy and the United Kingdom?¹

Charikleia Tzanakou, Luca Cattani, Daria Luchinskaya and Giulio Pedrini

4.1 INTRODUCTION

In the past two decades, education-to-work transitions for young people have become more turbulent and uncertain. The role of work experience and, more specifically, internships during higher education (HE) in facilitating access to work and enhancing labour-market outcomes has been debated in academic and policy literature.² For HE students, internships are widely considered a way of accessing work experience and on-the-job training, and are assumed to enhance their labour-market outcomes, in particular at the early career stage. For example, almost half (46 per cent) of 18- to 35-year-olds in the EU27 reported having undertaken an internship at some time in their

¹ We would like to thank the editors and symposium participants for their constructive comments and editorial assistance, our colleagues (especially Professor Marina Timoteo, Dr Silvia Ghiselli, Dr Dorel Manitiu and Professor Kate Purcell for access to AlmaLaurea and Futuretrack data), and IAS Warwick for funding this collaborative work.

² Angus Holford, 'Access to and Returns from Unpaid Graduate Internships' (2017) ISER Working Paper Series 2017-07, <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2017-07>, accessed 30 March 2021; Carys Roberts, *The Inbetweeners: The New Role of Internships in the Graduate Labour Market* (Institute for Public Policy Research 2017), <https://www.ippr.org/publications/the-inbetweeners>, accessed 30 March 2021; Felix Weiss, Markus Klein and Thomas Grauenhorst, 'The Effects of Work Experience during Higher Education on Labour Market Entry: Learning by Doing or an Entry Ticket?' (2014) 28 Work, Empl & Soc 788.

life,³ with younger cohorts experiencing a higher prevalence of internships than older cohorts, suggesting that internships are becoming more common.⁴ Nevertheless, not everyone benefits equally, and different types of internships may be associated with different types of outcomes.⁵

While there is no single fixed definition of internships, in this chapter we follow Broek and others,⁶ in alignment with other studies,⁷ by distinguishing between: (1) internships undertaken as part of vocational/academic curricula; (2) internships associated with active labour-market policies; and (3) internships in the open market. In contrast to Chapter 6 in this volume, which focuses on internships after graduation from HE, we focus on curricular and open-market internships taking place during HE studies in the first cycle (bachelor level) of the Bologna Process.

We explore how these internships affect graduates' transitions to work in the UK and Italy, countries in which the incidence of internships during HE study used to be lower than in other European countries,⁸ but has increased over time.⁹ This expansion highlights the increasing importance of internships undertaken during HE for enabling a smoother transition to the labour market and for mitigating the risk of high-skilled workers moving down the

³ European Commission, 'Eurobarometer 80.1 (2013)' (2017) TNS opinion, GESIS Data Archive, ZA5876 Data file Version 2.0.0, <https://doi.org/10.4232/1.12768>, accessed 30 March 2021.

⁴ Simon Broek, Terence Hogarth, Liga Baltina and Amerigo Lombardi, *Skills Development and Employment: Apprenticeships, Internships and Volunteering* (European Parliament 2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602056/IPOL_STU\(2017\)602056_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602056/IPOL_STU(2017)602056_EN.pdf), accessed 30 March 2021.

⁵ Ann-Marie Bathmaker, Nicola Ingram and Richard Waller, 'Higher Education, Social Class and the Mobilisation of Capitals: Recognising and Playing the Game' (2013) 34 *Brit J Sociol Educ* 723; Carl Cullinane and Rebecca Montacute, *Pay As You Go? Internship Pay, Quality and Access in the Graduate Jobs Market* (Sutton Trust 2018).

⁶ Broek and others (n 4) 16.

⁷ Eg Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, 'The Regulation of Internships: A Comparative Study' (2018) ILO Employment Policy Department Working Paper No 240.

⁸ Jim Allen and Rolf Van der Velden (eds), *The Flexible Professional in the Knowledge Society: New Challenges for Higher Education* (Springer Science & Business Media 2011).

⁹ Holford (n 2); Andrea Cammelli, Gilberto Antonelli, Furio Camillo, Angelo di Francia, Silvia Ghiselli and Matteo Sgarzi, 'Graduates' Employment and Employability after the "Bologna Process" Reform: Evidence from the Italian Experience and Methodological Issues' (2011) AlmaLaurea Inter-University Consortium Working Paper No 1.

occupation ladder.¹⁰ In both countries, the connection between HE and the labour market is relatively loose in that the field of study does not strongly determine routes into occupations and professions,¹¹ although this linkage may be stronger in Italy than in the UK. The two countries also have different institutional arrangements, with the UK often viewed as an example of a liberal, and Italy of a conservative and corporatist, welfare state,¹² although Italy may have moved towards more liberal arrangements on some dimensions in recent years.¹³ Both countries are also more liberal than other European countries in their regulation of internships undertaken during HE. Thus, Italy and the UK provide an interesting comparison of internships and their characteristics in national institutional and regulatory contexts. In Italy, curricular internships are widely considered first as training, while in the UK most types of internships tend to be seen first as work experience.¹⁴ This leads us to ask: does undertaking internships during HE lead to different early career outcomes for graduates in the UK and Italy, and if so why?

¹⁰ Pal Beaudry, David Green and Benjamin Sand, 'The Great Reversal in the Demand for Skill and Cognitive Tasks' (2016) 34(S1) J Lab Econ S199.

¹¹ Arthur Lore and Brenda Little, *The REFLEX Study: Exploring Graduates' Views on the Relationship Between Higher Education and Employment* (Centre for Higher Education Research and Information, Open University 2010); Brenda Little, 'Reading Between the Lines of Graduate Employment' (2001) 7 Qual Higher Educ 121; Antonio Schizzerotto and Carlo Barone, *Sociologia dell'istruzione* (Il Mulin 2006), cited in Valentina Di Stasio, 'Education as a Signal of Trainability: Results from a Vignette Study with Italian Employers' (2014) 30 Eur Sociol Rev 796.

¹² Gösta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990). Other authors define Italy as a 'mixed-market economy' characterized by low levels of social protection and a high level of employment protection: Oscar Molina and Martin Rhodes, 'The Political Economy of Adjustment in Mixed Market Economies: A Study of Spain and Italy' in Bob Hancké, Martin Rhodes and Mark Thatcher (eds), *Beyond Varieties of Capitalism: Conflict, Contradictions, and Complementarities in the European Economy* (Oxford University Press 2007).

¹³ Lyle Scruggs and James Allan, 'Social Stratification and Welfare Regimes for the Twenty-First Century: Revisiting "The Three Worlds of Welfare Capitalism"' (2008) 60 World Politics 642; Marc Goergen, Chris Brewster, Geoffrey Wood and Alan Wilkinson, 'Varieties of Capitalism and Investments in Human Capital' (2012) 51 Indust Rel 501.

¹⁴ See eg for the UK: 'An internship is a great way to gain experience and discover what a particular role is like': Prospects, 'Work Experience and Internships' (2020), <https://www.prospects.ac.uk/jobs-and-work-experience/work-experience-and-internships>, accessed 30 March 2021. For Italy: 'An internship is a period of on-the-job training that gives students and recent graduates the opportunity to acquire professional skills and know-how transferable to the world of work and to gain experience of a real work environment': Ca' Foscari University of Venice, 'Internships in Italy' (2020), <https://www.unive.it/pag/17134/>, accessed 30 March 2021.

The remainder of this chapter is structured as follows: first, we give a brief overview of research on internships. Then, we outline the surrounding HE and labour-market contexts in the UK and Italy. After explaining the methodological approach used (datasets, samples and empirical strategies), we present our results. The final section discusses the implications of our results and ends with key recommendations for regulating internships undertaken during HE.

4.2 INTERNSHIPS AND EARLY EMPLOYMENT OUTCOMES: THEORETICAL FRAMEWORK AND EXISTING EVIDENCE IN ITALY AND THE UK

There are several key theoretical reasons why we might expect internships to affect labour-market outcomes. We focus on two main theoretical perspectives: human capital and signalling/screening. From the human capital perspective, the typical insight is that learning is earning;¹⁵ undertaking an internship, as for other forms of workplace training, leads to skill development, which leads to improved productivity and, in turn, to higher wages.¹⁶ We may also interpret the human capital insight more broadly, and consider that the skills developed during an internship make a candidate more employable than someone with similar educational experience but no internship. The broad implications of this perspective are that all internships should improve labour-market outcomes.

In contrast, from the signalling/screening perspective,¹⁷ internships do not necessarily need to lead to skill development (although they may do so). Instead, internships act as information to differentiate between graduates entering the labour market, which is deemed to be increasingly important when educational credentials inflate.¹⁸ For example, internships might improve employment prospects because job seekers use them to signal their general abilities and learning potential to employers (who are unable to observe applicants' ability directly). From the related job-queue perspective, job seekers can

¹⁵ Gary Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (2nd edn, Columbia University Press 1964); Claire Smetherham, 'Firsts among Equals? Evidence on the Contemporary Relationship between Educational Credentials and the Occupational Structure' (2006) 19 *J Educ & Work* 29.

¹⁶ Eg Philip O'Connell and Delma Byrne, 'The Determinants and Effects of Training at Work: Bringing the Workplace Back In' (2012) 28 *Eur Sociol Rev* 283.

¹⁷ Michael Spence, 'Job Market Signalling' (1973) 87 *Quart J Econ* 355.

¹⁸ Phillip Brown, 'Cultural Capital and Social Exclusion: Some Observations on Recent Trends in Education, Employment and the Labour Market' (1995) 9 *Work, Empl & Soc* 29.

also use internships as a signal that they will require less training if hired than job seekers who have not done internships. The key insight is that, to be an effective signal, internships should differentiate employable from less employable candidates, that is, the signal should provide quality information, and what matters is the relative positioning in the job queue rather than absolute skill levels.¹⁹ The broad implications of this perspective are that internships effectively communicate information about applicant quality and should thus improve labour-market outcomes for high-quality applicants.

There is a research gap on the impact of internships on graduates' early career outcomes in Italy as a whole. Research focused on curricular internships undertaken during high school or HE in an Italian province showed that a significant share of internships is undertaken in industries characterized by low-skilled and highly repetitive jobs, such as trade and catering,²⁰ suggesting that internships may not be effective in skill acquisition. Other evidence, based on a study in the Italian information and communication technology (ICT) sector, found that internships did not act as a signal of employability and did not improve employment chances as might have been expected, possibly owing to the perceived short-term nature of the internships and to the lack of regulation regarding their content and duration.²¹ However, other research has found positive associations between internships and employment outcomes after graduation.²² Therefore, the nature of the association between internships and graduates' employment outcomes in Italy remains unclear.

In the UK, there is also limited research on how internships affect labour-market outcomes. Most of the literature tends to report on qualitative studies that focus on students' experiences of internships and perceptions of skills they developed, with the findings being broadly positive.²³ However,

¹⁹ Valentina Di Stasio, Thijs Bol and Herman G Van de Werfhorst, 'What Makes Education Positional? Institutions, Overeducation and the Competition for Jobs' (2016) 43 *Res Soc Stratification & Mobility* 53.

²⁰ Lisa Dorigatti, Barbara Grüning and Carlo Fontani, 'Tra formazione e sfruttamento: Uno studio sui tirocini in Provincia di Bologna' in Rossana Cirillo (ed), *Nuove frontiere della precarietà del lavoro: Stage, tirocini e lavoro degli studenti universitari* (Società e trasformazioni sociali 2015).

²¹ Di Stasio (n 11).

²² AlmaLaurea, *Condizione occupazionale dei laureati: XV indagine* (AlmaLaurea 2013); Unioncamere, Ministero del lavoro, *I fabbisogni occupazionali e formativi delle imprese italiane nell'industria e nei servizi per il 2012* (Unioncamere 2012), https://www.cliclavoro.gov.it/Moduli%20e%20Documenti/excelsior_2012_sintesi_principali_risultati.pdf, accessed 30 March 2021.

²³ Patricia Silva, Betina Lopes, Marco Costa, Dina Seabra, Ana I. Melo, Elisabeth Brito and others, 'Stairway to Employment? Internships in Higher Education' (2016) 72 *Higher Educ* 703.

some of the quantitative research has cast doubt on the linkages between internships and labour-market outcomes,²⁴ while other work has shown how different types of internships might reinforce existing inequalities and prevent social mobility.²⁵ This evidence suggests that not all types of internships equally affect labour-market outcomes, and that individuals from more privileged backgrounds (for example, those with a higher level of economic, social and/or cultural capital, or holding higher credentials) are more likely to access the ‘best’ internships, and less privileged individuals may be less likely to do so, reproducing existing social inequalities.

Studies from other countries have tended to support the signalling perspective, where undertaking an internship provides a signal to potential employers about the motivation and commitment of the interns, positively affecting their employment opportunities.²⁶ The subject of HE study and whether the internship is mandatory or voluntary also seem to play an important role.²⁷ Qualitative studies have been mostly preoccupied with the type of skills that graduates can develop by undertaking an internship, complemented by the skills acquired during their study curriculum.²⁸

In summary, the literature suggests that internships are broadly positively associated with labour-market outcomes, such as the probability of employment, a better job match and higher wages. However, there is a great deal of variation in the results, depending on the types of internships, labour-market

²⁴ Eg Nick Wilton, ‘The Impact of Work Placements on Skills Development and Career Outcomes for Business and Management Graduates’ (2012) 37 *Stud Higher Educ* 603.

²⁵ Charikleia Tzanakou, David Wilson and Kate Purcell, ‘Internships as a Pathway to Employment for Graduates in the UK: An Agency-Structure Analysis?’ (working paper, forthcoming); Holford (n 2); Wil Hunt and Peter Scott, ‘Participation in Paid and Unpaid Internships among Creative and Communications Graduates’ in Richard Waller, Nicola Ingram and Michael Ward (eds), *Degrees of Injustice: Social Class Inequalities in University Admissions, Experiences and Outcomes* (BSA/Routledge 2017).

²⁶ Weiss and others (n 2); Nils Saniter and Thomas Siedler, ‘Door Opener or Waste of Time? The Effects of Student Internships on Labor Market Outcomes’ (2014) IZA Discussion Paper No 8141, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2432425###, accessed 30 March 2021.

²⁷ John Nunley, Adam Pugh, Nicholas Romero and Richard Seals, ‘College Major, Internship Experience, and Employment Opportunities: Estimates from a Résumé Audit’ (2016) 38 *Lab Econ* 37; Jack Gault, John Redington and Tammy Schlager, ‘Undergraduate Business Internships and Career Success: Are They Related?’ (2000) 22 *J Marketing Educ* 45.

²⁸ Eg Gay Crebert, Merrelyn Bates, Barry Bell, Carol-Joy Patrick and Vanda Cragolini, ‘Developing Generic Skills at University, During Work Placement and in Employment: Graduates’ Perceptions’ (2004) 23 *Higher Educ Res & Dev* 147.

outcomes and countries used in the studies. In general, most of the literature has been limited to national case studies, specific industries and disciplinary subject fields. With notable exceptions,²⁹ there is a lack of multi-perspective cross-country studies on the impact of internships on graduates' early labour-market outcomes that account for internship heterogeneity.

4.3 INSTITUTIONAL VARIATION AND CONTEXTUAL CONSIDERATIONS IN ITALY AND THE UK

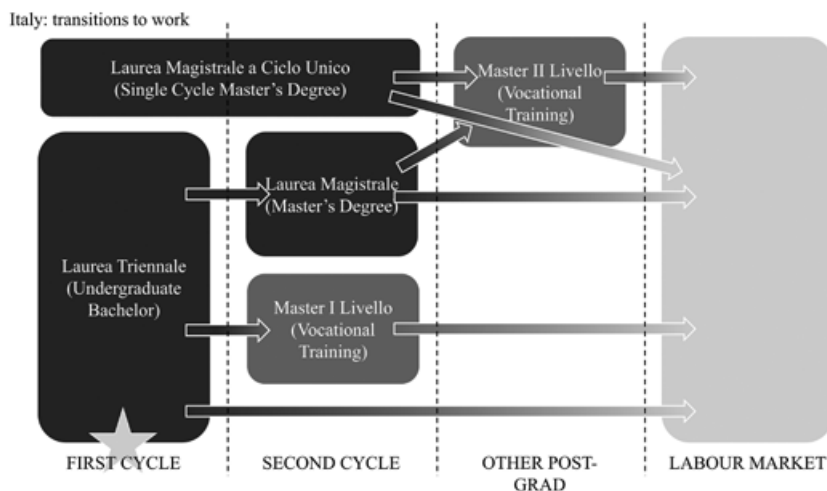
4.3.1 Higher Education

In the early 2000s, Italy reformed its HE system by introducing the so-called '3+2' Bologna system. The new system, based on a two-cycle degree structure consisting of a first-level degree (Laurea Triennale, a three-year bachelor's-type degree) and a second-level degree (Laurea Magistrale, a two-year master's degree), replaced the programmes of the old system which lasted at least four years, although some programmes maintain a five- or six-year single cycle. In addition, there are single-cycle master's degrees (Laurea Magistrale a Ciclo Unico, five-year courses) for specific courses, such as law and medicine. Furthermore, there are vocational training programmes that can be accessed by Laurea Magistrale and Laurea Triennale holders, which are not part of the HE system and are not equivalent to a master's degree awarded in HE institutions. These vocational training programmes aim to provide skills relevant to specific occupations (such as human resources managers and technical occupations) and have their own specific transitional path. Figure 4.1 illustrates the simplified structure of the two-cycle Italian HE system.

In the UK, the typical HE two-cycle structure is a three- or four-year full-time undergraduate degree (some degrees, for example in medicine and dentistry, take longer), after which graduates join the labour market. Some undergraduate courses, in science and engineering-related fields in particular, offer an integrated master's degree. Master's courses typically last one or two years, and are often studied for professional purposes,³⁰ although the proportion of graduates entering master's courses immediately after the bachelor's

²⁹ Eg Kari P Hadjivassiliou, Emanuela Carta, Tom Higgins, Catherine Rickard, Suzanne Ter-Minassian, Flavia Pesce and others, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report* (European Union 2012), <https://op.europa.eu/en/publication-detail/-/publication/19623a37-37ee-4a60-b7ba-14a55526012f>, accessed 30 March 2021.

³⁰ Brenda Little, 'The UK Bachelors Degree: A Sound Basis for Flexible Engagement with an Unregulated Labour Market?' in Harald Schomburg and Ulrich



Note: The internship data in this chapter concern only the first cycle (internships that are undertaken by individuals who are students in higher education for their first degree, represented by the star).

Figure 4.1 The Italian two-cycle HE system and graduates' transitions to work

degree has been increasing. While vocational aspects have been present in UK HE for a long time, the role of work experience became prominent again from the 1990s onwards.³¹ Figure 4.2 illustrates the simplified structure of the two-cycle HE system in the UK.

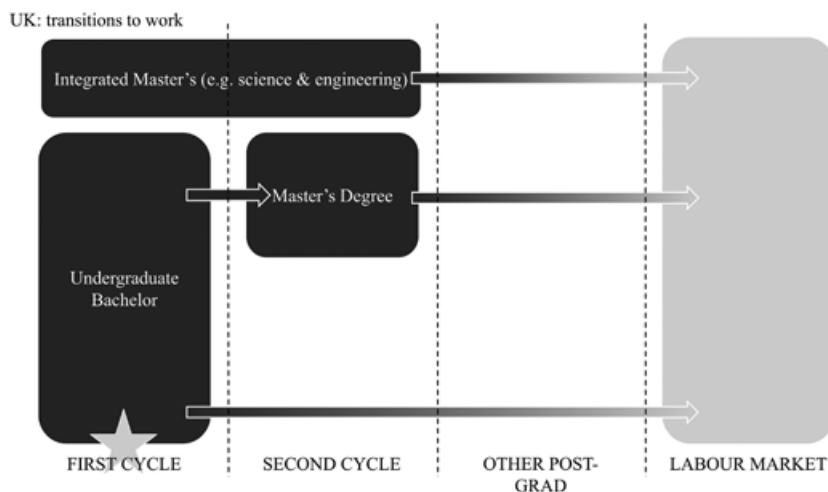
The Bologna reform led to a noticeable expansion of HE in Italy, with the number of graduates entering the labour market doubling from around 174 000 in 2002 to around 326 000 in 2018.³² During the years immediately after the '3+2' reform, the Italian graduate labour market provided employment opportunities to the additional graduate workforce,³³ but the situation deteri-

Teichler (eds), *Employability and Mobility of Bachelor Graduates in Europe* (Sense 2011).

³¹ Brenda Little and Lee Harvey, 'UK Work Placements: A Choice too Far?' (2007) 13 *Tertiary Educ & Manag* 227.

³² Ministero dell'Istruzione, dell'Università e della Ricerca, 'Anagrafe nazionale degli studenti e deilaureati' (2019), <https://anagrafe.miur.it>, accessed 30 March 2021.

³³ Giulio Bosio and Marco Leonardi, 'The Impact of Bologna Process on the Graduate Labour Market: Demand and Supply' (2010) 69(3) *Giornale degli Economisti e Annali di Economia* 29.



Note: The internship data in this chapter concern only the first cycle (internships that are undertaken by individuals who are students in higher education for their first degree, represented by the star).

Figure 4.2 The UK HE two-cycle system and graduates' transitions to work

olated after the outbreak of the financial crisis.³⁴ In response, one of the strategies to facilitate university-to-work transitions was encouraging internship programmes both during studies and after graduation. As a consequence, an increasing number of degree courses introduced internships in their curriculum and awarded credits to participating students. With the shift from a one-cycle to a two-cycle education system, the share of graduates who undertook a curricular internship (an internship that is part of a programme of study) increased from 15 per cent in 2000 to 58 per cent in 2017.³⁵

In the UK, HE has expanded substantially over the past few decades. The number of graduates from all undergraduate programmes increased from around 350 000 in 2001–02 to just under 425 000 in 2018–19.³⁶ However, it

³⁴ Maurizio Franzini and Michele Raitano, 'Few and Underutilized? Overeducation of Italian Graduates' in Emiliano Mandrone (ed), *Labour Economics: PLUS Empirical Studies* (Rubbettino 2012).

³⁵ AlmaLaurea, *Condizione occupazionale dei laureati: III indagine* (AlmaLaurea 2001); AlmaLaurea, *Condizione occupazionale dei laureati: XX indagine* (AlmaLaurea 2018).

³⁶ Higher Education Statistics Agency, *Higher Education Student Statistics: UK, 2018/19* (HESA 2020) fig 2a, <https://www.hesa.ac.uk/news/16-01-2020/sb255-higher-education-student-statistics>, accessed 30 March 2021.

is difficult to estimate the proportion of students participating in internships or placements during HE since there is a lack of comprehensive data. Some evidence suggests that there has been a decline in the number of undergraduate students taking up so-called ‘sandwich’ degree placements (sandwich degrees typically include a year-long placement/internship in industry, although the precise structure may vary): specifically, from just under 10 per cent in 1999–2000 to around 5 per cent in 2012–13,³⁷ although there is some suggestion that the number has increased since.³⁸

A key issue in both countries is the relatively loose connection between the HE system and the labour market,³⁹ whereby the field of study does not strongly determine the professions in which one might be employed. Although the Italian HE–labour market linkage has moved away from a tight coupling in recent decades, and has been described as ‘loose’,⁴⁰ it arguably remains more centralized and more regulated than that of the UK.⁴¹ It is widely reported that in institutional configurations where the education–labour market link is strong, internships may be less important in affecting employment outcomes. In contrast, in institutional configurations where the education–labour market link is loose, internships may be more likely to affect employment outcomes, for example, because the educational system does not provide the full range of information required by employers.⁴² Thus, we expect the association between internships and labour-market outcomes to be stronger in the UK than in Italy.

4.3.2 Labour-Market Context in Italy and the UK

There are several main differences in the labour-market context between Italy and the UK. First, the rate of economic activity is lower in Italy (56 per cent) than in the UK (70 per cent),⁴³ partly explained by the lower participation of women in the labour market in Italy. Second, the 2008 recession hit Italy more than it did the UK. While the unemployment rate was at similar levels in Italy

³⁷ CM Jones, JP Green and HE Higson, ‘Do Work Placements Improve Final Year Academic Performance or Do High-Calibre Students Choose to Do Work Placements?’ (2017) 42 *Stud Higher Educ* 976.

³⁸ Eg Mike Grey, ‘The Placement Panacea’ (*Higher Education Policy Institute Blog*, 11 April 2019), <https://www.hepi.ac.uk/2019/04/11/the-placement-panacea/>, accessed 30 March 2021.

³⁹ Lore and Little (n 11); Little (n 11).

⁴⁰ Schizzerotto and Barone (n 11).

⁴¹ Lore and Little (n 11).

⁴² Di Stasio and others (n 19); Valentina Di Stasio and Herman G van de Werfhorst, ‘Why Does Education Matter to Employers in Different Institutional Contexts? A Vignette Study in England and the Netherlands’ (2016) 95 *Soc Forces* 77.

⁴³ This is the 2017 labour force participation rate.

and the UK in 2008 (6.7 per cent and 5.6 per cent, respectively), by 2014 it had almost doubled in Italy (12.7 per cent) but had only slightly increased in the UK (6.1 per cent) after peaking at 8.1 per cent in 2011.⁴⁴ Third, youth unemployment is consistently higher in Italy than in the UK, both as a stand-alone rate and as a ratio of youth to adult unemployment rates, and this difference has increased since the recession (although the ratio of youth to adult unemployment has been converging during the past few years). In the UK, although youth unemployment increased from 15.0 per cent to 21.3 per cent between 2008 and 2012, the rates returned to pre-recession levels by 2015. However, in Italy, the youth unemployment rate more than doubled from 21.2 per cent to 42.7 per cent between 2008 and 2014. As a consequence, since the recession, Italian graduates have been facing substantial difficulties in finding their first job, arguably more than their counterparts in other countries.⁴⁵ Yet, Italian graduates are still better off than Italian non-graduates, as they experience a higher probability of employment and a lower increase in the unemployment rate than their non-graduate peers during the same period.⁴⁶

A key measure of graduate employment outcomes is the proportion of graduates working in graduate-level jobs. Although there are several ways of classifying jobs into graduate and non-graduate, in this chapter we use the term 'graduate jobs' for jobs that 'normally require knowledge and skills developed on a three-year university degree' to perform the job tasks in a competent way, following the definition and classification system developed by Elias and Purcell.⁴⁷ In Italy, the share of graduates employed in non-graduate jobs lies between 23 per cent⁴⁸ and 33 per cent,⁴⁹ a disappointing rate that reflects the low proportion of graduate jobs demanded in the labour market.⁵⁰ Data for

⁴⁴ Here and in the rest of this paragraph, unemployment statistics are taken from Eurostat, 'Employment and Unemployment (LFS)' (2020), <https://ec.europa.eu/eurostat/web/lfs/data/database>, accessed 30 March 2021.

⁴⁵ Ibid.

⁴⁶ AlmaLaurea, *Condizione occupazionale dei laureati: XX indagine* (n 35).

⁴⁷ Peter Elias and Kate Purcell, 'Classifying Graduate Occupations for the Knowledge Society' (2013) Institute for Employment Research, University of Warwick Futuretrack Working Paper 5, 8. See also section 4.4 in this chapter.

⁴⁸ Luca Cattani, Giovanni Guidetti and Giulio Pedrini, 'Overeducation among Italian Graduates: Do Different Measures Diverge?' (2018) 35 *Economia Politica* 491.

⁴⁹ Andrea Ricci, 'Mis-match, percorsi di studio e condizioni produttive' in CNEL (ed), *XX Rapporto su mercato del lavoro e contrattazione collettiva* (Consiglio nazionale dell'economia e del lavoro 2018).

⁵⁰ Francis Green and Golo Henseke, 'The Changing Graduate Labour Market: Analysis Using a New Indicator of Graduate Jobs' (2016) 5 *IZA J Lab Policy* 14; Francis Green and Golo Henseke, 'Graduates and "Graduate Jobs" in Europe: A Picture of Growth and Diversification' (2017) Centre for Global Higher Education Working Paper No 25.

the UK suggest that around a third of graduates are employed in non-graduate jobs, which increases to around 50 per cent for recent graduates.⁵¹ Employers' demand for graduates has not kept up with its relative supply, which has led in turn to an increased emphasis on employability initiatives during HE, including an increase in the take-up of placements and internships.⁵² In this context, in the UK, internships and work experience are used to demonstrate work-readiness, and are widely encouraged and viewed as necessary by employers.

4.3.3 Internships and Regulation of Internships in Italy and the UK

There is evidence of a proliferation of internship types undertaken during HE in both the UK and Italy, together with loose regulation of these internships. Less than half of trainees aged 18–35 years in Italy (43 per cent) and in the UK (47 per cent) had their most recent traineeship based on a written traineeship agreement or contract with the host organization or company, whereas in the EU28, six out of ten respondents with traineeship experience (62 per cent) signed a formal traineeship agreement.⁵³

In Italy, curricular internships undertaken during an undergraduate course can take place in a private firm, the public sector or the university. These internships can be optional or mandatory, depending on the course, but when students participate in either type of curricular internship, they need to acquire course credits to complete their degree. Moreover, curricular internships are always unpaid (except for very specific cases) and can take place either during or outside university term time.

In the UK, placements may be part of the HE curriculum as structured work placements, sandwich placements or other arrangements, depending on the type of course and subject studied. In most instances, the universities' role is mainly confined to advertising opportunities for industrial placements. It is usually students who are responsible for applying for and finding placements, often through personal contacts and networks. If students are unsuccessful in obtaining a placement, they may complete the degree without the industrial component. Some students may also undertake vacation internships which are not part of the HE curriculum. The existence of these different terms and their sometimes interchangeable use raises challenges in distinguishing between

⁵¹ Office for National Statistics, *Graduates in the UK Labour Market: 2017* (Office for National Statistics 2017).

⁵² Phillip Brown and Anthony Hesketh, *The Mismanagement of Talent: Employability and Jobs in the Knowledge Economy* (Oxford University Press 2004).

⁵³ European Commission (n 3).

these different types of work experiences and their effects on labour-market outcomes.

In Italy, strict regulations apply only to HE-level apprenticeships leading to HE degrees, internships undertaken during school (secondary) education and internships undertaken after graduating from HE (the Fornero reform). Curricular internships that take place during HE are less centrally regulated. Italian universities are constitutionally entitled to establish their own regulations and have a high degree of autonomy in setting up their own rules to implement curricular internships. Usually, they issue broad guidelines which placement offices should refer to when signing specific agreements with employers' associations or single employers available to host trainees. These bilateral agreements thus constitute the main rules of reference for curricular internships in Italy, shaping their design, content and duration (including the training objectives and skills to be developed). This loosely regulated system, however, has raised increasing concerns among the academic community and policy-makers as the media has exposed instances of labour exploitation at the expense of young students and workers by their hosting organizations.⁵⁴

In the UK, labour-market regulation around internships is a grey and complex area, as discussed in more detail in Chapter 6 of this volume. If an intern counts as a worker (if they are promised a contract of future work), they are entitled to the national minimum wage. However, students undertaking an internship lasting less than a year that is part of a higher or further education course based in the UK are not entitled to the minimum wage, though some may be paid at the employer's discretion.⁵⁵ While student interns are excluded from minimum wage legislation, they are included in regulations regarding working time and health and safety.⁵⁶ Individual HE institutions are responsible for ensuring the quality of their students' work placements and have their own internal quality assurance guidelines and procedures. At a national level, the Quality Assurance Agency for Higher Education has produced a code of practice on work-based learning.⁵⁷ While not formally binding, HE institutions are expected to take the code of practice into account when developing their own guidelines. However, this code has been criticized for its limitations in the

⁵⁴ Dorigatti and others (n 20).

⁵⁵ UK Government, 'Employment Rights and Pay for Interns' (2019), <https://www.gov.uk/employment-rights-for-interns>, accessed 30 March 2021.

⁵⁶ Stewart and others (n 7).

⁵⁷ Quality Assurance Agency for Higher Education, *Code of Practice for the Assurance of Academic Quality and Standards in Higher Education. Section 9: Work-Based and Placement Learning* (QAAHE 2007), <https://dera.ioe.ac.uk/4500/10/PlacementLearning.pdf>, accessed 30 March 2021.

areas of learning content and transparency in hiring practices, and the lack of evidence regarding the effectiveness of these practices.⁵⁸

4.4 METHODOLOGY

We draw our data from two longitudinal surveys of graduates' HE and labour-market experience: AlmaLaurea for Italy and Futuretrack for the UK. AlmaLaurea is a consortium of Italian universities that collects data about graduates' early career paths from 75 Italian universities (around 90 per cent of all graduates at the national level, $N = 109\,313$ for those graduating in 2009) at the time of graduation (a survey on the graduates' profile) and at one, three and five years after graduation (three surveys on the graduates' employment conditions). Futuretrack is a national longitudinal survey tracking those who applied in 2005–06 for full-time undergraduate degree programmes in the UK in four waves, from the point of application to HE in 2005–06 until 2011–12 when most will have graduated and will have been working in the labour market for 1.5 to 2.5 years.⁵⁹ The Futuretrack survey sample size ranges from around 120 000 in wave 1 to around 17 000 in wave 4.⁶⁰

To facilitate comparative analysis between Italy and the UK, we focus on first-degree graduates who enrolled during 2005–06 and completed their studies during 2009–10, just as the impact of the financial crisis started to bite. The Futuretrack data are restricted to graduates who graduated during 2009–10, who had a bachelor's degree only, who were UK nationals and lived in the UK at the time of applying to HE, and who did not study overseas ($N \approx 9000$), looking at their employment outcomes 1.5 to 2.5 years after graduation. The AlmaLaurea data are restricted to graduates who enrolled between 2005 and 2006 and graduated in 2009, and looks at graduates' employment outcomes one year after graduation ($N \approx 48\,000$).

We explore one main empirical question: how does doing an internship during undergraduate HE programmes affect labour-market outcomes for

⁵⁸ Tom Higgins and Becci Newton, *National Report on Traineeships UK* (European Commission 2012).

⁵⁹ Kate Purcell, Peter Elias, Gaby Atfield, Heike Behle, Ritva Ellison and Daria Luchinskaya, *Transitions into Employment, Further Study and Other Outcomes: The Futuretrack Stage 4 Report* (Institute for Employment Research, University of Warwick 2013).

⁶⁰ Although the surveys measure similar issues, they are not identical. For instance, Italian cohorts of surveyed graduates are selected based on the year of graduation rather than that of enrolment, which means there are important differences in age and years taken to complete their studies. Furthermore, AlmaLaurea only gathers information about internships and work experience during HE and/or at the time of graduation, not afterwards.

graduates in the UK and Italy? To facilitate comparison of Italian and UK data, we use the Italian 'curricular internship' as the reference point, and include, for the UK, sandwich placements and structured work placements, which may be optional or mandatory, paid or unpaid, and usually take place during university term time.⁶¹ We broadly view these as 'curricular' internships. For the UK, we also include vacation internships in a firm, which are optional, can be paid or unpaid, and which usually take place outside of university term time. Vacation internships are widely considered internships in the UK, but we view them as 'open-market' rather than 'curricular' internships in the Broek and others framework.⁶² We also include, for both countries, a variable proxying whether graduates did any paid work while at university, as an additional control.

The labour-market outcomes of interest in this study are (1) whether one is employed in a new job after graduation, (2) whether one is employed in a graduate job (SOC(HE)2010, using Elias and Purcell's classification⁶³) and (3) the wage in their current job at the time of the survey. We also looked at factors affecting access to internships, although we do not report the findings here in detail.⁶⁴

We estimated regression models for each of the three labour-market outcomes in each country. Whether one is in employment and whether one is working in a graduate job are binary variables (1 = yes, and 0 = no). In both countries, we measured wages using a multi-category variable that is well approximated by a continuous variable. We therefore used logistic specifications (analysis for Italy used probit specifications) for the dependent variables being in employment and working in a graduate job, and a log-linear ordinary least squares (OLS) model for the wage-dependent variable. The choice of the logistic estimator is justified by the binary nature of the response variable, while the OLS estimator is the typical econometric technique to estimate the wage equation when the dependent variable is continuous or can be assumed to be continuous.

In the absence of suitable longitudinal data, we cannot address the sample selection bias arising from the fact that we observed the probability of getting a job only for those graduates who are economically active, and that we

⁶¹ For further discussion see Higgins and Newton (n 58).

⁶² Broek and others (n 4).

⁶³ Elias and Purcell (n 47). Note that for the graduate job variable Italian data are only available for five years after graduation, while UK data are available for the first job after graduation and for the job held at the time of the wave 4 survey.

⁶⁴ For comprehensive results, see Charikleia Tzanakou, Luca Cattani, Daria Luchinskaya and Giulio Pedrini, 'Access and Labour Market Outcomes of Internships During Higher Education in Italy and the United Kingdom' (AMS-Acta, University of Bologna 2020).

observed the wage and the job type only for employed graduates. A typical correction is the well-known two-step estimator,⁶⁵ which requires the identification of one or more exogenous exclusion restrictions to be used as regressors in the selection equation. As our data do not match this requirement, we decided to run the regressions within the subsample of employed graduates only.⁶⁶ Nonetheless, thanks to the inclusion of a wide set of control variables, our estimates still provide valuable measures of association between types of internships and labour-market outcomes.

4.5 RESULTS

4.5.1 Incidence of and Access to Internships in the UK and Italy

A high proportion of the Italian respondents did either an internship (61 per cent) or paid work (68 per cent, see Table 4.1) during HE. The most frequent type of internship occurred in the public sector (37 per cent), followed by internships in a firm (33 per cent), while only a minority of students had internships within university premises (20 per cent).⁶⁷ In the UK, around 20 per cent of participants did structured work placements, 11 per cent sandwich placements and 9 per cent vacation internships. Respondents could participate in more than one type of work-related activity.⁶⁸ Almost 19 per cent of participants did no work-related activity at all (see Table 4.2).⁶⁹

As regards access to internships, we found that, compared with women and individuals from lower socio-economic backgrounds, men from higher socio-economic backgrounds were more likely to access the types of internships associated with more positive labour-market outcomes. In particular, in

⁶⁵ James J Heckman, 'Sample Selection Bias as a Specification Error' (1979) 47 *Econometrica* 53.

⁶⁶ This methodology is considered acceptable since there would be a high correlation between the error terms of the selection and the main equation if the Heckman two-step procedure was chosen. In these cases 'Heckman's estimator is particularly inefficient and subsample OLS may therefore be more robust': Patrick Puhani, 'The Heckman Correction for Sample Selection and its Critique' (2000) 14 *J Econ Surveys* 53, 65.

⁶⁷ The remaining 9.6 per cent of respondents who did an internship did not provide any information on its type. Descriptive statistics and regression results for Italy are weighted.

⁶⁸ The percentage of cases refers to the percentage of respondents who mentioned undertaking this activity. Since this is a multiple response variable, the total frequency is greater than the number of cases, and the total percentage of cases is greater than 100.

⁶⁹ For the UK, we present unweighted and weighted descriptive statistics, and unweighted regression results. Our UK weighted regression analysis did not substantially affect the reported associations.

Table 4.1 *Distribution of work-related activities done during study (weighted), Italy^a*

Variable	Observations	Absolute frequency	Relative frequency/mean (std dev.)
Any type of internship	48 058	29 320	61.01%
Internship in a firm ^b	29 320	9 746	33.20%
Internship with a university ^b	29 320	5 815	19.83%
Internship in the public sector ^b	29 320	10 856	37.03%
Length of the internship (hours) ^b	48 058	29 320	466.18 (1044.36)
Paid work	48 058	32 751	68.15%

Notes:

^a All variables are weighted in order to refer the sample to the population of reference.

^b These variables are observed only if the graduate has undertaken an internship (N = 29 320).

Table 4.2 *Distribution of work-related activities done during study allowing for multiple responses (unweighted and weighted), UK*

Type of work-related activity	Freq.	Unweighted		Weighted	
		% of responses	% of cases	% of responses	% of cases
A sandwich-year undergraduate placement	989	7.39	10.84	7.57	10.90
One or more shorter structured work placement(s) integral to course	1 813	13.54	19.88	14.91	21.47
Assessed project work in external organization as part of course	650	4.85	7.13	5.31	7.64
Vacation internship with an employer	807	6.03	8.85	4.83	6.96
Paid work	4 968	37.11	54.47	35.51	51.14
Unpaid work undertaken to gain useful career-related experience	2 275	16.99	24.94	16.50	23.77
Other work-related activity	119	0.89	1.30	0.87	1.25
None of the above	1 713	12.79	18.78	14.07	20.27
Voluntary work, no information whether career related	55	0.41	0.60	0.43	0.61
Total	13 389	100.00	146.79	100.00	144.01

Note: Valid cases 9121; missing cases 19.

the UK social class still plays a significant role in affecting access to the best internship opportunities, whereas in Italy it was gender as well as student performance that affected participation in the most effective internships.

4.5.2 Do Internships during HE Affect Labour-Market Outcomes in the UK and Italy?

Evidence from Italy suggested that doing any curricular internship did not tend to improve the employability of recent graduates in the labour market, whereas the UK experience showed more positive results (see Table 4.3). However, in Italy, undertaking an internship within a firm was associated with an increase in the probability of finding a job after graduation. This positive relationship was confirmed when controlling for the interaction term between an internship within a firm and paid work, which was not significant. Thus, doing an internship within a firm and doing paid work enhanced the probability of employment; however, there was no additional benefit gained from doing both activities. We thus observe substitutability rather than complementarity between doing an internship within a firm and paid work. In contrast, in the UK, our analysis shows that sandwich placements and, to a lesser extent, vacation internships and structured work placements were positively associated with the probability of being in employment.

Undertaking an internship did not affect the likelihood of working in a graduate job (five years after graduation) in Italy. However, in the UK, doing a sandwich placement, a vacation internship or a structured work placement was positively associated with working in a graduate job.⁷⁰ Unfortunately, we cannot say whether the findings arise owing to the effect of internships, or to the temporal difference in the data.

Finally, in Italy there was no significant effect of internships on wages, but in the UK undertaking sandwich placements was associated with a 15.5 per cent increase in wages (around 1.5 to 2.5 years after graduation), structured work placements with a 7.0 per cent increase and a vacation internship with a 21.4 per cent increase. Paid work during HE was associated with small increases in wages in both Italy (2.7 per cent) and the UK (4.6 per cent).

4.6 CONCLUSIONS AND IMPLICATIONS FOR INTERNSHIP REGULATION

We found that comparing graduates' early career outcomes in two different institutional contexts highlights the importance of having a clear definition

⁷⁰ Results are available on request.

Table 4.3 *Comparison of the association between undertaking an internship and the probability of being in employment and wages in Italy and the UK*

	Employment (probability of getting a job after graduation) ^a			Wages in current job		
	Italy	Italy	UK	Italy	Italy	UK
Internship (any type)	0.0257 (0.0585)			0.0059 (0.0114)		
Internship within a firm		0.0598*** (0.0886)			0.0144 (0.0142)	
Paid work	0.0569*** (0.0759)	0.0654** (0.0756)	0.048*** (0.008)	0.0272*** (0.0089)	0.0269*** (0.0089)	0.046** (0.015)
A sandwich-year undergraduate placement			0.063*** (0.015)			0.155*** (0.023)
One or more shorter structured work placement(s) integral to course			0.031* (0.014)			0.070** (0.022)
A vacation internship with an employer ^b			0.037* (0.016)			0.214*** (0.024)
Controls (vary slightly between UK and Italian data)	Type of high school, age, living area, area of study, type of HE institution, Italian citizenship, internal migrant, study period abroad, father's occupation, average mark, years to get the degree, degree classification					
N	10 409	10 409	6018	7665	7665	5265
Pseudo- <i>R</i> ² (Wage regression: <i>R</i> ²)	0.0892	0.0903	0.068	0.5972	0.5973	0.261
	Marginal effects at the mean, probit (Italy), Average marginal effects, logit (UK), robust standard errors in parentheses. * <i>p</i> < 0.05, ** <i>p</i> < 0.01, *** <i>p</i> < 0.001			Log-linear OLS coefficients, standard errors in parentheses. Regression on subsample of employed graduates. * <i>p</i> < 0.05, ** <i>p</i> < 0.01, *** <i>p</i> < 0.001		

Notes:

Regressions for Italy are weighted by respondents' individual coefficients provided by the data collector (AlmaLaurea). Regressions for UK are unweighted (weighted regressions were also conducted but did not substantially affect the results).

^a Italy, 1 year after graduation; UK, 1.5 to 2.5 years after graduation.

^b The effect of a vacation internship on the likelihood of employment was not significant in the UK weighted regressions; all other associations remained significant.

of internships to distinguish them from other types of work experience within and beyond national and institutional boundaries. What we counted as an internship in Italy was slightly different from the UK definition. An agreed

and detailed definition would enable us to compare internships in a meaningful and comprehensive way, and enhance our academic understanding of this phenomenon.

In summary, we have shown that internships in both the UK and Italy have a positive effect on being employed after graduation, and in the UK they also have a positive effect on wages. In Italy, we found this positive effect only if the internship was undertaken within a firm. We found no evidence that internships positively affect the probability of obtaining a graduate job in Italy, but some evidence for this in the UK. This complements the results we reported in a working paper: that social class plays a significant role in shaping access to the ‘best’ internship opportunities (that is, associations with labour-market outcomes) in the UK, whereas in Italy participation in the ‘best’ internships is substantially gendered.⁷¹

While we found more positive outcomes associated with internships in the UK than in Italy, we argue that the particular way in which we operationalized and measured labour-market outcomes captured only a part of the overall benefits of internships. We cannot report on less tangible qualitative benefits of internships, such as individuals’ experience of work in specific sectors, occupations and organizations, or how students make informed career-related decisions.⁷² We need to consider more broadly the skills, experience and knowledge gained from undertaking an internship, even if this is not directly reflected in the better job outcomes that we chose to look at.

We do offer a word of caution: our analysis appears to support the argument for the signalling role of internships, with the implication that, if internships become curricular and compulsory, the signal they send may become diluted.⁷³ That is, from the economic signalling perspective, increasing the accessibility of internships has a trade off with labour-market outcomes (for example in terms of wages) since employers can no longer use the internship as a reliable signal of applicant quality or job readiness. However, we argue that the economic perspective is not the only way to look at this issue. A wealth of evidence suggests that internships help students decide what they want to do and develop a wide range of skills, thus, it is still useful to improve access to internships in general. Yet, the extent to which graduates benefit from intern-

⁷¹ Tzanakou and others (n 64).

⁷² Kate Purcell, Peter Elias, Anne Green, Gaby Atfield, Arlene Robertson, Noel Whiteside and others, *Present Tense, Future Imperfect? Young People’s Pathways into Work* (Institute for Employment Research, University of Warwick 2017), https://warwick.ac.uk/fac/soc/ier/research/pathways/presenttensefutureimperfect__final.pdf, accessed 30 March 2021.

⁷³ Eg Weiss and others (n 2).

ships is partly hampered by the uncertainty stemming from the loose regulation of these activities.

Furthermore, the Italian findings on the lower effectiveness of internships on graduates' labour-market outcomes compared with the situation in the UK should be viewed in the context of the growing number of graduates combined with the major demand-side shock that occurred during the 2008–09 financial crisis. In Italy, that crisis potentially contributed to the labour market's inability both to absorb the additional supply of graduates, and to offer high-quality curricular internships to HE students. Curricular internships are characterized by a persisting loosely regulated regime, where working time, pay and skills content are defined by bilateral agreements in which these dimensions vary greatly depending on the relative bargaining power deployed by universities and hosting organizations, failing to secure a clear and consistent set of training objectives. In both countries, there is a need for an explicit regulatory framework for curricular internships which should include explicit information about the content, duration, pay and supervision to ensure that these internships are of high quality and are not exploitative and/or of limited use for HE students.⁷⁴

Our research thus reinforces the significance of regulations that will ensure recruitment for internships is open and transparent to avoid reproducing structured inequalities in the labour market (for example, along gender and socio-economic background lines). Furthermore, to enable all students (irrespective of their socio-economic background) to access opportunities that could be instrumental in furthering their career, regulations should protect less privileged individuals, for instance, through access to state-funded bursaries or through introducing a minimum wage for all interns. Support should also extend to firms that are less able to pay their interns and/or to train them properly. The cost to government of doing this should be carefully contrasted with the potential broader social and economic gains made through improved youth employment outcomes.

Further research is needed to understand the meaning and role of internships in different countries. Otherwise, we run the risk of discussing different types of work experience in different contexts, leading to seemingly positive outcomes across the board, without exploring why this might be the case.

⁷⁴ Roberts (n 2); Stewart and others (n 7).

5. Challenging the assumptions supporting work experience as a pathway to employment

**Paula McDonald, Andrew Stewart and
Damian Oliver**

5.1 INTRODUCTION

Taken at face value, there is a plausible link between work experience, employability and employment. We take work experience for this purpose to mean a period of time spent in a workplace to develop skills, contacts or familiarity with the requirements of a job, industry or profession. Employability, which is defined as ‘the perceived ability to attain sustainable employment appropriate to one’s qualification level’ and which is often measured via student satisfaction surveys, is distinct from independent measures of employment outcomes.¹ In relation to both potential outcomes, if work experience has emerged as a de facto prerequisite for securing professional employment in particular, those who do not participate will inevitably be at a disadvantage. These claims, however, rest on two key assumptions that constitute the focus of this chapter. The first is that it is possible, merely by participating in work experience, to acquire a competitive advantage over job-seeking peers who do not participate. This can only be logically true if participation is not universal and there are no effective substitutes. The second assumption is that, where participation is not universal, it does improve employability and enhance employment outcomes. In this chapter we challenge both of these assumptions, exposing the tensions inherent in research and policy on unpaid work experience through a synthesis of extant research. We do this by, first, problematizing the notion of competition and advantage in the labour market, especially in fields where the majority of graduates have completed a sustained period of work-integrated

¹ Andrew Rothwell, Ian Herbert and Frances Rothwell, ‘Self-Perceived Employability: Construction and Initial Validation of a Scale for University Students’ (2008) 73 *J Vocat Behav* 1, 2.

learning (WIL) during their degree or some other form of internship. Secondly, we present the available evidence on the relationship between employability/employment outcomes and participation in work experience. Furthermore, to the extent that employability and employment outcomes can be enhanced, the question of access becomes crucial. We therefore examine the evidence for advantages that work experience may confer.

Our focus in this chapter is primarily, though not exclusively, on unpaid work experience. Although work experience can sometimes be paid, it is unpaid work experience which has attracted the most concern, as it is prominent in media revelations of exploitative practices, especially where young people undertake ‘real’ work for the primary benefit of the employer instead of acquiring authentic learning outcomes for themselves. Although unpaid work experience may be undertaken for a range of reasons, we focus here on participation directed towards acquiring professional or career employment, either during or following a degree programme. This includes compulsory, educationally focused work experience required by licensing or registration bodies or professional associations, such as in nursing or social work;² voluntary, educationally focused work experience, which may be associated with less oversight by higher education institutions; and internships organized through the open market entirely outside an educational framework. Students may participate in any or all of these forms of unpaid work during or following a degree programme.

The chapter draws on a range of published studies to inform our claims, offering a critical and comprehensive synopsis of the available evidence that challenges some of the espoused benefits of these practices. It is important to note, however, that studies often do not explicitly distinguish between different forms of work experience or WIL, whether it is a compulsory or voluntary component of a degree, or internships organized on the open market. Where relevant, we use the term adopted in the source study. Finally, since unpaid work experience has become an entrenched feature of the youth employment landscape, the chapter concludes by discussing policy responses that may assist in ameliorating adverse impacts on participants.

5.2 THE GROWTH OF UNPAID WORK EXPERIENCE

A key assumption of proponents of unpaid work experience is that individuals who have greater opportunities to participate are conferred a competitive

² Georgina Atkinson, *Work-Based Learning and Work-Integrated Learning: Fostering Engagement with Employers* (National Centre for Vocational Education Research 2016).

advantage in the labour market over peers who have less opportunity to participate. Universities and vocational training institutions have contributed to the growth of unpaid work experience through significantly expanding WIL into a range of disciplines and fields of study where there are no statutory or professional requirements for work placement hours. This has been motivated by the apparent desire to provide their graduates with skills and knowledge they cannot acquire in the formal classroom and, therefore, a labour market advantage.³

There is some support for this assertion. For example, Roberts reported that nearly half of British employers believed that job candidates who have not gained work experience will have little or no chance of receiving a job offer for their organizations' graduate programmes, regardless of academic qualifications.⁴ Further, a study of pathways into employment in the Midlands region, based on interviews with young people and employers, found that work experience prior to entry to paid work is a strong prerequisite for all but the lowest skilled, lowest paid jobs.⁵ The perceived benefit of internships for graduates' employability is both absolute (acquiring skills they cannot develop in formal education or in non-career paid employment) and relative (accruing additional skills, experience and networks in excess of those required to perform a standard entry-level graduate role). Accordingly, students and graduates often rationalize their decisions to participate in unpaid work experience in complex, class-conscious, politicized ways that emphasize the delivery of desirable social and cultural capital in order to position themselves ahead of their peers.⁶ However, the expansion of unpaid work experience into a majority graduate experience raises the vexed question of how graduates can realistically differentiate themselves from their peers.

Abundant small-scale studies, as well as some emerging larger-scale research, suggest that unpaid interns represent 'a uniquely vulnerable, growing

³ Janice Orrell, *Good Practice Report: Work-Integrated Learning* (Australian Learning and Teaching Council 2011), https://ltr.edu.au/resources/GPR_Work_Integrated_Learning_Orrell_2011.pdf, accessed 30 March 2021; Deborah Burke and Robert Carton, 'The Pedagogical, Legal and Ethical Implications of Unpaid Internships' (2013) 30 J Leg Stud Educ 99.

⁴ Carys Roberts, *The Inbetweeners: The New Role of Internships in the Graduate Labour Market* (Institute for Public Policy Research 2017).

⁵ Kate Purcell, Peter Elias, Anne Green, Gaby Atfield, Arlene Robertson, Noel Whiteside and others, *Present Tense, Future Imperfect? Young People's Pathways into Work* (Institute for Employment Research 2017), https://warwick.ac.uk/fac/soc/ier/research/pathways/presenttensefutureimperfect_final.pdf, accessed 30 March 2021.

⁶ Pauline Leonard, Susan Halford and Katie Bruce, "'The New Degree?'" Constructing Internships in the Third Sector' (2016) 50 Sociology 383.

sector of the workforce'.⁷ Estimates of the increasing prevalence of internships include, for example, that around half of all US college students report having completed an internship, half of which are unpaid; that interns constitute approximately 1.3 per cent of the US labour force; and that creative graduates in particular may be prepared to work up to 1000 hours for free in order to increase their visibility in the industry.⁸ A European study conducted across 27 countries revealed that 46 per cent of survey respondents aged 18–35 years had participated in at least one traineeship, of which more than half were unpaid.⁹ United Kingdom-based Graduate Prospects reported that 45 per cent of the 22 000 graduates they surveyed now secure entry-level jobs via internships, while in Canada, 42 per cent of university students reported having undertaken an institutionally organized work placement.¹⁰ A prevalence study of unpaid work experience undertaken in Australia suggests even higher estimates. More than half (58 per cent) of respondents aged 18–29 years had participated in at least one episode of unpaid work experience in the previous five years.¹¹ Around half of participants' most recent experiences were associated with formal education or training (university, vocational education or secondary school).

The research above highlights that the advantage conferred by unpaid work experience is increasingly scaled. As participation becomes a central dimension of tertiary study, previous differentiation benefits are potentially erased. To distinguish themselves from their peers, in a process described by Brown and Hesketh as seeking 'entry into the winner's enclosure', young people may seek multiple episodes of work experience, for longer periods, or in higher status or internationally recognized organizations.¹² It is not difficult to see how tensions may arise between the desire to acquire relevant workplace

⁷ Laura Fredericksen, 'Falling through the Cracks of Title VII: The Plight of the Unpaid Intern' (2013) 21 Geo Mason L Rev 245, 253.

⁸ Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso 2011); Sabina Siebert and Fiona Wilson, 'All Work and No Pay: Consequences of Unpaid Work in the Creative Industries' (2013) 27 Work, Empl & Soc 711; Anthony P Carnevale and Andrew Hanson, 'Learn & Earn: Career Pathways for Youth in the 21st Century' (2015) 4 EJCLS 76.

⁹ TNS Political & Social, *The Experience of Traineeships in the EU* (Flash Eurobarometer 378, European Commission 2013), http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_378_en.pdf, accessed 30 March 2021.

¹⁰ Miriam Kramer and Alex Usher, *Work-Integrated Learning and Career-Ready Students: Examining the Evidence* (Higher Education Strategy Associates 2011).

¹¹ Damian Oliver, Paula McDonald, Andrew Stewart and Anne Hewitt, *Unpaid Work Experience in Australia: Prevalence, Nature and Impact* (Department of Employment 2016).

¹² Phillip Brown and Anthony Hesketh, *The Mismanagement of Talent: Employability and Jobs in the Knowledge Economy* (OUP 2004) 2.

exposure through internships and a grudging awareness of potential and actual exploitation.¹³ More broadly, critics have suggested the expansion of unpaid work experience can have the unintended effect of positioning the practice as an obligatory rite of passage to paid employment,¹⁴ and of placing downward pressure on the wages and opportunities of other workers.¹⁵ Hence, as regards our first assumption, as work experience becomes ubiquitous, both through requirements for professional registration and through normative practice, the competitive advantage conferred through participation may be diminished.

5.3 INTERNSHIPS, EMPLOYABILITY AND EMPLOYMENT

The primary justification for extending access to unpaid work experience is that it enhances employability, through increased skills, knowledge, experience and pre-professional identity, and by assisting individuals to match their human capital profile to labour market demands.¹⁶ Participation also allows individuals to establish connections with prospective employers and signpost their value, such as by allowing graduates to demonstrate their real-world experience in a 'try before you buy' culture.¹⁷ Graduate employability can be defined as 'the perceived ability to attain sustainable employment appropriate to one's qualification level'.¹⁸ Tholen differentiates mainstream notions of employability often seen in higher education and government policy, which emphasize strategic investments by autonomous individuals in education, training and skill acquisition, from critical framings of employability which emphasize that the construct is contextual, relational and structured by opportunities, inequalities and power relations.¹⁹

Most support in the literature for the claim that work experience improves labour market prospects rests on self-reported perceptions from the participants

¹³ Deanna Grant-Smith and Paula McDonald, 'Ubiquitous Yet Ambiguous: An Integrative Review of Unpaid Work' (2018) 20 *IJMR* 559.

¹⁴ Thomas A Discenna, 'The Discourses of Free Labour: Career Management, Employability, and the Unpaid Intern' (2016) 80 *West J Commun* 435.

¹⁵ Siebert and Wilson (n 8).

¹⁶ Sally Smith, Colin Smith and Martha Caddell, 'Can Pay, Should Pay? Exploring Employer and Student Perceptions of Paid and Unpaid Placements' (2015) 16 *Active Learning High Educ* 149; Discenna (n 14).

¹⁷ Vicki Smith, 'Enhancing Employability: Human, Cultural, and Social Capital in an Era of Turbulent Unpredictability' (2010) 63 *Hum Rel* 279; Siebert and Wilson (n 8).

¹⁸ Rothwell and others (n 1) 2.

¹⁹ Gerbrand Tholen, 'What Can Research into Graduate Employability Tell Us About Agency and Structure?' (2015) 36 *Br J Sociol Educ* 766.

themselves. This despite the fact that an individual can clearly be ‘employable but unemployed’.²⁰ Evidence for the benefits of open-market internships which are not linked to an educational course is particularly lacking.²¹

Those who promote work experience as a viable conduit to graduate employment often rely on studies demonstrating student satisfaction with their experiences; that is, again, a subjective measure of employability, rather than employment outcomes per se. Students generally report positive outcomes of work-based experiences, considering them a future-orientated ‘braggable investment’,²² an essential strategy for gaining a competitive edge in the graduate marketplace,²³ and an experience that improves their critical and analytical thinking in areas related to their study.²⁴ The Australian prevalence study reported, for example, that 80 per cent of university students agreed or strongly agreed that their unpaid work experience had helped them develop new skills.²⁵ A review of 57 peer-reviewed studies of the impact of internships identified a variety of student-defined benefits, including the enhancement of job and social skills, assistance in deciding on career paths, and improved employment outcomes in a career-orientated job following graduation.²⁶

The employability benefits attributed to work experience are often associated with a number of caveats. Benefits depend on: the quality of mentoring provided to the intern and the nature of the tasks undertaken;²⁷ opportunities to appraise and reflect on their experiences through learning activities and assessment;²⁸ the degree to which exploitative practices occur, such as unreasonable workloads, unethical tasks and risky physical activities;²⁹ and the disciplinary field of the participant.³⁰

²⁰ Brown and Hesketh (n 12) 217.

²¹ Grant-Smith and McDonald (n 13).

²² Thomas Corrigan, ‘Media and Cultural Industries Internships: A Thematic Review and Digital Labour Parallels’ (2015) 13 tripleC 336, 341.

²³ Andrew J Cannon and Mark J Arnold, ‘Student Expectations of Collegiate Internship Programs in Business: A 10-Year Update’ (1998) 73 J Educ Bus 202.

²⁴ Kramer and Usher (n 10).

²⁵ Oliver and others (n 11).

²⁶ Gisela Sanahuja Vélez and Gabriela Ribes Giner, ‘Effects of Business Internships on Students, Employers, and Higher Education Institutions: A Systematic Review’ (2015) 52 J Employ Couns 121.

²⁷ Ibid.

²⁸ Susan M Matthew, Rosanne M Taylor and Robert A Ellis, ‘Relationships Between Students’ Experiences of Learning in an Undergraduate Internship Programme and New Graduates’ Experiences of Professional Practice’ (2012) 64 High Educ 529.

²⁹ Perlin (n 8).

³⁰ Alan Milburn, *Unleashing Aspiration: Final Report of the Panel on Fair Access to the Professions* (Stationery Office 2009).

Open-market internships, in contrast to those that are aligned with a course of study, appear to attract greater quality concerns. Creative industries and media graduates are thought to be at particular risk of exploitation given their job motivations and the competitiveness of the sector.³¹ However, it cannot be assumed that, simply because work experience involves an educational provider, employability benefits will inevitably result. Although the potential for the exploitation of interns has been widely acknowledged, this is often framed as an inevitable trade-off for gaining employability benefits. Considering the perceived value of internships, it is unsurprising that interns will sometimes accept very poor conditions while also espousing positive sentiments about their experiences.³² Hence, regardless of their genesis, all work placements should focus on facilitating meaningful learning opportunities and skill development, since it is through the development of authentic work-based skills, knowledge and experience that employability benefits are most likely to be achieved.

In contrast to research addressing the impact of work experience on employability, econometric analysis of the extent to which participation improves employment outcomes is relatively scarce.³³ There is also the added difficulty of directly comparing studies owing to differences in target sample (secondary, tertiary or vocational students) and how focal constructs (for example, WIL, paid, unpaid or open-market internships) are defined and measured. Outcome variables, such as full- or part-time employment (at differing skill levels) also vary across studies, as do time frames between completion of work experience and the measurement of outcomes.

Polidano and Tabasso examined data from the Longitudinal Survey of Australian Youth and found a positive relationship between combined, short-term structured workplace learning and classroom-based vocational education and training (VET), and subsequent full-time employment for upper

³¹ Will Hunt, Linda Ball and Emma Pollard, *Crafting Futures: A Study of the Early Career of Crafts Graduates from UK Higher Education Institutions* (Institute for Employment Studies, University of the Arts London and Crafts Council 2010); Kim Allen and Sumi Hollingworth, "'Sticky Subjects' or 'Cosmopolitan Creatives'?" *Social Class, Place and Urban Young People's Aspirations for Work in the Knowledge Economy* (2013) 50 *Urban Stud* 499.

³² Elaine Swan, 'The Internship Class: Subjectivity and Inequalities – Gender, Race and Class' in Adelina Broadbridge and Sandra Fielden (eds), *Handbook of Gendered Careers in Management: Getting In, Getting On, Getting Out* (Edward Elgar 2015).

³³ Patricia Silva, Betina Lopes, Marco Costa, Ana I. Melo, Gonçalo Paiva Dias, Elisabeth Brito and others, 'The Million-Dollar Question: Can Internships Boost Employment?' (2018) 43 *Studies High Educ* 2.

secondary students.³⁴ Similarly positive associations between educationally focused internships and labour market outcomes and/or wages have been found in Finland,³⁵ Denmark,³⁶ and Spain and Italy.³⁷ An indicator of the importance of high-quality placements on employment outcomes was found in the European study of traineeships mentioned previously. Those who participated in the 30 per cent of traineeships found to be inferior in quality were significantly less likely to find subsequent employment.³⁸ To the extent that a paid internship may be considered a marker of quality, O'Higgins and Pinedo conclude, based on an analysis of data from the 2013 European survey, together with an online survey undertaken in 2015 by the Fair Internship Initiative, that paid internships are associated with better labour market outcomes than are unpaid internships, though there is little to suggest that the amount of the payment makes a significant difference.³⁹ O'Higgins and Pinedo suggest a number of explanations for this finding, including that interns who are paid may be more motivated to invest significant effort into developing competencies through the internship, may be able to focus in a more directed way on their internship as they are not burdened by financial hardship, and have access to better training opportunities because companies use the internships as trial recruitment periods.⁴⁰

The Australian prevalence study found that only 27 per cent of unpaid work participants were offered employment by the organization which had hosted their most recent placement.⁴¹ Further, respondents who had participated in open-market internships that were potentially unlawful (defined as involving the same work as that done by regular employees and which did not predominantly involve observing or performing mock or simulated tasks), were more

³⁴ Cain Polidano and Domenico Tabasso, 'Making it Real: The Benefits of Workplace Learning in Upper-Secondary VET Courses' (2013) Melbourne Institute Working Paper 31/13, <https://melbourneinstitute.unimelb.edu.au/publications/working-papers/search/result?paper=2156478>, accessed 30 March 2021.

³⁵ Iida Häkkinen, 'Working While Enrolled in a University: Does It Pay?' (2006) 13 Labour Econ 167.

³⁶ Juanna Schrøter Joensen, 'Academic and Labour Market Success: The Impact of Student Employment, Abilities and Preferences' (SSRN, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352077, accessed 30 March 2021.

³⁷ Giampiero Passaretta and Moris Triventi, 'Work Experience during Higher Education and Post-Graduation Occupational Outcomes: A Comparative Study on Four European Countries' (2015) 56 Int J Comp Sociol 232.

³⁸ TNS Political & Social (n 9).

³⁹ Niall O'Higgins and Luis Pinedo, 'Interns and Outcomes: Just How Effective are Internships as a Bridge to Stable Employment?' (2018) ILO Employment Policy Department Working Paper No 241.

⁴⁰ Ibid. See also Chapter 3 in this volume.

⁴¹ Oliver and others (n 11).

likely than their peers who had completed apparently lawful internships to be neither employed nor looking for work at the time the survey was completed.⁴² A recent study in the UK further suggested that university graduates who participate in an unpaid internship following the completion of their degree earn less 3.5 years after graduation than peers who go immediately into paid work or on to further study.⁴³ Regarding mandatory unpaid work experience as part of active labour market programmes, research suggests that there is either no positive effect on employment outcomes or a reduced likelihood of separating from unemployment payments.⁴⁴

In contrast to self-reported measures of the employability benefits of unpaid work experience (discussed further below), the studies cited previously offer only limited evidence of how unpaid internships affect objective employment outcomes. The dearth of literature on this subject may be partly due to the relative recency of the phenomena and/or the challenges associated with collecting representative data. Establishing causal relationships between internships and employment outcomes is also difficult owing to lagged effects (benefits may only accrue to participants over time) and/or the difficulty of establishing employment outcomes between comparable groups who have and have not participated, especially when the practice is widespread.⁴⁵ What is clear, however, is that while there is consistent evidence for employability benefits ensuing from work experience, especially if it is educationally focused, there is only tenuous and incomplete support for the assumption that work experience – whether educationally focused or not – delivers real employment benefits. That is, the proliferation of participation in work experience, widely offered by organizations, promoted and facilitated by governments, universities and other education institutions, and enthusiastically adopted by students and graduates, rests primarily on the assumption of labour market advantage, rather than on its empirical reality.

⁴² Andrew Stewart, Damian Oliver, Paula McDonald and Anne Hewitt, 'The Nature and Prevalence of Unlawful Unpaid Work Experience in Australia' (2018) 31 *Aust J Labour L* 157.

⁴³ Angus Holford, 'Access to and Returns from Unpaid Graduate Internships' (2017) ISER Working Paper Series 07/2017, <https://www.iser.essex.ac.uk/research/publications/524563>, accessed 30 March 2021.

⁴⁴ James J Heckmann, Robert J LaLonde and Jeffrey A Smith, 'The Economics and Econometrics of Active Labor Market Programs' in Orley Ashenfelter and David Card (eds), *Handbook of Labour Economics*, vol 3A (Elsevier 1999); Jeff Borland and Yi-Ping Tseng, 'Does "Work for the Dole" Work? An Australian Perspective on Work Experience Programs' (2011) 43 *Appl Econ* 4353.

⁴⁵ O'Higgins and Pinedo (n 39).

5.4 EQUITY AND ACCESS

The significant expansion of unpaid work experience among university students and graduates seeking a professional career has raised concerns about equity of access, especially in relation to high-status, high-paying jobs, such as in finance, law and journalism. Policy solutions put forward to address this issue have been dualistic. The UK government has indicated a willingness to ban or at least limit unpaid internships owing to their potential impact on social mobility,⁴⁶ although there has been no move yet to introduce this reform. In contrast, a UK report by Roberts, which examined the role of internships in the career paths of graduates and other skilled young people, argued for ‘universities, employers and the government [to] act together to *increase* the overall availability of internships and minimise any barriers to take up for those who are disadvantaged’.⁴⁷ Similarly, higher education institutions around the world have made significant efforts to provide greater opportunities for students to access on-the-job work experience connected to specific courses and degrees. The National Work Integrated Learning Strategy in Australia, for example, promotes increased support for WIL on the basis that it enables students to develop employability skills and gain genuine work experience linked to their career objectives.⁴⁸

United Kingdom-based bodies such as the Panel on Fair Access to the Professions,⁴⁹ the Sutton Trust⁵⁰ and the Social Mobility and Child Poverty Commission⁵¹ have highlighted that professions, such as law, politics, journalism and finance, are dominated by individuals from privileged backgrounds. This has been attributed in part to wealthy families being able to afford to

⁴⁶ Rowena Mason, ‘Ban on Unpaid Internships Being Considered, Says UK Employment Minister’ *Guardian* (London, 31 October 2016), <https://www.theguardian.com/politics/2016/oct/30/unpaid-internships-face-ban-damian-hinds-uk-employment-minister>, accessed 30 March 2021; UK Government, *Good Work: A Response to the Taylor Review of Modern Working Practices* (HM Government 2018), <https://www.gov.uk/government/publications/government-response-to-the-taylor-review-of-modern-working-practices>, accessed 30 March 2021.

⁴⁷ Roberts (n 4) 3 (emphasis added).

⁴⁸ National WIL Partners, *National Strategy on Work Integrated Learning in University Education* (Universities Australia 2015), <http://cdn1.acen.edu.au/wp-content/uploads/2015/03/National-WIL-Strategy-in-university-education-032015.pdf>, accessed 30 March 2021.

⁴⁹ Milburn (n 30).

⁵⁰ Sutton Trust, ‘Research Brief: Internship or Indenture?’ (2014) Sutton Trust Research Brief 2/2014, <https://www.suttontrust.com/wp-content/uploads/2020/01/Unpaid-Internships-1.pdf>, accessed 30 March 2021.

⁵¹ Social Mobility and Child Poverty Commission, *State of the Nation 2014: Social Mobility and Child Poverty in Great Britain* (HMSO 2014).

support their children undertaking work experience in high-cost cities and having strong existing networks in desirable or high-status organizations. In contrast, disadvantaged graduates are generally less likely to possess the class- and place-based habitus that enables them to see competitive opportunities as an option.⁵² Drawing on focus groups with a small number of interns, Roberts reported that young people from less privileged backgrounds can struggle to secure an internship owing to discrimination and low confidence in navigating opaque recruitment practices.⁵³ Social class can therefore stamp an imprint on the role of internships in the transition from education to employment, extending and, even, intensifying the mechanisms of socio-economic reproduction already evident in the education system.⁵⁴

Although the problem of equity of access is often asserted in relation to privately organized or advertised internships, it can also apply to WIL programmes administered by higher education institutions. This is because students from lower socio-economic backgrounds may struggle to afford the costs of travel and accommodation, especially if the host employer is at a distant location, or may face challenges in undertaking paid work to cover living expenses while concurrently participating in unpaid WIL. These limits to participation may therefore constrain career opportunities and access to particular employment pathways for those without adequate financial, social and education resources.⁵⁵

Hunt and Scott compared access to paid internships with access to unpaid internships in a survey of creative arts graduates from the UK.⁵⁶ The data showed that those from less advantaged backgrounds were less likely to participate in internships in general. However, after controlling for factors such as grades, institutional reputation and prior placement experience, it was paid internships the graduates found most difficult to secure. Hunt and Scott argued that their results undermine the myth of meritocracy, as factors other than academic ability and credentials play a significant part in employment opportunities and outcomes.

⁵² Allen and Hollingworth (n 31).

⁵³ Roberts (n 4).

⁵⁴ Wil Hunt and Peter Scott, 'Participation in Paid and Unpaid Internships Among Creative and Communications Graduates: Does Class Advantage Play a Part?' in Richard Waller, Nicola Ingram and Michael RM Ward (eds), *Higher Education and Social Inequalities: University Admissions, Experiences, and Outcomes* (Routledge 2017).

⁵⁵ Alexandre Frenette, 'Making the Intern Economy: Role and Career Challenges of the Music Industry Intern' (2013) 40 *Work & Occupations* 364.

⁵⁶ Hunt and Scott (n 54).

A social-class effect of participation in internships was also reported by Holford, who found that graduates who had completed unpaid internships had lower earnings than peers who had gone immediately into paid work or further study.⁵⁷ He noted that this salary penalty is significantly mitigated for graduates with professional parents, arguing that their social and financial capital provides an advantage in accessing 'good' internships that allow opportunities to capitalize on experience in the labour market.

5.5 POLICY CHALLENGES

The increasing emphasis placed on real-world and relevant work exposure and experience by governments, employers, universities and students/graduates is, at least in part, a response to the problem of youth employment and contracting labour market opportunities for young people. In this chapter we have examined and challenged two related assumptions underpinning the expansion of internships and other forms of unpaid work: that is, competitive advantage over peers, and positive employability and employment outcomes. The evidence outlined suggests only tenuous support for each of these assumptions.

First, the expansion of unpaid work experience, in the numbers of individuals participating as well as the types of previously unaffected fields of study involved, means that individuals with even extensive workplace exposure are less likely to stand out from their peers than in the past. There is no evidence that the expansion of work experience has directly created new paid jobs, so graduates must compete with their peers for a limited number of career positions.

Second, definitive empirical evidence of the extent to which, or under what conditions, participation in unpaid work experience leads to jobs remains elusive. This stands in contrast to more substantial evidence of unpaid work enhancing capacities associated with employability, as reported by graduates themselves. As we have indicated, although research addressing these questions is likely to be plagued by methodological challenges, it is nonetheless critical. Many students clearly enjoy their intern experiences and perceive them to be of value in enhancing employability. Yet the sheer volume of anecdotal and empirical evidence of unequal access, exploitative practices, and the challenges faced by young people in simultaneously juggling paid work, study obligations and/or unpaid work, demands that these questions should be answered. Indeed, critics have argued that the characterization of unpaid work as 'not working but learning' is used to 'legitimately deny a whole raft of rights, protections and claims to wages and working conditions that are granted

⁵⁷ Holford (n 43).

to other workers'.⁵⁸ If unpaid work experience has become a compulsory rite of passage to paid employment,⁵⁹ we at least need to know if the investment of individuals and institutions is worthwhile.

Emerging evidence suggests that paid, rather than unpaid, internships tend to be of higher quality and may facilitate better quality learning experiences and more successful employment outcomes.⁶⁰ If work experience improves participants' employability and/or significantly increases the likelihood of obtaining paid employment in the graduate labour market, we should be vigilant that social background does not limit access or play a part in sorting individuals into high- and low-quality internships. Paying work experience participants does not solve the problem of unequal access, but policy responses should still encourage a greater proportion of work experience episodes to be paid, at least at the minimum adult wage.

The practice of work experience – whether paid or unpaid – is now an entrenched feature of youth education-to-work transitions in many countries. Critical media commentary and the efforts of specialized advocacy groups, such as Intern Aware in the UK, the Geneva Interns Association, the Canadian Intern Association and Interns Australia, may help to curb some of the excesses identified. However, host organizations play a vital gatekeeping role in deciding who has access, and are key to shaping the quality of participants' learning experiences. Although employers have, to date, been reluctant to engage with broader critiques of unpaid work, their practices may be moderated through effective state regulation. This might involve, among other things, placing limits on the length of internships and taking action against businesses that systematically use interns as a free source of labour.⁶¹

It is difficult to imagine a time in the foreseeable future where unpaid work experience will be completely banned, or even considerably scaled back. A recent comparative study of the regulation of internships reveals that a few countries, such as Argentina, Brazil and France, have legislated to prohibit open-market internships, requiring unpaid work to be undertaken only in conjunction with an educational institution, and then only subject to various regulatory requirements. Other nations, such as Germany, while not going so far, have endeavoured to extend labour protections to open-market interns, even if they might not otherwise be regarded as employees in the ordinary sense. More commonly, however, the legal status of these arrangements is unclear.

⁵⁸ Mayssoun Sukarieh and Stuart Tannock, 'The Education Penalty: School, Learning and the Diminishing of Wages, Working Conditions and Worker Power' (2015) 38 Br J Sociol Educ 245, 249.

⁵⁹ Discenna (n 14).

⁶⁰ O'Higgins and Pinedo (n 39).

⁶¹ Stewart and others (n 42). See also Chapter 20 in this volume.

In countries such as the USA, the UK and Australia, it has been necessary to bring test cases to determine whether interns qualify for minimum wages or other entitlements; and, in the first two of those countries at least, those cases have not always succeeded. It is also common for both educationally focused and open-market internships to be exempted from the operation of labour standards, with the general exception of health and safety requirements.⁶²

Regulation and policy responses should, ideally, look first to ensure that the focus in any period of work experience is on developing workplace-specific skills and, secondly, to ensure that financial considerations and existing networks are not a barrier to young people from less advantaged backgrounds accessing high-quality placements. Notwithstanding the efforts of the European Union to impose quality standards,⁶³ few countries can claim to have taken decisive action in this regard. However, the approach adopted in France arguably provides a useful model. In addition to requiring a tripartite arrangement with an educational institution, the Education Code requires effective supervision by both the institution and the host organization, limits working hours, and mandates remuneration for placements lasting more than two months.⁶⁴ Together with government-led policies, strengthened regulation of this type should in principle help to promote fairness in access to work experience by students from across the socio-economic spectrum, and work towards eliminating the worst of the exploitative organizational practices.

Universities are also key demand-side stakeholders in this debate and have demonstrated a strong commitment to educationally focused work experience. Higher education institutions have adopted an increasing array of WIL pedagogies in order to strengthen their academic courses, improve employability for students and, ultimately, signal that they deliver a return on investment.⁶⁵ Convincing evidence for enhanced employment outcomes remains thin, yet we cannot ignore that formal, educationally focused WIL is consistently perceived by educators, students and employers as a legitimate pedagogy that results in positive benefits for critical thinking skills, improved knowledge related to an area of study and valuable exposure to professional practice.⁶⁶ Roberts sug-

⁶² Ibid.

⁶³ European Commission, 'Applying the Quality Framework for Traineeships' (2016) European Commission Staff Working Document COM(2016) 646 final.

⁶⁴ Anne Hewitt, 'Avoiding the Trap of Exploitative Work: A National Approach to Making Work-Integrated Learning Effective, Equitable and Safe' (2018) 31 Aust J Labour L 101.

⁶⁵ Universities Australia, *Work Integrated Learning in Australian Universities: Final Report* (Universities Australia 2019).

⁶⁶ Belinda McLennan and Shay Keating, 'Work-Integrated Learning (WIL) in Australian Universities: The Challenges of Mainstreaming WIL' (Career Development

gested a number of recommendations for higher education institutions, including offering small wage subsidies for small- and medium-sized enterprises where the placement is not part of an accredited course, banning placements lasting for more than four weeks, and providing a matching service to ensure high-quality placements are available to disadvantaged students.⁶⁷

5.6 CONCLUSIONS

We have examined two related assumptions supporting the proliferation of unpaid work experience: first, that it is possible to acquire a competitive advantage over peers in the labour market by participating and, secondly, that those who have an opportunity to participate do achieve enhanced employability and employment outcomes. We have shown that, as unpaid work experience becomes a central dimension of tertiary study, previous differentiation benefits from the practice are potentially erased. Further, although there is mixed evidence on employment outcomes, high-quality experiences appear to improve employment outcomes more than low-quality placements do. Since access to high-quality work experience is influenced by social background, policy and regulatory intervention is required to address the challenges this creates for intergenerational advantage and disadvantage. Whatever the rights or wrongs of these various debates, two issues demand further attention. One is the need for more research into the economic and social impacts of work experience arrangements, which have, by any measure, become a significant aspect of the transition from education to paid work for young people. The other is the need to closely interrogate assumptions about the relationship between work experience and employment, and about why, how and at what (or whose) cost it should be enhanced.

6. The (non)instrumental character of unpaid internships: Implications for regulating internships¹

Wil Hunt and Charikleia Tzanakou

6.1 INTRODUCTION: GRADUATE INTERNSHIPS IN THE UK CONTEXT

Internships have become an established feature of the UK graduate labour market and the issue of unpaid internships has dominated media and policy discussions about social mobility and access to key professions and industries.² Figures from the most recent Destination of Leavers from Higher Education survey (DLHE) show that 6970 leavers from UK higher education institutions in 2016–17 were engaged in an internship six months after leaving university (2 per cent of those in employment).³ This rises to 7560 (2.5 per cent) when ‘hidden’ internships – internships reported as ‘voluntary’ positions while not being in the voluntary sector or occupations associated with work for a good

¹ The research for this chapter was supported by a UK Economic and Social Research Council grant [ES/M500604/1] and a PhD studentship bursary and internal research project grant from Portsmouth Business School. The authors would also like to acknowledge the Higher Education Statistics Agency for supplying the DLHE data.

² Social Mobility Commission, *State of the Nation 2018–19: Social Mobility in Great Britain* (Her Majesty’s Stationery Office 2019); Rebecca Montacute, ‘Internships – Unpaid, Unadvertised, Unfair’ (2018) Sutton Trust Research Brief 20; Carys Roberts, *The Inbetweeners: The New Role of Internships in the Graduate Labour Market* (Institute for Public Policy Research 2017); Alan Milburn, *Unleashing Aspiration: Final Report of the Panel on Fair Access to the Professions* (Stationery Office 2009).

³ The DLHE is a census of UK and EU domiciled graduates from UK higher education institutions. The survey captures information about graduates’ labour-market activity at six months after leaving their course and asks about their main job (or further study), how they found out about their main job and motivations for taking it, and reflections on their course.

cause – are taken into account.⁴ Even this is likely to be an underestimate as the DLHE is only a snapshot of graduates' main job at six months after graduation, while many graduates engage in internships as a second job or more than six months after graduation. A separate survey of 2011–12 creative arts and mass communications and documentation graduates showed that 26 per cent had engaged in at least one graduate internship during the first two years after graduation,⁵ and a YouGov survey of graduates in their twenties showed that 39 per cent had done at least one internship at some time.⁶

Despite the prevalence of graduate internships and the apparent interest in policy debates, there remains no formal definition of the practice, either in research or UK law. A number of terms such as 'industrial placement', 'volunteer worker' and 'work placement' have been used to describe internships.⁷ Likewise, the term 'internship' has been used to describe a range of different types of work experiences ranging from the mundane to the developmental, at different points in a student's or graduate's trajectory and in different national contexts. Tasks can range from stuffing envelopes or shuttling coffee in a newsroom, to more structured and developmental experiences, such as contributing to news stories or live advertising campaigns.⁸ O'Higgins and Pinedo, among others, distinguish three main uses for the term, while noting that there may at times be some overlap between these:

1. Work experience undertaken as part of an active labour-market programme.
2. Internships linked to a course of academic study (traditionally termed work placements or sandwich placements in the UK).
3. Open-market internships – work placements or experience in organizations that do not fit the previous two categories.⁹

⁴ Wil Hunt, *Participation in Paid, Unpaid and 'Hidden' Internships at Six Months after Graduation: Are Some Graduates Excluded?* (SRHE 2020).

⁵ Wil Hunt, 'Internships and the Graduate Labour Market' (PhD thesis, University of Portsmouth 2016).

⁶ Carl Cullinane and Rebecca Montacute, *Pay As You Go? Internship Pay, Quality and Access in the Graduate Jobs Market* (Sutton Trust 2018).

⁷ Chartered Institute of Personnel and Development (CIPD), *Internships: To Pay or Not to Pay?* (CIPD 2010).

⁸ Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (rev edn, Verso Books 2012); Charlotte McLeod, Stephanie O'Donohoe and Barbara Townley, 'Pot Noodles, Placements and Peer Regard: Creative Career Trajectories and Communities of Practice in the British Advertising Industry' (2011) 22 *Brit J Management* 114; Milburn (n 2); Alexandre Frenette, 'Making the Intern Economy' (2013) 40 *Work & Occupations* 364.

⁹ Niall O'Higgins and Luis Pinedo, 'Interns and Outcomes: Just How Effective are Internships as a Bridge to Stable Employment?' (2018) ILO Employment Working Paper No 241. See also Chapter 2 in this volume.

The above categorization has merit because it enables a demarcation between very different types of experiences; especially between internships (work placements) linked to a course of academic study and open-market internships. These experiences are not only treated differently in UK law, but have different practical implications for employability. Work placements in the UK are supported by the student's institution of study (at least in theory), are often eligible for student finance (although sometimes at a different rate) and normally provide academic credit for the course.¹⁰ These governed internships tend to be more structured than open-market internships and so may be more likely to be developmental.¹¹

The timing here may also be important, especially when national contexts are compared. In Europe and the USA the terms 'internship', 'traineeship' or 'stages' are used in different contexts to refer to both post- and pre-graduation experiences (either linked to a higher education course or otherwise).¹² In the UK, until recently, the term 'internship' has tended to be reserved for post-graduation experiences.¹³ In this chapter, while recognizing that some open-market internships may occur prior to graduation, we focus on those carried out after graduation for analytical purposes, to avoid conflating the potential differences in employability implications attributed to pre-graduation internships. In contrast, Chapter 4 of this volume focuses on pre-graduation internships undertaken during higher education to allow comparisons between Italy and the UK. Thus, in this chapter we use the term 'graduate internships' for open-market internships carried out after leaving university.

¹⁰ Kayte Lawton and Dom Potter, *Why Interns Need a Fair Wage* (Institute for Public Policy Research 2010).

¹¹ David Lain, Kari Hadjivassiliou, Antonio Corral Alza, Iñigo Isusi, Jacqueline O'Reilly, Victoria Richards and others, 'Evaluating Internships in Terms of Governance Structures: Contract, Duration and Partnership' (2014) 38 Eur J Training Devt 588.

¹² TNS Political & Social, *The Experience of Traineeships in the EU* (Flash Eurobarometer 378, Directorate-General for Employment, Social Affairs and Inclusion, European Commission 2013).

¹³ Chartered Institute of Personnel and Development (CIPD), *Internships that Work: A Guide for Employers* (CIPD 2015); Perlin (n 8); Oakleigh Consulting and CRAC, *Increasing Opportunities for High Quality Higher Education Work Experience* (Higher Education Funding Council England 2011).

6.2 THE LEGAL POSITION OF GRADUATE AND OTHER OPEN-MARKET INTERNSHIPS IN THE UK

Despite the previously mentioned interest in graduate internships in policy debates,¹⁴ two tribunal cases¹⁵ and at least two parliamentary debates on the position of internships vis-à-vis national minimum wage (NMW) legislation,¹⁶ the legal position of internships remains ambiguous.

The current UK approach to the regulation of open-market internships has been characterized by the use of soft law,¹⁷ whereby the government has ‘sought to influence the use and content of internships, without directly regulating them’.¹⁸ This has mainly been attempted via the publication of best practice guidance for employers, which typically reminds employers of their obligations under particular work regulations and encourages them to adopt good practice.¹⁹

As Stewart and others note, the extent to which rights and protections under UK law extend to open-market internships depends on whether a given intern would be considered under law to be a ‘worker’ or an ‘employee’, depending upon the particular regulation to be applied (for example, NMW, holiday pay, or health and safety regulations).²⁰ Ultimately, this often comes down to whether an employment relationship is adjudged to have been in place.

The most hotly debated issue in relation to internships is whether open-market internships should be paid. While internships are not specifically mentioned

¹⁴ Eg Milburn (n 2); Lawton and Potter (n 10); CIPD, *Internships* (n 7); CIPD, *Internships that Work* (n 13); Montacute (n 2); Roberts (n 2).

¹⁵ See Andrew Stewart and Rosemary Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Fair Work Ombudsman 2013) 228–30.

¹⁶ HC Deb 4 November 2016, vol 616, cols 1195–213 (National Minimum Wage (Workplace Internships) Bill); HL Deb 18 December 2017, vol 787, cols 1825–7 (Unpaid Internships).

¹⁷ Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 *Int Lab Rev* 679; Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, ‘The Regulation of Internships: A Comparative Study’ (2018) ILO Employment Policy Department Working Paper No 240.

¹⁸ Owens and Stewart (n 17) 699.

¹⁹ Gateways to the Professions Collaborative Forum, *Common Best Practice Code for High-Quality Internships* (TUC 2013); National Council of Voluntary Organisations, *Voluntary Internships in the Voluntary Sector: Review and Guidance* (NCVO 2015), <http://knowhownonprofit.org/people/volunteers-and-your-organisation/NCVOVolunteerInternshipsintheVoluntarySector.pdf>, accessed 30 March 2021.

²⁰ Stewart and others (n 17).

in NMW legislation, work experience carried out while at school and work experience linked to a course of higher or further education are explicitly exempt from NMW regulations.²¹ Volunteers or voluntary workers are similarly excluded from coverage of the NMW in the legislation.²² This exclusion was intended to allow individuals to give their time freely to good causes.²³ In contrast, the primary aim of internships is to be able to gain experience in order to work towards a particular career goal.²⁴ There may be some overlap between the two, particularly where interns hope to establish a career in the voluntary sector.²⁵

A voluntary worker is defined in NMW legislation as ‘a worker employed by a charity, a voluntary organisation, an associated funding body or a statutory body’.²⁶ A volunteer, however, is not so clearly defined and this exemption is often exploited in order to justify the non-payment of open-market internships.²⁷ Examples of these volunteers, found in the DLHE data used in the analysis described later in this chapter, include clothing designers, management consultants, and graduates working in publishing, financial services and music and film production. It has been described as ‘a significant loophole’ that makes it ‘perfectly legal to employ an intern without paying them’.²⁸ Official guidance suggests that volunteering applies when the individual has no contract (express or implied), is under no obligation to carry out work and does not expect to receive any reward.²⁹ Lawton and Potter note that in most cases it is likely that interns are expected to turn up at particular times and perform specific tasks, and so an unwritten agreement exists.³⁰ This was the finding of two test cases that were taken to the Employment Tribunal in

²¹ National Minimum Wage Act 1998, s 3(1a).

²² Ibid s 44(1).

²³ Department for Business, Innovation and Skills, *Internships and the National Minimum Wage: Frequently Asked Questions* (DBIS 2009); Douglas Pyper, ‘The National Minimum Wage: Volunteers and Interns’ (2015) House of Commons Library Briefing Paper No 00697.

²⁴ Eg Perlin (n 8); Gateways to the Professions Collaborative Forum (n 19); Oakleigh Consulting and CRAC (n 13).

²⁵ Pauline Leonard, Susan Halford and Katie Bruce, “‘The New Degree?’” Constructing Internships in the Third Sector’ (2016) 50 Soc 383.

²⁶ National Minimum Wage Act 1998, s 44(1).

²⁷ Owens and Stewart (n 17); Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1.

²⁸ CIPD, *Internships* (n 7) 12.

²⁹ Department for Business, Innovation and Skills (n 23).

³⁰ Lawton and Potter (n 10).

the UK – *Vetta v London Dreams Motion Pictures*³¹ and *Hudson v TPG Web Publishing Ltd*³² – in which back pay was awarded.³³

There have been two recent attempts to bring internships explicitly within NMW legislation. However, both of these failed as Members of Parliament who supported the practice of unpaid internships talked the motion out.³⁴ The invaluable nature of unpaid internships in helping young people get a foothold in a career were invoked as a justification for not bringing the practice explicitly within NMW legislation, and these Members of Parliament did not want to prevent employers from offering these valuable experiences to young aspirants.³⁵

This raises the question of how invaluable and instrumental unpaid internships really are in helping labour-market entrants access better jobs. While there is some evidence that work placements carried out as part of a higher education course may improve the labour-market outcomes for participants,³⁶ reliable evidence on the outcomes of engaging in open-market internships in the UK has been relatively thin.³⁷ Two evaluations of government-backed graduate internship schemes suggested that unpaid open-market internships after graduation improve the labour-market outcomes for interns.³⁸ However, the analysis of these studies failed to control for wider factors (personal background, grades and institutional reputation) when attributing outcomes. A Sutton Trust study suggested that pay premiums associated with intern-

³¹ [2009] UKET 2703377/08.

³² [2011] UKET 2200565/11.

³³ See Stewart and Owens (n 15).

³⁴ A process by which MPs deliberately continue debating a ‘private members Bill’ put to the house until the allotted time for debate runs out before the debate can conclude with a vote. This is otherwise known as ‘filibustering’. See Tom Bateman, ‘Talking Out: How MPs Block Private Members’ Bills’ *BBC News* (7 November 2016), <https://www.bbc.com/news/uk-politics-37845980>, accessed 30 March 2021.

³⁵ HC Deb 4 November 2016, vol 616, cols 1156–1226.

³⁶ Eg Ruth Brooks and Paul Youngson, ‘Undergraduate Work Placements: An Analysis of the Effects on Career Progression’ (2016) 41 *Stud Higher Educ* 1563; N Wilton, ‘The Impact of Work Placements on Skills Development and Labour Market Outcomes for Business and Management Graduates’ (2012) 37 *Stud Higher Educ* 603; Shiona Chillas, Abigail Marks and Laura Galloway, ‘Learning to Labour: An Evaluation of Internships and Employability in the ICT Sector’ (2015) 30 *New Tech, Work & Empl* 1.

³⁷ Deanna Grant-Smith and Paula McDonald, ‘Ubiquitous Yet Ambiguous: An Integrative Review of Unpaid Work’ (2018) 20 *IJMR* 559; O’Higgins and Pinedo (n 9).

³⁸ Robin Mellors-Bourne and Emma Day, *Evaluation of the Graduate Talent Pool Scheme* (Research Paper No 28, Department of Business, Innovation and Skills 2011); Oakleigh Consulting and CRAC (n 13).

ships (paid or unpaid) held up when controlling for gender, age, location and socio-economic class, although the data was not presented in the report.³⁹

Conversely, a number of studies have raised the prospect that unpaid internships may not be so instrumental in accessing the best jobs. Purcell and others found that, while unpaid work carried out while studying improves the chances of having a graduate job one to two years after graduation, unpaid work after graduation has a negative effect on the chances of having a graduate job.⁴⁰ Similarly, Holford found that unpaid work in professional and associate professional occupations six months after graduating had a negative effect on pay three years later.⁴¹

In this chapter we look at the early career experiences of graduates and draw out the implications for regulating internships in the UK. The findings show that unpaid graduate internships may not be so instrumental in helping interns access graduate jobs, and question the justification for excluding them from NMW and other employment legislation.

6.3 DATA AND METHODS

This chapter draws on quantitative and qualitative data from two separate projects exploring the relationships between higher education participation, access to work experience and early career development of graduates: Paths2Work⁴² and a PhD study looking at the role of graduate internships in the UK labour market.⁴³

The latter was a primarily quantitative study incorporating secondary analysis of the DLHE for the 2011–12 graduating cohort and a primary survey of creative and mass communications graduates (the Creative Graduates Careers Survey, CGCS). The DLHE analysis of UK- and EU-domiciled graduates from undergraduate and postgraduate courses examined participation in internships at six months after graduation, motivations towards and access routes to internships, and whether interns felt their qualification was needed for the role. The CGCS was a probability survey of UK- and EU-domiciled creative and

³⁹ Cullinane and Montacute (n 6).

⁴⁰ Kate Purcell, Peter Elias, Gaby Atfield, Heike Behle, Ritva Ellison, Daria Luchinskaya and others, *Futuretrack Stage 4: Transitions into Employment, Further Study and Other Outcomes* (Higher Education Careers Services Unit 2012).

⁴¹ Angus Holford, 'Access to and Returns from Unpaid Graduate Internships' (2017) IZA Institute of Labor Economics Discussion Paper No 10845.

⁴² Kate Purcell, Peter Elias, Anne Green, Gaby Atfield, Arlene Robertson, Noel Whiteside and others, *Present Tense, Future Imperfect: Young People's Pathways into Employment* (ESRC 2017).

⁴³ Hunt, 'Internships' (n 5).

mass communications graduates who had graduated from first degree courses at 12 higher education institutions from around the UK ($n = 616$). Institutions participating in the survey were a mix of pre- and post-1992 universities and specialist arts institutions, with a broad regional coverage of England, Scotland and Wales, all with significant provision in creative arts and mass communications subject areas. These subject areas were selected because analysis of DLHE data showed they were subject areas with high participation rates in graduate internships, yet without the established pathways into employment enjoyed by subjects such as medicine. Graduates from the 2007–08, 2009–10 and 2011–12 graduating cohorts were surveyed six, four and two years after graduating, respectively. The survey asked about internships and work activities at the time of the survey and since graduation, and covered job and career satisfaction and views of different forms of employment. While the estimated response rate was relatively low (7.4 per cent) when compared with the wider population of creative and mass communications graduates, the sample was broadly representative in gender, age, ethnicity, domicile and subject area.

Paths2Work was an interdisciplinary project on precarious pathways to employment for young people, completed in 2017, involving follow-up interviews in 2014–15 with 100 survey respondents from Futuretrack⁴⁴ five to six years after they graduated. Those interviewed were UK domiciled; were 21 or younger when they applied to attend university; had lived, studied or worked in the East and West Midlands; and had some experience of unpaid work or other work experience related to their career aspirations as students or after graduation. Interviewees were asked about their current activity, work history since graduating, work experiences before and during university, and future aspirations. The interviews lasted 30 to 60 minutes. They were recorded (with permission), transcribed and analysed thematically using NVivo. The qualitative analysis used in this research draws on a subsample of six who reported experience of open-market internships after graduation and an additional four interviewees who, although they had not reported the experience of an internship, provided useful insights about internships in relation to careers and employment. The qualitative data provided rich accounts of their work history during and after higher education, including quotations pertinent to the

⁴⁴ Futuretrack is a national longitudinal survey of individuals who applied in 2005–06 for full-time undergraduate degree programmes, covering all UK higher education applicants, involving the collection and analysis of data over a five-and-a-half-year period, from the point at which aspiring students applied to enter higher education in 2005–06 until winter 2011–12. Online surveys were conducted with respondents at four stages: when they were applicants in spring–summer 2006, in summer 2007 one year on, in autumn 2009 (repeated for those on four-year degree programmes in 2010) and in winter 2011–12, five-and-a-half years from the first survey.

experience of internships. The findings in this chapter also draw on qualitative accounts provided by two respondents who were interviewed as part of the CGCS research outlined previously.

6.4 FINDINGS FROM THE RESEARCH

6.4.1 The (Non)Developmental Character of Unpaid Internships

One of the key themes in the literature about graduate internships is that they are, or should be, a way of developing employability and bridging the transition from education into the world of work.⁴⁵ Internships are thought to provide valuable experience and help interns develop industry-specific skills, knowledge and networks.⁴⁶ Indeed, the developmental nature of internships has been used by some policy-makers as a justification for not bringing internships explicitly within NMW legislation.⁴⁷ This section presents quantitative data from the DLHE about the extent to which interns' higher education qualification was needed to obtain their job (arguably an indication of the level of skill needed for the role) and data from the CGCS on graduates' views on paid and unpaid graduate internships and their usefulness in the development of their subsequent careers.

The findings show that, while many report that their internships (paid or unpaid) have provided useful experience or have helped them to develop their careers – as has been shown elsewhere⁴⁸ – unpaid internships are less likely than paid internships to be rated positively or to be of a level that requires a degree.

6.4.2 Level, Usefulness and Developmental Benefits of Paid and Unpaid Graduate Internships

The DLHE asks respondents to indicate whether their qualification was a requirement for the job, just an advantage or not needed (Figure 6.1). Those who were currently doing an unpaid internship at the time of the survey were much less likely than paid interns to say their qualification was a requirement

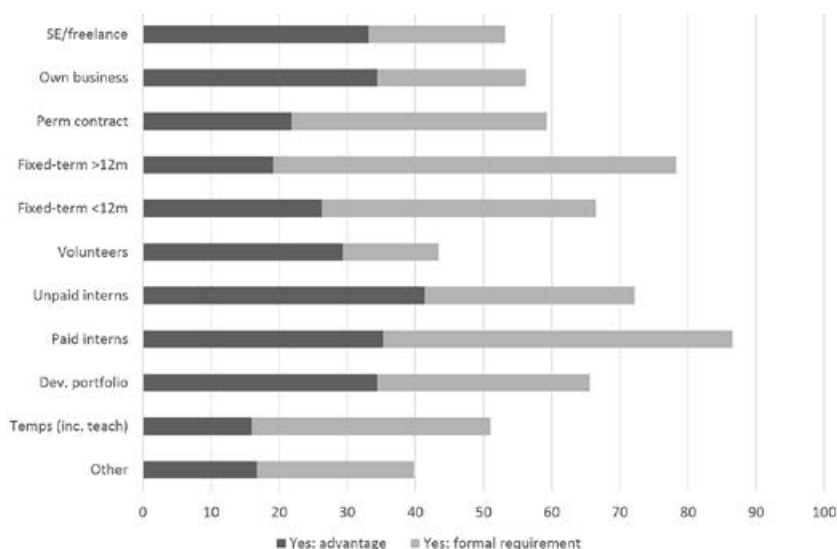
⁴⁵ Perlin (n 8); Milburn (n 2); Gateways to the Professions Collaborative Forum (n 19); Lawton and Potter (n 10).

⁴⁶ CIPD, *Internships* (n 7); CIPD, *Internships that Work* (n 13); Mellors-Bourne and Day (n 38); Oakleigh Consulting and CRAC (n 13).

⁴⁷ HC Deb 4 November 2016, vol 616, cols 1195–213; HL Deb 18 December 2017, vol 787, cols 1825–7.

⁴⁸ Eg Sabina Siebert and Fiona Wilson, 'All Work and No Pay: Consequences of Unpaid Work in the Creative Industries' (2013) 27 *Work, Empl & Soc* 711.

(31 per cent compared with 51 per cent), and twice as likely to indicate their qualification was not needed (28 per cent compared with 14 per cent). They were also less likely to say it was a requirement than those who were working on a fixed-term contract, particularly those on longer fixed-term contracts. However, they were more likely to say that their qualification was needed or a requirement than those working in voluntary positions or those working freelance or setting up their own business. Thus, while unpaid graduate internships appear more likely to be of a level appropriate for a graduate than, for example, temping or genuine volunteering, they appear to be at a lower level than paid internships, which appear to require a degree more than nearly all other forms of employment.



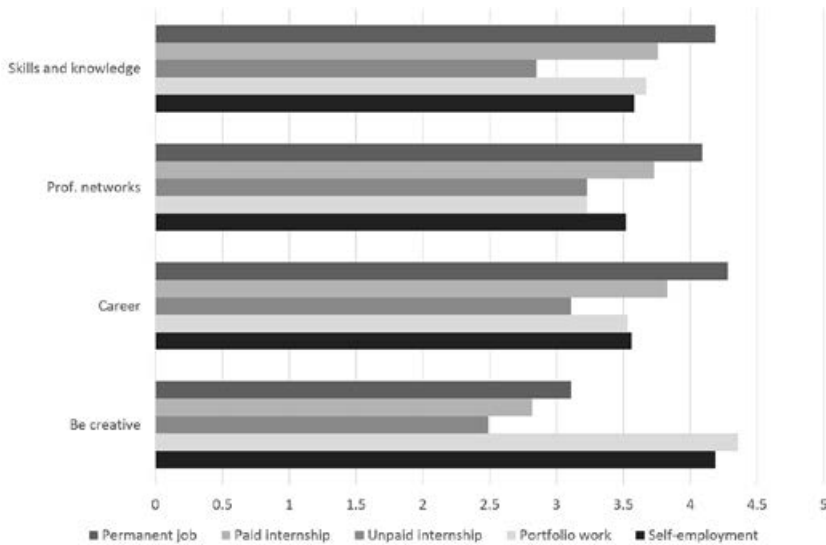
Note: Base – any evidence of work.

Source: Hunt (n 5); data – HESA Destination of Leavers survey 2011/12, Copyright Higher Education Statistics Agency Limited 2013. The Higher Education Statistics Agency (HESA) cannot accept responsibility for any inferences or conclusions derived from the data by third parties.

Figure 6.1 *Whether recent qualification was a requirement or just an advantage, by employment type (percentage)*

In the CGCS, all creative and mass communications graduates were asked to rate on a scale of one to five how effective they felt different types of employment were for developing a range of work and career-related aspects: skills and knowledge, professional networks, ability to be creative, and career

more generally (Figure 6.2). While paid internships were rated highly for development – second only to a permanent job for skills/knowledge, networks and career – unpaid internships were lower on all measures. Indeed, unpaid internships were rated lowest out of the types of employment listed on all four aspects of career development.



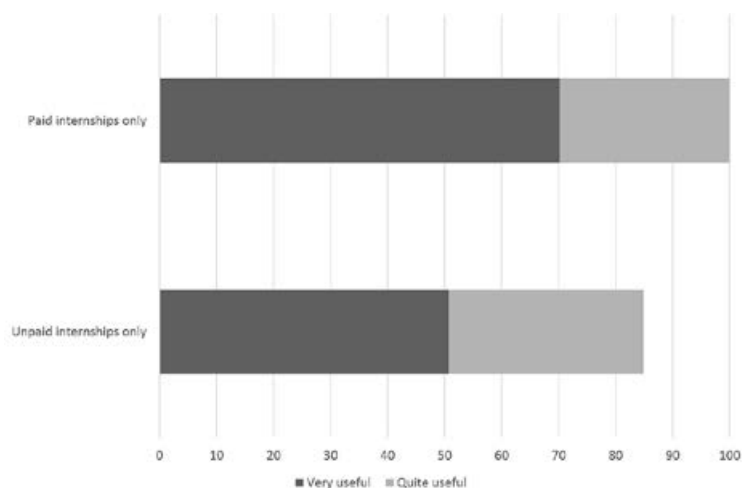
Note: Base – all respondents.

Source: Hunt (n 5); data – Creative Graduates Careers Survey.

Figure 6.2 Mean ratings for each employment type for each area of development

In the CGCS, not only were unpaid internships rated less highly for development, but they were less likely to be seen as useful by those who had engaged in them. While the majority (85 per cent) of those who had done an unpaid internship felt that they had been at least useful, and half (51 per cent) felt they had been very useful, they were much less likely than those with experience of paid internships to say they had been very useful (70 per cent) in the development of their career so far, and 14 per cent felt they had been no help at all (no one who had done a paid internship said they were of no help) (Figure 6.3).⁴⁹

⁴⁹ While these bivariate differences were found to be statistically significant at the 95 per cent level of confidence, they do not take account of differences in the personal and study characteristics of those who had done paid or unpaid internships.



Note: Base – those with experience of internships at any point after graduation.

Source: Data – Creative Graduates Careers Survey.

Figure 6.3 Perceived usefulness of paid and unpaid internships (percentage)

These quantitative findings were reflected in the qualitative data. Emily, a graduate in English and creative writing, completed a four-month unpaid internship in marketing after her degree which she ‘created for herself’. She was advised by an employment agency to get some marketing-relevant experience if she wanted to pursue a career in marketing. Thus, she approached the employer directly, and offered her services for free with only her travel expenses being paid. She suggested that this internship was not a graduate role, but felt that experience was important and that unpaid work was often a prerequisite in the creative sector:

[M]ost companies would be quite happy to take on a graduate, for an internship for free, so, I mean there’s lots of talk about, exploitative and how long is too long, and stuff like that ... I just thought right, I’m going to, to get this internship, get some experience under my belt.

This reflects the ‘rite of passage’ view expressed by graduates, particularly in the creative sector, in other studies.⁵⁰ Interestingly, Emily did not specify

⁵⁰ Eg Leslie Regan Shade and Jena Jacobson, ‘Hungry for the Job: Gender, Unpaid Internships, and the Creative Industries’ (2015) 63 *Sociol Rev* 188; Siebert and Wilson (n 48).

whether these internships require a degree, but the latter is perceived as a 'guaranteed level of literacy', as she reported in the advice she would give to higher education students in relation to work experience: 'Obviously if there are internships out there that pay, perfect, but if not then companies are more than happy to get, you know, graduates with, you know, guaranteed levels of kind of, as I say, literacy.'

Nikki, an environmental studies and media graduate, had completed a total of five work placements and internships over the years, which comprised one sandwich placement and four open-market internships (three unpaid while studying and one paid graduate internship). These varied considerably in structure, tasks and development, ranging from 'stuffing envelopes' for a political party 1.5 days a week to structured project work. The paid internship she characterized as 'basically a proper job', but she felt the 'internship label' gave the employer a 'licence' to pay less and to make it part-time and/or short term. The first unpaid internship she felt was a waste of time but the other two (one paid and one unpaid) were more structured and developmental:

So the first one was pretty much stuffing envelopes. Then moving onto, so the OD [organizational development] consultancy one, it was doing a piece of research, desk research, writing it up into a report. So jumping back to [the branding consultancy], it was producing some guidelines for an NGO on messaging, analysing transcripts.

Nikki's experience perhaps underscores the importance of the extent to which internships offer a structured developmental experience. This is identified by Lain and others, who also note that unpaid open-market internships may be less likely than paid internships to be structured.⁵¹

6.4.3 Do Unpaid Internships Provide a Bridge to Graduate Jobs?

Another theme in the literature and policy debate on internships is that, paid or unpaid, they help labour-market entrants bridge the transition from education to employment.⁵² Indeed, concerns in the literature that unpaid internships may exclude those from less privileged backgrounds from accessing certain professions or industries implicitly assume that these internships provide a route into these industries.⁵³

The multivariate analysis of CGCS data fails to support this view,⁵⁴ at least as far as creative and mass communications graduates – two subjects

⁵¹ Lain and others (n 11).

⁵² Roberts (n 2); Milburn (n 2).

⁵³ Montacute (n 2); Lawton and Potter (n 10).

⁵⁴ Hunt, 'Internships' (n 5).

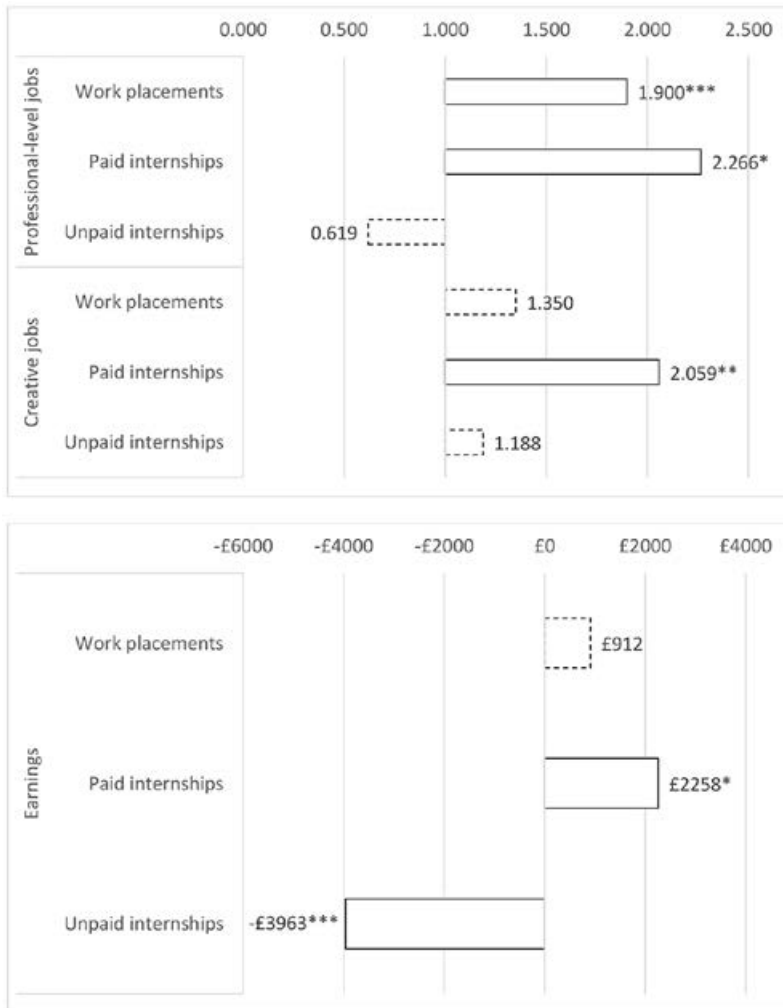
with a high incidence of graduate internships – are concerned. Ordinary least squares regression and binary logistic regression were used to analyse the effects of paid and unpaid internship experience on earnings and occupational outcomes, while controlling for other factors including grades and institution prestige.⁵⁵ There was no evidence to suggest that graduates with experience of unpaid internships were any more likely to have a creative or graduate-level job⁵⁶ than those without internship experience at the time of the survey (that is, two, four or six years after graduation). Furthermore, those with experience of unpaid internships after graduation earned substantially less on average than those without internship experience, other things being equal. Those with paid internship experience, however, were more likely to have a creative or graduate-level job and earned a substantial premium two, four or six years after graduation (Figure 6.4). The top panel of Figure 6.4 displays the effect (odds ratios) of having engaged in a work placement while studying or a paid or unpaid internship after leaving university on the propensity to have a professional-level or a creative job as a main job. The results show that, while holding other factors in the model constant:

- Having engaged in a work placement while studying increases the chances of having a professional-level job by nearly double, although the effect on creative jobs was not statistically significant.
- Having engaged in a paid internship after graduation more than doubles the chances of having a professional-level job, or having a creative job.
- The effect of having engaged in an unpaid internship on the propensity to have a creative or professional-level job was not found to be statistically significant.

Furthermore, when looking at earnings (the lower panel in Figure 6.4), paid internships were associated with a statistically significant increase in earnings, whereas having engaged in an unpaid internship was associated

⁵⁵ See *ibid* for a full description of the multivariate analysis. Control variables included age, ethnicity, gender, parental experience of higher education (a proxy for social class), country or region of domicile, subject, classification of degree, cohort, league table score of higher education institution, and work placement experience while studying. Whether work was part-time and whether respondents had multiple jobs were also controlled for in the ordinary least squares regression.

⁵⁶ These were: (1) a professional-level job (major groups 1–3 of the Standard Occupational Classification system: ‘managers, directors and senior officials’, ‘professionals’ and ‘associate professional and technical’); or (2) a creative job, based on a definition developed in a major study of the early careers of creative and mass communications graduates. See Linda Ball, Emma Pollard and Nick Stanley, *Creative Graduates, Creative Futures* (Creative Graduates Creative Futures Higher Education Partnership 2010).



Notes: Base: all graduates in employment at the time of the survey; statistically significant at * .05, ** .01, *** .005.

Source: Data – Creative Graduates Careers Survey.

Figure 6.4 *Effect of work placements during study and paid and unpaid graduate internships on propensity to have a professional-level/creative job (odds ratios) and on earnings (£)*

with a statistically significant decrease in earnings relative to not having any internship experience. The size of the decrease in earnings associated with having unpaid internship experience was larger than the effect of two years in the labour market (£2823). These findings fail to support the assumption that unpaid graduate internships provide an invaluable bridge into graduate jobs, and appear to indicate that they may have a detrimental effect on earnings in the short to medium term (at least for creative and mass communications graduates). However, paid graduate internships and (on some measures) work placements do seem to improve the employability of graduates.

These findings fit with those of Purcell and others and Holford, who also found that unpaid work after graduation had a negative impact on graduate outcomes.⁵⁷ Furthermore, while Cullinane and Montacute found that having engaged in one unpaid internship had a positive effect on outcomes,⁵⁸ having engaged in multiple unpaid internships could have a negative effect.

The qualitative data provided mixed evidence. Emily reported that her unpaid internship in marketing along with her paid work experience in an office administrative position played a significant role in getting her job as a marketing sales assistant: 'so that [paid office administration experience], combined with the kind of internship which was unpaid but gave me experience in marketing, um, the two combined were what led me to get the job that I currently have'.

On the contrary, Chloe, a graduate in archaeology, did an unpaid internship at a museum which did not lead to developing her career. She currently works as an administrator. However, the internship made her realize that she was more interested in people-facing jobs in the heritage sector, but she recognized that there were limited job opportunities in this competitive sector. Moreover, she highlighted the limited benefits that an individual can receive from an ongoing two-week placement scheme (open to students and graduates):

When I was working at the museum and art gallery in [city], and I was doing the X work, the conserving of objects, that was an ongoing placement, so they'd have one student for two weeks and then the next student for two weeks and then the next student for two weeks. So I was one of sort of many.

Nikola had an interdisciplinary degree (politics and languages) with unpaid and paid experience in think tanks during his studies. He obtained a paid internship for six months after graduation in a Brussels-based consultancy (he had to supplement his income with savings in order to live in Brussels). He explained how internships are being utilized for longer-term employment

⁵⁷ Purcell and others, *Futuretrack Stage 4* (n 40); Holford (n 41).

⁵⁸ Cullinane and Montacute (n 6).

in this organization to test and select employees, as auditions.⁵⁹ He benefited from these auditions himself, as he was employed as a political communication and policy analyst by the organization after the internship.

Similarly, Sally, a languages graduate, completed a paid internship in a European country providing translating services. While the organization wanted to keep her after the end of the internship, they could only provide an intern's earnings, which were too low for her to stay in a foreign country. However, after she returned to the UK, she continued working with the organization as a freelancer translator using contacts and networks developed during her internship. While the internship did not directly lead to a paid job at the organization, the contacts and experience were helpful in obtaining other work, albeit of a more precarious nature. This example also shows how interns may suffer a pay penalty in the short to medium term, as the period working for no or low pay may put them in a weak bargaining position moving into paid work and/or may hinder pay progression.

There was an expectation that internships, particularly graduate internships, would or should lead to something, even if it was not a job at the organization. This is what Nikki, an environmental studies and media graduate, had to say about graduate internships:

I would absolutely trust that it would lead to something. I wouldn't necessarily expect them to give me a job afterwards, I'd expect from them that they would have the intention and keenness to connect me and get me involved in the industry ... not just that they are using me as a resource for however many months and then, 'See you later. We haven't got a job for you.' It shouldn't be about, 'We've got a bunch of crap that needs doing, and if they don't perform we kick them out in the most brutal way possible', which happens.

Overall, these qualitative accounts provide a mixed picture of the value of unpaid open-market internships after graduation and the extent to which they provide a reliable bridge into meaningful employment.

6.5 DISCUSSION AND IMPLICATIONS FOR PUBLIC POLICY AND REGULATION

Owens and Stewart have identified five strategies for the regulation of open-market internships used in different national jurisdictions: specific regulation, regulation by inclusion, regulation by exclusion, application of

⁵⁹ Vicki Smith, 'Enhancing Employability: Human, Cultural, and Social Capital in an Era of Turbulent Unpredictability' (2010) 63 *Hum Rel* 279.

general-law and soft-law approaches.⁶⁰ In the UK, while the regulatory framework would allow for a general-law approach, lack of effective enforcement of labour regulations means that the approach can most accurately be categorized as a soft-law approach.⁶¹ Recent evidence showing that the proportion of unpaid internships may be declining suggests that this approach has had some limited success.⁶² However, the extent to which further progress is possible on the issue of the quality and prevalence of unpaid internships is unclear. While the existing voluntary codes of practice provide useful guidance, confusion about the legal status of internships and the apparent lack of political will and resources to enforce existing regulations means that less conscientious employers may be unlikely to change their ways.

The findings presented in this chapter suggest that, while paid open-market internships after graduation help develop employability and lead to positive labour-market outcomes, unpaid open-market internships are less likely to provide the same benefits. Unpaid internships are not so developmental or instrumental, for example, they do not improve the chances of having a creative or graduate-level job and/or they lead to reduction in earning power. Here we discuss the implications of this for each of the remaining four approaches to regulation identified by Owens and Stewart.

Regulation by exclusion would see internships defined and specifically excluded from existing labour regulations in much the same way as work placements linked to an educational course currently are. This would presumably have the benefit of not deterring employers from offering such positions, but would arguably weaken the existing rights of interns and lead to further exploitation, potentially displacing paid entry-level workers and driving down wages. In addition, under this approach interns would not enjoy the same level of governance or financial support enjoyed by university students on a work placement, cited by Lain and others as one of the benefits of governed placements.⁶³ One of the recommendations of the Panel for Fair Access to the Professions was to extend student loans to cover a period after graduation for engaging in internships.⁶⁴ However, this would arguably mean the government effectively subsidizing employers to offload their responsibilities for developing labour-market entrants in alignment with wider labour-market trends, linked to changes in the global economy.⁶⁵

⁶⁰ Owens and Stewart (n 17).

⁶¹ Stewart and others (n 17); Owens and Stewart (n 17).

⁶² Hunt, *Participation* (n 4).

⁶³ Lain and others (n 11).

⁶⁴ Milburn (n 2).

⁶⁵ Paul Thompson, 'Financialization and the Workplace: Extending and Applying the Disconnected Capitalism Thesis' (2013) 27 *Work, Empl & Soc* 472; Smith (n 59).

An alternative approach would be to introduce specific legislation to govern internships. The Chartered Institute of Personnel and Development (CIPD) initially recommended bringing internships in line with apprenticeships, instituting a new ‘training wage’ for interns at a much lower rate of NMW than for ‘workers’ (currently £3.90, compared with £7.70 for 21- to 24-year-olds and £8.21 for those aged 25 or over⁶⁶). Lawton and Potter criticized this proposal, arguing that many unpaid interns would be considered workers under the current rules and therefore eligible for the NMW at the higher rate.⁶⁷ Furthermore, they noted that formal apprenticeships lead to a recognized qualification, unlike unpaid internships, and that the recommendations would unfairly discriminate against those wishing to work in industries with no recognized entry-level routes. Interestingly, subsequent CIPD guidance on internships withdrew the recommendation for a ‘trainee rate’ of the NMW, instead extolling the virtues (for employers and interns) of paying interns at least the NMW.⁶⁸ More recently, Cullinane and Montacute have recommended explicitly banning internships of longer than four weeks.⁶⁹ While this would potentially minimize the financial impact on unpaid interns, and deter their long-term exploitation, it could lead to a revolving door of unpaid, exploitative and non-developmental internships.⁷⁰

Regulation by inclusion might be an alternative approach. Extending laws to include interns as workers or employees would ensure they receive at least the NMW, and discrimination and health and safety protections, and would encourage employers to make sure internships are structured and developmental. This would see internships specifically defined and brought within existing legislation and is, arguably, what the private members bill that was brought to Parliament sought to achieve.⁷¹ As noted previously, the Bill was ultimately ‘talked out’ by those opposing the legislation because they did not want to deter employers from offering such ‘invaluable’ opportunities.⁷² While some unpaid internships may well provide invaluable opportunities, the findings presented in this chapter make clear that this is not always the case. Bringing internships explicitly within existing legislation would clarify the status of internships for interns and employers and, as has been argued elsewhere, may

⁶⁶ UK Government, ‘National Minimum Wage and National Living Wage Rates’ (*Gov.UK*), <https://www.gov.uk/national-minimum-wage-rates>, accessed 30 March 2021.

⁶⁷ Lawton and Potter (n 10).

⁶⁸ CIPD, *Internships that Work* (n 13).

⁶⁹ Cullinane and Montacute (n 6).

⁷⁰ McLeod and others (n 8).

⁷¹ National Minimum Wage (Workplace Internships) Bill 2016–17.

⁷² HC Deb 4 November 2016, vol 616, cols 1195–1213.

lead employers and interns alike to invest more in the internship, to mutual benefit.⁷³ In the House of Commons debate, some members argued that bringing internships explicitly within the NMW may deter some employers from offering internships. The findings presented in this chapter cannot attest to this, but it is likely to be true for some, particularly smaller, employers. However, this assumes that labour-market entrants need opportunities for labour-market experience more than employers need highly motivated and educated new workers. Arguably, in a time of rapid technological change, employers may need graduate skills more than ever.

Finally, the application of the general-law approach would see greater enforcement of current labour-market protections. Arguably, the framework for this exists in UK law. However, the total lack of cases brought by the UK authorities means that enforcement effectively comes down to whether unpaid interns have the resources and are prepared to bring a case against their employer. For aspirants hoping to gain a foothold in a certain industry or profession, there are strong disincentives to do so. An example where a more robust approach to the application of general law has been attempted is the work of the Fair Work Ombudsman (FWO) in Australia. As in the UK, in Australia, while there are exemptions for placements linked to an educational course and for volunteering, the legal position of internships is not entirely straightforward and often comes down to whether a contract to perform work is in place.⁷⁴ According to Stewart and others, the FWO is the only example where ‘a government agency has systematically and publicly pursued sanctions against businesses or other organizations involved in the use of potentially unlawful internships’.⁷⁵ A number of cases have been successfully brought by the FWO, resulting in fines for a number of organizations. It is hard to assess the impact that this noncompliance work, together with the wider awareness and public engagement work that the FWO does, has had on the incidence and quality of unpaid internships. However, cases such as these are likely to have more of a deterrent effect than the current level of enforcement carried out by HM Revenue and Customs in the UK. However, this type of enforcement will require more resources, and political will.

In summary, there are costs and benefits in the above-mentioned regulation approaches and there is not a clear route forward. However, given the evidence presented in this chapter, it is clear that the status quo is unsustainable. Whichever approach to the regulation of internships is adopted, at the very least a clearer definition of the boundaries between work placements (linked

⁷³ Lain and others (n 11); CIPD, *Internships that Work* (n 13).

⁷⁴ Stewart and others (n 17).

⁷⁵ Ibid 41.

to a formal course of education), open-market internships and genuine volunteering would be desirable. A clear definition of internships is essential to understand differences between internships, volunteering roles, placements and work experience, and the advantages and disadvantages they entail.

PART III

Regulating Internships: National Perspectives

7. Rights and obligations in the context of internships and traineeships: A German perspective

Bernd Waas

7.1 INTRODUCTION

In 2005, the German weekly newspaper *Die Zeit* published an article entitled ‘Generation Praktikum’. Part of the article read as follows:

In and of itself, internships are a good thing. In the past they were often called trial internships, because it was about smelling into a cement factory or an advertising agency to find out whether the job suits you or not. Today’s interns have long since decided on a career. However, the more unemployed young academics there are, the more companies prefer to hire interns who do professional work for little money. Thus meanwhile between school and occupation lies a time of internships, which frequently lasts several years.¹

Although reliable figures – especially reliable current figures – are lacking, there is still widespread unease about internships. For example, in a recent article on internships and related (labour) legal problems, the authors acknowledge the significance of internships, but add the following:

The other side of the coin is the increased number of cases of abuse, particularly in certain sectors, in which employers systematically and permanently fill regular jobs with exchangeable interns in order to save personnel costs and social security contributions. Since these jobs – regardless of their actual content – are often not paid or only paid at a low rate, especially after the end of training, internships have become an archetype of ‘precarious employment’ alongside voluntary and temporary work relationships.²

¹ Matthias Stolz, ‘Generation Praktikum’ *Die Zeit* (Hamburg, 31 March 2005).

² Julia Burkard Pötter and Stephan Sura, ‘Das Praktikum im neuen Gewand: Praxiseinblicke zwischen Mindestlohn und prekärem Beschäftigungsverhältnis’ (2015) 68 *Neue Juristische Wochenschrift* 517, 517. However, a study published in February 2020 shows that trainees are currently largely satisfied with their working conditions;

In this chapter, I first describe what is meant by internships (and traineeships) in Germany and how these are distinguished from employment relationships in particular (section 7.2), before briefly discussing special types of internships (section 7.3). Next I identify which regulations are applicable to internships (section 7.4). Based on this, I discuss important aspects of traineeships (section 7.5) with a focus on the problem of ensuring adequate remuneration for trainees. The chapter ends with a short summary (section 7.6).

7.2 TRAINEESHIPS, INTERNSHIPS AND SIMILAR RELATIONSHIPS

Any, even moderately, profound examination begins with definitions. This is also the case with this survey. It is all the more important to spend a little time on definitions, as there are a large number of arrangements in Germany which have similarities with internships and traineeships. As a consequence, it is not uncommon in practice for delimitation problems to arise, and clear definitions can help to solve them.

7.2.1 Vocational Training Relationships

Vocational training in Germany is regulated by the Vocational Training Act (*Berufsbildungsgesetz*, BBiG). The law defines vocational training in principle as initial training following compulsory full-time schooling. However, it can also follow an initial vocational training. Basic knowledge, basic skills and behavioural patterns that are necessary for as many activities as possible must be conveyed in basic vocational training. This is generally actioned in a dual system, that is, training takes place in parallel in a company and at a vocational school; for some occupational fields, however, the first year of training can be designed as a purely school-based basic vocational training year. The vocational skills, knowledge and abilities required for an occupation are covered in that basic vocational training. Pursuant to BBiG section 4(2), vocational training must take place in an orderly training course in accordance with the training regulations.³

Of particular interest in this context is the vocational training relationship (*Berufsausbildungsverhältnis*). This relationship is based on a vocational training contract. Under BBiG section 10(1), anyone hiring people for voca-

see Nadine Bös, ‘Generation Praktikum war gestern’ *Frankfurter Allgemeine Zeitung* (Frankfurt am Main, 6 February 2020) 18.

³ See Monika Schlachter, ‘Berufsbildungsgesetz’ in Rudi Müller-Glöge, Ulrich Preis and Ingrid Schmidt (eds), *Erfurter Kommentar zum Arbeitsrecht* (21st edn, Beck 2021) s 1, n 4.

tional training must conclude a vocational training contract with the trainees. Pursuant to BBiG section 10(2), the legal provisions and principles of law applicable to the employment contract shall apply to the contract, insofar as nothing to the contrary results from its nature and purpose and from the law itself. This means that the training relationship is in principle subject to the regulations applicable to the employment relationship. The aim is to protect trainees in the same manner as employees. Contractual agreements that deviate from this are not permitted (BBiG section 25).

That BBiG section 10(2) declares the legal provisions and principles of labour law are basically applicable to vocational training contracts does not mean that the vocational training contract is an employment contract.⁴ The purpose of the vocational training contract is clearly described in BBiG section 10(1). It is concluded ‘for the vocational training’ of another person, and not for the purpose of performing dependent work as in the case of an employment contract. This may not even be demanded, as BBiG section 14(3) expressly states. According to this provision, ‘trainees may only be assigned tasks that serve the purpose of the training and are appropriate to their physical strength’. According to the Federal Labour Court:

Vocational training relationships and employment relationships are not generally to be equated, because both contractual relationships have different obligations. According to section 611 of the Civil Code⁵ the content of an employment relationship is the performance of the contractually owed service against payment of a remuneration. On the other hand, the trainee is entitled to be trained, while the main obligation of the trainee according to BBG s 14 is to provide the trainee with the training required to reach the target level, the knowledge and skills required to achieve the training objective. In contrast to an employee, the trainee does not owe any work in return for payment of a wage, but has to register in accordance with BBG s 13 sentence 1 to endeavour to acquire the vocational capacity to act which is required to achieve the training objective.⁶

7.2.2 Internships (Praktika)

According to the understanding in Germany, an intern is a person who, on the basis of an internship contract, is in a temporary in-company training relationship in preparation for their main occupation, which is part of an orderly basic vocational training. The aim of the internship contract is not to

⁴ See eg Heinrick Kiel, Stefan Lunk and Hartmut Oetker, *Münchener Handbuch zum Arbeitsrecht* (4th edn, Beck 2018) para 147, n 32ff. See also Federal Labour Court, 21 September 2011, 7 AZR 375/10.

⁵ BGB s 611a only came into effect in 2014.

⁶ Federal Labour Court, 12 February 2015, 6 AZR 845/13.

complete a specialist training course. The intern rather wants to gain practical knowledge and experience in a specific field of work, the existence of which they may have to prove at the start of further training or study. The internship is thus a target-orientated partial training in professional knowledge and skills perhaps prescribed to the intern by a school, a higher education institution at which they are studying, or a company. The main purpose of the internship contract, in any event, is the provision of training.

In order to distinguish vocational training from an internship, the Federal Labour Court stated:

Vocational training is intended to impart the ability to act in an orderly course of training. This is not the case for an internship. As a rule, an intern works temporarily in a company in order to acquire the practical knowledge and experience required to prepare for a profession. However, no systematic vocational training takes place. Nor are interns obliged to take part in vocational school lessons and examinations.⁷

In the underlying case, an intern had requested that periods of an internship be credited against the probationary period in a subsequent apprenticeship. The Court considered this request to be unfounded owing to the legal differences between a vocational training relationship and an internship.

The Minimum Wage Act (*Mindestlohngesetz*, MiLoG), enacted in 2014, provided a statutory definition of the term ‘intern’ for the first time. According to MiLoG section 22(3):

interns, irrespective of the designation of the legal relationship, are persons who, according to the actual form and execution of the contractual relationship, undergo a certain operational activity for a limited period of time in order to acquire practical knowledge and experience in preparation for a vocational activity, without this being vocational training within the meaning of the Vocational Training Act or comparable practical training.

This was intended to increase legal clarity.⁸ However, the definition does raise issues of delimitation. This applies in particular to the term ‘comparable practical training’. In the legal literature it is argued that practical training is only comparable if: (1) there is a (far-reaching) industry-wide consensus that it is a prerequisite for entering the profession, (2) the content and structure of

⁷ Federal Labour Court, 19 November 2015, 6 AZR 844/14. See also Federal Labour Court, 13 March 2003, 6 AZR 564/01.

⁸ See German Parliament, Printing Matter 18/2010 (new) 26. It is based on recommendation no 2.3 of the EU Council of Ministers of 4 December 2013, No 3301, on a quality framework for internships.

the training are well defined, and (3) it comes close to vocational training in duration, scope and intensity.⁹

7.2.3 Traineeships (Volontariate)

Internships must be distinguished from traineeships. The Federal Labour Court has defined traineeships as follows:

The traineeship can have a wide variety of forms according to the needs of the profession in question and its specific purpose. It differs from the vocational training relationship in that it is an additional training which is intended to deepen or in certain respects extend the existing training, from the employment relationship in that the trainee does not permanently perform work necessary for the company, is intended to replace a necessary worker and is remunerated for it, but rather that he becomes active in addition to the necessary workers for his training and further training.¹⁰

In contrast to an intern, a traineeship's practical learning phase is not part of a comprehensive training programme. For this reason, a traineeship is not a prerequisite for completing vocational training. Accordingly, becoming a trainee is a voluntary opportunity to gain an overview of a particular profession and beyond.¹¹

The legal definition of an internship in MiLoG section 22(1)(3) helps only to a limited extent. The legislature itself considered that traineeships as a whole did not fall within the scope of the law.¹² However, the term 'traineeship' is not clearly defined and is understood as a general term for a number of phenomena. After all, it is widely assumed that a 'comparable practical training' within the meaning of MiLoG section 22(1)(3) for an editor – depending on the concrete form – is a traineeship in the journalistic field.¹³ It is irrelevant that working as an editor does not necessarily require a traineeship.¹⁴

⁹ See Stefan Greiner, 'Mindestlohnsgesetz' in Christian Rolfs, Richard Giesen, Ralf Kreikebohm and Peter Udsching (eds), *Beck-OK Arbeitsrecht* (59th edn, Beck 2021) s 22, n 15.

¹⁰ Federal Labour Court, 21 December 1954, 2 AZR 76/53.

¹¹ See Friedrich Schade, *Praktikumsrecht* (Kohlhammer 2011) 5.

¹² See German Parliament, Printing Matter 18/2010 (new), 26.

¹³ See *ibid.*

¹⁴ See Greiner (n 9) s 22, n 16 for further references.

7.3 DIFFERENT TYPES OF INTERNSHIPS

7.3.1 Traineeships for Pupils Related to School Education

In Germany, every pupil has to complete a pupil (company) internship during their time at school. The details are regulated by the individual states on the basis of decrees and guidelines. The internship is intended to give pupils the opportunity to gain an impression of working life. A pupil internship can be an individual internship, an internship of a group of students or an internship which includes all students in a class. The duration of the internship varies depending on the type of internship.

The Federal Labour Court has ruled that the BBiG, which grants trainees special protection, is not applicable if the internship is an integral part of school education. This is because a pupil internship does not establish a training relationship within the meaning of the BBiG.¹⁵ This type of internship is a school event that takes place in a company. The teacher is responsible for its implementation. There is often no contractual relationship between the pupil and the company.¹⁶

7.3.2 Mandatory Student Internships Related to Studies

In many cases, faculties of higher education institutions stipulate a mandatory internship during a course of study as a prerequisite for successful completion of the studies. At most universities, at least two internships are prescribed in the study regulations of individual departments. According to the Federal Labour Court, these internships do not qualify as vocational training relationships either. The Court's reasoning is that the BBiG does not regulate and cannot regulate vocational training to the extent that it is subject to the legislative competence of the Länder (states) guaranteed under constitutional law.¹⁷ Accordingly, there is no vocational training relationship within the meaning of the BBiG if the training in question is part of university training. Instead, these internships are subject exclusively to the provisions of state law for universities and universities of applied sciences.¹⁸

¹⁵ See eg Federal Labour Court, 19 June 1974, 4 AZR 436/73.

¹⁶ See Werner Scherer, 'Verträge mit Praktikanten' [1986] *Neue Zeitschrift für Arbeitsrecht* 280, 284.

¹⁷ German Constitution arts 30, 70.

¹⁸ See Federal Labour Court, 19 June 1974, 4 AZR 436/73.

7.3.3 Voluntary Internships

Different rules from those applicable to compulsory internships apply to internships which are entered into on a voluntary basis. These internships are not uncommon, especially among students, since they can increase the chances of direct entry to a career after successful completion of studies. Although the focus of a voluntary student internship is on in-company training and learning knowledge, skills and abilities, these internships do not qualify as vocational training within the meaning of the BBiG. However, this type of internship does qualify as an ‘other contractual relationship’ under BBiG section 26, which results in the application, in principle, of the legal provisions and principles applicable to the employment contract under section 10(2). This means that the intern who completes their internship during their studies is thus simultaneously in two legal relationships: on the one hand, as a student in a public law relationship with the university¹⁹ and, on the other, as an intern in a private law training relationship with the trainer. The two legal relationships complement each other without overlapping.

7.4 APPLICABLE PROVISIONS

As internships aim at acquiring ‘practical knowledge and experience in preparation for a vocational activity’, it comes as no surprise that, in principle, the BBiG applies to them; this means that, owing to BBiG section 10(2) mentioned previously, labour law is applicable, in principle. Moreover, in practice, internships may sometimes be employment relationships in disguise, in which labour case law applies.

7.4.1 Applicability of Rules on Vocational Training

According to BBiG section 26, ‘unless an employment relationship has been agreed’, most of the provisions of the Act²⁰ apply to ‘persons hired to acquire professional skills, knowledge, abilities or professional experience, other than vocational training’. This means that if the purpose of the contract is to provide training, most of the rules in the BBiG apply,²¹ even if the relationship does

¹⁹ This applies if the university is a public institution, as is usually the case in Germany.

²⁰ These concern the establishment of the training relationship, duties of the trainers and duties of the trainees, remuneration, and commencement and termination of the training relationship.

²¹ Section 26 contains three modifications of the applicable provisions of the law. In particular, the statutory probationary period of a maximum of four months (BBiG s 20(2)) can be contractually shortened.

not qualify as a vocational training relationship. According to case law, these ‘other contractual relationships’ are legal relationships in which knowledge or skills are imparted for the first time,²² that is, generally the training of interns and trainees.²³

As already mentioned, however, pursuant to BBiG section 10(2), the legal provisions and principles applicable to the employment contract apply to the contract,²⁴ ‘insofar as nothing to the contrary results from its nature and purpose and from this Act’. This means that labour law regulations apply to internships to a large extent.

7.4.2 Application of Labour Law as a Result of a Reclassification of the Internship

Apart from that, labour law comprehensively applies when the participants have apparently only agreed to an internship in order to avoid the application of labour law.²⁵ This is then reclassified into an employment relationship by the courts. In this respect, however, it is necessary to go a little further.

For decades there was no legal definition of the contract of employment in Germany. This only changed with the insertion of section 611a into the Civil Code (*Bürgerliches Gesetzbuch*, BGB). The provision has been in force since 1 April 2017. Section 611a(1) sentence 1 of BGB reads as follows: ‘The contract of employment obliges the employee to perform work in the service of another person, in accordance with instructions and in the personal capacity of the employee.’ In addition to the legal definition of the employment contract, other elements of the provision are of interest. According to BGB section 611a(1) sentence 5, an overall assessment of all circumstances must be made in order to determine whether an employment contract exists. Moreover, BGB section 611a(1) sentence 6 stipulates that the designation in the contract is irrelevant if the execution of the contractual relationship shows that it is an employment relationship. That is, it does not depend on how the parties describe the contractual relationship, but on how the legal relationship

²² Federal Labour Court, 12 February 2013, 3 AZR 120/11.

²³ Federal Labour Court, 19 June 1974, 4 AZR 43/73.

²⁴ It should be noted that some special regulations apply in light of the peculiarities of the vocational training relationship. For instance, termination of the vocational training relationship by giving notice is permitted only to a limited extent. In addition, modifications of the relevant legal provisions and principles of labour law may be necessary so that they are applicable to vocational training contracts. See eg Federal Labour Court, 12 February 2015, 6 AZR 845/13, n 41.

²⁵ See also Martin Maties, ‘Generation Praktikum – Praktika, Einfühlungsverhältnisse und ähnliche als umgangene Arbeitsverhältnisse?’ [2007] *Recht der Arbeit* 135.

is classified objectively according to its business content. If the contract is executed differently from that which was expressly agreed, then the execution is decisive. This is because the practical application allows conclusions to be drawn about which rights and obligations the parties actually assumed. This means that, if there is no real internship, interns can be classified as employees.

An employment relationship is distinguished from an internship on the basis of whether the training and learning purpose is in the foreground. If there is a comprehensive performance obligation with the typical elements of an employment relationship, the underlying relationship is a sham internship and thus a genuine employment relationship. Among the criteria to be applied are the duration and type of activity, who is responsible for the result of the work, performance of overtime, rights of instruction vis-à-vis other trainees, extension of the trainee contract, and permanent filling of a trainee position.²⁶

7.5 CONTRACT, RIGHTS AND DUTIES

7.5.1 Contractual Issues

Similar to any other contract under private law, an internship is based on a legal agreement between the contracting parties or, more precisely, an offer by one party and an acceptance by the other. The general requirements for an effective contract apply.

No particular form is required for the conclusion of an internship contract. However, there is an obligation to provide trainees with a written statement regarding their essential contractual conditions. According to the Act on Notification of Conditions Governing an Employment Relationship (*Nachweisgesetz*) section 2(1a)(1), ‘anyone hiring a trainee must immediately after conclusion of the internship contract, at the latest before commencement of the trainee’s work, set down the essential contractual conditions in writing, sign the transcript and hand it over to the intern’.²⁷

It should be noted that internship contracts are subject to judicial review if they constitute general terms and conditions. Thus, BGB section 307 is applicable among other things. According to this provision, terms of the contract are invalid if they unreasonably disadvantage a party to the contract contrary to the requirements of good faith, whereby unreasonable disadvantage may also result if the provision is not clear and understandable (BGB section 307(1)). In case of doubt, an unreasonable disadvantage is presumed to exist if a provision

²⁶ Burkard Pötter and Sura (n 2). See also section 7.5.3 in this chapter.

²⁷ Ulrich Preis, ‘Nachweisgesetz’ in Rudi Müller-Glöße, Ulrich Preis and Ingrid Schmidt (eds), *Erfurter Kommentar zum Arbeitsrecht* (21st edn, Beck 2021) s 2, n 27a.

‘cannot be reconciled with the fundamental ideas of the statutory regulation from which the deviation is made’, or if a provision ‘restricts essential rights or obligations arising from the nature of the contract to such an extent that the achievement of the purpose of the contract is endangered’ (BGB section 307(2)).

7.5.2 Duties of the Intern

The main duty of the intern can be derived from the legal definition of the trainee in MiLoG section 23. According to this definition, a trainee is someone who ‘undergoes a certain operational activity ... in order to acquire practical knowledge and experience in preparation for a vocational activity’. This means that trainees are obliged to perform activities corresponding to their counterparts. Generally, the provisions of labour law, including working time law, apply.

In addition to the main obligation, there are also secondary obligations of the intern. These have their basis in BGB section 241(2), which is generally applicable to contractual relationships. Pursuant to section 241(2), ‘an obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party’.

7.5.3 Duties of the company

7.5.3.1 General questions

For a company, an internship gives rise to two main obligations. First, there is an obligation to provide training and employment. This obliges the company to employ the trainee in real terms and to train them in order to enable them to acquire the corresponding vocational skills, knowledge, abilities and professional experience. Second, there is an obligation to remunerate the intern for their work.

In addition to the main duties, companies have secondary duties. In particular, the intern is subject to protective duties. These are partly specified in the Act on Occupational Safety and Health (*Arbeitsschutzgesetz*, ArbSchG), section 1(1) sentence 1 of which seeks to ensure and improve the safety and health protection of employees at work through occupational health and safety measures. According to ArbSchG section 3(1), the employer is obliged to adopt the necessary occupational health and safety measures, taking into account the circumstances affecting the safety and health of employees at work. In addition, it must review the effectiveness of the measures taken and, if necessary, adapt them to the changed circumstances. All this also applies to internship providers.

One of the biggest challenges, indeed probably the biggest, is to ensure that interns receive fair pay. To tackle this problem, courts and legislators have taken different approaches.

7.5.3.2 Invalidity of the agreed remuneration and presumption of reasonable remuneration

According to BGB section 612(1), remuneration is deemed to be silently agreed upon if the service can only be expected to be provided for remuneration under the circumstances. The purpose of this provision is to ensure that each service of monetary value leads to a corresponding right to remuneration.²⁸ This also applies to interns. Accordingly, the Federal Labour Court decided that an intern who performs services of a higher value than those which they were required to perform according to the internship contract can demand remuneration corresponding to the higher value of the service.²⁹

In principle, BGB section 612(1) applies if an agreement about the remuneration of the promised services is missing or the agreement about the gratuitousness of the services to be provided is null and void owing to immorality (BGB section 138).³⁰ In the Court's view, if the parties agreed to complete an unpaid internship in a legally unobjectionable manner, it is still possible, in applying section 612(1), that there is an obligation to pay remuneration for certain services. The Federal Labour Court has explicitly stated in this respect:

According to the settled case law of the Court, the provision therefore applies (*mutatis mutandis*) if, for example, higher-quality services are provided beyond the scope of an employment contract at the instigation of the employer or with his approval, for which there is no remuneration provision. In these cases, the contractual remuneration regulation only covers the services owed, the remuneration of the non-contractual, higher-value work is performed in accordance with section 612. The same applies if a trainee performs services of higher value than those which he has to perform during the traineeship.³¹

As a result, in this case the Court ordered the defendant to pay remuneration of €8000, even though an unpaid internship had been agreed between the parties.

²⁸ Federal Labour Court, 10 February 2015, 9 AZR 289/13.

²⁹ *Ibid.*

³⁰ With regard to the latter, see eg Federal Labour Court, 18 March 2014, 9 AZR 694/12.

³¹ Federal Labour Court, 10 February 2015, 9 AZR 289/13, n 14. See also Federal Labour Court, 7 July 1993, 5 AZR 488/92.

7.5.3.3 Reclassification of an internship as an employment relationship

Occasionally, the courts go one step further and ask whether an internship in reality should not be classified as an employment relationship.

An illustration of the problem is a case that was decided by the Regional Labour Court Berlin-Brandenburg.³² The plaintiff studied the subject ‘fashion journalism’ and applied for a position as an ‘editorial intern’ at a publishing house shortly before completing her studies. The participants concluded an ‘internship contract’. The contract provided for the payment of a monthly remuneration of €400. The plaintiff filed a lawsuit claiming remuneration equal to an editor’s wage less the internship remuneration paid. The Court began its reasoning with the statement that a plaintiff is required to present evidence when claiming that they worked under an employment relationship rather than a traineeship. However, the Court referred to the principles of a graded burden of demonstration and proof. According to those principles, the burden of presentation and proof is transferred to the defendant if objective circumstances exist which suggest the existence of an employment relationship.

Applying these principles, the Court then affirmed the existence of an employment relationship in the present case. First, it argued that the term ‘internship contract’ is not clear, since an ‘internship’ can be carried out both as an employment relationship and as a non-employment relationship. Persons termed ‘interns’ in the contract could therefore also be employees. In addition, the Court pointed out that the written contract contained ‘typical employee obligations’. The plaintiff was obliged to work ‘daily’ and for ‘at least’ eight hours in the defendant’s branch; to follow the defendant’s instructions; and to prove possible incapacity for work by presenting a certificate of incapacity for work. Her duties were specifically described (‘Supervision and implementation of editorial projects, research, development of topics’). ‘Remuneration’ was also agreed. The leave regulation was ‘typical for employees’ in the Court’s view. The written contract also contained the defendant’s training obligations. In the Court’s opinion, however, these did not indicate the predominance of the training purpose. For example, the contract referred to a ‘training plan’. However, this ‘training plan’ had not been attached to the contract. It was therefore, as the Court remarked, not even ‘on paper’. A document which the defendant only submitted in the statement of grounds of appeal did not meet the requirements for a ‘training plan’. In the Court’s view, a training plan must determine ‘which learning steps are to be taught in which time through training, by whom, with which methods, in which contexts and at which workplace’.³³ The intended duration of the contract also indicated an employment

³² State Labour Court Berlin-Brandenburg, 20 May 2016, 6 Sa 1787/15.

³³ Ibid n 55.

relationship. According to both the case law and the definition in MiLoG section 22(1)(2), an internship is ‘temporary’. However, a one-year full-time internship for a graduate of fashion journalism at a publishing house was no longer ‘temporary’. Accordingly, in that case the Court affirmed the existence of an employment relationship. It summarized its findings, abstractly, as follows: ‘Internships of graduates of a relevant course of study who have already completed their studies and who only serve to enter the labour market, but who are predominantly associated with the usual work tasks of employees, are fictitious internships and employment relationships.’³⁴

As far as the amount of the remuneration demanded by the plaintiff was concerned, the Court relied on BGB section 138.³⁵ According to section 138(1), ‘a legal transaction which is contrary to public policy is void’. Under section 138(2),

in particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

In accordance with the case law of the Federal Labour Court, the Court assumed that there is a ‘clear disproportion’ if the value of the benefit is (at least) double the value of the consideration. In addition to the objective criteria, the courts generally demand the existence of a ‘reprehensible attitude’ in order to apply section 138. In the present case, the Court stated, however, that a particularly gross disproportion between performance and consideration generally leads to the assumption of a reprehensible attitude on the part of the beneficiary. In this connection, the Court also dealt with the defendant’s objection that these internships were extraordinarily widespread. The Court stated:

The alleged thousand-fold prevalence of internship relationships such as that of the plaintiff does not eliminate any reprehensible attitude of the defendants, but only makes them more common. The newspaper article ‘Generation Praktikum’ in 2005, the advancement of the term to ‘Word of the Year 2006’ and the associated socio-political discussion – ultimately culminating in § 22 (1) sentence 2, 3 MiLoG 2014 – show that a reference to the customary form of corresponding contracts even for a contract in 2013/2014 is only an expression of a fictitious naivety.³⁶

³⁴ Ibid n 43.

³⁵ See also State Labour Court Baden-Württemberg, 8 February 2008, 5 Sa 45/07.

³⁶ State Labour Court Berlin-Brandenburg, 20 May 2016, 6 Sa 1787/15.

Also, the Court did not accept that the defendant may have made it easier for the plaintiff to enter the profession by offering the plaintiff a bogus internship. This did not eliminate the accusation of a reprehensible attitude, either: 'The exploitation of a bad labour market situation for journalists does not entitle them to pay only about 13% of the usual remuneration.'³⁷

In conclusion, the Court stated:

The fact that the applicant did not claim a higher remuneration during the traineeship does not constitute a legitimate expectation on the part of the defendant, nor do particular circumstances render the applicant's conduct contrary to good faith. The defendant dictated the terms of the contract. As a newcomer to the profession, the plaintiff was in a predicament. It is typical of a sham internship that a trainee does not demand higher remuneration during the 'internship'. This is due to legal ignorance and/or – if with legal ignorance – in the hope that a formal employment relationship will be offered after the 'internship' or at least a good internship certificate will facilitate the further professional career. The defendant tried to take advantage of this. The defendant is therefore not worth protecting.³⁸

The Court applied BGB section 612(1) and awarded the plaintiff the collectively agreed wage of €3000.

7.5.3.4 Statutory minimum pay

The legislature has also addressed the problem of inadequate remuneration of interns. The statutory minimum wage, which has been in force in Germany since 2014, not only applies to employees, but has also been extended to interns or, to be precise, to a certain circle of interns.

According to the Minimum Pay Act (*Mindestlohngesetz*) section 22(1)(1), the Act applies to employees. However, under section 26(1)(2) of the Act, interns within the meaning of the BBiG section 26 are regarded as employees within the meaning of the Act unless they

1. undertake an obligatory internship on the basis of a provision under school law, a training regulation, a provision under higher education law or within the framework of training at a legally regulated university of cooperative education, 2. complete an internship of up to three months as an orientation for vocational training or study,³⁹ 3. complete an internship of up to three months to accompany a vocational or higher education course, if they have not previously had such a traineeship relationship with the same trainer, or 4. participate in an initial qualification in

³⁷ Ibid n 81.

³⁸ Ibid n 88.

³⁹ According to Federal Labour Court, 30 January 2019, 5 AZR 556/17, interns are not entitled to the statutory minimum wage if they perform the internship for orientation purposes for vocational training or at the beginning of a course of study and the duration does not exceed three months.

accordance with § 54a of the Third Book of the Social Code or in vocational training preparation in accordance with sections 68 to 70 of the Vocational Training Act.

According to section 22, the statutory minimum wage is thus generally extended to trainees. However, the legislature did not want to restrict the use of internships. Accordingly, four exceptions are provided to avoid undermining the willingness of companies to offer internships. The contractual partner of the trainee bears the burden of proof and presentation of evidence for the existence of such exceptional cases.

The extension of the minimum wage entitlement to trainees is controversial from a legal policy point of view. Moreover, constitutional concerns have been raised against the regulation in the labour law literature. It is asserted in this respect, among others, that the law violates article 3 of the Constitution, which guarantees equality before the law by equating (particular) traineeships with employment relationships for the purpose of the minimum wage.⁴⁰ These concerns did not prevail, however.⁴¹ The prevailing opinion asserts instead that both the trainee and the employee perform instruction-dependent work. The training purpose and thus the undisputed distinguishing feature was an internal fact which is objectively difficult to prove and which in the past had led to considerable problems of presentation of evidence and proof to identify abusive fictitious internships. As a consequence, internships and employment relationships are so close that the legislature is entitled to treat them equally in certain respects.⁴²

7.5.3.5 Other obligations

Other obligations on the company arise from labour laws which, as mentioned previously, in principle apply to internships as well.

The Continued Remuneration Act (*Entgeltfortzahlungsgesetz*) applies to employees and salaried employees as well as to those employed for vocational training. That is, via section 26, BBiG section 10(2) also applies to internships covered by the BBiG. This includes section 3(1) sentence 1 of the Act. According to this provision, an employee is entitled to continued payment of remuneration in the event of illness up to a duration of six weeks, if they are prevented from performing their work as a result of the illness, without any fault on their part.

⁴⁰ See Christian Picker and Philipp Sausmikat, ‘Ausnahmsweise Mindestlohn?’ [2014] *Neue Zeitschrift für Arbeitsrecht* 942.

⁴¹ See Greiner (n 9) s 22, n 6ff.

⁴² See Stefan Greiner, ‘Die Praktikantenregelung in § 22 MiLoG’ [2016] *Neue Zeitschrift für Arbeitsrecht* 594, 596.

As already mentioned, the Act on Occupational Safety and Health (*Arbeitsschutzgesetz*) also applies to interns. The Youth Employment Protection Act (*Jugendarbeitsschutzgesetz*), which contains regulations for the protection of minors, applies as well. Accordingly, the special working time regulations of this law are applicable.

Finally, pursuant to section 6(1) number 2 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), the Act also applies to ‘those employed for their vocational training’. This term is used to make it clear that not only the training relationships subject to the BBiG are included, but also retrainees, volunteers, interns and so on who are hired ‘outside an employment relationship in order to acquire vocational skills, knowledge or experience’ (within the meaning of BBiG section 26).⁴³

7.5.4 Dismissal Protection

For internships within the meaning of BBiG section 26, section 22 of the law will apply *mutatis mutandis*. Pursuant to BBiG section 22(1), the vocational training relationship may be terminated at any time without notice during the probationary period.⁴⁴ After the probationary period, the vocational training relationship may only be terminated: (1) for an important reason without observing a period of notice, or (2) by trainees with a period of notice of four weeks if they wish to give up vocational training or train for another occupation (BBiG section 22(2)). Notice of termination must be given in writing and, in the cases referred to in subsection 2, must state the reasons for the termination (BBiG section 22(3)). A termination for an important reason is invalid if the facts on which it is based have been known to the person entitled to the termination for longer than two weeks (section 22(4) sentence 1).⁴⁵

It should also be noted that internships are necessarily fixed-term contracts. The rules on fixed-term employment contracts under the Part-Time and Fixed-Term Contracts Act (*Teilzeit- und Befristungsgesetz*) apply to them.

7.5.5 Collective Bargaining

Trade unions and employers or, much more frequently in Germany, employers’ associations can conclude collective agreements for employees.⁴⁶ Pursuant

⁴³ See Schlachter (n 3) s 6, n 2.

⁴⁴ BBiG s 20(1) allows a probationary period of one month for an apprenticeship.

⁴⁵ If a planned conciliation procedure is initiated before an out-of-court body, this period shall be suspended until its termination (BBiG s 22(4) sentence 2).

⁴⁶ According to s 12a of the Act on Collective Agreements (*Tarifvertragsgesetz*), these agreements can also be concluded for quasi-employees (*Arbeitnehmerähnliche*).

to BBiG section 10(2), this authority to conclude collective agreements also applies to trainees.⁴⁷ For other non-employees, the bargaining parties have no legislative power. For example, they cannot specify a minimum remuneration for students in a study internship (even at a private university).⁴⁸ Consequently, collective agreements may be applicable to traineeships. It should be noted that there are independent collective agreements for internships, for example, for interns in the public sector.⁴⁹ The personal scope of the collective agreement is always decisive. Every individual collective agreement needs to be examined to determine whether it also covers apprenticeships, including internships.⁵⁰

7.6 SUMMARY

In practice, internships (and traineeships) often cause difficulties in defining boundaries. In addition, different types of internships follow different rules. In principle, the regulations that apply to vocational training apply to internships. In this way, it is also possible to achieve a far-reaching applicability of labour law regulations, as these are also generally applicable to vocational training relationships. In addition, it should be noted that internships must be classified as employment relationships if they have only been completed as a pretence. This then leads to the full application of labour law and has the consequence, among others, that the employer of the intern is obliged to pay the remuneration which they owe to an employee, for example, on the basis of a collective agreement. Apart from all this, it should be noted that some years ago the legislature introduced a general statutory minimum wage, which also applies to a large extent to interns.

⁴⁷ Trainees also enjoy the right to strike: see eg Federal Labour Court, 12 September 1984, 1 AZR 342/83.

⁴⁸ See Peter Löwisch and Volker Rieble, *Tarifvertragsgesetz* (4th edn, Beck 2017) s 2, n 261.

⁴⁹ 'Tarifvertrag für Praktikantinnen und Praktikanten – Öffentlicher Dienst' (*Öffentlicher Dienst*, 2 October 2018), <https://www.oeffentlichen-dienst.de/auszubildende/312-praktikanten/44-tarifvertrag-praktikant.html>, accessed 30 March 2021.

⁵⁰ See Schade (n 11) 97.

8. The law and regulation of internships in South Africa

Mahlatse Innocent Maake-Malatji

8.1 INTRODUCTION

In South Africa, creating jobs and reducing the unemployment rate are key economic and social challenges.¹ Although higher education is posited to be essential for economic and social development,² graduates still face challenges when transitioning from education to work. Thus, graduates do not automatically find jobs immediately after completing their studies.

Historically, black people in South Africa were disadvantaged by the apartheid government and colonialism, which barred them from attaining a meaningful education and prevented them from acquiring the skills they needed to thrive in a changing economy.³ In addition, poverty has a great impact on individuals' lives and can undermine individual success in the long run. This continues to feed into the struggle to achieve sufficient financial stability to pursue higher education and, unfortunately, those who do receive an education will still struggle to get jobs. The government attempts to counter this through initiatives such as the National Student Financial Aid Scheme, which assists students from disadvantaged families to pay for their tuition, food and accommodation at colleges and universities.

¹ Murray Leibbrandt, Ingrid Woolard, Hayley McEwen and Charlotte Koep, *Employment and Inequality Outcomes in South Africa* (Southern Africa Labour and Development Research Unit, University of Cape Town 2010).

² Mpho Phago and Lebo Thwala, *Baseline Study on Students' Perceptions and Attitudes Towards the HWSETA Postgraduate Research Bursary Programme* (HWSETA 2015), <http://www.hwseta.org.za/download/baseline-study-on-students-perceptions-and-attitudes-towards-the-hwseta-postgraduate-research-bursary-programme-full-paper/>, accessed 30 March 2021.

³ Siphokazi Koyana, *Final Report on the Internship Baseline Study* (South African Graduates Development Association 2013) 28, https://www.dphu.org/uploads/attachements/books/books_3612_0.pdf, accessed 30 March 2021.

Although for some time South Africa has been experiencing growth in its graduate labour force, the graduate unemployment rate has also been on the rise: the dilemma being that there are more graduates and fewer jobs.⁴ This is doubly problematic as it wastes scarce human capital and is detrimental to the economy in the long run.⁵ Although employers have embarked on a plethora of strategies to assist unemployed individuals to attain skills for the workforce at all levels,⁶ there is no evidence of their success.

Internships were initiated to alleviate the shortage of skills within specific fields⁷ and to reduce the high unemployment rate. Since internships are subject to different terms and conditions in different sectors, interns face a variety of challenges in their employment journey, even though in particular cases they are regarded as employees by the law.⁸ Interns may render their services for no compensation or for only very low pay, which does not cover their cost of living and so does nothing to alleviate poverty.

In order to combat graduate unemployment, internships have become one of the ways in which young people can be offered structured entry-level positions in their chosen occupation or profession.⁹ Nonetheless, for some graduates, internship programmes are no panacea as opportunities to progress beyond them and into employment vary. Graduates are also commonly treated differently as a result of, for example, their Grade Point Average¹⁰ and/or

⁴ The unemployment rate of graduates has risen dramatically from 4.4 per cent in the first quarter of 2011 to 7.9 per cent in the first quarter of 2019. See Statistics South Africa, *Quarterly Labour Force Survey* (Statistical release P0211, Stats SA 2019), <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2019.pdf>, accessed 30 March 2021.

⁵ Faith Oluwajodu, Derick Blaauw, Lorraine Greyling, Ewert PJ Kleynhans, 'Graduate Unemployment in South Africa: Perspectives from the Banking Sector' (2015) 13 SA J Hum Res Manage art 656.

⁶ Koyana (n 3) 29.

⁷ These fields include information technology and telecommunications; quality and regulatory professionals; and business, management and economics. See 'Department of Higher Education and Training, Skills Development Act 97/1998: National List of Occupations in High Demand, 2018', Republic of South Africa, *Government Gazette*, vol 636, no 41728 (22 June 2018), <http://www.dhet.gov.za/Information%20Systems%20Coordination/GAZETTE.pdf?platform=hootsuite>, accessed 30 March 2021.

⁸ See eg *Andreanis v Department of Health* (2006) 5 BALR 461, discussed later in this chapter.

⁹ South African Board for People Practices (SABPP), *Internships: A Guide for Employers* (SABPP 2014) 2–4, <https://www.workinfo.com/images/Attachments/SABPP/Internships-A-Guide-for-Employers-June2014.pdf>, accessed 30 March 2021.

¹⁰ Ruth Imose and Larissa Barber, 'Using Undergraduate Grade Point Average as a Selection Tool: A Synthesis of the Literature' (2015) 18 *Psychologist-Manager J* 1.

institutional preference.¹¹ This chapter mainly focuses on black graduates, as it has been shown that they suffer from higher unemployment than any other race.¹² The way in which internships are regulated affords them no assistance. Consequently, social justice is still not achieved in this regard.

8.2 REGULATING INTERNSHIPS AND GRADUATE CHALLENGES

The terms 'intern' and 'internship' have been defined in various ways, often depending on the field in which they are used. An intern is usually understood to be 'a person who is employed at an entry-level position in an organisation in a structured programme to gain practical experience in [a] particular occupation or profession'.¹³ A typical example can be seen in the guidelines published by Stellenbosch University, which describe an internship as 'a planned, structured and managed programme that provides work experience for an agreed period of time',¹⁴ which may last up to two consecutive years. An internship has also been described as 'career specific work experience that one undertakes during/after one's studies in order to gain the practical experience required to operate and make a positive contribution with respect to the career path one eventually pursues'.¹⁵

¹¹ In a qualitative study by Elza Lourens and Magda Fourie-Malherbe, one of the participants stated: 'if I can choose only 5 candidates to interview, I will prefer to choose the candidates from the more established institutions like UCT and Stellenbosch'. Elza Lourens and Magda Fourie-Malherbe, *From Graduate to Employee: Examining the Factors that Determine the Professional Success of Graduates from Disadvantaged Backgrounds* (Cape Higher Education Consortium 2017) 43, <http://www.chec.ac.za/files/2017-06-30%20Final%20CHEC%20research%20report%20with%20cover%2030%20June%202017.pdf>, accessed 30 March 2021.

¹² Nombuelo Precious Mncayi, 'The Determinants of Employment Status of Young Graduates from a South African University' (Master's thesis, North West University 2016), https://pdfs.semanticscholar.org/87dc/f8da9f500df106d71cc92838361466c5dfe9.pdf?_ga=2.126369229.1312254481.1584645323-433629486.1584645323, accessed 30 March 2021.

¹³ SABPP (n 9) 3. The definition includes graduates and school leavers, but not work placement trainees. See also Stellenbosch University, *Guidelines for Internships at Stellenbosch University* (Stellenbosch University 2018), <https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/Documents-Dokumente/Policies-Beleide/Staff%20Development/PD0328-%20Guidelines%20for%20internships%20at%20Stellenbosch%20University.pdf>, accessed 30 March 2021.

¹⁴ Stellenbosch University, *ibid* 2.

¹⁵ SA Works, 'FAQ SA Works' (*SA Works*, 2011), <http://www.saworks.co.za/faq.html>, accessed 30 March 2021.

8.2.1 The South African Employment Law on Internships

The transition of graduates from education to employment requires skill development within different professions. South Africa has enacted various pieces of legislation to regulate the workplace skills development of South African citizens. At the forefront is the Skills Development Act 97 of 1998, the main purpose of which is to develop the skills or human resources of the South African workforce: ‘to improve the quality of life of workers, their prospects of work and labour mobility’.¹⁶ The Employment Equity Act 55 of 1998 aims to eliminate unfair discrimination¹⁷ and to implement affirmative action measures in order to address employment discrimination.¹⁸

In addition, the Black Economic Empowerment Act 53 of 2003 encourages companies to increase the numbers of their black employees, managers, shareholders and service providers.¹⁹ This Act was intended to support the Black Economic Empowerment initiative, the aim of which is to empower the majority black people in South Africa, who in the past were suppressed by the apartheid government from participating in the economic affairs of the country.²⁰ However, the initiative has been subject to criticism.²¹

There are also policies to support the development of skills, such as the National Skills Fund, with a mandate of encouraging companies to pay skills levies, which they can later claim back if they can establish that the employees were trained according to set targets. In addition, there is a National Skills Development Strategy, the purpose of which is to improve the effectiveness and efficiency of the skills development system.²² One scheme that was designed to alleviate graduate unemployment is the Joint Initiative for Priority Skills Acquisition.²³ It proposes the implementation of special training programmes, bringing back retirees or expatriates to work in South Africa and attracting new

¹⁶ Skills Development Act 97 of 1998 s 2(1)(a). In addition, the Skills Development Levies Act 9 of 1999 provides for the imposition of a skills development levy.

¹⁷ See Employment Equity Act 55 of 1998, ch 2.

¹⁸ Ibid ch 3.

¹⁹ Koyana (n 3).

²⁰ Elvin Shava, ‘Black Economic Empowerment in South Africa: Challenges and Prospects’ (2016) 8 J Econ Behav Stud 161.

²¹ Ibid. See also Alec Hogg, ‘Gerhard Papenfus: BEE – A South African Dilemma’ (*BizNews*, 6 March 2015), <https://www.biznews.com/thought-leaders/2015/03/06/bee-south-african-dilemma>, accessed 30 March 2021; Anthea Jeffery, ‘BEE is Flawed and should be Scrapped’ *Mail & Guardian* (Johannesburg, 18 January 2013), <https://mg.co.za/article/2013-01-18-bee-is-flawed-and-should-be-scrapped/>, accessed 30 March 2021.

²² Koyana (n 3).

²³ Oluwajodu and others (n 5).

immigrants.²⁴ The South African Board for People Practices also encourages all employers, whether large or small, to create at least one internship and develop at least one young person for the future of South Africa.²⁵

In January 2018, the President of the Republic of South Africa, Matamela Cyril Ramaphosa, launched a programme aimed at developing youth, known as the Youth Employment Service. This initiative was implemented to reduce the high rate of unemployment among, and to afford necessary work skills to, young people in South Africa, in partnership with businesses and organized labour.²⁶ In his speech, he indicated that: ‘Another pillar of our national effort to creating jobs for our young people was ensuring the preparation for work readiness. We need sustainable programmes that will prepare the youth for first-time employment.’²⁷

Despite all these initiatives, differing approaches across sectors present a challenge in the regulation of internships. In some instances, an individual intern may satisfy all the legislative criteria of being an employee, including being under the control of the employer, and so qualify for the benefits accorded to those who are employees or in an employment relationship. For instance, in some circumstances, it has been shown that an internship may, according to the employer, exist for more than two years. For instance, take *Andreanis v Department of Health*, where an intern who was dismissed after working at a hospital for four years successfully argued that, despite being an intern, she qualified as an employee.²⁸ The applicant had been an intern in a state hospital for a period of four consecutive years, and she was then dismissed. The court ruled in her favour and held that she qualified as an employee by application of section 213 of the Labour Relations Act 66 of 1995 (LRA). Her dismissal was regarded as unfair and she was reinstated with full back pay.

The LRA provides guidelines on who is an employee.²⁹ However, in some circumstances, for example where a contract is void, an individual may not

²⁴ Kalie Pauw, Haroon Bhorat, Sumayya Goga, Liberty Ncube, Morne Oosthuizen and Carlene Van Der Westhuizen, ‘Graduate Unemployment in the Context of Skills Shortages, Education and Training: Findings from a Survey’ (2006) DPRU Working Paper 06/115, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=961353, accessed 30 March 2021.

²⁵ SABPP (n 9).

²⁶ Amanda Khoza, ‘Ramaphosa Launches YES Initiative to Address Youth Unemployment’ (*fin24*, 27 March 2018), <https://www.fin24.com/Economy/ramaphosa-launches-yes-initiative-to-address-youth-unemployment-20180327>, accessed 30 March 2021.

²⁷ Ibid.

²⁸ *Andreanis* (n 8).

²⁹ See Republic of South Africa, ‘Code of Good Practice: Who Is an Employee’ (notice 1774, *Government Gazette*, no 29445, 1 December 2006).

receive all the benefits of being an employee. Take, for instance, *Kylie v CCMA*,³⁰ in which a sex worker was employed by a massage parlour as an employee even though prostitution is illegal. In that case, the Labour Appeal Court stated that, despite the wrongful nature of the contract, sex workers are entitled to the benefit of the constitutional right to fair labour practices. However, while sex workers can be employees, it would be contrary to public policy for the courts to grant them any relief in respect of a claim for unfair dismissal.³¹ Most importantly, a contract of employment exists where both parties to an employment contract can be identified and the true nature of the contract is determined.

In some cases, the courts are hesitant to conclude that an intern or trainee is an employee in accordance with any applicable employment law. In *Mokone v Highveld Steel and Vanadium*,³² the arbitrator found that the applicant had only occasionally done some work for the respondent while he was completing studies financed by the respondent, and thus the arbitrator found that the applicant had not been an employee in terms of the LRA.³³

Employers have been warned that 'hiring interns as a way to get free extra help in the office [is] venturing down a slippery slope, which may lead to the matter being referred to the Commission for Conciliation, Mediation and Arbitration (CCMA)'.³⁴ This is because the definition of 'employee' in section 213 of the LRA is broad and applies not only to any person, other than an independent contractor, who works for remuneration but also to 'any other person who in any manner assists in carrying on or conducting the business of an employer'.³⁵ Indeed, in a case concerning an articulated law clerk, the Labour Court of South Africa established that, even where training is the main purpose of a contract, this is not inconsistent with the existence of an employment relationship under the LRA.³⁶ With similar reasoning, many other interns would be regarded as employees under the LRA.

³⁰ (2008) 29 ILJ 1918 (LC). The Court held that, while it would be inappropriate for a sex worker to be reinstated or compensated for a dismissal without a valid reason, they should nevertheless be accorded a hearing before dismissal.

³¹ *Ibid.*

³² (2005) 12 BALR 5.

³³ See also Paul Benjamin and Urmilla Bhoola, 'Subordination, Parasubordination and Self-Employment: A Comparative Study of Selected African Countries' in Giuseppe Casale (ed), *The Employment Relationship: A Comparative Overview* (Palgrave Macmillan 2011) 116.

³⁴ Dianne Shaddock Austin, 'You Must Tread Cautiously When You Use Unpaid Interns' (*HR Pulse*, 4 April 2013), <http://www.hrpulse.co.za/tech2/opinion/229470-you-must-tread-cautiously-when-you-use-unpaid-interns>, accessed 30 March 2021.

³⁵ Labour Relations Act 66 of 1995, s 213(a), (b).

³⁶ *Mashaba v Cuzen & Woods Attorneys* (1998) 19 ILJ 1486 (LC), [37].

The Basic Conditions of Employment Act 1997 (BCEA) also has a wide scope applying not only to ‘all employees and employers’, defined in the same way as in section 213 of the LRA, but also to ‘persons undergoing vocational training except to the extent that any term or condition of their employment is regulated by the provisions of any other law’.³⁷ Therefore an intern, whether regarded as an employee as legislatively defined or undergoing vocational training, provided the terms and conditions of employment of the latter are not regulated by other laws, has the right to be compensated by the employer under the BCEA. In addition, since 2002, both Acts contain provisions which put in place a presumption of employment status where a person satisfies at least one of a number of specified criteria, including their work being ‘subject to the control or direction of another person’.³⁸ This presumption of employment applies regardless of the form of the contract and is designed to give effect to the International Labour Organization’s (ILO’s) Recommendation on the Employment Relationship No 197.³⁹

Alternatively, employers may benefit from taking on interns for skills development in that salaries and training expenses for black interns may be included in the expenditure measured for Broad-Based Black Economic Empowerment points.⁴⁰ Employers are also obliged to pay a skills levy, which is used to fund skills development.⁴¹ However, these initiatives cannot assist the whole populace of unemployed graduates without skills. The Department of Labour, which administers the Skills Development Act, established the Sector Education and Training Authorities (SETAs), which pay grants to employers to fund internships. While SETAs are institutionally empowered to effect change, they ‘lack capacity to conduct demand forecasting to inform sectoral and national strategies’, and this has generally been ‘recognized as a major weakness’.⁴²

³⁷ Basic Conditions of Employment Act 1997, s 3(1), (2). See also Labour Relations Act, ss 213, 200A.

³⁸ Labour Relations Act, s 200A; Basic Conditions of Employment Act, s 83A.

³⁹ See Republic of South Africa, ‘Code of Good Practice’ (n 29). See also *Kylie v CCMA* (2010) 7 BLLR 705 (LAC).

⁴⁰ ‘Department of Trade and Industry, Broad-Based Black Economic Empowerment Act 53/2003: Code of Good Practice’, Republic of South Africa, *Government Gazette* (no 36928, 11 October 2013). See also Employment Tax Incentive Act 26 of 2013.

⁴¹ Keep Climbing, ‘How Much Internships Pay’ (7sundays, 16 September 2016), <http://7sundays.co.za/KeepClimbing/2016/09/16/how-much-are-interns-paid/>, accessed 30 March 2021.

⁴² Glenda Kruss, Angelique Wildschut, Dean Janse van Rensburg, Mariette Visser, Genevieve Haupt and Joan Roodt, *Developing Skills and Capabilities through the Learnership and Apprenticeship Pathway System: Synthesis Report* (Human Sciences Research Council 2012) 5.

8.2.2 Challenges Faced by Graduates

The nature of internships varies across companies; however, most internships are unpaid, especially in non-government organizations, and most work takes place in the public sector.⁴³ Owing to the high demand for the acquisition of necessary skills and work experience by graduates, some do not object to working without pay. This is arguably the case even in other countries, as a route chosen by either the graduate or the employer. For example in the USA, the rapid increase in unpaid internships has prompted arguments both for and against them based on their impact on the interns.⁴⁴ In South Africa ‘low- or no-pay “creative internships” are proliferating at an astonishing rate – something that has industry veterans, educators and savvy graduates questioning the ethics behind this trend’.⁴⁵ Despite this, most interns believe that internships are attractive and that they assist an individual to gain a foothold in their chosen industry, enhancing their résumé and, most importantly, enabling them to acquire soft skills relating to business etiquette, conflict resolution and teamwork. Many believe, therefore, that it is an individual’s decision whether to take a paid or unpaid internship.⁴⁶

Several problems associated with internships raise issues relating to their regulation. The period for which an internship extends has proven to be a problem. Normally, internships last anything from three months to two years; but there are exceptions.⁴⁷ Many interns must accept unpaid internships for the purposes of gaining work experience. This is problematic in that recent graduates must still pay for their fares to work, food at work and other incidental expenses. For those fortunate enough to be paid, the amount is often not adequate to cater for their needs and newly adopted lifestyles.

Successful transitioning from education into the labour market is critical in a young person’s life, and an inability to do so may have long-term socio-economic effects.⁴⁸ Yet success in this regard has become increasingly

⁴³ SA Works (n 15).

⁴⁴ Nicolas A Pologeorgis, ‘Unpaid Internship Impact on the Labor Market’ (*Investopedia*, 25 June 2019), <https://www.investopedia.com/articles/economics/12/impact-of-unpaid-internships.asp>, accessed 30 March 2021.

⁴⁵ Staff Writer, ‘Are South African Interns Being Taken Advantage Of?’ (*Businesstech*, 2 March 2019), <https://businesstech.co.za/news/business/301968/are-south-african-interns-being-taken-advantage-of/>, accessed 30 March 2021.

⁴⁶ Staff Writer, ‘Paid vs Unpaid Internships in South Africa’ (*Businesstech*, 4 September 2016), <https://businesstech.co.za/news/banking/135439/paid-vs-unpaid-internships-in-south-africa/>, accessed 30 March 2021.

⁴⁷ *Andreanis* (n 8).

⁴⁸ ILO, ‘Global Commission on the Future of Work’ (ILO Issue Brief No 2, 17 February 2018).

challenging for most black graduates, as they are still disadvantaged when it comes to acquiring employment in South Africa: thus by the second quarter of 2019, Stats SA found that 46 per cent of black African people were unemployed, compared with 9.8 per cent of white people.⁴⁹ Historically, the income gap between the employed and the unemployed has been as much a determinant of South Africa's high level of inequality as the gap between low and high earnings.⁵⁰

Consequently, for most black graduates, internships have not fulfilled the promise of being a step towards employment but instead have, at least anecdotally, dragged them backwards, as they form part of a ladder that can be non-functional at any point. After progressing to internships, black graduates often then fall back to being unemployed at the end of their internships.⁵¹ The difficulty of establishing themselves in the world of work kicks in soon after completion of their studies, a cause for depression among graduates. Consequently, graduates take on any opportunity that presents itself in order to gain work experience (even if the internship is not aligned with their field of study). This has an impact on graduates' preparation for entry into the real world of work as employees.

In South Africa, the issue of inequality at work also plays an important role in the labour market and regulation of employment.⁵² According to the ILO, by 2010 South Africa had the highest unemployment rate globally⁵³ and it was still the highest, at 29.1 per cent, in December 2019.⁵⁴ Job seeking in the form of internships, traineeships or vocational work anecdotally can undermine the

⁴⁹ Dennis Webster, 'Unemployment in South Africa Is Worse than You Think' *Mail & Guardian* (Johannesburg, 5 August 2019), <https://mg.co.za/article/2019-08-05-unemployment-in-south-africa-is-worse-than-you-think/>, accessed 30 March 2021. See also Mncayi (n 12).

⁵⁰ Murray Leibbrandt, Ingrid Woolard, Arden Finn and Jonathan Argent, 'Trends in South African Income Distribution and Poverty since the Fall of Apartheid' (2010) OECD Social, Employment and Migration Working Paper No 101, <http://dx.doi.org/10.1787/5kmms0t7p1ms-en>, accessed 30 March 2021.

⁵¹ Zipho Majova, 'Black Graduates are Faced with the Bitter Choice of Either Working for Free, for the Bare Minimum, or Not Working at All' (*Daily Maverick*, 30 July 2018), <https://www.dailymaverick.co.za/opinionista/2018-07-30-from-degree-to-internship-to-unemployment-the-life-of-a-black-graduate/>, accessed 30 March 2021.

⁵² Trading Economics, 'South Africa Unemployment Rate' (2 December 2019), <https://tradingeconomics.com/south-africa/unemployment-rate>, accessed 30 March 2021.

⁵³ ILO, *Brazil: An Innovative Income-Led Strategy* (ILO 2011). See also Nicoli Nattrass, 'Meeting the Challenge of Unemployment?' (2014) 652 *Annals Am Academy Pol & Soc Sci* 87.

⁵⁴ Countryeconomy.com, 'Unemployment', <https://countryeconomy.com/unemployment>, accessed 30 March 2021.

development of skills of new graduates, especially in cases where graduates undertake work not related to their field of study.

Lack of technological skills also presents a barrier to the successful transition of graduates to the world of work. The development of educational institutions is the key to overcoming this challenge, as a lack of institutional resources and facilities prohibits the acquisition of basic skills prior to completion of graduates' studies, which has long-lasting impacts on them. Minimal access to resources such as the Internet and other facilities, such as computer laboratories, has a negative impact on students' preparation for their careers. In an era when technology is integral to many workplaces, these graduates will also be at a disadvantage even in acquiring an internship. Most black graduates are unable to use the Internet, and those that can lack access to it owing to financial constraints.

8.3 THE TRANSITION OF GRADUATES INTO THE WORLD OF WORK

8.3.1 Adaptation

Problems related to the education-to-work transition have been observed in many jurisdictions, not only in South Africa. Thus, the transition from education to the world of work can be a shock to graduates. For example, it has been noted in Australia and the USA that, when graduates transition, they are confronted by the gap between theory and its practical application to work, known as 'reality shock'.⁵⁵

It is posited that the 'right to be trained is a component of the complete development of the human personality',⁵⁶ and 'through better training, spiritual and physical productivity in the workplace can be improved'.⁵⁷ Therefore, the importance of enabling a successful transition from education to work cannot be overstated. The ILO Global Commission on the Future of Work stated that the transition from school to work is becoming increasingly difficult.⁵⁸ Despite all the challenges faced by graduates transitioning from university to the world

⁵⁵ Marlene Kramer, *Reality Shock: Why Nurses Leave Nursing* (Mosby 1974); Matthew D Ankers, Christopher A Barton and Yvonne K Parry, 'A Phenomenological Exploration of Graduate Nurse Transition to Professional Practice within a Transition to Practice Program' (2018) 25 *Collegian* 319.

⁵⁶ University of Free State Business School, 'The Elements of the Tripartite Relationship' (*University of Free State* 2015), <https://lms.tuit.co.za/courses/107/pages/the-elements-of-the-tripartite-relationship>, accessed 30 March 2021.

⁵⁷ *Ibid.*

⁵⁸ ILO, 'Global Commission' (n 48).

of work and skills development, there are various factors that can positively cater for the latter and assist in the development of their careers.

Thus, internships are believed to enable individuals to gain work experience and learn from the ground level what is required in certain fields. Moreover, internships assist graduate interns to assess their strengths, aptness and dedication to the industry.⁵⁹ To the extent that internships can provide these opportunities, the challenge is to ensure that they do, that they are well regulated and not exploitative, and that black graduates enjoy equality of access to them.

8.3.2 Developments in Educational Institutions

Despite the high unemployment rate, education remains the key to young people's success in the labour market.⁶⁰ Yet often there are mismatches in expectations regarding the transition from education to work. Generally, graduates believe that education alone is enough to make it in the world of work, and institutions of higher learning have traditionally considered their graduates to be well prepared for the workplace, certainly as regards theoretical knowledge. However, employers often perceive graduates as lacking vital skills for employment.⁶¹

A study by Griesel and Parker examined these common misunderstandings of the roles of higher education and employers.⁶² Light certainly needs to be shed on their differing perspectives as this lack of alignment affects the extent to which graduates are equipped to enter and adapt to the labour market.⁶³ Griesel and Parker indicate that there is a need to address gaps between employer expectations and higher education outcomes. If, in the end, the mandate of higher education is not to provide job-related skills, but instead to perform the distinct role of preparing graduates with generic skills they can apply in the changing contexts of the work environment,⁶⁴ then internships could play an important role.

⁵⁹ SA Works (n 15).

⁶⁰ Statistics South Africa, 'Youth Graduate Unemployment Rate Increases in Q1: 2019' (*Stats SA*, 15 May 2019), <http://www.statssa.gov.za/?p=12121>, accessed 30 March 2021.

⁶¹ Oluwajodu and others (n 5).

⁶² Hanlie Griesel and Ben Parker, *Graduate Attributes: A Baseline Study on South African Graduates from the Perspective of Employers* (South African Qualifications Authority 2009) 3.

⁶³ Thato Valencia Mmatli, 'Adaptation Challenges Faced by Recent Graduates in South African Multinational Organisations' (MA thesis, University of the Witwatersrand 2015).

⁶⁴ Griesel and Parker (n 62) 5–28.

There are several higher education institutions in South Africa that, based on their recognition within the national and international spheres, gain leverage for their graduates in the world of work. Ironically, this becomes yet another factor for exclusion and inequality in the world of work, because an average graduate from these recognized institutions may be ranked higher than a meritorious (or an A-plus) student from an underprivileged institution. Generally, this arises from the status that an institution of higher education possesses and/or its rankings. In turn, other institutional developments are triggered by this recognition, including donations to the institution by its alumni.

The struggle for resources (for example, donations) will prevail for a very long time in underprivileged institutions. It is very rare for a black graduate from a poor background, who must work hard to take care of their family and eradicate poverty at home, to also give back to the development of an institution.

For black graduates, education is a tool to do away with poverty. The struggle to transition from education to work and out of poverty continues to be felt acutely during the job application process, which may require the use of complex and demanding social media platforms. These challenges can become a barrier to gaining employment, for example, because an Internet connection requires money. As Majova states: 'privileged white graduates may be oblivious to these issues but for majority of black graduates, this costly process excludes them from fully participating in the job seeking process'.⁶⁵

Several South African institutions of higher education⁶⁶ only engage in teaching and do not carry out regular career exhibitions or any form of graduate recruitment.⁶⁷ Consequently, individual graduates are often effectively excluded from attaining information about prospective organizations offering vacancies.

According to Oluwajodu and others, most employed graduates studied at the University of Johannesburg, the University of Cape Town (UCT),⁶⁸ the University of the Witwatersrand and the University of South Africa.⁶⁹ These universities have regular career-awareness programmes, career counselling

⁶⁵ Majova (n 51).

⁶⁶ These 'access universities' include the University of Zululand, University of the Free State and University of Limpopo.

⁶⁷ LM Luan, interview, 24 October 2012. See also Oluwajodu and others (n 5).

⁶⁸ The University of Cape Town is one of the most recognized and highly ranked universities in Africa, and well known within the international educational sphere. It offers more than 20 programmes (ranging from a career advice service, employer relations and global citizenship, to teaching and learning strategies) that prepare students to transition into the workforce in South Africa and globally.

⁶⁹ Oluwajodu and others (n 5).

and recruitment visits, and a reputation for high educational standards, facilities and equipment.⁷⁰ It then becomes difficult for graduates from other universities to gain employment and develop their careers.⁷¹ Institutional status thus continues to be inextricably linked with the success of graduates in entering the labour market.

8.3.3 Interns Equipped for Work

A qualification puts an individual one step through the employment door. However, this is not the only factor that determines whether a graduate will obtain a job. In order to do away with unforeseen challenges faced by graduates when transitioning from education to the world of work, they often seek to acquire the necessary skills within their chosen field through internships. Work experience also plays an important role in the employability of an individual graduate,⁷² since it is believed that it develops employability skills, which are argued to enhance employability among graduates.⁷³ However, there is an exception in the South African Public Services and Administration, as in 2018 Minister Ayanda Dlodlo announced that ‘South Africans need no work experience to get entry-level government jobs’.⁷⁴

Employability relates to the skills and attributes needed to gain employment and to progress in an industry.⁷⁵ Although the government and other private stakeholders have been trying to establish ways in which internships may be provided to train graduates and prepare them for work, this has not overcome the mismatched skills, inequality, high unemployment rate and lack of skills in some professions. Most graduates take on internships that do not build their growth, nor develop their skills, because their aim is to acquire a job to

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² ILO, ‘Global Commission’ (n 48) fig 2.

⁷³ Ben Davies, Katie Gore, Jan Shury, David Vivian, Mark Winterbotham and Susannah Constable, *UK Commission’s Employer Skills Survey 2011: UK Results* (UK Commission for Employment and Skills 2012).

⁷⁴ Staff Writer, ‘South Africans No Longer Need Work Experience to Get Entry-Level Government Jobs’ (*Mybroadband*, 16 November 2018), <https://mybroadband.co.za/news/government/285158-south-africans-no-longer-need-work-experience-to-get-entry-level-government-jobs.html>, accessed 30 March 2021.

⁷⁵ Susima Samudrika Weligamage, ‘Graduates’ Employability Skills: Evidence from Literature Review’ (ASAIHL Conference, Phnom Penh, Cambodia, 22–24 November 2009), http://fac.ksu.edu.sa/sites/default/files/weliganmage_2009_graduates_employability_skills_evidence_from_literature_review.pdf, accessed 30 March 2021.

alleviate poverty. While this might address poverty for a short period of time, it establishes a vicious cycle.

Taking up any internship programme can have detrimental consequences, as the intern may not be part of any other internship in the future. Internships are meant to enable interns to transfer their educational skills into the practical world of work, putting them in a better position than their counterparts when applying for work in the future and increasing their motivation to work in their field.⁷⁶ In addition, internships should provide graduates with an opportunity to practise skills relating to their studies in preparation for future work.⁷⁷ However, when graduates are looking for ways to provide for their families, taking an internship not aligned with their profession is not an immediate problem.

A range of other problems is evident in relation to internships. For example, the South African health sector experiences challenges when it comes to interns' skills and their development soon after completion of their internships. As Bola and others put it, there are deficiencies in supervision and safety across all rotations and hospitals, despite the internship programme being extended to two years.⁷⁸ In addition, health interns' supervision and workload have not always complied with the standards set by the Health Professions Council of South Africa.⁷⁹ Research in this field has described concerns regarding teaching, workload and supervision.⁸⁰ More generally, Morrow claims that stress in graduates rises when their capabilities do not meet expectations and there is a lack of support in the workplace, especially from managers.⁸¹ Notwithstanding this, it is sometimes the case that when interns demonstrate an ability to transfer acquired skills then, depending on their resources, com-

⁷⁶ SA Works (n 15).

⁷⁷ Department of Public Service and Administration, *The Public Service Internship Programme: Step by Step Guide* (Department of Public Service and Administration 2006), http://www.kzncomsafety.gov.za/LinkClick.aspx?link=DPSA_Internship.pdf&tabid=146&mid=459, accessed 30 March 2021.

⁷⁸ Sumrit Bola, Eudiet Trollip and Fran Parkinson, 'The State of South African Internships: A National Survey against HPCSA Guidelines' (2015) 105(7) SAMJ 535, <http://www.samj.org.za/index.php/samj/article/view/10059/6834>, accessed 30 March 2021.

⁷⁹ The Health Professions Council of South Africa is a statutory body established under the Health Professions Act 56 of 1974. See Bola and others, *ibid*.

⁸⁰ Ni Ni Sein and John Tumbo, 'Determinants of Effective Medical Intern Training at a Training Hospital in North West Province, South Africa' (2012) 4(1) African J Health Professions Educ 10.

⁸¹ Sandra Morrow, 'New Graduate Transitions: Leaving the Nest, Joining the Flight' (2009) 17 J Nurs Manage 278.

panies may offer them a permanent salaried position;⁸² however, there is no evidence of this.

8.4 CONCLUSION

To achieve social justice in South Africa, the role of higher education should be extended to developing disadvantaged students in order to assist in their employability.⁸³ If this is lacking, the aims of alleviating poverty, reducing unemployment and equal distribution of resources will be defeated. The regulation of internships in South Africa has been criticized. Thus, even though internships give graduates an advantage in acquiring work in the future, inequalities in attaining them still play a bigger role. Thus, those who were privileged in the past continue to benefit, as they are still benefiting from the consequences of apartheid. Again, graduate development is defeated.

Although the law and regulation of internships in South Africa is important for young people as individuals, it is also of wider social significance. The education and employment of graduates is a critical way of tackling two of the most difficult problems experienced by South Africa: unemployment and poverty. However, unemployment and poverty are linked closely with the problem of inequality – a seemingly intractable issue that is entwined in our daily lives.

The law makes provisions to adjudicate disputes, but this might not be of assistance for the vast majority, who are not familiar with the law. Acquiring jobs in this changing world is fraught with the challenges mentioned previously which black graduates are facing. The South African government is not doing enough to address challenges faced by black graduates, especially those from underprivileged universities, whom employers are not keen on taking. There is evidence of the high unemployment rate of black graduates, but unfortunately no evidence on whether the existing initiatives are alleviating poverty and assisting those who were disadvantaged during the apartheid era.

Many issues that are perceived as problems of unemployment have hidden partners which make the job-seeking process more difficult for black graduates. Poverty leads to challenges, such as access to the resources required to develop an individual's technical skills. In addition, educational institutions vary in prestige and, often, black students attend the poorer institutions, which provide little support for students seeking employment. The graduates of these universities cannot afford to donate to them, setting up a vicious cycle in which the poor get poorer.

⁸² SA Works (n 15).

⁸³ Lourens and Fourie-Malherbe (n 11).

9. Internships and apprenticeships in Sweden, collective bargaining and social partner involvement

Jenny Julén Votinius and Mia Rönnmar

9.1 INTRODUCTION

The aim of this chapter is to explore forms of internships and apprenticeships within the Swedish labour law and industrial relations system and to discuss a number of current important problems and challenges. Specific attention is paid to collective bargaining and social partner involvement¹ and the situation of young people, the traditional target group of internships and apprenticeships.

The definition of a young person varies with the policy context. In European Union (EU) policies on youth unemployment and labour-market statistics addressing young people, the category ‘young people’ covers people aged 15–24 years, and this definition is also used in most national legislation in the area, including in Sweden.

There is no established definition of the concepts of internship (also often referred to as traineeship) and apprenticeship.² Both internships and apprenticeships contain an element of education or training for work. In apprenticeships the element of education is formal, whereas in internships the element of education can be vague and undetermined. It can also simply remain on paper, without being implemented. Moreover, whereas apprenticeships contain an element of ‘work for payment’, internships may or may not contain an element of paid work. If the internship is unpaid, the intern expects to get some reward other than pay. Such rewards can for instance be experience, contacts, a richer curriculum vitae (CV) or promises of future employment with the employer. Other unpaid internships operate in the sphere of volunteering, which also

¹ In the Swedish context social partners are trade unions and employers’ organizations.

² Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 Int Lab Rev 679.

includes altruistic and non-profit work driven by an ethical or ideological commitment.

In this chapter, the definitions of the concepts of internship and apprenticeship are specified to fit with the Swedish national context. People who are enrolled in the educational system normally are eligible for the public study allowance, which means that the employer does not pay a wage. In the Swedish context, the definition of apprenticeship as ‘work for payment’ should thus be modified to ‘work for payment or work qualifying for the study allowance’.³

A legal-analytical method is applied in this chapter to clarify and systematize the content of the law. Furthermore, this chapter emphasizes collective bargaining and provides an integrated analysis of labour law and industrial relations.⁴ The chapter is structured as follows. Section 9.2 provides a discussion of the labour market situation of young people and different forms of internships and apprenticeships. Section 9.3 presents the labour law and industrial relations framework, and section 9.4 discusses collective bargaining and social partner involvement. Finally, section 9.5 comprises a concluding discussion.

9.2 THE LABOUR MARKET SITUATION OF YOUNG PEOPLE AND DIFFERENT FORMS OF INTERNSHIPS AND APPRENTICESHIPS

Prominent features of the Swedish labour market are high employment, high employment continuity over the life course and relatively low gender disparities in labour market integration.⁵ The number of employees in Sweden was just over 4.8 million people in November 2019. The employment rate is around 68.3 per cent of the total workforce, whereas the unemployment rate is 6.9 per cent of the total workforce. Slightly more men than women are unemployed.⁶

³ In Sweden the term ‘trainee’ normally refers to an employed person admitted to a high-profile company-designed programme to promote newly recruited people in the white-collar sector. Thus this term is not used in discussions of internships and apprenticeships.

⁴ The materials subjected to analysis are legal sources (eg legislation at national, EU and international levels; preparatory works to the legislation; collective agreements; and case law), policy documents, and legal and industrial relations scholarship.

⁵ Dominique Anxo, ‘Towards an Active and Integrated Life Course Policy: The Swedish Experience’ in Dominique Anxo, Gerhard Bosch and Jill Rubery (eds), *The Welfare State and Life Transitions: A European Perspective* (Edward Elgar 2010) 113.

⁶ Labour Force Surveys, November 2019. An unemployed person is here defined as someone who lacks employment, can and wants to take up work within 14 days, and has actively searched for jobs during the last month.

Although the labour market is performing well, it faces significant challenges. There are serious difficulties with labour shortages and skills mismatches. The issue of mismatches between qualifications and labour-market requirements has often been highlighted in relation to low-skilled people. However, the issue of mismatches is also relevant for highly qualified people, in that their skills, although high, do not correspond well with what is desired in the labour market.⁷ The challenges related to competence provision constitute a problem both at the societal level and for individual employers. For many years now, this issue has drawn a great deal of attention and engagement from social partners.

A closely related important and more recent challenge in the labour market is the integration of non-EU migrants into the labour force.⁸ The increasing number of refugees and newly arrived immigrants presents new challenges that have to be handled within the labour market and collective bargaining context. In November 2019, unemployment rates for people born outside Sweden were 19.7 per cent, in comparison to 3.9 per cent for people born in Sweden.⁹ In general, it takes a long time for refugees and newly arrived immigrants to establish themselves in the Swedish labour market, which makes the labour market situation for this group even more challenging.¹⁰ The policy measures introduced to promote the labour market inclusion of newly arrived immigrants in Sweden include early skills assessment, the recognition of qualifications, language courses, vocational training, job training and general education for learners with low levels of education. In many EU countries, social partners play an active role in education and apprenticeships, accelerating labour market access and recruitment of refugees.¹¹ Inclusion of these workers is fundamental not only to increase employment and growth, but also to

⁷ European Commission, *Moving Youth into Employment* COM(2012) 727 final, 5.

⁸ The refugee situation has created an urgent societal need to advance the inclusion of newly arrived immigrants in the labour market. This is clearly the case in Sweden, where many people have sought and received refuge. In 2015, for example, 160 000 people sought refuge in Sweden, and among them were 70 000 children (half of whom were unaccompanied).

⁹ Swedish Public Employment Service, *Arbetsförmedlingens verksamhetsstatistik november 2019* (Arbetsförmedlingen 2018), <https://mb.cision.com/Public/1326/2986880/9f4bf8826b4242fd.pdf>, accessed 30 March 2021.

¹⁰ Stefan Eriksson, Lena Hensvik and Oskar Nordström Skans, *Den svenska arbetsmarknaden och dess utmaningar* (IFAU 2017); Arbetsförmedlingen, *Ungdomsarbetslösheten och ungdomsgarantin – en översikt* (Arbetsförmedlingen 2017).

¹¹ Filip Tanay and Jörg Peschner, *Labour Market Integration of Refugees in the EU* (European Commission 2017); Eurofound, *Approaches to the Labour Market Integration of Refugees and Asylum Seekers* (European Union 2016).

achieve and maintain overall stability and legitimacy, in society in general and for the collective bargaining system. New demands have to be accommodated by the trade union movement, which at times has been reluctant to recognize gender inequality and the need for diversity perspectives.¹²

The labour market situation for young people¹³ is generally much better than it was only a few years ago. Since 2012, youth unemployment rates in Sweden have fallen considerably, although a slight rise can be seen since 2018. In November 2019, the youth unemployment rate was 19.8 per cent.¹⁴ Some groups of young people have a very weak position in the labour market: early school leavers, young people with reduced working capacity and young people born outside Europe. Around 15 per cent of Swedish employees are in fixed-term employment. Fixed-term employment is by far the most common among young people; in 2018, 50 per cent of employed women and 38 per cent of employed men in the age group 20–25 years had fixed-term employment.¹⁵ Considerably more women than men, and a large proportion of the young workforce, work part-time, around a quarter of them involuntarily. The most vulnerable young people in the labour market, that is, those not in education, employment or training (NEETS), were 8 per cent of the age group 15–24 years in 2018, in comparison to the EU average of 16.5 per cent.¹⁶ In parallel with the decline in youth unemployment, another group of unemployed people has quickly increased in numbers: newly arrived migrants or refugees, as described previously. These two groups overlap, as many of those who have recently migrated to Sweden are young. Currently, the Swedish labour market is marked by increasing segmentation between the majority of workers and groups of workers that have a particular difficulty in establishing themselves in the labour market, such as refugees and newly arrived immigrants, early school leavers and older unemployed people.

¹² Yvonne Hirdman, *Med kluven tunga: LO och genusordningen* (Atlas 1998); Rianne Mahon, 'Sweden's LO: Learning to Embrace the Differences Within?' in Fiona Colgan and Sue Ledwith (eds), *Gender, Diversity and Trade Unions: International Perspectives* (Routledge 2002).

¹³ This section partly builds on Julén Votinius's previous research: Jenny Julén Votinius, 'Youth, Labour Law, and European Economic Crisis' in Ulf Bernitz, Moa Mårtensson, Lars Oxelheim and Thomas Persson (eds), *Bridging the Prosperity Gap in the EU: The Social Challenge Ahead* (Edward Elgar 2018).

¹⁴ Labour Force Surveys, November 2019.

¹⁵ Akademikernas a-kassa, *Arbetslöshetsrapporten* (Akademikernas a-kassa 2019).

¹⁶ Eurostat, 'Statistics on Young People Neither in Employment nor in Education or Training' (*Eurostat Statistics Explained*, April 2019), https://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_young_people_neither_in_employment_nor_in_education_or_training, accessed 30 March 2021.

The Swedish educational system follows a structure of nine years of mandatory school, three or four years of secondary education, then higher education. In addition, to promote lifelong learning and to secure access to education in all stages of life, municipal adult education (*Komvux*), folk high schools (*folkhögskola*), and vocational training within labour market policies (*yrkesinriktad arbetsmarknadsutbildning*) are crucial. In order to promote labour market transition and to secure a supply of workers with adequate competences, the current government plans to expand and strengthen these systems for lifelong learning.¹⁷

Swedish labour market policy emphasizes active labour market programmes and vocational training, aiming to reduce benefit dependency and passive measures for the unemployed.¹⁸ Labour market measures are designed to prevent long unemployment periods and to integrate the unemployed into the labour force. Within general labour market policy, special programmes target particularly vulnerable groups, whereas other programmes are open to anyone registered at an employment office. The Swedish Public Employment Service (*Arbetsförmedlingen*), which up until now has been responsible for managing and monitoring the programmes, providing support for unemployment benefit recipients, and contributing in different ways to a well-functioning labour market, is currently subject to substantial reform and downsizing. Following political negotiations after the 2018 elections and the subsequent formation of the government in early 2019, a major part of the responsibilities of the Swedish Public Employment Service will be transferred to private companies.¹⁹ The detailed content and effects of these changes are yet to be seen but, given the extent of the reform, the implications will be significant.

We now briefly explore different forms of internships and apprenticeships in Sweden. Unpaid internships are less common than apprenticeships. The most typical group of unpaid interns are young people who in connection with their university studies spend a period abroad at the United Nations, non-government organizations or similar organizations to gain experience, seek adventure and enhance their prospects of future work. A different group of unpaid interns is found in the blue-collar sectors of retail and restaurants. Here, some employers may require young people to conduct a period of unpaid

¹⁷ These plans are part of the so-called ‘January Agreement’ (*januariöverenskommelsen*): see section 9.3 in this chapter.

¹⁸ Dominique Anxo and Thomas Ericson, *Labour Market Measures in Sweden 2008–13: The Crisis and Beyond* (ILO 2015).

¹⁹ Swedish Public Employment Service, *Vissa förutsättningar inför reformeringen av Arbetsförmedlingen* (Arbetsförmedlingen 2019), <https://arbetsformedlingen.se/download/18.47a458fb16df81b9133207b/1572604962796/vissa-forutsattningar-reformeringen-arbetsformedlingen.pdf>, accessed 30 March 2021.

test work before, possibly, being offered employment. The extent of this practice is unknown, and it is strongly opposed by the trade unions.

Apprenticeships appear as part of the educational system and within labour market policies. Within the educational system, mandatory on-site training periods are part of a number of educational programmes, such as for teachers and medical doctors, and are optional for other educational programmes, such as for lawyers. These apprentices are eligible for the study allowance. Mandatory periods of on-site training are also part of some secondary-level educational programmes, not least within the construction sector. In some programmes, the young person counts as a school pupil and is eligible for the study allowance (*yrkesprogram* or *arbetsplatsförlagt lärande*). In other programmes, the young person is employed by the company providing the on-site training, and receives payment according to a collective agreement (*gymnasielärling*).

Within the framework of active labour market policies, several forms of subsidized employment have been available since the early 1980s. Subsidized employment may be combined with training or education, but that is not always a requirement. The subsidies aim to compensate employers in instances where the expected productivity of an employee is not high enough to bear contractual wage costs.²⁰ The subsidy may cover the payroll tax, as for some of the new-start jobs (*nystartsjobb*) for people who for various reasons have been away from the labour market. In other instances, the subsidy covers 100 per cent of the wage costs; the labour market measure termed extra services (*extratjänster*) in the welfare, public, cultural or non-profit sectors is provided for very long-term unemployed and newly arrived migrants who work full-time and is paid according to a collective agreement. Since 2018, introduction jobs (*introduktionsjobb*) with 80 per cent compensation of the wage costs have replaced a number of other measures (but not the new-start jobs or the extra services). (These introduction jobs, a specific statutorily regulated labour market measure, are not to be confused with employment resulting from introduction agreements, discussed in section 9.4.) In addition to subsidized employment, individual plans for support in education, training and employment may be provided by the Swedish Public Employment Service. Currently, the measures provided within Swedish labour market policies are particularly difficult to assess and describe. As a consequence of the transformation of the Swedish Public Employment Service, labour market policies are in flux.

Measures introduced through collective bargaining and social partner involvement can be seen in the construction sector and in some other pro-

²⁰ Anders Forslund, *Subventionerade anställningar: Avvägningar och empirisk evidens* (IFAU 2018).

fessions (such as the glass industry), which provide a collectively bargained system for traditional apprenticeships, where the young person is employed as an apprentice without simultaneously being enrolled in an educational programme as a school pupil. The content and conditions of such apprenticeships are regulated in collective agreements.²¹ Two other, more recent, examples of actions initiated through collective bargaining and social partner involvement are introduction agreements and establishment employment, which is discussed in section 9.4.

9.3 THE LABOUR LAW AND INDUSTRIAL RELATIONS FRAMEWORK

Internships and apprenticeships raise a number of different issues related to the labour law and industrial relations framework (such as flexible work, age discrimination, and terms and conditions of employment). However, the focus of this section is on collective bargaining and social partner involvement, the notion of the employee and the scope of labour law protection.

The Swedish labour law and industrial relations system is based to a large extent on self-regulation through autonomous collective bargaining. Wages and employment conditions are generally set by collective agreements. Most Swedish labour legislation is semi-compelling, and allows for deviations by way of collective bargaining, whether to the advantage or detriment of individual workers. The relationship between trade unions and employers' organizations has traditionally been characterized by cooperation and social partnership. There is elaborate regulation of information, consultation and co-determination in the Co-determination Act (1976:580) (MBL) and complementary collective agreements. Worker participation is channelled through trade unions and their representatives, at local and central levels, in a single-channel system. Trade unions both negotiate and conclude collective agreements on wages and other working conditions, and take part in information and consultation at the workplace level.

A number of trends currently influence and challenge industrial relations and national collective bargaining systems in Europe and worldwide.²² A global trend towards individualization and decentralization has weakened

²¹ On the apprenticeship system in Sweden in a comparative European perspective, see Jonas Olofsson, *Läringsutbildning: Svenska erfarenheter och initiativ i ett europeiskt perspektiv* (SIEPS 2014); National Mediation Office, *Avtalsrörelsen och lönebildningen 2013: Medlingsinstitutets årsrapport* (National Mediation Office 2014) 149ff.

²² See eg Susan Hayter (ed), 'What Future for Industrial Relations? Special Issue' (2015) 154(1) *Int Lab Rev*; OECD, *OECD Employment Outlook 2016* (OECD 2016);

trade unions and collective bargaining, and has resulted in a decrease in trade union organization rates and collective bargaining coverage. In Sweden, the trade union organization rate is still high at about 70 per cent (even though there has been a significant drop in the past ten years) and the employers' organization rate is about 90 per cent. There are, however, important differences between sectors and groups of employees. Thus, in the hospitality and retail sectors the trade unionization rates are significantly lower, and the same applies for young workers. The collective bargaining coverage is about 90 per cent.²³ Since the 1990s, there has been a clear tendency towards individualization and 'organized' decentralization of industrial relations and wage negotiations in Sweden.²⁴ The stability of the Swedish collective bargaining system has been brought into question in recent years, and increasing tension and diversity characterizes the collective bargaining system, and its different sectors and levels.²⁵

Important traditional functions of collective bargaining in Sweden include creating a peace obligation and social truce; regulating wages and employment conditions; adapting statutory regulation to sectoral or company circumstances; complementing the statutory social security system;²⁶ protecting individual employees; regulating and facilitating negotiations and other collaboration between social partners; and supervising and enforcing employment conditions.²⁷ More recently, promoting the labour market inclusion of specific groups, such as young workers, older workers and newly arrived immigrants, has surfaced as a function of collective bargaining.

Collective agreements in Sweden are entered into at different levels. Nationwide collective agreements are concluded at the sectoral level, and

European Commission, *Industrial Relations in Europe 2014* (European Commission 2015).

²³ Medlingsinstitutet, *Avtalsrörelsen och lönebildningen 2018: Medlingsinstitutets årsrapport* (Medlingsinstitutet 2019) 199ff.

²⁴ See eg Franz Traxler, 'Farewell to Labour Market Associations? Organized versus Disorganized Decentralization as a Map for Industrial Relations' in Colin Crouch and Franz Traxler (eds), *Organized Industrial Relations in Europe: What Future?* (Avebury 1995).

²⁵ For a more developed discussion on the functions of, trends in and pressures on the Swedish autonomous collective bargaining system, see Mia Rönnmar, 'Autonomous Collective Bargaining in Sweden under Pressure' in Julia López López (ed), *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart 2019).

²⁶ For example, through additional regulation of occupational pensions, unemployment benefits and parental leave benefits.

²⁷ See eg Axel Adlercreutz, *Kollektivavtalet: Studier över dess tillkomsthistoria* (CWK Gleerup 1954); Folke Schmidt and others, *Facklig arbetsrätt* (Norstedts juridik 1997).

supplemented by local collective agreements concluded at the workplace level. In addition, some master agreements are concluded at the national level. Currently, wages are mostly set through individual and local bargaining within a sometimes very general framework of national sectoral bargaining. The Swedish labour market is covered by about 670 national sectoral collective agreements.

A collective agreement is statutorily defined as ‘an agreement in writing between an organization of employers or an employer and an organization of employees about conditions of employment or otherwise about the relationship between employers and employees’ (MBL s 23). Within its area of application, a collective agreement is legally binding not only on the parties to the agreement but also on their members (MBL s 26). In addition, an employer bound by a collective agreement is obliged to apply it to all employees, regardless of trade union membership. A collective agreement has both a normative and mandatory effect (MBL s 27). Unless otherwise provided for by the collective agreement, employers and employees bound by the agreement may not deviate from it by way of an individual employment contract. Such a contract is null and void, and breaches of the collective agreement are sanctioned by economic and punitive damages. In most cases collective agreements set minimum standards only, allowing employers, trade unions and employees to agree on better terms and conditions of employment by way of a local collective agreement concluded at the workplace level, or an individual employment contract.²⁸

There is no statutory minimum wage or system for extension of collective agreements. However, as we have seen, the collective bargaining coverage is about 90 per cent and a de facto *erga omnes* effect is achieved.²⁹ In line with the autonomous collective bargaining system, it is the role of social partners to safeguard a general level of pay and employment conditions.³⁰ Supervision and enforcement of terms and conditions of employment are carried out to a large extent by the trade unions or social partners in cooperation. Thus, effective enforcement depends to a large degree on the workplace being covered by a collective agreement.³¹

²⁸ See Jonas Malmberg, *Anställningsavtalet: Om anställningsförhållandets individuella reglering* (Iustus 1997) 144ff; Mikael Hansson, *Kollektivavtalsrätten: En rättsvetenskaplig berättelse* (Iustus 2010).

²⁹ See Medlingsinstitutet (n 23).

³⁰ The trade unions do this by trying to force employers who are not members of an employers’ organization (and thereby not automatically bound by collective agreements) to conclude ‘application agreements’ (*hängavtal*). If agreement cannot be reached by way of negotiations, the trade unions have the right to take collective action.

³¹ Cf Niklas Bruun and Jonas Malmberg, ‘*Lex Laval* – Collective Actions and Posted Work in Sweden’ in Roger Blanpain and Frank Hendrickx (eds), *Labour*

Labour law (especially employment protection and redundancy dismissal and seniority rules) and industrial relations are at the centre of the political and societal debate, and are addressed by the January Agreement (*januariöverenskommelsen*). The January Agreement was concluded at the beginning of 2019 (after general elections held in September 2018 and difficulties in forming a government) among four political parties forming the current government (the Social Democratic Party and the Green Party) and its parliamentary support (the Liberals and the Center Party). The January Agreement sets out 73 action points for the government's programme and collaboration between the political parties for the upcoming four-year period. The January Agreement also reflects a growing tension between collective bargaining and legislative intervention.

Swedish labour law and collective bargaining is characterized by a uniform and extensive personal scope, and a traditionally high degree of equal treatment of different categories of employees, such as blue- and white-collar employees and private- and public-sector employees.

The notion of employee (*det civilrättsliga arbetstagarbegreppet*) is not statutorily defined, but its content and meaning have been described and developed by the courts in case law and the legislature in preparatory works.³² In order to determine whether or not a specific person is an employee, the court makes an overall assessment of the situation, taking all relevant factors of the individual case into consideration. The multi-factor test applied by the courts focuses on the individual person in question, and on whether the overall situation of this person is similar to that of an ordinary employee or an ordinary self-employed worker. The courts take a number of factors into consideration, such as a personal duty to perform work according to the contract; the actual personal performance of work; whether there are any predetermined work tasks; a lasting relationship between the parties; whether the worker is subject to the orders and control of the principal or employer concerning the content, time and place of work; whether remuneration is paid, at least in part, as a guaranteed salary; and whether the economic and social situation of the

Law between Change and Tradition: Liber Amicorum Antoine Jacobs (Kluwer Law International 2011).

³² See further Mia Rönmar, 'New Forms of Employment in Sweden' in Bernd Waas (ed), *New Forms of Employment in Europe* (Wolters Kluwer 2016). For a classical and comprehensive study of the notion of employee, see Axel Adlercreutz, *Arbetstagarbegreppet: Om arbetstagarförhållandet och därtill hörande gränsdragningsfrågor i svensk civil – och socialrätt* (PA Norstedts & Söners Förlag 1964). The Co-determination Act (1976:580), regulating freedom of association, collective bargaining, collective action and information, consultation and co-determination, applies not only to employees, but also to the 'quasi-employee' category of *jämställda uppdragstagare*.

worker is equal to that of an ordinary employee.³³ The notion of employee is a mandatory concept. In order to prevent the parties to a contract from circumventing labour legislation and depriving the employee of protection, the courts are not bound by the description or definition of the relationship given by the parties themselves, for example, in a written contract. The court conducts an independent assessment of the legal nature of the relationship on the basis of the actual situation. However, the parties to the contract are, in principle, free to organize their relationship and the ways in which the work will be carried out, in practical terms. A court may then find that these practical arrangements, and the overall situation of the worker, best fit the description of a self-employed worker.³⁴

There has been a trend towards a uniform and far-reaching notion of employee, and the extent of the notion of employee has continuously widened, aiming at providing additional groups of workers with the protection afforded by labour law and labour legislation.³⁵ Many interns and apprentices are covered by the notion of employee, and fall within the scope of labour law protection. Those who are not employees may still be covered by some labour legislation, such as legislation on the working environment and non-discrimination.

9.4 COLLECTIVE BARGAINING AND SOCIAL PARTNER INVOLVEMENT³⁶

Important reasons for the long-standing Swedish tradition of social partner involvement in efforts to meet labour market challenges are the need to secure

³³ See Government Inquiry Report SOU 1975:1, 721ff; Government Inquiry Report SOU 1993:32, 216ff; Government Inquiry Report SOU 1994:141, 74ff; Government Inquiry Report Ds 2002:56. See also eg Labour Court judgments AD 2013:92 and AD 2013:32.

³⁴ The Labour Court is sensitive to attempts to circumvent labour legislation, and will frequently rule in favour of an employment relationship if the person in question has gone from being an employee of the employer to an alleged self-employed worker.

³⁵ In recent years, there has been a growth in so-named *egenanställningsföretag* (sometimes referred to as umbrella companies, portage salarial or professional employer organizations), where a (basically) self-employed person offering their services is employed by such a company, and the company, in return for a fee, pays wages, social security contributions and taxes, and deals with invoices and other administrative work.

³⁶ This section draws upon earlier research by Rönmmar in the area of intergenerational bargaining, age discrimination and collective bargaining. See Mia Rönmmar, *Intergenerational Bargaining: Sweden* (iNGenBar 2014); Mia Rönmmar, 'Does Age Matter? Sweden, Younger and Older Workers and the Intergenerational Dimension of Contingent Work' in Edoardo Ales, Olaf Deinert and Jeff Kenner (eds), *Core and Contingent Work in the European Union: A Comparative Analysis* (Hart 2017);

the transition of skills and knowledge between generations of employees, and to secure a supply of competent workers. As early as 1938, in connection with the conclusion of the historic Saltsjöbaden Agreement, social partners decided to regulate apprenticeships in sectoral collective agreements.³⁷

Trade unions are very attentive to individual employers' practices that take advantage of unemployed people by offering them unattractive positions that involve a risk of exploitation. In the large parts of the labour market that are covered by collective agreements, unpaid or low-paid test work and similar arrangements are likely to constitute an infringement of the collective agreement. In companies that are not covered by collective agreements, which is particularly common in small retail companies and restaurants, it is difficult for the trade union to act against the employer. Here, instead, the strategy of the trade unions has been to encourage job applicants – particularly young people – to reject unpaid test periods, thus limiting the supply of potential employees for this type of practice. The Swedish Trade Union Federation (LO) provides an on-call service for young people, which every summer is promoted in public relations campaigns in media and through other outreach work.

The urgent demand for skilled and competent employees is a strong driving force for employers, but also for trade unions, to find joint solutions in collective bargaining. In the following, two examples of measures in this area initiated through collective bargaining and social partner involvement are discussed: introduction agreements and establishment employment.

Introduction agreements for young workers (*yrkesintroduktionsavtal*) are one example of apprenticeships introduced in recent years. Youth unemployment and the desire for labour market inclusion of young workers form the background to these national sectoral collective agreements. Introduction agreements regulate employment for young workers, combining work with education, training and supervision.

In 2010, the employers' organization Teknikföretagen and the trade union IF Metall concluded a pioneer introduction agreement in the industrial sector, and introduction agreements have since been concluded in several other sectors, such as in the municipal/regional health-care and care sector, the retail sector, and the wood and graphic design sectors.³⁸

Mia Rönmar, 'Age Discrimination and Labour Law: A Comparative Analysis' in Ann Numhauser-Henning and Mia Rönmar (eds), *Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International 2015); Rönmar, 'Autonomous Collective Bargaining' (n 25).

³⁷ Jonas Olofsson, *Svensk yrkesutbildning: Vägval i internationell belysning* (SNS Förlag 2005).

³⁸ See Arbetsförmedlingen, *Återrapportering 2014, Yrkesintroduktionsanställningar, 1 augusti 2014* (Arbetsförmedlingen 2014); see also Regeringen, *Yrkesintroduktionsanställningar – en ny väg till jobb för unga* (Regeringen 2014).

In 2012, the government started negotiations with social partners on a tripartite job pact, aimed at tackling youth unemployment. One of the aims was to provide young people with employment through introduction agreements, partly financed by the state. The Confederation of Swedish Enterprise (Svenskt Näringsliv) later withdrew from the negotiations, but negotiations on further introduction agreements continued at the national sectoral level between the social partners. In 2013, the government presented a number of proposals emanating from these and other tripartite consultations, aimed at improving the functioning of the labour market and creating higher employment and lower unemployment through action in three areas: introduction agreements, transition and employability, and short-term working arrangements in times of severe economic crisis.³⁹ In 2014, a government regulation entered into force establishing a government scheme to support and subsidize introduction employment for young workers.⁴⁰ According to the scheme, an employer who hires a young person within the framework of a collectively bargained introduction agreement can be awarded financial support corresponding to ordinary employers' social security contributions and a monthly supervisor grant.

The original introduction agreement concluded by Teknikföretagen and IF Metall declared that the industry was facing a large generational renewal in the coming years, which had increased the need for new employees. Currently, work entails greater requirements for theoretical education and professional experience. Recruitment measures are, therefore, vital to secure the future long-term competence provision of industry. The aim of the introduction agreement was to stimulate companies in the industrial sector to offer introduction employment to young people so they could work and develop in their professional life in the Swedish labour market.

Introduction employment is aimed at young people under the age of 25 who lack relevant professional experience. The introduction employment contract is a fixed-term contract, which may last for 12 months, with the possibility of an extension for up to an additional 12 months. Every introduction employment period is combined with supervision and an individual training plan regarding work tasks and educational and introductory elements. Wages paid are of at least 75 per cent of the collectively bargained minimum wage. The employer and the employee are free to terminate the introduction employment contract with one month's notice. If there is no termination, the introduction employment contract is converted into a permanent employment contract.

³⁹ See Government Inquiry Report Ds 2013:20.

⁴⁰ The government scheme has been authorized by the European Commission under EU state aid rules: see decision C(2013) 4053 final. See also Government Inquiry Report Ds 2013:20; *Förordning (2013:1157) om stöd för yrkesintroduktionsanställningar*.

A common theme in interviews held with social partners for a research project on intergenerational bargaining was that introduction agreements are not seen as a labour market measure that can grow quickly into large volumes. Introduction agreements are only one way of combating youth unemployment and promoting young workers' entry into the labour market. Another important aim of collective agreements is to ensure provision of current and future competence. Introduction agreements are about securing a future core group of employees and building up competence.⁴¹

Introduction agreements in municipal and regional areas do not clearly address young workers or reserve introduction employment for them. Subsequently, the scope of introduction agreements – and the government scheme – has been extended to long-term unemployed people and newly arrived immigrants.⁴²

Social partners have contributed to the creation of a fast track into the labour market for newly arrived immigrants. In February 2019 there were 14 different fast tracks, covering about 30 different professions. The fast tracks aim to secure skills provision in professions and sectors marked by skills and labour shortage, and to reduce the time newly arrived immigrants spend unemployed. The fast tracks are developed and run in collaboration among social partners, the Swedish Public Employment Service, and other authorities and actors. They cover a range of different measures, such as validation and recognition of qualifications, vocational training, job training and language courses.⁴³

⁴¹ Research on introduction agreements (and collective agreements on partial retirement, transition and redundancy) and intergenerational bargaining reveals that Swedish labour law, industrial relations and collective bargaining lack a clear intergenerational dimension, as well as an articulated debate on intergenerational solidarity or conflict. The interests of younger and older workers, and the labour market inclusion of these groups, are to a large degree dealt with separately and in parallel. The strategies to combat youth unemployment and to promote active ageing and a prolonged working life for older workers, respectively, are in principle seen as separate, equally important and non-conflicting strategies. Although Swedish collective bargaining developments display a lack of direct and explicit intergenerational bargaining, several indirect and implicit intergenerational elements can be found in collective agreements. These indirect intergenerational elements relate, for example, to generational renewal of future skills provision, competence development and transfer of knowledge and experience between older and younger workers, and older workers' participation in education and supervision of younger workers, as a way of adapting the working environment to enable a longer working life. See further Rönmar, *Intergenerational Bargaining* (n 36).

⁴² See Government Bill prop 2016/17:100. See also Government Inquiry Report SOU 2018:81.

⁴³ See Arbetsförmedlingen, *Arbetsförmedlingens nulägesbedömning av arbetet med snabbspår: Juni 2018* (Arbetsförmedlingen 2018); Arbetsförmedlingen,

Furthermore, as we touched upon previously, the scope of existing introduction agreements has been extended to include newly arrived immigrants. This is, for example, the case with the introduction agreement concluded between Teknikföretagen and IF Metall in the industrial sector.

The debate has also revolved around the creation of ‘simple jobs’ and the use of lower wages for newly arrived immigrants and other groups of workers. In this context, in August 2017 the Alliansen, the four centre-right political parties forming the political opposition at the time, presented a proposal for a new form of statutorily regulated form of employment, entry employment (*inträdesjobb*), for newly arrived immigrants and some categories of young workers. Controversially, and at odds with the Swedish autonomous collective bargaining system, this proposal built on statutorily regulated wages of no more than 70 per cent of the collectively bargained starting wage in the relevant sector.⁴⁴

In November 2017 – partly as a reaction to the proposal regarding entry employment – a number of key social partners, such as the LO, Unionen⁴⁵ and the Confederation of Swedish Enterprise, agreed, in principle, to conclude collective agreements on a new form of employment: establishment employment (*etableringsjobb*). Establishment employment is another recent example of apprenticeships.

In developing this agreement, they built on, and sought to improve upon, introduction agreements. The aim of the collective agreements and establishment employment is to help newly arrived immigrants and the long-term unemployed to become established in the labour market, and to facilitate future skills provision for employers. In March 2018, the social-democratic–green government and their social partners signed a declaration of intent whereby the government agreed to financially and otherwise support this initiative. The intention is to ensure that newly arrived immigrants and the long-term unemployed have opportunities to acquire knowledge and experience that are sought after in the labour market. Establishment employment will be open for newly arrived immigrants who have been granted residence in Sweden in the past 36 months, and for people with more than 12 months of unemployment (or six months of unemployment for those below 25 years of age). An employment contract under the scheme should lead to a permanent, full-time employment

Arbetsförmedlingens nulägesbedömning av arbetet med snabbspår: Februari 2019 (Arbetsförmedlingen 2019).

⁴⁴ Up to a maximum of around SEK21 000 per month. During the period of employment, which could last for a maximum of three years, the employer would not have to pay payroll tax for the employed person. See further Alliansen, *Inträdesjobb för fler i arbete* (Alliansen 2017).

⁴⁵ Sweden’s largest white-collar trade union in the private labour market.

contract with the employer. The employee will be given the opportunity to take part in a language course and other short training courses as agreed by the employer and the employee.⁴⁶

In 2018, the government asked the Swedish Public Employment Service to review and propose a new model for involving private actors in the matching related to establishment employment.⁴⁷ Furthermore, the January Agreement, which is now to be implemented in different ways, addresses establishment employment and the labour market situation of newly arrived immigrants. It states that establishment employment, with lower wages, for newly arrived immigrants and the long-term unemployed is to be introduced (in line with the proposal of the social partners). Establishment employment will also be extended to companies without collective agreements and to temporary work agencies in a way that does not restrict the advantages of establishment employment. Measures shall be introduced to enable newly arrived immigrants to speed up the processes of labour market inclusion. In the spring of 2020 a government bill was approved, introducing some necessary adaptations to social security and tax regulation.⁴⁸

9.5 CONCLUDING REMARKS

In Sweden, internships and apprenticeships are shaped within a labour law and industrial relations system that is strongly characterized by comprehensive social partner engagement and robust, innovative and constructive collective bargaining.

In the area of promoting lifelong learning and securing competence provision, collectively bargained solutions for internships and apprenticeships

⁴⁶ See further Declaration of Intent of 5 March 2018 between the government, the LO, Unionen and the Confederation of Swedish Enterprise, <https://www.government.se/49381d/contentassets/ae057fea761949e6950ad9a56dc81350/declaration-of-intent-between-the-government-the-swedish-trade-union-confederatio-lo-unionen-and-the-confederation-of-swedish-enterprise.pdf>, accessed 3 March 2021. Cf the previous proposal along similar lines presented by the LO, *LOs förslag om utbildningsjobb för stärkt etablering* (LO 2017). In 2019, an employer's total payroll expenses for a position of this kind will amount to SEK8400 per month. In addition, the employee will receive a tax-free, individual state benefit amounting to at most SEK9870 per month in 2019. The government and the social partners agree that the salary and the individual benefit will follow wage developments. The individual state benefit can be claimed for no more than two years. The basic premise is that the size of the individual benefit should provide an incentive for the individual to obtain regular employment. The scheme must be brought in line with EU state aid rules, which might involve a notification to the European Commission.

⁴⁷ See Regeringsbeslut 2018-05-31, A2018/01212/A.

⁴⁸ See Government Bill Prop 2019/20:117; Government Inquiry Report Ds 2019:13.

highlight key priorities and current important challenges for social partners and for the labour market. This is reflected in the two examples discussed in this chapter. Introduction agreements and establishment employment have been established and advanced in line with general developments in the labour market. As the labour market situation of young people has improved, the focus has partly shifted from young people to newly arrived migrants and the long-term unemployed.

Internships and apprenticeships typically raise a number of important problems and challenges. At the individual level, there is a risk of exploitation, for example, as regards unpaid interns or test work. Since there is no reliable information on the frequency of these practices in Sweden, it is difficult to assess the urgency of this risk, but the prevalence appears to be limited. Trade unions actively monitor developments in this area, and take preventive measures. At a collective or societal level, other challenges appear. First, internships and apprenticeships may exert downward pressure on wages generally, which affects other employees. In the Swedish debate, much attention has been directed towards the risks of wage dumping, and the crowding out of ordinary employment, that comes with labour market policy measures involving subsidized internships and apprenticeships.⁴⁹ In a setting where unpaid or low-paid work becomes an important way to enter certain professions, other risks appear. Not everyone can afford to take up these positions; and there is a risk of reduced social mobility, increased socio-economic inequality and, in the long run, erosion of social legitimacy and cohesion.⁵⁰ Again, in Sweden, there is nothing to indicate the frequent occurrence of unpaid or low-paid work in high-status professions. On the contrary, within several of these professions, the educational system provides mandatory optional periods of apprenticeship under which apprentices are eligible for the study allowance. An important challenge that is inherent in every form of apprenticeship is risks related to the balance between work and education; that the educational part is not comprehensive enough or is of low quality, and that there is little or no follow-up of the educational outcome. This potential problem is constantly present in the debate on internships and apprenticeships, in Sweden as in other countries.⁵¹

⁴⁹ Forslund (n 20).

⁵⁰ Cf Owens and Stewart (n 2), who also raise the risk that internships and apprenticeships may legitimize a downsizing of the education system. As a large part of the education is provided in the workplace, parts of the costs of education are passed on to young people in the form of unpaid or low-paid work.

⁵¹ European Commission, *Apprenticeship Supply in the Member States of the European Union* (Directorate-General for Employment, Social Affairs and Inclusion 2012).

A final challenge that should be addressed in the Swedish context of internships and apprenticeships is the preservation of the labour market model and the role of social partners. Both introduction agreements and establishment employment follow a strong tradition of collectively bargained solutions where social partners have agreed upon the form and application of the reform, while the state's participation is limited to providing a financial contribution. However, in the course of implementing these solutions, the proposals put forward from the political right have followed a different path. This is articulated most clearly in the 2017 proposal for newly arrived immigrants and some categories of young workers, suggesting the introduction, for these categories, of statutorily regulated wages much lower than the collectively bargained starting wage. This proposal seriously challenges a number of cornerstones of the Swedish model, namely, that the autonomy of social partners should be left untouched, that wages are to be determined through collective bargaining and that the costs of labour market inclusion should be borne by the state.

10. Square pegs and round holes: Shrinking protections for unpaid interns under the Fair Labor Standards Act¹

James J. Brudney

10.1 INTRODUCTION

Since 2011 in the United States, there have been close to 1 million unpaid interns among the university population during any given year.² Although many if not most are working at for-profit companies, their right to compensation under the Fair Labor Standards Act (FLSA)³ has been denied or seriously questioned under standards set out by the federal courts of appeal. Yet the FLSA offers the broadest definition of ‘employ’ in all federal law, along with detailed exemptions requiring a reduced but actual wage payment for ‘apprentices’, ‘learners’ and ‘students’.⁴ And Congress, when enacting the FLSA in 1938 and amending it in subsequent decades, has expressed a goal of preventing evasion of minimum wage requirements under the guise of such exemptions. How have the law’s protections been eroded in such a way? That is the principal question this chapter sets out to answer.

¹ I thank Jennifer Gordon and David Weil for very helpful comments on an earlier draft, Janet Kearney and Jeff Irwin for excellent research assistance, and Fordham Law School for generous financial support. This chapter is current as of September 2020.

² Precise figures on the number of unpaid interns are not available. Ross Perlin’s path-breaking book *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso 2011) concluded that as many as 75 per cent of the 9.5 million students then attending four-year colleges and universities ‘undertake at least one internship before they graduate’: *ibid* xiv. Since 2011, attendance at these institutions has increased to almost 11 million. Between 40 per cent and 50 per cent of internships were unpaid between 2011 and 2018, with a modest decline occurring over that period.

³ 29 USC s 201ff.

⁴ See 29 USC s 203(g) (“‘employ’ includes to suffer or permit to work’); s 214(a), (b) (setting forth exemptions).

All statutes are meant to apply over time to unforeseen circumstances. Under our canons of construction, remedial statutes such as those protecting civil rights or labour standards are to be liberally construed, meaning interpreted expansively in response to new situations. At the same time, private employers regulated under comprehensive workplace statutes often maintain that enforcement will compromise established or preferred business policies. As regards unpaid internships, these policies reflect an implicit arrangement involving commercial enterprises and universities. In recent decades, private employers – often working with educational institutions – have contended that internships are an important form of training and socialization into the world of white-collar work, and as such they can justifiably be unpaid.

Legal standards under the FLSA were, until recently, fairly clear. They had been consistently articulated by the agency from 1938, as applied through a leading Supreme Court decision in 1947 and a series of Labor Department Interpretive Bulletins, opinion letters and related agency pronouncements over many decades, emanating from both Democratic and Republican administrations. Pursuant to this confluence of enacted text, agency application and Supreme Court analysis, unpaid internships at for-profit employers were permissible only if they were part of a prescribed educational or training course that offered close employer supervision of the educational experience, with no displacement of regular employees and no immediate employer advantage derived from intern performance.⁵ However, this long-standing approach has been superseded by an ad hoc balancing test adopted by numerous courts of appeal in the past decade. The prevalence of the new primary beneficiary approach has made it considerably easier for for-profit employers to establish and maintain unpaid internships.

This chapter's main argument is that the new balancing test is in tension with the text, legislative history and long-standing agency application of the Act. As the bright-line approach – developed over decades to protect basic minimum rights to compensation for work performed – has been replaced by a balancing test permitting far more judicial discretion, unpaid internships have become easier to justify under the FLSA. Unpaid internships are also

⁵ The FLSA separately provides for unpaid 'volunteer' activities applicable to internships at public agencies. See 29 USC s 203(e)(4); 29 CFR s 553.101–4. The Wage & Hour Division of the Department of Labor (DOL) has opined that, for both public agencies and non-profits (in contrast to for-profit employers), volunteers may displace paid employees and also may provide these organizations with an immediate advantage from the interns' work. The FLSA could be applied more rigorously to protect interns in non-profit settings: see David C Yamada, 'The Legal and Social Movement against Unpaid Internships' (2016) 8 NEULJ 357, 375–8. This chapter, however, addresses only the legal and policy aspects of for-profit internships.

contestable as a matter of policy. The asserted benefits of internships include résumé enhancement, networking opportunities and training. But available data indicates that these benefits are realized to a considerably greater degree by paid rather than unpaid interns. And any benefits for unpaid interns are offset, if not outweighed, by various individual and social costs: lack of protection under anti-discrimination laws for unpaid intern non-employees; the socio-economic impact on student populations when access to unpaid internships is a function of family wealth; and employers' ability to substitute unpaid interns for regular employees receiving decent wages. Still, whatever the policy ramifications, the FLSA was enacted to prevent the undermining of basic worker protections.

10.2 UNPAID INTERNS AND THE LAW

10.2.1 FLSA 1938 Text and Initial Context

Although a number of states had enacted minimum wage laws by the 1920s, the Supreme Court in 1923 held that these laws unconstitutionally interfered with employers' ability to freely negotiate wage contracts with their employees.⁶ The Roosevelt Administration made the first attempt to establish a national minimum wage in 1933, but the National Industrial Recovery Act was ruled unconstitutional by the Supreme Court in 1935.⁷ After President Roosevelt's overwhelming re-election in 1936, he first pursued legislation to reform Supreme Court membership while also supporting a new law to provide for minimum wage and overtime protection.⁸ The bill that became the Fair Labor Standards Act was introduced in the Senate in May 1937, and was signed into law in June 1938.⁹ The original bill gave broad discretion to a 'Fair

⁶ *Adkins v Children's Hospital* 261 US 525 (1923). See Frank T DeVlyver, 'Regulation of Wages and Hours Prior to 1938' (1939) 6 Law & Contemp Prob 323, 327.

⁷ *ALA Schechter Poultry Corp v United States* 295 US 495 (1935).

⁸ See John S Forsythe, 'Legislative History of the Fair Labor Standards Act' (1939) 6 Law & Contemp Prob 464, 465–6; Delbert Clark, 'Unions Drive for New Labor Laws' *New York Times* (New York, 10 January 1937); 'Good Form' *Time Magazine* (11 January 1937) 13. The Court altered its position in late March 1937, upholding the constitutionality of a state minimum wage law for the first time: *West Coast Hotel Co v Parrish* 300 US 379 (1937).

⁹ See Forsythe (n 8) 466–73. The 1938 minimum wage law covered 'employees engaged in interstate commerce or in the production of goods for interstate commerce'. Amendments in 1961 and 1966 extended the federal minimum wage law to employees in retail and service enterprises, state and local government employees, and other areas of the economy.

Labor Standards Board' to establish exemptions at 'lower than applicable' wage levels for the employment of learners and apprentices.¹⁰ The final bill substantially narrowed that discretion. As enacted, the FLSA directed the Wage & Hour Administrator to provide 'by regulation or by orders' for the employment of learners and of apprentices, under special certificates issued by the Administrator, '*to the extent necessary in order to prevent curtailment of [their] opportunities for employment*' at '*such wages lower than the [statutory] minimum wage* and subject to such limitations as to time, number, proportion, and length of service' as the Administrator prescribed.¹¹ For current purposes, there are certain key takeaways from this text specifying exemptions for learners and apprentices: (1) they are to be paid; (2) their lower rates of pay are justified by the need to prevent curtailment of their own opportunities for employment; and (3) they are covered by special certificates as prescribed by the Administrator.

Congress added a parallel exemption in 1961, also based on preventing curtailment of opportunities for employment for 'full-time students outside of their school hours in any retail or service establishments'.¹² Congress in 1966 expanded this exemption to cover full-time students without regard to their school hours (in compliance with child labour laws), and extended coverage to students employed in agriculture and at institutions of higher education where they are enrolled.

The relatively sparse relevant legislative history addressing the 1938 exemptions indicates that 'learners' were meant to be included as part of the term 'employee'. This is reflected in floor statements and hearing testimony noting the need to prevent employers from evading minimum wage provisions by utilizing 'learners'¹³ and also by defeat of a House amendment proposing to exclude 'beginners and apprentices' from the Act's coverage for an initial period.¹⁴

The Administrator's initial regulations on the 1938 law reinforced the narrowness of the learner and apprentice exemptions. Employers had to apply

¹⁰ S2475, s 6(c), 18–19 (25 May 1937).

¹¹ Pub L No 75-718, s 14 (emphasis added).

¹² Pub L No 87-30, cl 1 (1961), codified at 29 USC s 214 (1) (1964). See also S Rep 87-145, 50–51 ('This section provides for employment (as in the case of learners and apprentices under present law) of full-time students ... in retail or service establishments in jobs not of the type ordinarily given to a full-time employee'); HR Rep 87-75, 11.

¹³ Joint Hearings on S2475 and HR 7200, 75th Cong, 1st Sess 1937, 37, 38, 44 (statement of Assistant Attorney General Robert Jackson); 83 Cong Rec 7309 (23 May 1938) (remarks of Rep Fitzgerald).

¹⁴ 83 Cong Rec 7389, 7391, 7393 (24 May 1938) (consideration and rejection of amendment offered by Rep Taylor).

to the Labor Department for approval to employ learners at the lower rate; propose a specific lower hourly pay rate and explain why learners should be receiving that reduced pay rate; and carry the burden of demonstrating at a hearing that paying the applicable minimum wage ‘will curtail employment opportunities for learners in the occupation’.¹⁵ In denying the first two applications for learner exemptions, the Administrator concluded that for one job the employer’s request for a 90-day learning period was excessive as the training could be completed in a week, and for the second type of job the work was easily learned and there was a large available supply of experienced workers.¹⁶ In summary, the detailed and explicit regulatory approach adopted by the Administrator, closely tracking the statutory text, conveyed that these exemptions were meant to provide some level of compensation for learners and apprentices, but that, even so, they would be narrowly construed to prevent exploitation by employers who wished to avoid paying regular minimum wage rates.¹⁷

10.2.2 The Supreme Court in 1947: *Walling v Portland Terminal Co*

Against this background, the Supreme Court in 1947 decided its first case raising the possibility that persons being trained for jobs with an employer might be exempted from the Act altogether as non-employees rather than exempted from the full wage provisions as learners or apprentices. In *Walling v Portland Terminal Co*,¹⁸ the railroad company offered a seven- to eight-day course to applicants for the position of yard brakeman, in which each applicant was supervised by regular yard crew, learning tasks through observation and eventually by doing the actual work under close scrutiny. While the applicant was involved in training needed to acquire skills for a full-time job, the Court made clear that his activities ‘do not displace any of the regular employees’

¹⁵ Wage and Hour Regulation 1939 pts 522.4, 522.5, 522.7. Similar requirements were imposed for persons seeking to employ apprentices: *ibid* pts 521, 521.1.

¹⁶ Denial of Applications for Learner Exemptions involving pecan shellers and silk throwers, W&H Reference Manual (1939) 84. Further, when interpreting the comparably phrased exemption for ‘messengers employed exclusively in delivering letters and messages’ in the 1938 statute, the Administrator rejected an exemption application from Western Union once it was established that the messengers performed separate duties in addition to delivering messages. The Administrator noted that this exemption would give the company a competitive advantage in those separate areas from paying a sub-minimum wage: W&H Reference Manual (1939) 85–9 (Administrator’s Decision on Western Union Appeal affirming report and findings of Presiding Officer).

¹⁷ See Frank E Cooper, ‘The Coverage of the Fair Labor Standards Act and Other Problems in its Interpretation’ (1939) 6 Law & Contemp Prob 333, 334, 343–4.

¹⁸ 330 US 148 (1947).

and his work ‘does not expedite the company’s business, but may, and sometimes does, actually retard it’.¹⁹

The Court recognized Congress’s purpose of avoiding a ‘blanket exemption’ of trainees from the Act’s wage provisions by allowing for ‘[f]lexibility of wage rates under the safeguard of administrative permits’. But notwithstanding the Act’s broad definitions of ‘employ’ and ‘employee’, those definitions do not make ‘a person *whose work serves only his own interest* an employee of another person who gives him aid and instruction’.²⁰ Accepting the ‘unchallenged findings’ that ‘the railroads *receive no “immediate advantage” from any work done by the trainees*’, the Court concluded that these trainees were not employees under the Act.²¹

This is not to say that the railroads initiated this training out of philanthropic motives. They considered the programme helpful in identifying future employees from among individuals who participated. Still, they reaped no ‘immediate advantage’ during the course of the programme itself. In this regard, the Court reasoned that, had the trainees taken similar instruction at a vocational school unconnected to the railroad, they would not be deemed employees of the school. Nor could they be regarded as employees of the railroad simply because upon graduation they might be hired by the railroads. The Court remained keenly aware of the possibility of evasion of the minimum wage law’s letter or spirit if employers accepted the services of learners at substandard pay and without permits from the Administrator. But it determined that the instant set of factual circumstances did not raise that threat.

10.2.3 The Administrator’s Consistent Application of the Supreme Court Approach

In the decades following *Portland Terminal*, the Administrator received numerous fact-specific inquiries from employers and educational institutions concerning whether students, trainees or interns are entirely exempt from the FLSA. In responding through opinion letters, the Administrator from at least the early 1960s relied on six general criteria derived from *Portland Terminal*,

¹⁹ Ibid 149–50. The respondent’s brief in *Portland Terminal* relied heavily on the facts as found below, emphasizing that the trainee ‘is always an extra and unnecessary man [who] does not aid the work of a yard crew but rather impedes it and slows it down’: Brief for Respondent, 5.

²⁰ Ibid 152 (emphasis added).

²¹ Ibid 153 (emphasis added).

and made clear that students, trainees or interns are not employees *only if all six of the criteria apply*. These six criteria are:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close supervision.
4. The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion the employer's operations may be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.²²

In applying these six criteria to factual settings, the Administrator reached varying determinations. Students required to engage in a particular number of hours of on-the-job training or work experience as a prescribed part of a specialized educational course were not considered employees of the firms where the training took place.²³ On the other hand, participants in education or training programmes were considered employees where they engaged in work that was needed to help operate a facility (to that extent displacing regular employees), or where products that vocational students generated enabled the cooperating firm to constrain job opportunities for regular employees (again displacement), or where the training programme competed to any extent with other establishments in an industry or trade (so that the employer derived an immediate advantage).²⁴

²² See Opinion Letter of 5 September 2002, 2002 WL 32406598; Opinion Letter of 8 May 1996, 1996 WL 1031777; Opinion Letter of 27 March 1986, Wages-Hours 89-90 CCH-WH para 31,831; Opinion Letter of 19 October 1961, Wages-Hours 61-66 CCH-WH para 30,558.

²³ Opinion Letter of 31 March 1970, Wages-Hours 69-73 CCH-WH para 30,630 (90–100 hours required by an interior design department at a state university); Opinion Letter of 18 July 1967, Wages-Hours 66-69 CCH-WH para 30,628 (hours required by a course to become a certified laboratory assistant).

²⁴ Opinion Letter of 17 January 1986, Wages-Hours 89-90 CCH-WH para 31,749 (participants in a food service training programme); Opinion Letter of 22 February 1974 Wages-Hours 73-78 CCH-WH para 30,911 (vocational school trainees producing glove inserts); Opinion Letter of 9 June 1969, Wages-Hours 69-73 CCH-WH para 30,548 (military personnel being trained to return to civilian life for any week when they are individually engaged in or producing goods for interstate commerce). On still

Although many of the Administrator's decisions dealt with vocational training broadly analogous to that which was at issue in *Portland Terminal*, some responded to inquiries involving white-collar internships. When on-site work experience is part of a required university or professional/white-collar vocational curriculum, or is part of a clinical internship or externship course offered at all professional schools of this type, even if not required, then the work experience is unlikely to give rise to an employment relationship.²⁵ The Administrator distinguished the educationally prescribed or system-wide for-credit aspects of the work experience from settings where similar job-related assignments were termed an 'internship' in a post-graduation setting.²⁶

Moreover, the Administrator was troubled by other white-collar internship or experience-based programmes that occurred in an educational setting. For instance, an internship of 7–10 hours a week where students perform the work of a field marketing representative on campus – responsible for collecting data, conducting surveys and utilizing online chat rooms while wearing company logo clothing – may well confer an immediate benefit on the employer, and students may not be closely supervised during their work. These aspects would violate two of the *Portland Terminal* criteria.²⁷ Third-year law students who serve as teaching assistants to law professors, although viewed as an educational experience, seemed likely to be deemed employees under the FLSA in the 1960s, as they would be today.²⁸ In short, Administrator determinations

other occasions, the Administrator declined to make a specific determination because the information presented by the inquirer was insufficient to decide whether all six factors had been met. See eg Opinion Letter of 5 September 2002 (n 22); Opinion Letter of 8 May 1996 (n 22); Opinion Letter of 13 March 1995, 1995 WL 1032473.

²⁵ Opinion Letter of 7 July 1977, Wages-Hours 73-78 CCH-WH para 31,122 (pharmacy school students engaged in 16 hours weekly work experience at participating hospital or community pharmacies as part of for-credit clinical internship and externship course, together with four hours of weekly classroom lectures and laboratory work; while the course is optional, it is offered at all 72 pharmacy schools in the country); Opinion Letter of 31 March 1970 (n 23) (university degree in interior design requires that rising seniors experience 90–100 hours of practical interior design work under supervision of interior design firm); Opinion Letter of 18 July 1967 (n 23) (student in training to become certified laboratory assistant engages in work experience at hospital as a required part of the curriculum; student receives stipend or allowance for subsistence which is not considered wages establishing an employment relationship).

²⁶ Opinion Letter of 7 July 1977 (n 25) (Administrator emphasized that, unlike required undergraduate course work experience, post-graduation internships at pharmacies 'certainly' would 'give rise to employment relationships between the intern and the employing pharmacy').

²⁷ Opinion Letter of 17 May 2004, FLSA2004-5NA.

²⁸ Opinion Letter of 13 September 1967, Wages-Hours 66-69 CCH-WH para 30,641. This is a separate inquiry from whether teaching assistants are employees under

from the 1960s into the 2000s feature various applications of the *Portland Terminal* factors in white-collar settings.

Administrator opinion letters invoking *Portland Terminal* have been issued under Democratic and Republican administrations for more than half a century.²⁹ Although they are not agency pronouncements with the force of law, such as notice and comment rules, their consistency in structure and thoroughness of exposition qualify them for some degree of deference under the *Skidmore* doctrine.³⁰ A review of relevant federal court decisions suggests that there was greater respect for the Administrator's approach in the period up to the early 1990s, but little agreement with that approach since about 2011.

10.2.4 Lower Federal Courts from the 1970s to the Early 1990s

Lower court cases during this period recognized the importance of the six *Portland Terminal* criteria, but began articulating more of an 'economic reality' approach when applying the six criteria, by assessing which party (trainees/students or employers) received the bulk of the benefit.³¹ When the training was short term and on-the-job, some courts pointed to the limited and narrow kinds of learning that took place, while also emphasizing whether trainees performed tasks or functions that provided immediate benefit to the employer's business.³² However, when the training consisted of a longer-term vocational course provided by the employer, the fact that such a course produced a labour pool of potential employees did not by itself create the 'immediate advantage' to which *Portland Terminal* referred.³³

Courts tended to consider the 'no immediate advantage' factor in more depth for longer-term training. One court examined evidence to determine that

the National Labor Relations Act, which has a more elaborated statutory definition of 'employee'. See *Trustees of Columbia University* 364 NLRB No 90 (2016).

²⁹ The author was able to retrieve 17 Administrator opinion letters addressing the *Portland Terminal* factors, dating from the early 1960s to 2013. Of the 13 letters cited in nn 22–28, seven are from Democratic administrations and six from Republican administrations.

³⁰ *Skidmore v Swift & Co* 323 US 134 (1944); *United States v Mead Corp* 533 US 218 (2001). See *Solis v Laurelbrook Sanitarium and School* 642 F 3d 518, 525 (6th Cir, 2011) (reviewing varying circuit court rulings as to appropriate deference due to DOL's six-part test).

³¹ See eg *McLaughlin v Ensley* 877 F 2d 1207, 1209 (4th Cir, 1989); *Donovan v American Airlines* 686 F 2d 267, 272 (5th Cir, 1982); *Marshall v Baptist Hospital* 473 F Supp 465, 476 (D Tenn, 1979).

³² See eg *McLaughlin v Ensley* (n 31) 1210; *Bailey v Pilots' Association for Bay and River Delaware* 406 F Supp 1302, 1307 (ED Pa, 1976).

³³ *Donovan* (n 31) 272.

long-term trainees whose course required time in the field did not assume the duties or perform any key functions of the career employees who helped train them.³⁴ And, in a situation where on-the-job training and outside class work were sufficiently distinct components, the court relied in part on the trainees being entitled to be paid for the productive work content of their activities though not for the classroom activities.³⁵

Importantly, most courts closely analysed training courses to determine whether they taught skills and competencies that were employer-specific or ‘fully fungible’ so they could be utilized in other settings with minimal additional training.³⁶ When the skills imparted were deemed valuable and transferrable, courts concluded that the immediate benefit flowed to the trainees or students.³⁷ However, if the courses were not well supervised, trainees did not receive adequate orientation, they were restricted to performing one or two procedures, or they spent substantial portions of time on routine activities of at best peripheral educational value, then courts found the course conferred minimal or no benefit on trainees and instead delivered the bulk of benefits to the employer.³⁸

10.2.5 Federal Appeals Courts in Recent Years: The Primary Beneficiary Approach

Since 2011, appeals courts in seven circuits have addressed the issue of whether students or trainees should be considered workers under the FLSA. In two instances, the courts invoked the six *Portland Terminal* criteria, articulating an economic reality approach similar to the decisions described from prior decades.³⁹ These courts applied the six factors by focusing primarily on whether the skills and training acquired in an extended vocational course were transferrable, and whether the course provider (a for-profit enterprise) derived

³⁴ *Reich v Parker Fire Protection District* 992 F 2d 1023, 1028 (10th Cir, 1993) (ten-week training course at a firefighting academy).

³⁵ *Ballou v General Electric Co* 433 F 2d 109, 111 (1st Cir, 1970) (40-hour-a-week training that includes work at GE plant and classwork at independent educational institutions).

³⁶ *Donovan* (n 31) 270 (four- to five-week training course). See also *Reich v Parker* (n 34) 1027.

³⁷ See eg *Reich v Parker* (n 34); *Donovan* (n 31).

³⁸ *Marshall v Baptist Hospital* (n 31) 475–7 (two-year training course). See also *McLaughlin v Ensley* (n 31) 1209–10 (five-day course).

³⁹ *Nesbitt v FCNH Inc* 908 F 3d 643, 647 (10th Cir, 2018); *Harbourt v PPE Casino Resorts Maryland* 820 F 3d 655, 660–61 (4th Cir, 2016), cf *Hollins v Regency Corp* 867 F 3d 830, 835–6 (7th Cir, 2017) (invoking *Portland Terminal* and the six factors while resolving the issue based on its own ad hoc analysis).

immediate advantage from the training offered. In one case, an integrated classroom and clinical training course in massage therapy (where the clinical component included massages for members of the public at discounted rates) was held to be of primary if not exclusive benefit to the trainees rather than the facility operator.⁴⁰ In the other case, trainees' allegations about a casino's 12-week training course for table dealers (that the training was tailored to the casino's specifications and not transferrable to work in other casinos) were found to confer immediate advantage on the casino and were 'either conceived or carried out in such a way as to violate ... the spirit of the minimum wage law'.⁴¹

10.2.5.1 Analysing the primary beneficiary approach

Four circuits have openly rejected the six *Portland Terminal* criteria that were applied for decades by the Department of Labor. These courts found the agency's approach 'a poor method for determining employee status in a training or educational setting'⁴² and inapposite for 'longer-term intensive modern internships that are required to obtain academic degrees and professional certification and licensure'.⁴³ Instead, following the lead of the Second Circuit, they have invoked seven non-exhaustive factors, none of which carries presumptively special weight, to assess whether the student/trainee or the employer is the 'primary beneficiary' of the educational arrangement.⁴⁴ The Second Circuit's list of seven factors⁴⁵ tracks the agency's six factors in certain

⁴⁰ *Nesbitt* (n 39) 645, 648. The court noted, but did not rely on, evidence that the school made no profit from the programme given its overhead and other operational costs. The Tenth Circuit stated that it was following the economic reality test from circuit precedent in *Reich v Parker* (n 34) and declined to adopt the primary beneficiary test that had recently been articulated by the Second Circuit in *Glatt v Fox Searchlight Pictures Inc.* 811 F 3d 528 (2016), discussed below. See *Nesbitt* (n 39) 647.

⁴¹ *Harbourt* (n 39) 660–61 (quoting *Portland Terminal* (n 18) 153). The Fourth Circuit concluded that the facts alleged stated a claim under the FLSA and reversed the lower court's dismissal of the complaint: *ibid* 661.

⁴² *Solis* (n 30) 525.

⁴³ *Schumann v Collier Anesthesia, PA* 803 F 3d 1199, 1211 (11th Cir, 2015).

⁴⁴ *Glatt v Fox Searchlight Pictures* (n 40). The Second Circuit test was endorsed by the Eleventh Circuit in *Schumann v Collier* (n 43) 1211–12, and by the Ninth Circuit in *Benjamin v B&H Education Inc* 877 F 3d 1139, 1147 (2017), which also identified the *Solis* court (Sixth Circuit) as adhering to this approach.

⁴⁵ The seven factors in *Glatt* are identified in terms of 'the extent to which' each applies: (1) mutual understanding of no expected compensation; (2) provision of training similar to that provided in an educational environment; (3) links to a formal education programme such as receipt of academic credit; (4) correspondence to the academic calendar; (5) duration limited to the period of beneficial learning; (6) intern work complementing, rather than displacing, work of paid employees while providing significant

particulars – notably that the training is similar to what would be provided in an educational environment; that the student/intern's work does not displace the work of paid employees; and that both employer and student/intern understand there is to be no compensation for time spent in training and also no expectation of a paid job at the conclusion of such training.⁴⁶

At the same time, the new standard – which was subsequently adopted by the Trump Administration Labor Department⁴⁷ – departs in notable respects from the long-standing Labor Department approach. First, it identifies as relevant various detailed aspects of the modern higher education process: whether the student/intern receives academic credit or their experience is integrated with other coursework; whether the internship corresponds to the academic calendar; and whether the duration of the internship is limited to a period of beneficial learning. These new factors can serve as constraints against abuse, but they are primarily formalistic and procedural rather than substantive. Also, while the circuit courts have maintained that these new factors were needed to bring the *Portland Terminal* approach into the modern era, the Administrator had long been sensitive to specific interactions between such extended training courses and receipt of academic credit as well as the integration of experiential learning in a curricular context.⁴⁸

Of greater significance, the new 'primary beneficiary' standard removes a key substantive component of the Labor Department approach: that the employer providing the training *derives no immediate advantage from the activities of the trainees or students*.⁴⁹ The 'no immediate advantage' factor was never understood to disqualify employers simply because they offer training. Identifying and helping to prepare a pool of potential or likely future employees is presumably the main reason most employers provide or underwrite the training courses in the first place. But what 'no immediate advantage' does accomplish is to focus the close attention of reviewing authorities (either the agency or courts) on whether employers benefit in more direct terms from the educational programme.

This immediate benefit to employers could derive from work performed by 'students/interns' during the course of the programme, work that does not technically displace other employees but that still enriches the employer while

educational benefits; and (7) mutual understanding of no entitlement to a paid job at the end of the internship.

⁴⁶ Compare factors 1, 3, 5 and 6 of the agency approach above (text at n 22) with factors 1, 2, 6 and 7 of the Second Circuit test.

⁴⁷ See DOL Field Assistance Bulletin No 2018-2, 5 January 2018.

⁴⁸ See previous discussion of Administrator letters.

⁴⁹ Listed as the fourth *Portland Terminal* factor by the Administrator, also noting that 'on occasion the employer's operations may actually be impeded'.

failing to compensate the students. A remarkable illustration is the decision in *Solis v Laurelbrook Sanitarium and School*.⁵⁰ Once the Court determined that students rather than the sanatorium were the ‘primary beneficiaries’ of the school’s practical training component, it discounted as ‘offset in various ways’ the considerable economic value the school realized from countless hours of uncompensated activities required of students.⁵¹ Another example involves menial tasks performed by student interns going well beyond the licensure-related work experience that justified their status as non-employees. One court suggested that, by assigning them tasks such as receptionists, cleaning floors and restocking shelves, the employer could have concluded that ‘students needed to learn time-management skills’.⁵²

A second immediate benefit to employers may result in cases where the training provided is employer-specific, in that the skills and knowledge acquired are largely if not completely non-transferrable. An example of this second type of benefit was a 12-week training course for casino dealers that was tailored to the casino’s specifications and not transferrable to other casinos.⁵³

By declining to consider seriously whether a student/intern experience creates an ‘immediate advantage’ for the employer, even a substantial one,⁵⁴ the primary beneficiary approach ignores a central factor in rooting out employer evasion of the statutory minimum wage. Concern about employer exploitation of students and learners is what led to the crafting of detailed and difficult-to-satisfy exemptions by Congress. It is what led the Supreme Court in *Portland Terminal* to articulate a narrow exception to those exemptions for an educational experience that ‘serves only [the student’s] own interest’ and where the employer/trainer ‘receives no immediate advantage for any work

⁵⁰ *Solis* (n 30).

⁵¹ *Ibid* 530–31. These hours included not only providing patient services for which the sanatorium was paid and providing hours of service that counted toward the sanatorium’s licensing requirements, but also assisting in growing and selling to the public flowers, produce and wood pallets, and assisting in repairing cars for the public.

⁵² *Hollins v Regency Corp* (n 39) 836–7.

⁵³ *Harbourt* (n 39). In that setting, unless the students/interns chose to seek jobs with this employer upon completing the course, they would effectively have wasted their time and money on preparation.

⁵⁴ See *Velarde v GW GJ, Inc* 914 F 3d 779, 781–5 (2nd Cir, 2019) (for-profit cosmetology school offers ‘1000-hour course of study’ consisting of eight weeks in classroom followed by 22 weeks at 34 unpaid hours per week, performing supervised barbering and hair styling for paying customers and janitorial and clerical work; court recognizes that school gains economic benefit but holds that trainees as primary beneficiaries need not be paid for the 748 hours of course that involves their profit-generating work).

done by the trainee/students'.⁵⁵ And it is what led the Labor Department to insist that the 'no immediate advantage' factor should be applied in every instance to assess just what the employer is receiving beyond the educational development of a pool of future potential employees.

The primary beneficiary approach also brings two lower-profile changes in emphasis from what had been the law for decades under the Labor Department standard. One involves the ordering of the factors themselves. 'No expectation of compensation from time spent in training' was the last of the six factors in the agency standard, and was rarely a material element in the agency's review. It is now the first-listed factor in the Second Circuit's primary beneficiary approach, signalling to employers that securing this understanding is an important initial step in the process of engaging interns without pay. These understandings can often be preconditioned by the realities of unequal bargaining strength. The Supreme Court has made clear that waivers of the right to compensation are prohibited under the FLSA,⁵⁶ and has warned against employers using superior bargaining power to pressure employees into saying they performed work 'voluntarily'.⁵⁷ But bargaining leverage is a foundational element in our labour standards system, including with respect to the FLSA, and this leverage is too often overlooked or ignored when considering the application of that statute and its regulations. Accordingly, one should not be surprised at the proliferation of agreements between interns and employers, 'negotiated' in advance and specifying that services will be performed without pay.

The other change is that the Second Circuit's seven factors are assigned no specific weight and are not even meant to be exclusive. The emphasis on such a wide-ranging ad hoc balancing approach diminishes the attention given to elements that were previously deemed essential – notably that the student/intern's work does not displace the work of paid employees. The underlying risk is that a set of procedural elements (formal ties to an educational programme and an academic calendar, and a set of pre-existing signatures and understandings between unequal players) has supplanted a substantive focus on whether work is being performed by 'students' that could and should be performed by regular employees and that therefore confers economic benefits on the employer/trainer.

⁵⁵ *Portland Terminal* (n 18) 152–3.

⁵⁶ *Barrentine v Arkansas-Best Freight System Inc* 450 US 728, 740 (1981).

⁵⁷ *Tony and Susan Alamo Foundation v Secretary of Labor* 471 US 290, 302 (1985).

10.2.5.2 Applying the approach to unpaid internships

There is an almost patronizing class-conscious perspective underlying the circuit courts' new insistence that modern internships 'required to obtain academic degrees and professional certification and licensure in a field are just too different from the short training course offered by the railroad in Portland Terminal'.⁵⁸ The implication that white-collar internships in the knowledge economy are mismatched with FLSA approaches to more blue-collar-orientated vocational training is belied by the fact that, as noted previously, the Labor Department applied its six-factor approach to university and professional educational programmes over many decades. Moreover, this new perspective ignores the reality that university-affiliated internships often differ from apprenticeships and cooperative education arrangements in precisely the ways that legal protections were designed to address. Unpaid internships tend to be characterized by a high level of informality and the absence of well-defined or tightly structured educational or training objectives. Although it may be unfashionable to consider sophisticated college students and graduates as susceptible to being taken advantage of in work settings accompanied by credit or certification, this type of vulnerability is what gave rise to protections accorded to students, learners and apprentices 80 years ago in the FLSA.

Perhaps not surprisingly, circuit courts have begun to extend the primary beneficiary test beyond a relatively formalized educational setting. In *Wang v Hearst Corp*, the Second Circuit held that a group of unpaid interns working for Hearst Publishing were not employees. As part of its analysis, the court concluded that being assigned to complete repetitive tasks or to take minutes at marketing meetings was beneficial training which need not 'resemble[...] university pedagogy'; that interns did not have to receive university credit as long as such credit was made available; and that although interns did 'complete some work regularly performed by paid employees', this displacement factor favouring the interns was not dispositive, because intern work may 'complement' that of paid employees.⁵⁹

The *Portland Terminal* mandatory factors place limits on this potentially exploitative arrangement. For instance, the first factor – that 'the training ...

⁵⁸ *Schumann v Collier* (n 43) 1211. See also *Glatt v Fox Searchlight* (n 40) 535 citing 2011 Position Statement on US Internships by National Association of Colleges and Employers.

⁵⁹ 877 F 3d 69, 74–5 (2nd Cir, 2017). *Wang* also makes clear that courts will rely heavily on the interns' clear understanding that they will not be paid: *ibid* 73. However, as noted previously, the unequal bargaining power of workers and employers, plus the fact that FLSA rights are not waivable, renders such an 'understanding' and its accompanying 'consent' of dubious persuasive value.

is similar to that which would be given in a vocational school' – has been understood to require an educational component that extends throughout the internship and delivers substantive content valued beyond the boundaries of the particular workplace, that is, skills and knowledge transferrable to a larger professional or occupational setting. The second factor – 'training for the benefit of the trainees or students' – involves something more targeted to the intern than simply learning the general skills and work habits that accompany any new employee's exposure to a new profession or industry. The third factor – 'no displacement of regular employees' – anticipates close supervision from regular employees, such as a shadowing relationship, rather than allowing interns to perform the company's work independently.⁶⁰ This supervision also is not a licence to assign to interns normal operational tasks that would otherwise be handled by paid workers.⁶¹

Finally, the fourth *Portland Terminal* factor – 'no immediate advantage' – has been addressed in detail previously. Although criticized as a harsh bright-line rule, the Labor Department and lower courts recognized that this factor does not preclude minimal productive work by interns if that work is offset by the employer's training and supervision efforts.⁶² Also, under *Portland Terminal*, there is no balancing among the various factors, no chance that the formalities of interns 'agreeing' not to be paid will outweigh the reality that the employer is receiving immediate benefits from the interns' work and that work is displacing other employees.

By contrast, the primary beneficiary approach emphasizes training analogous to an educational environment, beneficial learning and educational benefits received by the intern.⁶³ Yet one would expect interns, like entry-level workers in general, to obtain these educational and training benefits from their work. And interns – again like entry-level employees – will predictably

⁶⁰ See Amicus Brief for Secretary of Labor in *Glatt* (n 40) 13–16 for a discussion of these three factors.

⁶¹ For an illustration of the difference between the *Portland Terminal* approach and current primary beneficiary law, consider the legal advice offered to employers in a recent news article: 'your role, if you're going to have them as unpaid interns, is to educate them, and it needs to be part of a bigger picture for their development *and not just the benefit of your day-to-day operation*'. Braden Campbell, 'Interns in the Trump Era: What Employers Need to Know' (*Law 360*, 29 April 2019) (emphasis added), <https://www.law360.com/articles/1154059>, accessed 30 March 2021.

⁶² See Amicus Brief in *Glatt* (n 40) 16–17, citing Opinion Letters of 5 September 2002 and 13 March 1995. See also *Donovan* (n 31) 272. The fifth and sixth *Portland Terminal* factors focus more straightforwardly on students' understandings that they are not entitled to a job after the internship, and that they will not be paid during its operation.

⁶³ See *Glatt* (n 40) factors 2, 5 and 6.

be inclined to value these benefits as much or more than the employer values their entry-level services. These comparative balancing assessments, based on subjective judgements, obscure the underlying objective issue that matters from the standpoint of the FLSA: whether the interns are performing services that replace or displace what paid employees would offer, and that confer an immediate economic advantage on the employer.

10.3 UNPAID INTERNS AND PUBLIC POLICY

From 2014 to 2018, between 53 and 60 per cent of college seniors completed an internship during their time at school.⁶⁴ In the same five-year period, between 43 and 46 per cent of these internships were unpaid. Although many internships involve service to non-profits or government agencies, over half of seniors' college internship experiences were with for-profits during this five-year period.⁶⁵

Internships also have become more regular features of business school and law school education. There is a steady demand among employers for business student internships; the majority of business interns work at for-profit enterprises and nearly half of them are unpaid.⁶⁶ The law school numbers are not as well researched,⁶⁷ but it is clear that many law schools sponsor unpaid internships with for-profit enterprises for academic credit.⁶⁸ While these field placements may now be paid and receive academic credit (pursuant to a 2016 change in American Bar Association guidance), one consequence has been

⁶⁴ National Association of Colleges and Employers (NACE), *2018 Student Survey Report: Attitudes and Preferences of Bachelor's Degree Students* (NACE 2018) 20.

⁶⁵ Ibid. The proportion of total internships at for-profits was 55 per cent, 53 per cent, 55 per cent, 53 per cent and 47 per cent for the years 2014–18: *ibid* 21. In 2018, internships at non-profits were 32 per cent of the total, and at government agencies 21 per cent. The numbers for 2018 are for all seniors, not just graduating seniors.

⁶⁶ Ann Marie Johnson and David L Baker, 'Business Student Internships: A Pathway to Resolving the Perils of Unpaid Placements' (2018) 10 *Bus Educ Innovation J* 41, 43, 45.

⁶⁷ In a recent survey of applied legal education, the median percentage of students who participated in a field placement course before graduation was 51–5 per cent: Robert R Kuehn and David A Santacroce, *The 2016–17 Survey of Applied Legal Education* (CSALE 2017) 12.

⁶⁸ Melissa Hart, 'Internships as Invisible Labor' (2014) 18 *Employee Rts & Empl Poly J* 141, 150. Four years after Hart's survey, the American Bar Association (ABA) lifted its ban on law students receiving both pay and academic credit for internships: Karen Sloan, 'ABA Approves Pay for Law Students' For-Credit Externships' (*Law.com*, 8 August 2016), <https://www.law.com/sites/almstaff/2016/08/08/aba-approves-pay-for-law-students-for-credit-externships/?slreturn=20200829021021>, accessed 30 March 2021.

a trend toward more internships at for-profit firms that are minimally supervised as regards education. These for-profit enterprises notably include companies in the media and fashion industries as well as private law firms; they all must provide some form of ‘written assurance that the students will receive an educational experience’.⁶⁹

10.3.1 Policy Arguments Supporting Internships, with Caveats

In the current professional world, internships are perceived as generally beneficial to students and employers as well as to educational institutions. A recent research paper describes internships as ‘provid[ing] students with valuable professional experience and networks [and] giv[ing] employers a steady stream of new talent with fresh ideas from academia’; in addition, they ‘enable educators to create venues for students to translate academic knowledge to real-world situations’.⁷⁰ From an optimal standpoint, interns enrolled as undergraduates, business students or law students acquire a level of on-the-job training through closely observing the operations of successful enterprises and individual mentors within those enterprises. In addition, interns’ networking opportunities forge connections that may lead to job opportunities in the future. And by listing the internship on their curriculum vitae (CV), students demonstrate to possible future employers their commitment to a field, as well as their capacity to participate in the relevant professional or occupational culture.⁷¹

There is debate about how far interns realize these benefits in practice. Ross Perlin is perhaps the leading sceptic. In his book examining the experiences of interns across the United States, Perlin concludes that ‘focused training and mentoring are vanishingly rare’ and that ‘the sheer scale of the internship arms race has made the raw credential unremarkable, a box to be checked ... [its] power is largely negative – it seems risky *not* to have done one, it teaches you what *not* to do’.⁷² Perlin acknowledges that some internships meet the idealized

⁶⁹ Letter from M Patricia Smith, Solicitor of Labor, to Laurel G Bellows, Immediate Past President of American Bar Association, 12 September 2013.

⁷⁰ Matthew T Hora, Zi Chen, Emily Parrott and Pa Her, ‘Problematizing College Internships: Exploring Issues with Access, Program Design, and Developmental Outcomes in Three U.S. Colleges’ (2019) Wisc Center for Educ Research Working Paper No 2019-1.

⁷¹ *Ibid.* See also NACE (n 64). Among the results reported are: 73 per cent of students were satisfied or very satisfied with the experience, and they reported improved development of a range of job-related competencies (such as work ethic, teamwork collaboration, communication skills, problem-solving). At the same time, nearly 60 per cent expressed dissatisfaction with pay level or status, and 25 per cent of time was spent on administrative, clerical or non-essential functions.

⁷² Perlin (n 2) xv, 203–4 (original emphases).

standards referred to above, but contends that on the whole they fall far short of meeting that description: ‘As education, they pale in comparison to our schools. As training to work, they compare unfavourably with apprenticeships. As a form of work, they are often a disappointment, and sometimes a rank injustice.’⁷³

Perlin is hardly the only sceptic about the positive effects of internships. Studies of internships in the United Kingdom, Europe and Australia identify a range of concerns about internships being deficient in learning content as well as working conditions and employment outcomes.⁷⁴ Overall, results in the United States setting might be characterized as positive though mixed in terms of educational benefits and employment prospects. Perhaps representative is one study concluding that students derived greater value from internship programmes when the programmes were highly structured, integrated into their programme of study, and clearly related to their interests and career goals.⁷⁵

10.3.1.1 Paid versus unpaid internships

Accepting for the sake of argument that the enormous increase in internships over the past decade or more reflects at least some positive results, a key question is whether the benefits and advantages are comparable for paid and unpaid internships at for-profit companies. The quantitative answer seems to be no – paid internships offer more in the way of employment prospects and entry-level compensation than do unpaid internships.

Recent research indicates that, of the sizeable number of undergraduate students who want an internship but are unable to pursue one, over a quarter report insufficient pay as a factor and more than half invoke the need to work at their current paid job.⁷⁶ Moreover, for those who do gain access, being in a paid internship is more likely to lead to employment than being in an unpaid internship. A 2015 National Association of Colleges and Employers (NACE) study found that paid internships with private for-profit companies result in a substantially higher rate of offers of permanent employment (72.2 per cent versus 43.9 per cent).⁷⁷ Also, median starting salaries for students following

⁷³ Ibid 205.

⁷⁴ See eg Chapter 2 in this volume; Paula McDonald, ‘Open Market Internships: What Do Intermediaries Offer?’ (2020) 33 *J Educ & Work* 33, 35–6.

⁷⁵ Michael Hergert, ‘Student Perceptions of the Value of Internships in Business Education’ (2009) 2 *Am J Bus Educ* 9, discussed in Matthew T. Hora, Matthew Wolfram and Samantha Thompson, ‘What Do We Know about the Impact of Internships on Student Outcomes? Results from a Preliminary Review of the Scholarly and Practitioner Literatures’ (2017) CCWT-WCER Research Brief No 2.

⁷⁶ Hora and others, ‘Problematising College Internships’ (n 70) 11.

⁷⁷ NACE, ‘Paid Interns/Co-Ops See Greater Offer Rates and Salary Offers than Their Unpaid Classmates’ (*NACE*, 23 March 2016), <http://www.nacweb.org/job>

paid internships at for-profits are more than 50 per cent higher than median starting salaries following unpaid internships in the same settings.⁷⁸

A more recent NACE study supports the continued existence of a substantial pay differential for first-position salaries between college graduates with paid and unpaid internships; it further found that students with paid internships attained jobs more quickly than those whose internships were unpaid.⁷⁹ Another study also showed that participation in unpaid internships was correlated with a longer job-search process upon graduation.⁸⁰ In summary, available data indicates that students seeking internships often cannot afford one if it is not paid and, while students accepting unpaid internships at for-profits may do better in the job market than those with no internships at all,⁸¹ they do not do nearly as well in securing jobs or decent starting salaries as their classmates who had paid internships.

10.3.1.2 Nature of the unpaid intern population

The most extensive survey data on the personal and curricular backgrounds of unpaid college interns dates from 2010.⁸² Results from this study indicate that unpaid interns are much more likely to be women than men.⁸³ Among students in unpaid internships, those from high-income families were more likely to be at for-profit companies, whereas those from lower-income settings tended to do unpaid internships with non-profit organizations. Paid interns from

-market/internships/paid-interns-co-ops-see-greater-offer-rates-and-salary-offers-than-their-unpaid-classmates/, accessed 30 March 2021 (citing 2015 Student Survey). There is a differential across all sectors, not just for-profit, but the difference is considerably smaller for internships in the non-profit (51.7 per cent versus 41.5 per cent), state/local government (50.5 per cent versus 33.8 per cent), and federal government sectors (61.9 per cent versus 50 per cent). See *ibid*.

⁷⁸ *Ibid*.

⁷⁹ Desalina Guarise and James Kostenblatt, *Unpaid Internships and the Career Success of Liberal Arts Undergraduates* (NACE 2018) 6.

⁸⁰ Andrew Crain, *Understanding the Impact of Unpaid Internships on College Student Career Development and Employment Outcomes* (NACE 2016) 18, <http://www.naceweb.org/uploadedfiles/files/2016/guide/the-impact-of-unpaid-internships-on-career-development.pdf>, accessed 30 March 2021.

⁸¹ According to Guarise and Kostenblatt (n 79) 6, previous NACE studies had found no correlation between unpaid internships and job offers prior to graduation, but their study found that those with unpaid internships found jobs more quickly and had higher initial salaries than those with no internships.

⁸² Phil Gardner, *The Debate over Unpaid College Internships* (Intern Bridge 2010). The online survey was completed by 27 335 students at 234 colleges and universities in the US: *ibid* 5.

⁸³ *Ibid* 6 (77 per cent of unpaid interns were women).

high-income families were more likely to be interning at for-profits than were lower-income students.⁸⁴

Unpaid interns include a greater share of students majoring in education, social sciences, health sciences, communications, and arts and humanities, as compared with those majoring in engineering and computer sciences, biological and physical sciences, or agriculture.⁸⁵ More recent data indicates that the curricular patterns continue to apply, as does the strong tendency for unpaid interns to be female.⁸⁶

Companies in the utilities, transportation and manufacturing sectors were highly unlikely to offer unpaid internships.⁸⁷ By contrast, employers in the arts, entertainment and broadcasting sectors offered a substantial majority of their internships as unpaid.⁸⁸ The frequency of unpaid internships in the arts, a sector characterized by small firms that might find a minimum wage requirement onerous, raises the possibility that students will have less access to on-the-job experience if internships in this sector must be paid. However, the entertainment and broadcast industries include many large companies that can presumably well afford to pay an internship wage.

10.3.1.3 Synergies with educational institutions

Educational institutions benefit from tuition payments that accompany outsourcing of experiential learning. This outsourcing can be minimized for internships that feature sufficient educational control including extended classroom supervision.⁸⁹ However, often these internships are characterized by looser educational connections and weak to non-existent academic supervision.⁹⁰

At law schools, there is pressure, caused by ABA accreditation standards, to provide substantial experiential opportunities.⁹¹ Although the ABA has changed its standards so that law school-approved internships can also be paid, anecdotal data indicates that a sizeable number of law schools permit unpaid internships for credit in corporate counsel offices involving media and fashion companies, among others. Of 12 law schools nationally responding to listserv questions posed by a Fordham law colleague in June 2019, 11 allow unpaid

⁸⁴ Ibid 7.

⁸⁵ Ibid 6.

⁸⁶ Andrew Crain, *Exploring the Implications of Unpaid Internships* (NACE 2016).

⁸⁷ Gardner (n 82) 7 (17 per cent of internships in this group were unpaid).

⁸⁸ Ibid (68 per cent of internships for this group were unpaid).

⁸⁹ See Hora and others, 'What Do We Know' (n 75).

⁹⁰ Perlín (n 2) ch 5; Hora and others, 'Problematising College Internships' (n 70)

14.

⁹¹ Hora and others, 'What Do We Know' (n 75) 150.

in-house placements at for-profit firms, while only one does not.⁹² Within the New York area, six out of seven law schools contacted (in a separate ad hoc survey) allow internship placements with for-profit firms, including law firms. Responses suggest that between ten and twenty law students at each school participate each semester; most are unpaid for-credit arrangements.⁹³

More broadly, law firms want experience-ready entry-level attorneys, and are not willing to pay for the experience as they formerly did when they could train first-year associates at clients' expense. Law clinics are the principal way that law schools have responded to the changing priorities of the profession, but these clinics are costly and labour intensive. Internships or externships with loosely supervised academic credit can thus provide both employers and law schools with advantages.

10.3.2 Costs Associated with an Unpaid Intern Population

10.3.2.1 Lack of protections under anti-discrimination laws

Unpaid internships leave students vulnerable to being discriminated against based on their sex, race, age or disability status. Because the relevant federal anti-discrimination statutes protect only 'employees', that is, those who work for an employer for some form of compensation, unpaid interns generally do not qualify. In the often cited case of *O'Connor v Davis*,⁹⁴ a college student was sexually harassed by a psychiatrist at the mental hospital where she was serving her senior-year unpaid internship. She sued the hospital under Title VII but the district court dismissed her claim. In holding that O'Connor was not an employee under the statute or under a common law agency analysis, the court emphasized that 'the preliminary question of remuneration is dispositive in this case. It is uncontested that O'Connor received from [the hospital] no salary or other wages, and no employee benefits'.⁹⁵

Absent any federal law protection, a minority of states have attempted to address this gap. Legislatures in ten states or localities now include unpaid

⁹² The one school that did not allow unpaid internships gave as its reason: 'in order to avoid potential Fair Labor Standards Act violations'. Results on file with author.

⁹³ Results on file with author.

⁹⁴ 126 F 3d 112 (2nd Cir, 1997).

⁹⁵ Ibid 116. The *O'Connor* decision has been cited in 175 other cases. The same threshold problem identified under *O'Connor* regarding Title VII protection also exists under the Americans with Disabilities Act and the Age Discrimination in Employment Act. If interns receive a sufficient level of remuneration not in the form of wages, they may be protected as employees under federal law. See *United States v City of New York* 359 F 3d 83, 91–7 (2nd Cir, 2004). For an intern population that is overwhelmingly female and either undergraduate or postgraduate (in law or business), the major gap in protection involves sexual harassment in the workplace.

interns within the scope of their anti-discrimination protections.⁹⁶ At least three of these state statutes define ‘intern’ or ‘unpaid intern’ in language that tracks the Labor Department’s former six-part test.⁹⁷ Some courts have narrowly construed the language or purpose of these laws,⁹⁸ while others have applied them more generously.⁹⁹ Still, the great majority of states have no law protecting unpaid interns against discrimination, including sexual or racial harassment.

10.3.2.2 Social mobility consequences

As noted previously, students with more serious financial needs often cannot afford unpaid internships. This can exacerbate the existing lack of equal access to the professions. It seems that wealthier students reap a greater share of networking and CV-enhancing benefits that accrue to some extent even from unpaid internships with large for-profit companies in the entertainment, broadcasting or fashion industries. These economic disparity effects also are likely to entail disparate impacts related to race. Insofar as unpaid internships are a gateway to higher-skill job markets, the well-documented gap in economic opportunity faced by African-American and Hispanic youth¹⁰⁰ is reinforced for populations with college or professional degree credentials.

Moreover, the great majority of unpaid interns being female suggests that women either have, or perceive they have, less bargaining power than do men. The distinctly gendered aspect of unpaid internships exacerbates larger gender-based disparities in the labour market. Similar gap-widening effects of unpaid internships have been noted in studies from the United Kingdom, Australia and other countries.¹⁰¹

⁹⁶ See laws in Washington, DC, Oregon, New York City, New York State, California, Texas, Maryland (which covers disability discrimination as well), Connecticut, Illinois and Delaware.

⁹⁷ Ore Rev Stat s 659A.350 (enacted 2013); Tex Lab Code s 21.1065 (enacted 2015); Illinois also uses the six-part DOL test in its definition of interns, although the statute is limited to sexual harassment: ILCS 5/2-101. New York and Maryland define ‘intern’ using the DOL test but omit the ‘immediate advantage’ factor: see NY CLS Exec s 296-c (2014); Maryland State Gov’t Code s 20-610 (effective 2015).

⁹⁸ *Vejo v Portland Pub Schls* 204 F Supp 3d 1149, 1169 (D Ore, 2016); *Hughes v Twentieth Century Fox* 304 F Supp 3d 429 (SD NY, 2018); *Commission on Human Rights v Echo Hose Ambulance* 140 A 3d 190 (Conn, 2016).

⁹⁹ *Hirst v City of Oceanside* 236 Cal App 4th 774, 783–90 (Cal App, 2015).

¹⁰⁰ See generally Emily Badger and others, ‘Extensive Data Shows Punishing Reach of Racism for Black Boys’ *NY Times* (New York, 19 March 2018); Ronald Brownstein, ‘The Challenge of Educational Inequality’ *The Atlantic* (Boston, MA, 19 May 2016).

¹⁰¹ See Chapter 2 in this volume; McDonald (n 74) 36.

10.3.2.3 Displacing paid employment

There has also been deep concern expressed at the international level that unpaid or even low-paid internships may displace paid employment and prevent experienced and trained workers from entering or continuing in the labour market.¹⁰² One aspect of research in the United States not pursued by employers or universities is how many full-time entry-level jobs are lost because interns are doing this work. Although the issue of job displacement is often framed in terms of unpaid placements at the lower end of the job market, the proliferation of undergraduate and law school internships (unpaid but also paid) at for-profit firms raises the issue in a white-collar knowledge-economy context.

It is not clear, for example, to what extent entry-level attorneys may be replaced by a series of renewable unpaid (or even paid) third-year law students serving as interns. Intriguingly, when the ABA abandoned its long-standing rule against awarding academic credit for paid internships, thereby substantially increasing the attraction of for-profit firm placements, the change was opposed by the Clinical Legal Education Association (CLEA). As part of its concern that this would adversely affect the quality and diversity of law school field placements (public interest and public service field placements cannot afford to pay), the CLEA indicated risks of exploitation and abuse related to the job market:

Effective educational practice requires that ... field placement supervisors serve as teachers and mentors, not as employers ... When work is compensated, the employer is compelled to make its own interests the primary focus of the supervisor–student relationship. The supervisor of a paid employee has an obligation to justify the compensation ... Paid employment is a contract between employer and employee, to which the law school is not a party.¹⁰³

Notwithstanding CLEA's concerns, an increasing number of law schools are inclined to utilize these loosely supervised internships with for-profit employers. The possibility that large media or fashion companies may engage two or three interns each semester, effectively displacing the need for an entry-level attorney, deserves more research attention.

Stepping back, there are larger normative implications of the widespread use of unpaid internships as a 'check the box' aspect of career preparation. Millions of university students and graduates now enter higher-skilled labour markets where working without being compensated is both expected and

¹⁰² See Chapter 2 in this volume.

¹⁰³ Clinical Legal Education Association, *Comment on Interpretation 305-2 and the Question of Paid Externships in Law Schools* (CLEA 2015).

accepted without complaint. These entry-point perceptions (shared by countless others who wish they could secure these internships) impact the attitudes and aspirations of those same individuals as they graduate from university and move into the paid labour market. Such a cultural change is difficult to quantify, but it seems possible that pervasive acceptance of unpaid internships increases readiness to accept work as an independent contractor with no expectation of being paid for hours worked; or willingness to work long hours for no pay when holding jobs as non-exempt employees under the FLSA. Comparable shifts in perception or attitude may also be manifested when these individuals become managers and their expectations of workers they supervise – especially higher-skilled or professional workers – are that working for many months without pay is a valuable rite of passage into the relevant labour market. In summary, the institutionalized use of unpaid internships potentially creates and embeds norms that tolerate wider non-payment of work.

10.4 CONCLUSION

It is difficult to envision a return to stronger intern protections under the FLSA in the immediate future. Although the Supreme Court has not addressed the tension between *Portland Terminal* and the appeals courts' endorsement of a primary beneficiary test, the Supreme Court's recent FLSA jurisprudence does not suggest an especially worker-protective approach.¹⁰⁴ There also is little prospect of legislative correction at the federal level; Congress remains gridlocked on various labour standards issues, including its inability to raise the federal minimum wage under the FLSA since 2007.

Still, given the shrinking of protection for millions of unpaid interns, several possible responses at the federal level are worth considering. First, the Labor Department could develop a guidance aimed specifically at for-profit institutions and employers that wish to sponsor internships. The strong presumption should be that for-profit employers will pay the minimum wage to interns or individuals in intern-type positions. At the very least, for-profit employers should not be able to assign unpaid interns tasks or duties that displace regular employees. Nor should unpaid interns perform activities that provide the employer with an immediate economic advantage.

Second, the Labor Department could encourage educational institutions to demonstrate their provision of meaningful protections for student interns.

¹⁰⁴ See *Encino Motorcars, LLC v Navarro* 138 S Ct 1134 (2018); *Integrity Staffing Solutions v Busk* 574 US 27 (2014); *Sandifer v US Steel* 571 US 220 (2014); *Genesis Healthcare Corp v Symczyk* 569 US 66 (2013); *Christopher v SmithKline Beecham* 567 US 142 (2012).

Detailed compliance records, to be completed regularly by responsible academic faculty, should attest to the learning objectives of particular fieldwork experiences, the metrics for assessing whether those objectives are being met and the implementation of a regular review mechanism to assess the interns' working conditions.

Finally, the department could strongly encourage academic credit to be part of approved internships. As part of this academic credit experience, the department should require close and continuing employer supervision, and prohibit any displacement of regular employees.

11. Work experience, the contract of employment and the scope of labour law: The United Kingdom and Australia compared¹

Rosemary Owens

11.1 INTRODUCTION

The ‘crisis of modern labour law’ is that millions of workers are outside its protections: a situation resulting, it has been argued, not so much from an explicit embrace of extreme deregulation but from inaction in the face of two interrelated developments in the world of work, namely, the growth of the informal economy and the proliferation of new forms of work falling outside the definition of employee.² These issues have garnered attention not only from scholars but also from governments, social partners and other stakeholders, at both the national and international levels. Their importance has been highlighted recently by the report of the ILO’s Global Commission on the Future of Work and the adoption by the International Labour Conference of the Centenary Declaration for the Future of Work.³

¹ The author gratefully acknowledges funding from the Australian Research Council (DP150104516: ‘Work Experience: Labour Law at the Intersection of Work and Education’).

² Guy Davidov and Brian Langille, ‘Introduction: Goals and Means in The Regulation of Work’ in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006) 1.

³ ILO, *Work for a Brighter Future: Global Commission on the Future of Work* (ILO 2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf, accessed 30 March 2021; ILO, ‘Centenary Declaration for the Future of Work’ (Adopted by the International Labour Conference, 108th session, Geneva, 21 June 2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711674.pdf, accessed 30 March 2021.

Thus the scope of labour law and the adequacy of its fundamental concepts to respond to the changing world of work is a focus of those engaged in policy and legal discourse. In particular, the boundary between employment and self-employment and the most effective way to regulate it remain matters of debate.⁴ The advent of the gig economy has attracted much recent scholarly discussion.⁵ However, with some notable exceptions,⁶ far less attention has been devoted to identifying the limits and scope of labour law in the context of the regulatory challenges posed by the intersection of education and work.

This chapter focuses on these issues. The background context is not only changes in the world of work, but also developments in the world of education.⁷ Universities, schools and other training institutions have been undergoing significant change. The emergence of the digital classroom and the ‘Uber-fication’ of education – where commercial providers deliver a wide range of courses on a global basis – is already evident. These courses may not always comply with government regulation of education,⁸ and there is already some evidence of multinational corporations disregarding national regulation.⁹ The main section of this chapter examines the common law’s understanding of the intersection of education and work, in relation to unpaid work experience, internships and traineeships, in Australia and the United Kingdom (UK).¹⁰ The concluding section of this chapter is mindful of the challenge presented by the Global Commission on the Future of Work: ‘to seize the opportunities presented by these transformative changes to create a brighter future and deliver

⁴ See Nicola Kountouris, ‘The Concept of “Worker” in European Labour Law: Fragmentation, Autonomy and Scope’ (2018) 47 *Indust LJ* 192; Martin Risak and Thomas Dullinger, *The Concept of ‘Worker’ in EU Law: Status Quo and Potential for Change* (ETUI 2018).

⁵ See eg Abi Adams, Judith Freedman and Jeremias Prassl, ‘Rethinking Legal Taxonomies for the Gig Economy’ (2018) 34 *Oxford Rev Econ Pol* 475; Andrew Stewart and Shae McCrystal, ‘Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?’ (2019) 32 *Aust J Lab L* 4.

⁶ See Niall O’Higgins, *Rising to the Youth Employment Challenge: New Evidence on Key Policy Issues* (ILO 2017); Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, ‘The Regulation of Internships: A Comparative Study’ (2018) International Labour Office Employment Policy Department Working Paper No 240.

⁷ See Rosemary Owens, Andrew Stewart, Anne Hewitt and Joanna Howe, ‘Labour Regulation, Work Experience and Youth: Lessons from the Scholarship of Ann Numhauser-Henning’ in Mia Rönnmar and Jenny Julén Votinius (eds), *Festskrift till Ann Numhauser-Henning* (Lund 2017).

⁸ Bob Lingard, Sam Sellar, Anna Hogan and Greg Thompson, *Commercialisation in Public Schooling* (NSW Teachers’ Federation 2017).

⁹ See *Bridge International Academies (K) Ltd v Attorney-General*, High Court of Uganda, Misc Application No 70 of 2018 (arising from Misc Cause No 23 of 2018).

¹⁰ For a detailed analysis of the law in the USA, see Chapter 10 in this volume.

economic security, equal opportunity and social justice – and ultimately reinforce the fabric of our societies’.¹¹

The Global Commission identified increasing investment in people’s capabilities, including ‘a universal entitlement to lifelong learning that enables people to acquire skills and to reskill and upskill’ and ‘stepping up investments in the institutions, policies and strategies that will support people through future of work transitions’,¹² as a critical means to achieve the end of decent and sustainable work for all. The ILO Centenary Declaration commits to this goal.¹³ These strategies require regulatory action rather than inaction. This chapter suggests some of the regulatory responses needed to meet the challenges at the intersection of education and work. It considers whether any inadequacy in the capacity of the common law to regulate unpaid work experience, internships and traineeships stems from a limitation in the concepts of ‘employee’ and ‘employment’ and, to this end, it considers the purposes of labour law and their relation to its subject.¹⁴

11.2 LABOUR LAW AT THE INTERSECTION OF WORK AND EDUCATION

11.2.1 Recent Australian Labour Law Cases on Unpaid Internships

At first glance, it might be thought that in recent years common law jurisdictions have demonstrated labour law’s capacity to respond to the challenge of unpaid internships and include them within its protections.

In Australia, for example, there is now a significant body of case law concerning unpaid internships where courts have imposed penalties on employers for breaches of labour law in relation to the provision of basic standards, such as minimum pay, and payments for overtime, public holidays or accrued annual leave. Persons undertaking work experience have also sometimes been protected from other harms, such as injury or sexual harassment at work.¹⁵ The cases have often involved open-market arrangements.¹⁶ In some (but by

¹¹ ILO Global Commission on the Future of Work (n 3) 1.

¹² Ibid 11.

¹³ ILO, ‘Centenary Declaration’ (n 3) esp IIA(iii), IIIA(ii)–(iv), IIIB(i)–(iv).

¹⁴ See generally Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016). See also Mark Freedland, *The Personal Employment Contract* (OUP 2003); Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011); Stewart and McCrystal (n 5).

¹⁵ *Cossich v G Rosetto and Co Pty Ltd* [2001] SAIRC 37; *GLS v PLP* [2013] VCAT 221.

¹⁶ *Fair Work Ombudsman v Bosen* [2011] VMC 81; *Enforceable Undertaking given by McDonald Real Estate Dandenong Pty Ltd* [5 December 2012]; *Fair*

no means all) instances, the internship had been sought by students engaged in formal study programmes of relevance to the industry who did not formally require work experience.¹⁷ In a number of instances, unpaid work experience was undertaken for consecutive periods, as an open-market arrangement and a requirement of a course of study.¹⁸ In yet other cases, a recent graduate was taken on by a business as an intern.¹⁹

In other common law jurisdictions, there is also evidence of labour law's capacity to protect those undertaking unpaid internships.²⁰

In the vast majority of Australian cases, liability depended on the employment status of the intern. Yet that legal issue was seldom elaborated. Instead, the parties and the court were simply prepared, either explicitly or implicitly, to accept that there was a contract of employment. However, as Mark Freedland and Nicola Kountouris have suggested, that is a weak foundation upon which to proceed. In a detailed study of personal work relations, they identified 'those engaged in preparatory work, such as "trainees", "apprentices" or "interns"' as one of seven major groups of personal work relations that are not contractual or, at least, do not easily fit within the conventional legal analysis of the employment contract.²¹

Conventionally, the law of contract presents two problems in relation to unpaid work experience.²² At one level there is the requirement that the parties must have an intention to create legally binding relations. While it is well established that intention is an objective not a subjective matter,²³ nonetheless it has the potential to be problematic in cases involving unpaid work experience. The issue can be particularly complex when the relevant work

Work Ombudsman v Devine Marine Group Pty Ltd [2014] FCA 1365; *Fair Work Ombudsman v Aldred* [2016] FCCA 220; *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024.

¹⁷ *D-Studio Architects Pty Ltd Enforceable Undertaking* [March 2015]; *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140.

¹⁸ *Cossich* (n 15); *GLS v PLP* (n 14); *Fair Work Ombudsman v Her Fashion Box Pty Ltd* [2019] FCCA 425.

¹⁹ *Cossich* (n 15); *Fair Work Ombudsman v Her Fashion Box* (n 18).

²⁰ In the UK, *Vetta v London Dreams Motion Pictures* [2008] UKET 2703377/08 and *Hudson v TPG Web Publishing Ltd* [2011] UKET 2200565/11, but cf *Drozd v Money Matters* [2014] NIIT 287 14IT; and in the USA, *Glatt v Fox Searchlight Pictures, Inc.* 811 F 3d 528, 536 (2016).

²¹ See Freedland and Kountouris (n 14) 344 ff esp 347–8.

²² See Andrew Stewart and Rosemary Owens, *Exploitation or Experience? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (University of Adelaide 2013); Stewart and others, 'The Regulation of Internships' (n 6).

²³ *Ermogenous v Greek Orthodox Community of SA (Inc)* [2002] HCA 8, (2002) 209 CLR 95.

experience relationship involves more than two parties (for example, a student, a university and a host business; or an intern, an internship agent and a host business; or a person in receipt of welfare payments, the state, a training organization and a host organization). Indeed, Freedland and Kountouris note that in many cases involving work and learning, a third party plays a very large role in prescribing the nature and structure of the relationship, so that it ‘would render an analysis in terms of “contractual intention” frankly fictitious’.²⁴

Secondly, there is the problem of mutuality. A contract of employment has generally been thought of as bilateral (as opposed to unilateral), and so the idea of mutual obligations regarding future performance is usually treated as essential to its existence. In some Australian cases this has denied the protection of labour law to those undertaking a work trial²⁵ or other unpaid work.²⁶ The concept of mutuality has been vigorously critiqued, especially in the context of precarious employment in the UK. Nicola Countouris has argued persuasively that the concept was originally focused on the relational aspect of employment, but later remoulded by courts into a prescriptive element and then used to defeat claims relating to forms of precarious employment.²⁷ While its resilience in common law cases in the UK relating to employment has hardly been denied,²⁸ other jurisdictions have not adhered to it so strictly. However, even in Australia, where the concept has been applied with less rigidity and more akin to the requirement of a wages–work bargain,²⁹ it too has been problematic in the context of unpaid internships.

Leaving to one side the important question of whether a contract can be found at all in unpaid work experience, a further dimension to the problem of whether or not the person on unpaid work experience is within the scope of labour law’s protection is how that contract is characterized: whether it is a contract of employment or a contract for education, or possibly both.

²⁴ Freedland and Kountouris (n 14) 138.

²⁵ *Dietrich v Dare* (1980) 54 ALJR 388, 390.

²⁶ See *Teen Branch Pty Ltd v Brown* (1995) 87 IR 308; *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201; Fair Work Ombudsman, *Statement on Findings in Relation to the Fair Work Ombudsman’s Investigation of Entities Related to the Church of Scientology, Narconan and Get Off Drugs Naturally* (Fair Work Ombudsman 2011).

²⁷ Nicola Countouris, ‘Uses and Misuses of “Mutuality of Obligations” and the Autonomy of Labour Law’ in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2015).

²⁸ See eg *Carmichael v National Power P/L* [1999] ICR 1226, 1229.

²⁹ *Automatic Fire Services v Watson* (1946) 72 CLR 435.

11.2.2 The Historical Approach to the Education–Work Boundary in Australia

Australian labour law, historically, has not marked a strict separation between education and work. Indeed, Australian courts have had no difficulty in understanding that a contract might be simultaneously for education as well as for employment.

This was precisely the approach in *Rowe v Capital Territory Health Commission*,³⁰ which held that nurses undertaking training at a hospital were employees and so entitled to award rates of pay mandated under labour legislation. The evidence revealed that, although treated as ‘supernumeraries’ and not counted on the ward rosters, the trainee nurses performed a variety of general nursing tasks under the direction of employed staff as part of the service provided to the hospital’s patients. If not carried out by the student nurses, the work would have had to be done by the hospital’s employees. However, the hospital would not have needed to employ additional staff because experienced staff would do the jobs more quickly and would also be freed from the tasks of supervising trainees.

The hospital sought, unsuccessfully, to persuade the court to treat work that was a ‘learning experience’ as distinct from work that was ‘ward service’. At trial, it was held that there was no mutual exclusivity between the two and the disaggregation of work that was part of training or ‘clinical experience’ was particularly difficult in the context of lifelong learning at work, especially where there was no specification of quantitative or qualitative measures of when skills are achieved. Justice Keely commented:

It is not correct to assume (either as a matter of logic or language) that the one activity by a student nurse cannot be accurately described as falling within both categories [‘clinical experience’ and ‘ward service’]. An activity of an apprentice (or an articulated law clerk) may well be both valid practical experience for him [*sic*] as part of the process of learning his trade (or profession) and yet, at the same time, be fairly described as providing a service to his master or as providing on behalf of his master, a service to the master’s client. Nor is it any less a ‘service’ that the activity of the apprentice has to be supervised by the master (directly or through other employees) or that the ‘service’ provided by the apprentice or law clerk, either to or on behalf of his master, has to be checked or counter-signed or certified by the master or someone on his behalf.³¹

³⁰ *Rowe v Capital Territory Health Commission* (1982) 39 ALR 39; and on appeal (1982) 2 IR 27.

³¹ *Rowe* (1982) 39 ALR 39, 50.

In taking this approach, the judge relied on an earlier Australian decision, the *Junior Constables Case*.³² In that case, in response to a similar argument that junior police officers were engaged in training rather than employment, a neat separation between learning, training and work was also rejected.³³ Justice Morgan identified at least three different interactions between work, education and training: training which did not involve any work; work which involved learning activity; and work that rendered service and did not involve learning. In the *Junior Constables Case*, he held that the police officers were involved in all three. Nor was it considered important to disaggregate the times when these various work activities might predominate. It was the liability of a junior constable to serve that was relevant, even though they might not serve all the time.

Since *Rowe* a number of Australian cases have simply accepted that a trainee may have a contract of employment.³⁴ Pertinently, there has been a long legislative history in Australia of regulating apprentices under industrial awards. One of the earliest High Court cases, *Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow & Co*,³⁵ dealt with a dispute over apprentices' wages. No issue was raised as to the appropriateness of regulating the wages of apprentices in awards. That did not necessarily mean, as was assumed in *Rowe*, that apprentices were considered to be employees. In *Whybrow* the statutory context was critical. Under the *Conciliation and Arbitration Act 1904* (Cth), the important issue was whether the dispute could be classed as 'industrial', and in that regard the Court expressed no doubt. In almost all of these cases the terms of the legislation have been significant. In the *Junior Constables Case*, the relevant legislation expressly defined 'industrial matters' as not only concerning the rights and obligations of employers and employees, but also of those who proposed to be employers and employees. Nonetheless, what *Whybrow* and later cases demonstrate is that the Australian regulatory system establishing wages and conditions has long applied to those who are apprentices or trainees.³⁶ Indeed, in *Rowe* Justice Keely took these cases to support the principle of the *Junior Constables Case*: 'the fact that an apprentice (or other person) is performing duties under a contract the primary purpose of

³² *Junior Constables Case* (1943) 17 SAIR 334.

³³ *Ibid* 346.

³⁴ See *Popoovski v Purity Property Services Pty Ltd* [2005] AIRC 453; *Phung v Advanced Arbor Services Pty Ltd* [2010] NSWCA 215.

³⁵ *Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow & Co* (1910) 11 CLR 1.

³⁶ See *John Heine & Son Ltd v Pickard* (1921) 29 CLR 592; *Fletcher v AH McDonald & Co Pty Ltd* (1927) 39 CLR 174; *Culbert v Clyde Engineering Co Ltd* (1936) 54 CLR 544.

which is to teach that person an occupation, does not prevent that person from being an employee'.³⁷

Not surprisingly then, Australian scholars have confidently stated that for the purposes of labour law the contract of apprenticeship has been treated as an employment contract,³⁸ and that 'apprentices can ordinarily be regarded as employees' and 'the same is generally true of other trainees who are engaged to perform work while also undergoing a program of training'.³⁹

One of the factors in *Rowe*, touched upon only briefly by the Court, was that previously the trainee nurses had been treated as employees of the hospital, with their conditions of work regulated under the relevant award. The hospital then revamped several aspects of the training programme and updated its accompanying documentation. As a consequence, the trainee nurses were subsequently paid a lower 'scholarship allowance'. As the Court found, although the form of the work and training relationship had changed, the substance had not. Owing to this, the appeal judges indicated that *Rowe* would not necessarily be applicable to a situation where student nurses undertaking a course at another training institution were then placed at the hospital.

*Re Crown Employees (Technical Teachers) Award*⁴⁰ provided an example analogous to that latter situation. At issue was whether teacher education scholarship holders at institutions of tertiary education were employees to whom the award applied. In particular, there was discussion of whether or not some tasks, such as 'yard duty', undertaken under direction by students assigned to schools for practical teaching amounted to rendering service rather than the receipt of training. All the circumstances of the relationship, including that the trainee teachers spent the greater part of their time undertaking training and only a small part on practical placement, were considered to identify the nature of the relationship. Any control exercised, it was held, was ancillary to the provision of training. In addition, practical teaching was undertaken as part of tertiary education courses and was clearly not part of the teaching service as defined in the *Teaching Service Act*. The contracts between the Education Department and the trainee teachers were contracts to provide a scholarship during a period of training.

³⁷ *Rowe* (n 30) 57.

³⁸ Mark Irving, *The Contract of Employment* (LexisNexis 2012) [3.43].

³⁹ Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (6th edn, Federation Press 2016) 265 [10.41].

⁴⁰ *Re Crown Employees (Technical Teachers) Award* (1974) 74 AR (NSW) 450.

11.2.3 The Historical Approach to the Education–Work Boundary in the UK

In contrast to the approach in Australia, the reasoning in British cases reveals a much clearer dichotomy between employment contracts and contracts of training and education.

Wiltshire Police Authority v Wynn,⁴¹ one of the leading cases in the UK, considered whether a police cadet was an ‘employee’ under section 30(1) of the Trade Union and Labour Relations Act 1974 and able to claim a remedy for unfair dismissal. In argument it was stated that often service rendered by an employee in training or probationary periods was not very useful to the employer, but this did not nullify the existence of an employment relationship.⁴² However, in deciding the case, Lord Denning applied a test of primary purpose, which emphasized the particularity of the relationship rather than its similarity to ‘ordinary’ employment:

The distinction between the cases where teaching and learning is the primary purpose – and the cases where the work done is the primary purpose – is helpful in the present context ... [T]hroughout the cadetship the primary purpose is to teach and to learn – not a trade – but as part of general education. It is divided into two phases. In the first year he or she is being given further education. In the second year he or she is there to watch – to see how things are done. We are told that sometimes they help in a minor way: such as holding the tape when there is a measurement to be taken at an accident, or something of that kind. They are giving minor assistance in the work. They are not being taught a trade such as would make them an ‘apprentice’. They are not doing work for the employer such as to be under a ‘contract of service’. They are neither apprentices nor servants. They are in a class by themselves – police cadets.⁴³

Despite the argument from counsel that reliance on old cases was not of assistance in understanding modern work conditions, the court relied on cases from the late eighteenth and early nineteenth centuries concerning whether a pauper was working in a master–servant relationship or as an apprentice.⁴⁴ In *R v Inhabitants of Crediton*⁴⁵ Justice Taunton provided an overview of a number of

⁴¹ *Wiltshire Police Authority v Wynn* [1981] 1 QB 95.

⁴² *Ibid* 102.

⁴³ *Ibid* 109.

⁴⁴ *R v Inhabitants of Laindon* (1799) 8 Term Rep 379; *R v Inhabitants of Crediton* (1831) 2 B & Ad 493.

⁴⁵ *R v Inhabitants of Crediton* (n 44).

even earlier authorities, some concerning teacher–scholar relationships,⁴⁶ and others involving a contract of service.⁴⁷ He concluded:

I take the true distinction in these cases to be this: where teaching on the part of the master, or learning on the part of the pauper is not the primary, but only the secondary object of the parties, that will not prevent (where work is to be done for the master) the contract being considered one of hiring and service ... where teaching and learning are the principal objects of the parties, though there was a service, the contract is to be considered one of apprenticeship.⁴⁸

Horan v Hayhoe,⁴⁹ also relied upon in *Wynn*, held that a person who had a deed of apprenticeship as a riding groom but also carried out the work of a stable hand, had a contract of apprenticeship rather than a contract of service.

Thus, UK law has long emphasized that an apprenticeship involves a special kind of contract, different from an ordinary contract of employment. In *Dunk v George Waller & Son Ltd*⁵⁰ this was illustrated in the context of a decision regarding the appropriate damages to be awarded for breach of a contract of apprenticeship. More recently in *Edmonds v Lawson*,⁵¹ involving a pupil barrister, the Court of Appeal of England and Wales described the contract of apprenticeship or any equivalent as:

a synallagmatic contract in which the master undertakes to educate and train the apprentice (or pupil) in the practical and other skills needed to practice a skilled trade (or learned profession) and the apprentice (or pupil) binds himself [*sic*] to serve and work for the master and comply with all reasonable directions. These mutual covenants are in our judgment cardinal features of such a relationship.

Thus, even though legislation has now often assimilated the apprenticeship to employment,⁵² in the UK the cases are more apt to remind us that the contract of apprenticeship is ‘a distinct entity at common law’, with its first purpose training, and work as only a second purpose.⁵³

⁴⁶ See eg *R v Bilborough* (1817) 1 B & A 115; *R v St Mary Kidwelly* 2 B & C 750; *R v The Hamlet of Walton Carth* 200 2 Bott pl 267.

⁴⁷ See eg *R v Hitcham Burr* SC 489.

⁴⁸ *R v Inhabitants of Crediton* (n 44) 497–8.

⁴⁹ *Horan v Hayhoe* [1904] 1 KB 288.

⁵⁰ *Dunk v George Waller & Son Ltd* [1970] 2 QB 163.

⁵¹ *Edmonds v Lawson* [2000] 2 WLR 1091, [30].

⁵² See eg Employment Rights Act 1966 (UK), s 230(1).

⁵³ See also *Wallace v CA Roofing Services Ltd* [1996] IRLR 435. See further Simon Deakin and Gillian Morris, *Labour Law* (6th edn, Hart 2012) 172–4; Freedland and Kountouris (n 14) 137–8.

Courts and tribunals in the UK have continued to emphasize the primary purpose of the contract, whether education and training or work, when determining whether or not there is an employment relationship.⁵⁴ This has also been evident in cases concerning work experience participants under active labour market programmes (ALMPs). In *Daley v Allied Suppliers Ltd*,⁵⁵ a young person accepted into a government Youth Opportunities Programme was paid a small amount from a sponsoring business, which in turn was reimbursed from the Manpower Services Commission. Although the decision in the case was based on a failure to establish a contract because there was no relevant mutuality, it was noted that even if a contract had been established it would not have been a contract of employment because the primary purpose of the relationship was training. This meant that the trainee had no protection under the Race Relations Act 1976, which at the time covered only those ‘employed’.

11.2.4 The Approaches Compared

By way of contrast, in the Australian case of *Rowe*⁵⁶ Justice Keely rejected an invitation to determine the matter by considering the primary object of the contract, as Lord Denning had done in *Wynn*. While acknowledging that a distinction between contracts of service and contracts of apprenticeship was critical for some purposes, Justice Keely ruled that it did not follow that it was relevant when determining whether someone was an employee for the purposes of labour standards. In the result, *Wynn* was distinguished in *Rowe* on the basis of the different statutory context and because the role outlined in it was largely observational in nature, involving the performance of only some minor tasks.

The statutory context may also have been a significant issue in *Daley*. In Australia there have been similar rulings that work experience forming part of an ALMP did not involve an employment relationship. For instance, in *Pierce v WorkCover/QBE Mercantile Mutual (Dark's Cleaning Services Pty Ltd)*⁵⁷ an agreement facilitated by a placement agency that the applicant would present for ‘work experience’ on a two-week work trial was held to indicate ‘no common intention of the parties that the relationship entered into ... was that of an employer and employee’. This resulted in no protection for the injury which had been incurred. Similarly in *Frattini v Mission Imports*⁵⁸

⁵⁴ *GE Caledonian Ltd v McCandliss* [2011] UKEAT 2011/0069_10_221, esp [43].

⁵⁵ *Daley v Allied Suppliers Ltd* [1983] ICR 90.

⁵⁶ *Rowe* (n 30).

⁵⁷ *Pierce v WorkCover/QBE Mercantile Mutual (Dark's Cleaning Services Pty Ltd)* [2001] SAWCT 98, [19].

⁵⁸ *Frattini v Mission Imports* [2000] SAIRComm 20.

a person engaged on a one-week trial of unpaid work experience organized by Jobs Statewide, the provider of an employment training programme for unemployed persons, was held not to be an employee of the host business and so not protected when injured. It is also evident from these cases that it is unlikely that the training or education provider will be held responsible for an injury to a person undertaking work experience.⁵⁹

11.2.5 Work Experience and the Multi-Factorial Approach to Identifying an Employment Relationship

The categorization of work experience as a contract of employment or a contract for education is important because, in most legal systems, the employment relationship remains the touchstone for access to most of the protections of labour law.⁶⁰ Examples of labour regulation ignoring it are the exception rather than the rule. Where the categories of worker protected are more extensive, the legislative framework generally achieves this through additions to a basic category of employment.⁶¹ The issue of identification of an employment relationship has arisen predominantly in cases concerning the distinction between employees and independent contractors. A multi-factorial approach, examining all the relevant facts or circumstances of the case, is now adopted in most jurisdictions,⁶² and in the ILO's Employment Relationship Recommendation.⁶³

However, it is notable that the cases characterizing relationships involving both work and education rarely articulate a multi-factorial test. While the Australian cases generally have taken a broad approach, examining all the facts of the case, the UK courts (as we have seen) frequently refer to the importance of defining the 'primary purpose' of the relationship. In the USA, recent cases, while appearing to take a non-exhaustive multi-factorial approach, have also echoed this by indicating that 'the proper question is whether the intern or the employer is the primary beneficiary of the relationship' and emphasizing

⁵⁹ *Yi v The Service Arena Pty Ltd* [2001] NSWCA 400.

⁶⁰ See eg US Department of Labor, *The Dunlop Commission on the Future of Worker-Management Relations: Final Report* (Dunlop Commission 1994) 64, https://digitalcommons.ilr.cornell.edu/key_workplace/2, accessed 30 March 2021.

⁶¹ See Stewart and McCrystal (n 5).

⁶² See Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Ashgate 2007).

⁶³ ILO Employment Relationship Recommendation, 2006 (No 198), esp arts 9, 11(b). See also ILO, *Promoting Employment and Decent Work in a Changing Landscape* (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part B), International Labour Conference, 109th session, International Labour Office 2020).

that '[t]he purpose of a bona fide internship is to integrate classroom learning with practical skill development in a real world setting'.⁶⁴

Freedland and Kountouris have argued that the 'purpose' of the relationship is important in exposing

the implicit and normally unquestioned reductive analysis of all personal work contracts which would envisage all of them as having the single purpose of providing for the exchange of work for remuneration, the work being provided either in the modality of subordination of the worker or in the modality of the autonomy of the worker.⁶⁵

However, their point merely highlights the fact that a multi-factorial approach to identifying whether or not a work experience arrangement involves an employment relationship will necessarily require consideration of a range of factors different to those used to distinguish employees from independent contractors. One Australian case stands out as an example of this.

*Cossich v G Rosetto and Co Pty Ltd*⁶⁶ raised the question of whether a person undertaking unpaid work experience was really an employee and so entitled to minimum wages and protection in relation to injury. It involved a student undertaking an Associate Diploma in Wine Marketing, which required 240 hours (equivalent to six weeks' full-time) 'work experience within the wine industry'. The course contained few restrictions on the manner in which the work experience could be gained (whether paid or unpaid, or whether performed on one or several days per week). The student had to locate the work experience herself, there was no liaison between the university and the business, and there were no guidelines as to what the student was expected to do on the placement. The university required only that the student write a report at the completion of her work experience. The applicant spent 21 days with one winemaker, and then approached another with whom she completed the course requirements. Thereafter, she continued to work unpaid for a further eight months, both before and after the completion of her studies and with no change in the substance of what she did, except for an increase in the hours she worked after graduation. She usually worked alone, though with a manager close by, undertaking various tasks, such as serving customers, preparing and maintaining wine displays, moving and unloading cartons of wine, as well as preparing for and attending wine tastings on four evenings. She was paid a small amount, ostensibly to assist with travel expenses.

⁶⁴ *Glatt* (n 20) 536–7. For analysis see Chapter 10 in this volume.

⁶⁵ Freedland and Kountouris (n 13) 125.

⁶⁶ *Cossich* (n 15).

Without taking a rigid approach, the magistrate found that the work experience was a 'form of engagement which was little different from full-blown employment' after considering a range of factors. On the length of time of the work experience, he noted: 'By nature work experience ought to be relatively short and little more than a period of acquaintance and understanding of the duties of the work involved. Without attempting to put a limit on it, a year is simply far too long and suggestive of exploitation.'⁶⁷

He linked the relevance of the time factor to the nature of learning and work experience, 'which cannot be permitted as a smokescreen for genuine employment'⁶⁸; it needs to be objectively defined or quantified, in terms of skills to be observed or demonstrated, and accordingly limited in terms of time. That the work experience was part of a formal course of study was significant, although not conclusive.⁶⁹ That it could be undertaken on a paid or unpaid basis was seen as highlighting that there was no mutual exclusivity between employment and work experience.⁷⁰ Other factors of relevance were the lack of training and the minimal supervision provided by the putative employer; the extent of the work performed and the responsibilities undertaken, which included taking money, using credit cards, operating the till, and being entrusted with basic organization of events like wine tastings; and the expectations regarding the person's competence. As the magistrate concluded, the applicant was actively engaged, not a mere observer, and what she did was of value to the business.⁷¹ The facts revealed little distinction between the duties of someone on a work experience placement and someone engaged as an employee.⁷² In emphasizing that the true nature of the relationship as revealed by the evidence was what was significant, the magistrate also showed a preparedness to look beyond the words used by parties to describe the relationship: 'the nomenclature ascribed to a position in the agreement cannot be decisive of the nature of the contract'.⁷³ The approach in the case specifically eschewed an emphasis on the purpose of the arrangement:

In the matter before me the engagement was undeniably for the purpose of work experience but for reasons to be given ... it was also employment for most if not all of the engagement. There is no good reason why work experience cannot be gained by virtue of employment. It is probably preferable for that purpose but it neces-

⁶⁷ Ibid [30].

⁶⁸ Ibid [36].

⁶⁹ Ibid [30].

⁷⁰ Ibid.

⁷¹ Ibid [34].

⁷² Ibid [35].

⁷³ Citing *Kura Yerlo Council Inc (FAI Workers Compensation (SA))* (Decision A12/1998).

sarily differs from those engagements where a putative employee takes a passive, untrained role without responsibility.⁷⁴

Finally, in preferring overall the evidence of the applicant, the magistrate adverted to the financial advantage to the business in ‘gaining the services of an employee for an outlay well below her award entitlement’.⁷⁵

Cossich is not the only Australian case where a multi-factorial approach has been taken to determine whether an ostensible education or training/work experience position was in reality disguised employment. In *Fair Work Ombudsman v Devine Marine Group Pty Ltd*⁷⁶ the multi-factorial approach involved examining all the facts, including: the benefits provided to those undertaking the training (including accommodation, various payments); whether or not the work undertaken was part of a profit-making exercise; the work patterns involved; and the degree of direction and control. Therefore, the case serves as a reminder that a multi-factorial test need not necessarily imply that the set of factors to consider is fixed; the factors reflect the relevant facts of the particular case.

11.3 CONCLUDING THOUGHTS

A multi-factorial approach to characterizing a work experience relationship is not without difficulties. As academic commentators have noted, despite broad agreement on a multi-factorial approach in the context of distinguishing an employee from an independent contractor, this test still presents problems. At one level, this is because the courts implement it in different ways. Stewart and McCrystal identify at least three approaches in Australia.⁷⁷ The first is a formalistic approach, giving significant weight to the stated intention of the parties in any contractual documentation. The second approach is a practical reality approach, in which even carefully crafted contracts may be effectively disregarded when they do not reflect the practical reality of the relationship and are thus judged to be a sham. This second approach recognizes that the factors may be manipulated by the more powerful party, which is particularly problematic when a formalistic view is taken. Thirdly, in what may be a variant of the previous approach, some courts have focused on the business reality of the relationship and applied an entrepreneurial test, which involves the determination that there is a fundamental difference between an employee (who serves in the business of another) and an independent contractor (who is an entrepreneur

⁷⁴ *Cossich* (n 15) [33].

⁷⁵ *Ibid* [29].

⁷⁶ *Devine* (n 16).

⁷⁷ Stewart and McCrystal (n 5).

operating their own business, autonomous in their decision-making, and financially self-reliant and chasing a profit).

By analogy, it is not difficult to see that a similar analysis adapting these three approaches could be applied in the cases characterizing relations at the intersection of work and education. For instance, the second approach indicates that, although the parties may label their relationship as ‘work experience’, perhaps for which there are ‘scholarships’ or ‘certificates’ awarded on completion of certain requirements, these labels would only be determinative under a formalistic approach – which now has little support among commentators and judges, who are generally more inclined to focus on the reality of the arrangements.⁷⁸ The third approach would seem to invite consideration of whether there is any fundamental difference between working and learning (and possibly thereby a consideration of the primary purpose as in the UK, or primary benefit of the arrangement as in the USA).

It may be too early still to identify the death of contract as a relevant legal analytical tool in characterizing work relationships, although the steady abandonment by courts of a formalistic approach seems a certain sign that its utility in the field of labour law is diminishing. The factual reality of the relationship is increasingly seen as the relevant thing. Nonetheless, in relation to all three approaches identified here it may still be noted that one of the long-recognized shortcomings of the multi-factorial test is that it does not provide clear guidance to the participants in a work relationship. A multi-factorial approach is even more complex in the context of multilateral arrangements. It remains evident that issues of degree may arise, inevitably requiring a judgement as to whether a work experience relationship is work or education or both. In *Devine*, Justice White made it clear that was exactly the issue he faced:

I accept that the men did receive some training but it cannot reasonably be regarded as sufficiently detailed or continuing to warrant the description of a course of training ... In my opinion the instruction given to the men was in the form of on the job training of the kind which is common in many workplaces. It cannot reasonably be regarded as an incident of a structured and organised training programme. In particular, the evidence does not indicate that the men spent much time at all being shown techniques, or the manner of working, or in observing others for instructional purposes.⁷⁹

It may be that these words effectively return us to the question of primary purpose or primary beneficiary. However, in the changing world of education it may also be too ‘formalistic’ to focus on whether work experience is part

⁷⁸ See *Devine* (n 16) [90]–[95].

⁷⁹ *Ibid* [85].

of, or similar to, a structured and organized course of education or training programme, whether offered by a public or private provider, as that does not necessarily indicate incompatibility with an employment relationship. In addition, it may be that these programmes or courses are sometimes themselves a sham involving no real education.

In developing a theory about the effectiveness of labour law, its limits and scope, it is not enough to focus solely on the empirical facts of the work experience relationship itself. The classification of work relationships in order to determine whether a law does (and/or should) apply is a normative exercise. Therefore the multi-factorial approach must be undertaken in conjunction with a consideration of the purposes or goals of the relevant law.⁸⁰

Adopting a frame of analysis similar to that applied by Stewart and McCrystal to the gig economy,⁸¹ the all-important first question is to identify the laws that should apply to all workers, regardless of their employment status. To this extent, some statutory regulatory schemes need to extend their protections to all workers, and should not be limited to those within the common law concept of 'employee'. These laws should apply to all those engaged in work experience of whichever form (whether as a private arrangement, or an arrangement that is part of a course of education and/or training, or an ALMP arrangement). The principal concern here is recognition of the principle that labour is not a commodity and the right of 'decent work' for all. Laws which are often described as concerned with 'human rights' are the obvious category here. They include protections relating to: equality and anti-discrimination; harassment, bullying and violence at work; freedom of association; freedom from child labour; work safety and health; and limits on working time.⁸² An important and perhaps more difficult issue for policy-makers is not only incorporating these guarantees into law, but also clearly identifying the person or organization with legal responsibility to ensure they are implemented. In so far as the protections are to apply to those at work, in relation to work experience the host employer/business entity seems the obvious entity bearing by default the first responsibility, although it may be both necessary and appropriate to make explicit the liability of other parties, such as education providers.

The issue of the entitlement to minimum wages is a more complex matter. Usually minimum wage standards set out in legislation or agreements are applicable only to employees. As we have noted from the Australian cases, there is no reason why someone undertaking work experience cannot also be an employee. Often this will be the case, and in those situations a minimum

⁸⁰ See Rosemary Owens and Joellen Riley, *The Law of Work* (OUP 2007) 142–3.

⁸¹ Stewart and McCrystal (n 5).

⁸² See also ILO, 'Centenary Declaration' (n 3) art IIIB.

wage should be payable under the law. However, it will not always be the case. Analogously to arguments put by Stewart and McCrystal in the context of the gig economy, it is neither necessary nor sensible nor realistic to consider that all work experience arrangements should attract the minimum wage under labour law. Where work experience is properly characterized as a learning or training experience rather than as employment, it may be appropriate that minimum wage standards do not apply. However, in these cases it should be expected that other legal standards could be indicated as providing a minimum income to the person, specifically in relation to their participation in the work experience (for example, a government welfare payment in the form of a student stipend, or payment for participation in an ALMP). In these cases it should also be expected that states will set out detailed regulations regarding work experience: documentation and standards relating to educational or ALMP placements, including their duration, the hours expected, the specific learning and skills outcomes to be achieved, and the supervision arrangements and mechanisms for assessing the acquisition of skills. It should not be assumed that the involvement of an educational institution or a public employment service is sufficient to ensure that the work experience is attaining learning or training objectives.⁸³ Explicit cross-references between the various regulatory regimes (labour law, social security and welfare law, and education law) will serve to bring the requirements to the attention of the full range of persons involved with work experience who deserve clear guidance from the law. However, again following Stewart and McCrystal, a default assumption should be that a person undertaking work experience is an employee. The burden of proving the relationship is exempted from labour standards relating to pay and governed by an alternative regulatory regime must lie with other relevant actors (host businesses, educational institutions or agency providers) involved in the relationship. In this way the law should ensure that there are no gaps in labour law's protection of those undertaking work experience.

⁸³ See Stewart and others, 'The Regulation of Internships' (n 6) ch 11.

PART IV

Internships, Education and Welfare

12. Regulating international educational internships: Opportunities and challenges

Joanna Howe

12.1 INTRODUCTION

At the boundary between education and employment, there is a ‘pragmatic ambiguity’ that inheres in educational internships.¹ An internship (commonly referred to as a ‘traineeship’ in Europe) is ‘typically used to cover a wide range of schemes that seek to provide skills, knowledge and experience in a workplace’.² The broad, varying and fluid nature of schemes that may be categorized as internships creates both opportunities and challenges. These arise from the mixed purposes of an educational internship and the multi-faceted identities of those involved. On the one hand, there is a context of employment, or at the very least the potential for employment or the appearance of employment, between an employer and a worker and the context for their interaction is the workplace. On the other hand, the nature and arguably primary purpose of an internship is educational, with the worker as a student. Other parties are also involved, including education institutions, academics and third parties who facilitate internships. In some cases the relevant work is carried out for the educational institution itself, so that the institution wears two hats: employer and educator. Thus, educational internships, although presenting many opportunities for those involved, are incredibly complex to regulate.³ This complexity is heightened considerably when the educational internship is overseas.

¹ Maria Laura Toraldo, Mark Smith and Gazi Islam, ‘Navigating Pragmatic Ambiguity: Career Identity in an Emerging Work Category’ (31st EGOS Colloquium, Athens, Greece, July 2015).

² Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, ‘The Regulation of Internships: A Comparative Study’ (2018) ILO Employment Policy Department Working Paper No 240, xi.

³ See eg Niall O’Higgins (ed), *Rising to the Youth Employment Challenge: New Evidence on Key Policy Issues* (International Labour Office 2017); Stewart and others (n 2).

A corollary of globalization – a term that defies precise definition⁴ – international educational internships are an emerging work and education category that responds to the internationalization of education and the global movement of workers. Facilitated by computer and technological developments and the associated information and communications revolutions, globalization has gained momentum by the progressive opening up of national economies (especially through trade liberalization), the ease with which corporations have adapted to a new world without borders, the increased international flows of capital and the consequent growth of international business.⁵ Universities, charged with educating and equipping the workers of the future, are now under increasing pressure to be globally focused and offer international experiences and opportunities to their students.

This chapter examines ‘international educational internships’, which refers to internships that are undertaken for the purpose of study at a particular institution but in a different country to that in which the institution is located. This is distinct to situations where a student goes abroad to study and does an internship while in the host country for their studies. The latter situation refers to what is typically understood as ‘international students’. Here I focus on local students who travel abroad for an internship as part of their degree, or international students who travel to an overseas country other than that in which their studies are being undertaken. Although the discussion in this chapter of the complexity and challenges in regulating international educational internships is relevant for any country that seeks to regulate these arrangements, whether as the destination country or the country in which the relevant institution is based, I specifically draw upon an Australian empirical study on the regulation of work experience in 16 universities. This chapter uses this study to consider the emerging regulatory landscape and the regulatory opportunities and challenges created by international educational internships. It commences with a discussion of how this particular category of work and employment has arisen, and how it might be conceptualized. This is followed by a presentation and discussion of the empirical study, in light of the regulatory implications

⁴ See Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008) 29: ‘the term globalization has grown out of control. There is no longer much to be gained in pinning down a definition for this shape shifter. Rather, it makes sense to use it with full consciousness of the fluidity and its inevitable incorporation by reference of lawyers of meaning from the popular to the erudite.’

⁵ Joanna Howe and Rosemary Owens, ‘Temporary Labour Migration in the Global Era: The Regulatory Challenges’ in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era* (Bloomsbury 2016).

and risks of international educational internships and the extent to which these are currently understood and addressed.

12.2 CONCEPTUALIZING INTERNATIONAL EDUCATIONAL INTERNSHIPS IN AUSTRALIA

Work experience, in the form of internships, is increasingly regarded as an essential transitional form of learning designed to bridge academic education and the workplace. This emphasis on students' employability has arisen at the same time as the internationalization of education, with a new concern with giving students global education experiences through study abroad or exchange programmes. Combined, this has resulted in the rise of international educational internships. Although some studies have focused on whether international educational internships affect employers' recruitment decisions,⁶ how educational institutions prepare students for overseas work experience⁷ or the perspectives of students participating in international educational internship programmes,⁸ there has not been a focus on the regulatory architecture framing and supporting the experience of students as workers in a foreign labour market. This is surprising given the emergence of a strong scholarly interest in Australia on the experience of international students as workers in the Australian labour market and the consensus view that these students are typically vulnerable workers employed in industries with a norm of non-compliance.⁹ This attention to international students in remunerated work has also been accompanied by a scholarly focus on the experience of international students in unpaid work through unpaid trials, internships or other forms of work experience.¹⁰

⁶ Christof Van Mol, 'Do Employers Value International Study and Internships? A Comparative Analysis of 31 Countries' (2017) 78 *Geoforum* 52.

⁷ David Engstrom and Loring P Jones, 'A Broadened Horizon: The Value of International Social Work Internships' (2007) 26 *Soc Work Educ* 136.

⁸ Elizabeth Huettman Roberts, 'The Innocents Abroad: Do Students Face International Internships Unprepared?' (1998) 39 *Cornell Hotel Restaur Adm Q* 64.

⁹ See eg Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, *International Students and the Fair Work Ombudsman* (Fair Work Ombudsman 2017); Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Aust J Lab L* 181; Iain Campbell, Martina Boese and Joo-Cheong Tham, 'Inhospitable Workplaces? International Students and Paid Work in Food Services' (2016) 51 *Aust J Soc Iss* 279; Joanna Howe, 'A Legally Constructed Underclass of Workers? The Deportability and Limited Work Rights of International Students in Australia and the United Kingdom' (2019) 48 *ILJ* 416.

¹⁰ See eg Joanna Howe, Andrew Stewart and Rosemary Owens, 'Temporary Migrant Labour and Unpaid Work' (2018) 40 *Syd L Rev* 183; Lisa Ruhanen, Richard Robinson and Noreen Breakey, 'A Foreign Assignment: Internships and International

In contrast, there has not been a sustained focus on Australian local students travelling and working overseas as part of an international educational internship. Yet these students are likely to share many of the attributes that make international students vulnerable in the Australian workplace. Both groups typically involve young people with limited experiences of paid and unpaid work, with aspirations of securing a positive reference and vital skills and experience from an internship in order to further their future career. Many Australian students involved in an international educational internship will be in a non-English-speaking country where they will be speaking a language less familiar to them. Most will be in a country where they have not been before, and have limited networks and scant knowledge of that country's laws pertaining to employment, and where the culture and societal norms and expectations are vastly different. Each of these aspects has the potential to make students who undertake international educational internships vulnerable in the workplace. Thus, while international educational internships are being pursued as part of a global mobility education agenda, there is a need to better understand the way these work experiences are framed, marketed and supported by education providers, and the extent to which education providers are cognizant of some of the potential challenges which arise in this emerging form of work-integrated learning.

12.3 THE APPLICATION OF LABOUR REGULATION TO CROSS-JURISDICTIONAL WORK BY EDUCATIONAL INTERNS

An important aspect of the complexity of international educational internships is that the internship occurs in a different country to that in which the student's education is being undertaken. Different countries take radically different approaches to the regulation of work performed by educational interns. It is also not straightforward to determine which laws apply in the performance of cross-jurisdictional work. This section briefly introduces and explores these complexities.

There is no uniform approach internationally to whether educational internships are brought within the scope of labour regulation.¹¹ Labour regulation is a broad term that encompasses a range of laws that affect the employment relationship. In some countries, for example, educational interns are covered

Students' (2013) 20 J Hosp Tourism Manage 1; Cate Gribble, *Employment, Work Placements & Work Integrated Learning of International Students in Australia* (Research Digest 2, International Education Association of Australia 2014).

¹¹ See generally, Stewart and others (n 2) ch 8.

by the same health and safety laws that govern employees, and this is often so for equality or anti-discrimination laws. However, other forms of labour regulation concerning minimum wages, working hours and protection from unfair dismissal are much less likely to cover educational interns. For example, in Australia, when a student undertakes an internship as part of their studies, this is categorized as a 'vocational placement' and, as a consequence, the student is not entitled to minimum wages, leave entitlements or other employment-related benefits or protections.¹² In some countries, notably Argentina, France and Romania, the exclusion of educational interns from the benefits of labour regulation is compensated for by the detailed regulation of the relationships between the intern, the institution at which they are studying and the host organization for the internship.¹³ The different arrangements by which educational interns are covered by labour regulation in various countries create immense complexities for students, host organizations and educational institutions in arranging and facilitating international educational internships.

A related challenge is that the law relating to cross-jurisdictional work is very complex. It can be hard to determine which law applies in situations where an employment relationship has a cross-jurisdictional dimension, for example, since the employer is from a different country to the employee, or in situations where an employee is working abroad. This complexity is exacerbated in relation to international educational internships because there is an overlay of ambiguities about the categorization of work experience and its regulation in labour law. Nonetheless, if work has a connection to more than one jurisdiction, the rules of private international law provide answers to disputes about jurisdiction and choice of law.¹⁴ It can generally be assumed that local labour laws will apply as a matter of public international law on the basis of their 'mandatory' status. However, this is not always so, for example, when there are specific carve outs in free trade agreements¹⁵ or in situations (as in Australia, mentioned previously) where a local law has a vocational placement exception. One way parties have resolved cross-jurisdictional

¹² *Fair Work Act 2009* (Cth) ss 13, 15, 30C, 30M.

¹³ Stewart and others (n 2) 51.

¹⁴ See generally, Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (3rd edn, LexisNexis Butterworths 2015) ch 4.

¹⁵ See eg Joo-Cheong Tham, 'Trade Agreements and Australian Labour Law: Implications of the Death of the Trans-Pacific Partnership Agreement' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations: Development and Future Research Directions* (Federation Press 2017); Samuel Engblom, Nicola Kountouris and Åsa Odin Ekman, 'Temporary Labour Migration and the Trade in Services: European and Global Perspectives in an Age of Economic Integration' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era* (Bloomsbury 2016).

complexities in employment contracts is to agree that a particular country's law is to be regarded as the 'proper law' governing the contract,¹⁶ and this is generally respected by the courts, except in situations where there may be a clear statutory presumption that the statute is to apply to work performed in a particular country.¹⁷ However, it is unlikely that these clauses are commonplace in placement contracts for students involved in international educational internships, as these types of internships are a new and developing phenomenon. Moreover, if there were a dispute about the obligations in a placement contract, it might be a matter for the proper law of the contract, which might be the local law, the law of the country where the institution is located or the law of a third country (for example, where a broker located elsewhere has drafted the contract).

12.4 THE EMPIRICAL STUDY

This chapter draws on data from a research project implementing a three-phase, mixed methodological approach to analyse the nature and extent of unpaid work experience in the Australian university sector. The methodology for this study is discussed elsewhere in this collection.¹⁸ Here I confine my analysis to the findings from this project in relation to international educational internships.

12.4.1 Defining International Educational Internships

It was striking from the university case studies that international educational internships are not homogenous and can be structured and organized in different ways. First, the overseas internship could pertain to local students (that is, Australian residents or citizens) taking up overseas work experience. It could also encompass situations where international students in Australia either go back to their country of origin to do an internship or go to another overseas country for an internship as part of their studies. The process for arranging an educational internship is also potentially subject to a number of different variables. The arrangement could be organized by the university dealing directly with a host (for example, an overseas business, government entity or charity), the student acting alone and directly organizing the host, or through

¹⁶ Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (9th edn, LexisNexis 2014) 441–56.

¹⁷ Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton and Stewart's Labour Law* (6th edn, Federation Press 2016) [6.23].

¹⁸ See Chapter 13 in this volume.

a third party, such as a commercial broker who may be based in Australia, in the host country or in another country. Another possibility is situations where the internship is facilitated through a direct government arrangement between two countries (such as the New Colombo Plan) but involves universities and businesses. These different dimensions of how an international educational internship could be accessed and arranged were reflected in the interviews.

There was significant variation in how international educational internships were understood and discussed by the interviewees in our study. Some students organized their own international internship, while others applied for this opportunity through their university with an overseas employer who had an established arrangement with the university. Some universities offered study abroad experiences which included a practical component, whereas others arranged straight internships. One interviewee reported 'quite a lot of growth' and 'much stronger student interest' in international educational internships through greater variation in their structure, via short-term programmes, and mixed programmes with both a study and applied component.

The interviewees regarded international educational internships as important for improving students' employability in a global labour market. Many universities appeared to be developing pathways and opportunities for students to be involved in an international internship as part of their degree. A number of the universities involved in the study had established new positions for high-level university administrators such as 'Pro-Vice Chancellor for Community and Global Engagement' and new central divisions such as 'Global' or 'Global Mobility'.

In some instances, overseas educational internships were paid, although it was more common for interviewees to refer to international educational internships as unpaid. A number of interviewees suggested that overseas educational internships had a humanitarian component (more so than domestic ones), with students working for charities and other non-government organizations to meet a specific social justice need overseas. In contrast, an academic reported that it was not uncommon for students to seek to rebadge overseas volunteer work as part of a course. She stated, 'they come to me and asks if that counts ... Sometimes it does, most of the time it doesn't because they're going to be in Africa to build an orphanage and that's not work experience in the way that's defined by the university'. In other instances reported by interviewees, an overseas experience was formally designated as an internship by the university but did not involve a genuine work experience. One interviewee stated:

We have placements where a small group of students has gone overseas and that's all been organized through the school and not us [centrally] ... from my understanding they call it an internship, but it's been more of an observation where they've gone as a group to visit certain universities and then a workplace.

12.4.2 Processes for Establishing and Managing International Educational Internships

The interviewees identified that the lack of homogeneity in how international educational internships are sourced and managed makes it difficult for universities to develop a uniform and consistent approach. Across each of the university case studies this appeared to be an area that was in a state of flux, with very limited centralized processes for establishing and managing international educational internships. Nonetheless, it was an area that was being promoted in many universities as part of a strategy to promote work experience as well as global experiences for students. Some universities even had specific targets, such as a commitment to ensure a certain percentage of their cohort graduate with an international work experience.

There was a sense conveyed by some interviewees that this was a growth area that was not being adequately regulated at present. One interviewee said, 'Where the student has sourced an international placement that's hard, because not only do we not know the partner but they're not even using our law.' Another interviewee reported, 'Our students are everywhere overseas, it's just frightening', alluding to the myriad administrative challenges in organizing and overseeing international educational internships. A number of interviewees suggested that their university had not yet adequately developed processes for sourcing and managing international educational internships. In the absence of adequate structures within the university at the central level, some academics voiced concerns such as: 'We're still in a state of flux' and 'There isn't a lot of direction from the top'. Some academics attempted to manage this challenge by developing their own partnerships with overseas host employers.

In another interview, a university administrator voiced her perception that the strong institutional understanding of the legal requirements around internships in Australian workplaces was not matched by an understanding of employment law requirements in overseas workplaces. She observed: 'Probably the greyest area for me are the international-based internships or placements that, you know, that we've got students in a foreign country and there's, things that can go wrong and I'm not sure we have that really worked out as well as we could do.'

Across all the institutions we examined, there appeared to be some understanding of the importance of safety, although this was largely interpreted as being about the physical safety of a student travelling to a particular country rather than occupational health and safety issues in a foreign workplace. As one interviewee stated, 'There's a great deal of emphasis and support on keeping students safe in travelling, but that's not necessarily associated with work.' A number of institutions appeared to have reasonably developed processes around managing safety, including preventing students from doing internships

in countries perceived as high risk. For example: 'So if we're approached by an organization from the Congo for example, I would automatically say "no" because we're not going to put our students at such a high risk.' Another interviewee stated, 'We had a student the other day that wanted to go to North Korea and someone in the school signed off on it ... so we interceded on that occasion.' A number of universities had protocols in place which involved risk management plans for any overseas placements or exchange, provision for international emergency student air services and a free 24-hour telephone hotline which students could call in emergencies. Typically, universities contracted with third parties to provide overseas support services such as these to their students. One university referred to a mobile tracking service that it used to identify the locations of its students when overseas. Across the universities there seemed to be a strong desire to manage personal safety risks arising from overseas educational internships. One interviewee stated, 'So you try to think of every possibility, every possible risk that can take place and how you can remedy that risk before anything happens. You can't cover all possible scenarios but at least you can minimize them. And so we sort of have action plans in case anything happens.'

12.4.3 University Protocols for Selecting Host Organizations for Overseas Internships

Some, though not all, universities did site visits for international educational internships, which on a few occasions appeared to take into account workplace issues and not just general safety concerns. However, most of the time it appeared from the interviews that site visits were extremely rare owing to the immense resources required to undertake site visits for internships in another country. However, site visits themselves can be of varying use as their effectiveness in identifying health and safety risks requires the person doing the visit to assess and understand safety systems in the workplace and to ensure that there are robust and established protocols around managing safety. At some universities, there appeared to be a level of assessment at the central level of whether an overseas internship opportunity should be pursued. In contrast, other universities had more devolved structures, relying on individual disciplines and academics to manage risks arising from international educational internships. For example, one interviewee observed that it is now common at their institution for an academic to travel with students undertaking work experience and to meet with an overseas host and assess their workplace prior to the placement.

12.4.4 Preparing Students Prior to an Overseas Internship

A number of universities conducted pre-departure briefings for students, although again these appeared to focus on safety protocols and, in some cases, advice and training around cultural norms in their destination country, rather than on workplace laws, rights and occupational health and safety. As one interviewee stated, ‘We don’t actually deal with workplace harassment and health and safety and all that sort of thing explicitly. What we do is ... before they go overseas, part of the preparation involves a cultural orientation.’ It appears that these pre-departure briefings and training tended to be organized centrally by the university, although some individual academics we interviewed took additional steps to ensure the well-being and safety of students while overseas. For example, one academic we interviewed reported:

One of the things about work-integrated learning being much more integrated across the university is finally there’s some systems. So we now get them to register online through Global Mobility. Through that they do all sorts of crazy training stuff – which I don’t think are that good. And then they get given a phone number and so if they need to be air-vacced out or whatever else they can just call that number. But that’s not the kind of emergency my students really feel. So I have a closed Facebook page so if they have an issue they can just tag me day or night. I also give my students in this class, everybody has my mobile phone number.

Although the genuine concern of this academic for her students was apparent in her additional efforts to support them while overseas, it is unlikely that individualized responses such as these to student vulnerability in overseas workplaces will be of substantial use. It may even be misleading because it provides a false sense that there is a system of safety for managing dangers and risks, when in reality no individual academic can offer 24-hour monitoring or emergency support from afar without broader institutional support and processes.

12.4.5 The Use of Third Parties to Facilitate and Manage Overseas Internships

A common feature across all the universities, with one notable exception, was the use of brokering firms to source and manage international educational internships. The absence of regulation of third-party internship providers and migration agents involved in cross-border mobility creates risk for universities

as there are no regulatory barriers to entry or external standards which universities can rely upon when selecting which brokers to work with.¹⁹

Interviewees suggested that third-party brokers were essential to developing connections with overseas businesses and organizations to arrange placements. As one interviewee stated: ‘There are these hesitations to using external providers ... but yet this is the only way we can get students to do overseas internship placements because no-one [within the university] has the contacts and the time to be able to do this across the world.’ Most interviewees referred to robust processes for selecting brokering firms to manage the risks arising from contracting with a third party to place students overseas. As one interviewee stated: ‘So internationally we work with a small number of third-party providers. There’s extensive due diligence that goes into vetting those third-party providers in terms of their credentials.’ It was common for universities to abdicate all responsibility for sourcing and managing overseas internships to a third party. For example, one interviewee stated:

We’ve got about three or four of these companies. They’re not really brokers, they’re partners, and so when we send kids over to do work, they’re not looked after by anybody from us. We’ve got four or five partners that I can think of and so they become responsible for the student over there. They are the company in charge of the student while they are away. So we have kids going to India, Indonesia, China, Vietnam, and then of course the other ones which are Singapore and Cupertino.

Another interviewee referred to a situation where a student had made a complaint of sexual harassment during an internship experience in China. The student contacted the broker who had organized the internship on behalf of the university and was removed from the workplace and placed at an alternative workplace in China. According to the interviewee, ‘I only heard about it [the sexual harassment] after the student’s return when we had a debrief but ... it

¹⁹ Paula McDonald, ‘Open Market Internships: What Do Intermediaries Offer?’ (2020) 33 *J Educ & Work* 33. See also an investigation for the *Sun Herald* which uncovered exploitation of occupational trainees employed as ‘interns’ by a luxury hotel chain in regional New South Wales. The trainees paid \$6500 for the internship opportunity, a 52-week training contract, provided by a third party, Australian Internships: Anna Patty, ‘Australia’s International Reputation “At Risk” Over Treatment of Visa Workers’ *Sydney Morning Herald* (Sydney, 28 July 2019), <https://www.smh.com.au/business/workplace/australia-s-international-reputation-at-risk-over-treatment-of-visa-workers-20190715-p527a5.html>, accessed 30 March 2021; Anna Patty, ‘Hotels Clawing Back Wages from Workers: Exclusive’ *Sun Herald* (Sydney, 7 July 2019); Anna Patty, ‘Staff at Luxury Hotel Group Threatened after Speaking Out about Exploitation’ *Sydney Morning Herald* (Sydney, 9 July 2019), <https://www.smh.com.au/business/workplace/staff-at-luxury-hotel-group-threatened-after-speaking-out-about-exploitation-20190708-p5258b.html>, accessed 30 March 2021.

was dealt with very quickly, within 24 hours actually'. However, it was unclear from the interview whether this incident led to a systemic outcome as the interviewee was unaware whether other students from the university were still sent by the broker to the workplace where an allegation of sexual harassment had been made.

Not all universities used brokers to both source and manage overseas internships. One university referred to using a 'company on the ground that actually finds the placements, but then we take responsibility'. This interviewee stated that this demarcation between the broker's role in sourcing placements and the university's role in vetting and managing them was instituted because they were 'very conscious of the risks'. The interviewee stated that the university had often rejected placements proposed by the broker on the basis that the university could not get enough information about the nature of the internship and could thus not guarantee its quality to its students.

Nonetheless, to avoid altogether the risks associated with third parties, one institution had a policy of organizing all overseas placements in-house rather than through a third-party broker. A representative from this university stated that they did not partner with any internship providers because of a feeling of 'nervousness around them because we sometimes worry about their intentions, as opposed to sort of the income generation [from arranging internships] rather than the quality of the experience'.

12.4.6 Awareness of Migration Laws and Regulations by Universities

A final issue that arose in the interviews pertaining to overseas educational internships was the migration arrangements used to facilitate students' travel and work overseas. There appeared to be a high level of confusion and/or a lack of general awareness of the types of visas that students used while on overseas educational internships. It did not appear that universities had systems in place to assist students in identifying and applying for visas. There was a general belief that students relied on tourist visas to travel overseas and work as interns, as these were easy to arrange, although some interviewees acknowledged an awareness that tourist visas generally do not permit visa holders to work in a foreign country. As one interviewee stated:

Normally you [students] get a tourist visa, just because if you're going to get a work visa or a business visa, it's a lot more complex, they ask you so many other questions and the process is just much longer and it's more expensive. So if you just get a tourist visa that covers you for a period of time, no questions asked, and you can do whatever you need to do and get out.

In most of the universities we studied there was a poor understanding of the migration rules for internship agreements or, in some instances, a willingness to rely on a more easily accessible visa despite concern that it may be inappropriate for the type of travel involved. For students travelling overseas for an internship, holding an incorrect visa that does not permit a right to work during the visa holder's stay may prevent them undertaking the internship. For example, in 2015 a group of university students who had their internships arranged through a broker were unable to complete their internship in Singapore after it became clear that the broker had not arranged for the students to have a valid work visa.²⁰

12.5 CONCLUSION

Our findings demonstrate that, despite the increased interest and growth in international educational internships, there is a high degree of uncertainty within universities about how to manage them. Although there is increasing scholarly attention on whether interns are 'employees' and thus fall under the scope of national labour laws, the focus of the universities in which we conducted interviews tended to be on international educational internships as learning experiences, in some instances involving volunteering or charity work, or a fusion of study abroad and work experience. It was extremely uncommon in the interviews for participants to refer to international educational internships as a form of employment. This perhaps contributed to interviewees not demonstrating cognizance that there are complex cross-jurisdictional issues in determining which labour laws apply to students undertaking overseas internships. Although some universities offered pre-departure training, this typically never focused on employment-related matters, and was more about cultural awareness training and safety protocols. Very few universities appeared to conduct on-site or even online audits and inspections of the overseas workplaces which were being used by their students as part of an international educational internship. When these site visits did occur, it was unclear how robust they were in identifying safety and other workplace risks to students. Each of these aspects suggests that most Australian universities do not seem to have adequate regulatory and oversight processes in place, although there is a clear drive among universities to promote growth in international educational internships. The presence of third parties, and in particular brokers,

²⁰ Josie Taylor, 'Absolute Internship: Claims Students Left without Visas in Singapore Spark National Review' *ABC News* (Sydney, 12 March 2015), <https://www.abc.net.au/news/2015-02-19/concerns-about-paid-overseas-internships-spark-national-review/6148634>, accessed 30 March 2021.

with a vested interest in promoting international educational internships also poses risks for universities and students. These risks include sending students to overseas workplaces that have not been subject to proper vetting processes, or outsourcing visa arrangements and safety management protocols to a broker who may not have adequate procedures in place. This appears to be a growing sector, as one interviewee stated: 'We get approached almost every day by brokers offering internships overseas.'

Perhaps as a result of the framing of international educational internships as international experience rather than work experience, most of the universities did not focus on managing risks arising from the workplace but appeared to concentrate their efforts on managing travel risks. Most universities focused more on developing travel guidelines, protocols and information for students going overseas and the few interview participants who mentioned the different labour laws in overseas countries acknowledged their lack of awareness of these laws or whether they applied to interns. Although students' physical safety overseas was the main aspect safeguarded by universities' central administration, a number of individual academics we interviewed referred to steps they took to verify and assess internship opportunities in other countries and to assist and support students undertaking international educational internships. Some of the strategies that academics referred to were to rely on personal contacts and networks to establish international internship opportunities, to provide their personal mobile numbers to students going overseas and to meet with students individually to discuss the internship. The resource-intensive and personal nature of these support efforts by individual academics may be difficult to replicate at a centralized university level, which is perhaps another reason why support services for students in overseas workplaces have tended to focus on the more generic issues of physical safety and cultural awareness training.

The research also identified a striking lack of awareness and engagement by universities with migration regulations permitting overseas travel. Interview participants did not demonstrate awareness of the types of visas being used by their students to conduct international internships and the few participants who did identify this suggested that their students were using tourist visas to undertake overseas internships. Tourist visas typically do not permit the visa holder to work, although there is often ambiguity as to whether this includes a prohibition against unpaid work. This poses risks for students when working in an internship abroad; if they are found to be on the incorrect visa, it could amount to a breach of that country's migration laws and regulations, and lead to visa cancellation and deportation. This poses reputational and other risks for universities who are keen to facilitate and promote growth in international educational internships.

Thus, this exploratory chapter has pointed to the existence of a range of regulatory issues that pertain to international educational internships. Although universities appear to be increasingly promoting these opportunities to students, this appears to be taking place without the development of policies and procedures for arranging and managing these internships. There appears to be a consistent lack of understanding by Australian universities of the implications of labour law and migration law when internships are organized abroad. There also appears to be inadequate preparation for students undertaking international educational internships and measures to assess safety and other workplace risks and dangers, and processes for responding when undesirable situations arise.

13. Universities as internship regulators: Evidence from Australia¹

Anne Hewitt

13.1 INTRODUCTION

Many universities offer students the opportunity to undertake an internship in a workplace outside the university (or one operated jointly with an external partner) as a part of their course of study. It is often assumed that the involvement of universities ensures these opportunities are better regulated and of higher quality than other internships. For example, the 2014 Council of the European Union recommendation on a quality framework for traineeships² explicitly excludes educational internships on the basis that they are ‘of better quality, due to the quality assurance by the educational institutions ... involved’.³ This chapter explores that assumption by considering the educationally focused regulation of internships in three jurisdictions (Australia, England and France) and critically examining the regulatory role played by Australian universities.

In Australian educational regulation, educational internships are referred to as work-integrated learning (WIL).⁴ This chapter adopts that term. Section 13.2 introduces some key issues associated with WIL. Section 13.3 explores the Australian regulation of WIL, while section 13.4 investigates the regula-

¹ The research that informs this chapter was conducted with the support of the Australian Research Council’s Discovery Projects funding scheme (‘Regulating Post-Secondary Work Experience: Labour Law at the Boundary of Work and Education’, DP150104516). The enormous contribution to that project of my fellow Chief Investigators, Professor Emerita Rosemary Owens, Professor Andrew Stewart and Associate Professor Dr Joanna Howe, is gratefully acknowledged.

² Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1.

³ European Commission, ‘Applying the Quality Framework for Traineeships’ (2016) European Commission Staff Working Document 324, 4.

⁴ This definition of WIL is drawn from Tertiary Education Quality and Standards Agency, *Guidance Note: Work-Integrated Learning* (TEQSA 2017) 1.

tory role being played by Australian universities using data from a national study of the regulation of internships. Section 13.5 outlines the regulatory regimes which apply to WIL in England and France, and considers whether any of the issues identified from the Australian data may be relevant to these jurisdictions. Section 13.6 concludes with a number of insights into the utility of educational regulation.

The absence of empirical or other evidence about the ‘impact or effectiveness’ of regulatory regimes governing internships has caused a substantial gap in our understanding to date.⁵ This chapter begins to fill this gap by considering whether laws in one jurisdiction that seek to ensure the quality of educational internships are having their intended effect, and whether those insights may be relevant elsewhere. A comprehensive evaluation of the role of universities as regulators is beyond the scope of this chapter. Instead, it focuses on their role in relation to regulation directed towards ensuring educational quality. This focus has been chosen because it is arguably core business for universities, and because concentrating on the educational aspects of internships complements the other foci in this collection.

The three jurisdictions that will be considered demonstrate two very different regulatory approaches but are unified by the regulation in each being predominantly recent, with much of it enacted in the past decade. England is considered because its regulatory regime is similar to that in Australia, with both having a dedicated educational regulator applying relatively broad-brush pedagogically focused regulations. In contrast, France takes a very different approach, with much more stringent regulation of WIL and dual enforcement of regulation from both universities and workplace regulators.

13.2 INTRODUCING WIL

Work-integrated learning is a growing phenomenon. Universities Australia undertook a national survey of the WIL activities that occurred in 2017 across Australia’s 39 comprehensive universities.⁶ That survey found that more than one-third of enrolled tertiary students (451 263 students) had one or more WIL experience in 2017, and 555 403 of these activities were undertaken.⁷ A 2013 survey of people aged 18–35 years in 27 European Union countries found that

⁵ Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, ‘The Regulation of Internships: A Comparative Study’ (2018) ILO Employment Policy Department Working Paper No 240, xiii, 25.

⁶ Universities Australia, *Work-Integrated Learning in Universities: Final Report* (Universities Australia 2019).

⁷ Ibid 8.

46 per cent had undertaken at least one paid or unpaid traineeship,⁸ though the figure was well over 70 per cent in some countries. For survey respondents who had completed internships, the majority did so while they were studying.⁹ Although the survey did not require participants to indicate whether their internship experience was a part of their course of study, it is safe to assume that a significant number were. For example, it could be assumed that the great majority of internships undertaken in France were undertaken as a part of a course of study, because since 2011 the only internships that are legal in that country are those completed as part of a course of study.

While stakeholders and students have embraced WIL around the world, it is associated with a variety of risks. These include what could be described as workplace risks, such as students being subject to discrimination, bullying or harassment in the workplace, being injured, or exploited by being required to work long hours or undertake work without proper safety measures in place. In addition, there are also educational risks, including that a poorly planned, supervised or assessed WIL opportunity can deliver less than optimal learning opportunities.¹⁰

Occupying dual roles as both student and worker exposes participants in WIL to multiple vulnerabilities. Students often need to successfully complete a WIL placement in order to graduate from their degree, be eligible for admission into a profession with a work experience prerequisite, and to secure work experience, references and contacts to assist them to gain graduate employment. These factors make it difficult for student participants to complain about poor treatment, exploitation or inadequate learning outcomes. This is particularly true as, in many circumstances, the only remedy available when a WIL opportunity is deemed unsatisfactory is to withdraw the student and place them elsewhere. This often involves disruption and cost for the student, and can delay their graduation and professional admission.

Different jurisdictions take radically different approaches to regulating WIL, including the extent to which, and how, they seek to manage its educational quality. These regulatory regimes are of interest not only to regulatory schol-

⁸ 'Traineeships' were defined as 'a limited period of work experience and training spent in a business, public body or non-profit institution by students or young graduates. This excludes regular jobs': TNS Political & Social, *The Experience of Traineeships in the EU* (Flash Eurobarometer 378, Directorate-General for Employment, Social Affairs and Inclusion, European Commission 2013) Q1.

⁹ Ibid 15.

¹⁰ Some of the workplace and educational benefits and risks of WIL are discussed in Anne Hewitt, 'Avoiding the Trap of Exploitative Work: A National Approach to Making Work-Integrated Learning Effective, Equitable and Safe' (2018) 31 *Aust J Lab L* 101.

ars, but also to academics and others concerned to ensure WIL delivers quality learning outcomes. There is extensive pedagogical literature considering how to design and run WIL to maximize students' learning. A full analysis of that literature is not necessary here, save to note that regulation directed to educational quality establishes minimum standards for WIL within the jurisdiction. This has the potential to ensure that participation in WIL is a valuable learning experience, not mere exploitation. However, there are strong arguments that, in most jurisdictions, the regulation establishes minimum thresholds and that not every example of compliant WIL will be of high quality. Nonetheless, these education-focused regulations are significant as they set a threshold applicable across the education sector.

It is also interesting to consider the content and impact of the educational regulation of WIL since, as discussed previously, it is often assumed work experience associated with education is of higher quality than other internships. The Council of the European Union made this assumption in its 2014 recommendation, as discussed in the introduction to this chapter. Whether this is really the case can only be determined by critically evaluating the relevant regulatory regimes and their implementation.

13.3 THE REGULATION OF TERTIARY WIL IN AUSTRALIA

In 2012 Perlin suggested that students were potentially being charged tuition for completing internship courses which did not require the provider to incur expenses for facilities or instruction.¹¹ In Australia this risk is controlled by the Higher Education Support Act 2003 (Cth), which provides that, if WIL is to receive government funding at the same level as other university courses, it needs to be directed and meet specific academic criteria to do with the quality and nature of the university input.¹²

Australian universities are regulated by the Tertiary Education Quality and Standards Agency (TEQSA), an independent statutory authority, established by the Tertiary Education Quality and Standards Agency Act 2011 (Cth) (the TEQSA Act). The TEQSA Act requires all Australian universities to

¹¹ Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (rev edn, Verso 2012) ch 8.

¹² See ss 33-30(1) regarding non-payment for 'work experience in industry' and the definition of that term in ch 1, cl 1(1). See also Higher Education Support Act Administration Guidelines 2012, 5.5.1, which provide that, if the educational provider meets criteria that include monitoring students, providing direction of their work, and managing the educational content and objectives of placements and assessing student learning, then a placement is not regarded as 'work experience in industry'.

be registered.¹³ Each course of study offered by a registered university must comply with the Provider Course Accreditation and Qualification Standards.¹⁴ Self-accrediting institutions (all 40 Australian universities are self-accrediting) can develop a course of study and begin delivering it without any formal advance evaluation by TEQSA,¹⁵ but remain responsible for ensuring it complies with the standards. TEQSA is authorized to conduct audits to evaluate compliance.¹⁶ If an audit reveals that a university has failed to comply with the standards, TEQSA can impose sanctions by shortening or cancelling the period of registration.¹⁷

The standards provide that WIL arrangements must be ‘quality assured, including assurance of the quality of supervision of student experiences’.¹⁸ In addition, a TEQSA Guidance Note on Work-Integrated Learning makes it clear that, while the standards do not prescribe any particular type of WIL compliance, they require every WIL experience to be ‘well-conceived, educationally sound and its implementation ... quality assured and monitored by the provider’.¹⁹ It is notable that these provisions do not provide much detail about what constitutes high-quality WIL, and could logically be applied to any learning experience.

The Education Services for Overseas Students Act 2000 (Cth) (ESOS Act) sets out a legal framework governing the delivery of education to international students in Australia on a student visa. It provides that a university that wishes to offer courses to overseas students must be registered,²⁰ must disclose specific information about WIL to overseas students,²¹ and comply with the National Code of Practice for Providers of Education and Training to Overseas Students 2018 (Cth) (the National Code). Standard 11 of the National Code requires TEQSA²² approval for various modes of study including work-based

¹³ TEQSA Act, s 4.

¹⁴ Higher Education Standards Framework (Threshold Standards) 2015.

¹⁵ TEQSA Act, s 45.

¹⁶ *Ibid* s 59.

¹⁷ *Ibid* ss 99–101.

¹⁸ Higher Education Standards Framework (Threshold Standards) 2015, standard 5.4.1.

¹⁹ TEQSA (n 4) 2.

²⁰ ESOS Act, pt 2. A list of registered providers can be found at Department of Education, Skills and Employment, ‘Commonwealth Register of Institutions and Courses for Overseas Students’, <http://cricos.education.gov.au/>, accessed 30 March 2021.

²¹ See eg Code of Practice for Providers of Education and Training to Overseas Students 2018 (Cth), standards 1.2.2, 2.1.2, 3.3.1.

²² ESOS Act, s 6C provides that the ESOS Agency for a registered higher education provider is TEQSA.

training.²³ The Tertiary Education Quality and Standards Agency can also request the university demonstrate that ‘any work-based training to be undertaken as part of the course is necessary for the student to gain the qualification and there are appropriate arrangements for the supervision and assessment of students’,²⁴ and that ‘the provider and any partner they engage to deliver a course ... has adequate staff and education resources, including facilities, equipment, learning and library resources and premises’ to properly deliver the course.²⁵ Universities which do not comply with the ESOS Act or National Code can face sanctions including suspension or cancellation of registration, or imposition of conditions on registration.²⁶

Despite the existence of a regulator with investigation and sanction powers, intra-university policies and practices remain critical to ensure that WIL offered by Australian universities is of a high quality. There are several reasons for this. An important reason is that TEQSA compliance audits are irregular, occurring in a seven-year cycle.²⁷ In addition, TEQSA employs a risk-based audit procedure which means it can consider evidence of compliance on selected issues, which may or may not include WIL.²⁸ A notable consequence of this principally self-regulating approach is that it is critical to evaluate intra-university compliance processes to determine the effectiveness of the regulation.

13.4 AUSTRALIAN UNIVERSITIES’ PERFORMANCE AS REGULATORS

If the regulatory standards introduced above are to have any impact on the quality of WIL, it is necessary to consider not only regulatory content but also its implementation. The regulations target Australian universities, which are expected to implement the regulations in developing and delivering WIL. As a consequence, universities’ response to the regulation is critical to regulatory compliance.²⁹ The extent to which, and how, universities respond is explored here through an Australian case study, as at this stage no equivalent data from other jurisdictions exist.

²³ Standard 11.1.2.

²⁴ Standard 11.2.3.

²⁵ Standard 11.2.5.

²⁶ ESOS Act, s 83.

²⁷ This is the registration period provided for in the TEQSA Act.

²⁸ TEQSA Act, s 15.

²⁹ Christine Parker and Vebeke Lehmann Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar 2011).

13.4.1 Research Methodology

The empirical evidence informing this analysis is qualitative ‘language data’ comprising interview responses from 68 semi-structured interviews completed from May 2017 to January 2018.³⁰ Those interviews were conducted at 15 diverse Australian universities located in five different Australian states,³¹ including universities with multi-state campuses, those located in the outer suburbs of a city, rural/regional universities and providers of distance education.³²

Interviews of 45–60 minutes were conducted with personnel involved with WIL in a variety of roles using an interview instrument with only minor differences for each of the cohorts. The interviews were digitally recorded, professionally transcribed and de-identified prior to analysis.

Analysis of the interview data occurred simultaneously with the data collection phase, which is common in a grounded theory approach. The qualitative data analysis software NVivo was used to code the interview transcripts manually against themes that were emerging from the material. In addition, NVivo facilitated keyword searches within the interview transcripts. For this chapter, the interview content which was identified by thematic code or keyword as being relevant to the regulation of educational quality of WIL was collated and considered to develop insights into the regulatory role of universities.

13.4.2 Analysis

An important preliminary point is how little direct reference to formal educational regulation was made in the interviews. The term ‘TEQSA’ was only used in 29 out of 68 interviews, despite being included in the interview instrument. The term ‘ESOS’ was not included in the interview instrument for any of the participant cohorts, but was raised in five interviews, exclusively by participants. The Higher Education Support Act 2003 (Cth) was obliquely referenced in two interviews, on both occasions by interviewees.

Analysis of the interview data suggested that the scarcity of explicit reference to the formal regulatory framework of tertiary WIL experiences reflected

³⁰ Ethics Approval H-2016-254. See Donald E Polkinghorne, ‘Language and Meaning: Data Collection in Qualitative Research’ (2005) 52 J Counseling Psych 137, 137.

³¹ New South Wales, Queensland, South Australia, Victoria, Western Australia. Excluded were Tasmania and all Australian territories. Our rationale for the exclusions was time, cost and particularity (accounts in excluded regions would be *sui generis*).

³² These categories overlapped in some institutions; for example, a university could be both regional and have campuses in outer suburbs of cities in that region.

a general lack of knowledge about the regulation. No participant informed us that they had received specific training regarding relevant educational regulation. On the contrary, most participants had an experience similar to the following:

I was sort of put in this position. They said, ‘Well, this is your role. This is what you’re going to do.’ You know, you do get those online modules that you have to do about workplace health and safety, bullying, sexual harassment, all that sort of thing. You do those online. But I didn’t get any formal training [on educational regulation], no ... And I don’t know that the other staff members that are involved in programs would either.

Another interviewee explained it was assumed that the relevant people are aware of the regulatory framework: ‘the assumption is that those staff for whom [educational regulation] is relevant understand it, they’re aware of it and they recognize their responsibilities’.

One participant explained the lack of general knowledge of the education regulation on the basis that ensuring compliance with it was a specialist role within universities, and that ‘ordinary’ university employees were therefore not required to know about it: ‘I think the attitude of a lot of universities appears to be: there are the team that get the ulcers dealing with those things, that they will tell you what [to do], and how you have to do it.’

It is true that if universities implement processes to ensure compliance with the regulatory regime, the individuals undertaking those processes might not be aware they were engaged in compliance. The interview data regarding each university’s internal quality assurance processes were analysed to see whether there was any evidence to support this, and the results were mixed. In some universities it seemed that the institution had developed courses and approval processes which addressed the WIL regulatory requirements. For example:

[I]n our course design process, which I won’t go into it in all in detail, but ... work-integrated learning is built into that. So for every single unit that you develop, you have to, I’ve got a whole framework that I have developed around thinking about your assessment and the authenticity of it. So they have to assign a descriptor that reflects the authenticity, as in the work-integrated learning inherent in that assessment. In other words, it can’t just be an experience; students have to evidence in their assessment.

While these interviews did not explicitly acknowledge any link between the educational regulation and the policies and processes being described, it is certainly possible to see them as an internal process for ensuring compliance with the regulation. This could be described as a method for ensuring ‘compliance by design’ with the relevant regulatory framework. Only one interviewee made this overt, explaining that the education regulation which underpinned the

policy and procedural framework was explicitly referred to in the associated staff training package.

However, in other universities it was clear the course design and approval processes were generic, and did not explicitly respond to the regulatory requirements regarding WIL: ‘when you introduce a WIL experience there’s no extra questionnaire, you’re just going through the normal course approval process’.

In a third cohort of universities, policies and processes could be described as ‘catching up’ to the growth of WIL pedagogies. Interviewees from these institutions made it clear that their policies were being crafted in the wake of a rapid expansion of WIL experiences, rather than the WIL experiences being developed in accordance with a policy: ‘[W]e put together a workplace learning website in this faculty and we realized there was no policy to load up onto it, so we are now writing one.’

This spectrum of responses strongly suggests that, at the time the interviews were conducted, not all universities had a robust internal system to ensure that WIL complied with the thresholds established by the educational regulation. While a number of universities were in the process of policy development or review, which might address this, our analysis raised further questions about how successful this would be. A number of participants expressed what could be described as ‘policy abstinence’. That is, a perception that ‘we drown in policies’, and as a consequence they were choosing not to engage with those relating to WIL: ‘When I was the [coordinator of an internship programme], I have to confess that I remained as blissfully ignorant as possible of any rules and regulations that were going to make things harder.’ In addition, some interview participants described situations that could be described as ‘policy ignorance’:

I’ve been in universities for 10 years and I’ve come across random academics that you might be in a meeting with and their students go out and do, I guess you would call it work experience, and I’m like, ‘Oh great, so who signs off your paperwork?’ and they’re like, ‘What paperwork?’

In a broad sense, many of the interviewees identified tensions between the central university and discipline areas as a significant stumbling block to institution-wide regulatory compliance: ‘I see a bit of a push/pull – the discussion is always, “Well we should have a policy, we should have a procedure, we should get everyone involved” and then everyone sits down and it’s, “My area is different because – ”.’ In addition, some participants expressed significant

dissatisfaction with the development of universally applicable policies and procedures. For example:

So it looks like there might be a new policy coming, but the creation of that policy, the mechanics of how it was generated seem a little bit vague? ... [It was] [a]uthored by a whole bunch of people and they didn't talk to me or anyone else who does [WIL].

The disengagement from formal university policy typified in the previous quotations raises questions about the effectiveness of internal university processes to ensure regulatory compliance, regardless of the quality or content of the policy in question.

What does the previous analysis demonstrate about the role of universities as regulators? Before identifying key themes from the Australian data, it is worth noting that the analysis was restricted in a number of ways. First, it considered only how universities are acting as regulatory actors in relation to compliance with the regulation discussed in section 13.3. Secondly, the interview data considered are drawn from 68 interviews conducted at 15 universities. This is clearly not a comprehensive data set. However, it constitutes what the research team believed to be a reasonable sample to offer insights into the sector. A systematic literature review revealed that 'an overall norm of between approximately 15 and 60 participants'³³ is appropriate in organizational and workplace research. There was also a clear theoretical rationale behind the stratified purposive sampling strategy employed in selecting participants, which was intended to achieve breadth as well as depth in the resulting data.³⁴

When the interview data regarding compliance with TEQSA, the ESOS Act and the Higher Education Support Act 2003 (Cth) are considered, three critical themes emerge. First, despite education being core business for Australian universities, the data suggest that many of those who work within universities are not well informed (or informed at all) about the regulatory framework governing it. Second, it does not appear that all universities are designing processes and policies which will ensure regulatory compliance. Instead, many of the processes and policies for course design and approval appear generic, and do not address the specific regulatory requirements for WIL. Third, while some universities had implemented processes to encourage regulatory compliance

³³ Mark Saunders and Keith Townsend, 'Reporting and Justifying the Number of Interview Participants in Organization and Workplace Research' (2016) 27 *Brit J Manage* 836, 849.

³⁴ Purposive sampling strategies are 'non-random ways of ensuring that particular categories of cases within a sampling universe are represented in the final sample of a project': Oliver Robinson, 'Sampling in Interview-Based Qualitative Research: A Theoretical and Practical Guide' (2014) 11 *Qual Res Psych* 25, 32.

by design, there were still issues of policy abstinence and policy ignorance which affected the utility of those processes in ensuring all WIL delivered by the institution was compliant with the regulation.

It is acknowledged that these themes are impressionistic in nature. This is the consequence of the research methodology and data analysis process used in the research project. However, to date this is the only extensive data set available which can provide insights into how universities are acting as regulators in the context of WIL.

The Australian regime described previously makes it clear that, despite having a national regulator (TEQSA), the regulation of WIL is predominantly occurring within universities themselves. The analysis suggests that internal university regulation of WIL, to the extent it is happening, is not framed by institutions themselves, nor those applying the internal processes, as a mechanism to ensure regulatory compliance. If compliance with the formal education regulation is not a central objective of the university processes, then the efficacy of those processes to ensure compliance must be in doubt. This is problematic, as the formal TEQSA enforcement processes are both irregular and non-comprehensive. In addition, the details of the outcomes of formal enforcement processes, such as TEQSA audits, are often not publicly available. This exaggerates the lamentable gap in regulatory compliance, which must lead us to critically evaluate the enforcement and effectiveness of the educational regulation considered here.

13.5 REGULATING WIL IN FRANCE AND ENGLAND

The regulatory approach in France and England is outlined for comparative purposes.³⁵ Both jurisdictions have attempted to implement regulation that ensures WIL delivers learning outcomes for students, and is not merely exploitative work, but in very different ways.

13.5.1 France

In France the 2011 ‘Cherpion Law’, which was amended in 2014,³⁶ introduced a range of measures to regulate internships and protect interns from being

³⁵ For an analysis of how 13 different countries approach the educational content of internships, see Stewart and others (n 5) 62–8.

³⁶ *Loi* no 2011-893 pour le Développement de l’Alternance et de la Sécurisation des Parcours Professionnels (28 July 2011); *loi* no 2014-788 tendant au développement, à l’encadrement des stages et à l’amélioration du statut des stagiaires (10 July 2014). The French Ministry of Education has developed a standardized traineeship agreement, which contains all rights and obligations of the parties involved: Ministère de l’Édu-

exploited. As a consequence of these reforms, open-market internships have effectively been outlawed, and the only legal internships are those undertaken under a tripartite agreement (*convention de stage*) between a student intern, host and educational institution.³⁷ The *convention de stage* must specify the educational objectives of the internship and its conditions, including the activities the intern will undertake and the skills they will develop during the course of their internship.³⁸ The legislation also requires that both the educational institution and host organization provide a supervisor for every intern,³⁹ and strict limits have been imposed on the number of interns that supervisors can oversee.⁴⁰ In order to reduce the risk that an intern will be exploited, internships have been limited to a duration of six months, and for any arrangement exceeding two months the intern is entitled to compensation (although this is expressly stated not to be a salary).⁴¹ A range of other workplace protections are also extended to interns, including limits on daily and weekly working hours.⁴²

The university teacher supervising an intern is responsible for ensuring compliance with the conditions of the *convention de stage*.⁴³ Additional enforcement is undertaken by labour inspectors. Hosts are required to record interns on the staff register,⁴⁴ which is intended to enable labour inspectors to identify fraudulent internships. If the labour inspectors find that a host organization has breached its obligations regarding the number of interns, tutors or the working hours of the intern,⁴⁵ the organization may be fined.⁴⁶ For other breaches the labour inspectors will inform the intern, their educational institution and staff of the host organization.⁴⁷ In addition, host organizations must report the number of interns and their employment conditions in their annual

cation Nationale, de l'Enseignement et de la Recherche, Arrêté du 29 décembre 2014 relatif aux conventions de stage dans l'enseignement supérieur.

³⁷ Code de l'éducation, art L 124-5. A doctoral student completing an internship requires a less comprehensive *convention d'accueil*, which does not contain extended details on the conditions of the internship, such as insurance or the stipend payment, and requires signature only by the researcher and the host institution.

³⁸ Ibid arts D 124-4(4), L 124-2(2).

³⁹ Ibid arts L 124-2(3), L 124-9.

⁴⁰ Ibid arts R 124-13, D 124-3.

⁴¹ Ibid art L 124-6. In 2020 compensation is €591.49 per month for a full-time internship.

⁴² Ibid art L 124-14.

⁴³ Ibid art L 124-2(3) (created by *loi* no 2014-788, art 1).

⁴⁴ Ibid art L 1221-13 (as amended by *loi* no 2014-788, art 3).

⁴⁵ See *ibid* arts L 124-8 (number of interns), L 124-9 (host organization's obligation to designate a tutor), L 124-14 (intern's working hours).

⁴⁶ Ibid art L 124-17 (created by *loi* no 2014-788, art 1).

⁴⁷ Code du travail art L 8223-1-1 (created by *loi* no 2014-788, art 6).

report.⁴⁸ In theory this enables the work council to identify hosts that are in breach of the regulations.

This legislative approach is interesting because of its clear regulatory focus on genuine learning. This is indicated by the link with formal study, the prerequisite that learning outcomes and work are specified, and the supervision requirements. A focus on learning can also be implied from the time limit imposed on internships, and the requirements which ensure host organizations are not replacing paid workers with interns.⁴⁹ However, in 2016 it was reported that some abuse of internships was still occurring in France; for example, ‘employers not offering appropriate pay or using interns as cheap sources of labour rather than offering them structured training and work experience’.⁵⁰ This illustrates that, despite the quality of the regulation, consideration of enforcement is critical in order to determine whether the regulation is having the intended effect.

13.5.2 England

England has a very different regulatory framework, with an external regulator, the Office for Students (OfS), which was established by the Higher Education and Research Act 2017 (UK). The OfS maintains a register of English higher education providers, which are required to register if they, *inter alia*, wish to access public grant funding or student support funding. Conditions of registration include a number of criteria directed to provision of high-quality education, including delivery of well-designed courses, provision of support for all students to enable them to succeed, and delivery of successful outcomes for all students which are recognized and valued by employers and/or enable further study.⁵¹ The OfS is empowered to conduct reviews of institutions on the register to ensure compliance with those quality criteria, as well as the

⁴⁸ Sarah Mongourdin-Denoix, ‘Strengthened Regulation of Internships’ (*Eurofound*, 12 December 2011), <https://www.eurofound.europa.eu/publications/article/2011/strengthened-regulation-of-internships>, accessed 30 March 2021.

⁴⁹ See Code de l’éducation, arts R 124-10 (created by decree no 2015-1359, art 1), L 124-8 (created by *loi* no 014-788, art 1), L 124-11 (created by *loi* no 2014-788, art 1(V)).

⁵⁰ Andrea Broughton, Martha Green, Catherine Rickard, Sam Swift, Werner Eichhorst, Verena Tobsch and others, *Precarious Employment in Europe, Part 1: Patterns, Trends and Policy Strategy* (University of Amsterdam 2016) 51, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU\(2016\)587285_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU(2016)587285_EN.pdf), accessed 30 March 2021.

⁵¹ Office for Students, *Securing Student Success: Regulatory Framework for Higher Education in England* (OfS 2018) Annex A 139-9.

rest of the regulatory regime.⁵² However, the OfS has made it clear that it will not systematically conduct reviews on a scheduled cyclical basis. Instead, it will conduct reviews based on random sampling or if various risk indicators suggest there may be issues within an institution.

The OfS has adopted the Quality Assurance Agency (QAA) Quality Code for Higher Education (Quality Code) to provide guidance regarding compliance with the regulatory framework. The Quality Code sets out clear expectations for all UK higher education institutions. These are in 12 areas and include work-based learning.⁵³ In each of these areas the Quality Code includes ‘expectations’ and ‘core practices’, compliance with which is mandatory in all parts of the UK, and ‘common practices’, which are not regulatory requirements in England.⁵⁴ If an OfS review of an English university determines there is an issue with compliance with an expectation or core practice of the Quality Code, it has a number of potential responses. These include further investigations, enhanced future monitoring or imposing specific conditions on the university, and can extend to monetary penalties, suspension of registration and deregistration.⁵⁵

The Quality Code contains some guidance relating to WIL; however, it is general in nature. Indeed, it is arguably relevant to almost any learning opportunity, rather than being particularly targeted towards WIL. A critical expectation is that ‘courses are well-designed, provide a high-quality academic experience and enable a student’s achievement to be reliably assessed’.⁵⁶ Another expectation is that, ‘[w]here a provider works in partnership with other organisations, it has in place effective arrangements to ensure that the standards of its awards are credible and secure irrespective of where or how courses are delivered or who delivers them’.⁵⁷

Since the OfS has been recently created, there is not yet enough information to evaluate whether its reviews will be effective in enforcing the standards for WIL. However, it is probable that some of the problems identified in relation to Australia will be relevant in this jurisdiction also.

⁵² Authorized under Higher Education and Research Act 2017 (UK), s 75. See Office for Students (n 51).

⁵³ Quality Assurance Agency, *UK Quality Code for Higher Education Advice and Guidance: Work-Based Learning* (Quality Assurance Agency 2018).

⁵⁴ Ibid 1.

⁵⁵ Office for Students (n 51) 27.

⁵⁶ Quality Assurance Agency (n 53) 3.

⁵⁷ Ibid.

13.5.3 How do France and England ‘Measure Up’?

There are no data available to determine how English universities are performing as regulatory actors. However, there are many similarities in the regulatory regimes implemented there and operating in Australia. In particular, as in Australia, the risk-based approach proposed by the English OfS is likely to result in intra-university processes being important in the efficacy of the regulatory regime in ensuring WIL is a quality learning experience, not exploitation. While there are no data on which to rely, it is also plausible that the three themes identified which limit the effectiveness of university implementation of educational regulation in Australia are relevant in England.

In France, the enforcement processes are divided between universities and labour inspectors. This reduces the reliance on universities as regulatory actors, and potentially increases the opportunity for exploitative WIL to be identified and remedied. However, concerns about abuses continue to be expressed despite these dual enforcement avenues.⁵⁸ This suggests that increasing the number of regulatory actors responsible for enforcement may be insufficient to remedy the issues identified in the Australian context.

13.6 CONCLUSION

In both Australia and England educational regulation articulates (generic) general principles regarding quality WIL and establishes an external regulator tasked with conducting irregular reviews to determine whether universities are compliant. It is inevitable this means internal university processes for establishing and running WIL activities significantly affect students’ experiences.

This chapter has begun to explore the assumption that universities are managing WIL effectively. The data from Australia suggest that this hypothesis is incorrect. Instead, it seems Australian universities are failing to ensure:

1. employees are adequately informed about the regulatory framework governing tertiary education, including that specifically directed towards WIL;
2. processes and policies (for example, for course design and approval) are designed to ensure regulatory compliance; and
3. WIL is consistently compliant with educational regulation.

This calls into question the efficacy of a regime which relies on universities operationalizing regulation to ensure students engaged with WIL have quality learning experiences and are not exploited. While some institutions are

⁵⁸ Broughton and others (n 50).

focusing on developing and delivering quality WIL, the failure to consistently engage with educational regulation undermines the proposition that this is consistently the case. Lack of engagement with educational regulation is even evident in national guidance regarding WIL from one of the organizations that promotes it, the Australian Collaborative Education Network (ACEN). In June 2020 ACEN released a Quality Framework, which makes only oblique reference to the regulatory framework, suggesting that a quality indicator is that an institution maintains a 'Policy Register of relevant government and university regulations' regarding WIL.⁵⁹

While there are no data available from England, the similarity of its regulation and enforcement regime mean it is probable that equivalent issues will arise. An intuitive response to the regulatory problem which has been identified in the Australian context might be to add an additional regulatory enforcer, external to the tertiary education sector, as has occurred in France. There is some suggestion, however, that the French approach of dual educational and workplace regulation and enforcement is not proving to be effective. The extent to which this is so remains to be explored, but it does cast doubt on the efficacy of adding layers of enforcement. A more productive approach may be to focus on robust and effective enforcement processes rather than multiply the number of potential enforcers. In both England and Australia, a more active enforcement role by the formal regulator (OfS and TEQSA) might be more effective in encouraging universities to develop and consistently implement more robust compliance processes.

Whether the issue is that these regulatory regimes are misconceived, poorly drafted or badly operationalized, or a combination of all three, has not yet been determined. Whatever the genesis of the problem, stakeholders that support WIL within tertiary education should be concerned about the regulatory compliance issues identified in Australia, and the potential for similar risks in England and France. As one of the interviewees in the Australian research stated:

I think we need to watch that very carefully because it is a delicate balance. If we lose focus on the need of the student and the educational requirements of the programs then we run the risk of the students being exploited and if that becomes the perception, even if it's not the reality, then that will destroy some very good education programs that do involve legitimate internships.

⁵⁹ Matthew Campbell, Leoni Russell, Lindy McAllister, Lorraine Smith, Ricky Tunny, Kate Thomson, and others, *Framework to Support Assurance of Institution-Wide Quality in Work Integrated Learning* (ACEN 2020) 18.

14. Regulating internships in active labour market programmes: A comparative perspective¹

Irene Nikoloudakis

14.1 INTRODUCTION

Internships undertaken as part of active labour market programmes (ALMPs) are an important aspect of vocational training in welfare states. They target unemployed youth with little or no professional skills and recent graduates to facilitate their transition into the labour market.² ALMP internships often involve a tripartite relationship among the intern, a host organization and an employment services provider, most often the public employment service or other organizations delivering workfare programmes which require beneficiaries to engage in some type of activity in order to receive their benefits. Typically, the provider is responsible for recruiting job seekers and graduates for the programme, and acts as the intermediary between the intern and host organization. It assumes a supervisory role, overseeing the quality of the internship and the results of the programme.³ In contrast, the role of the host organization or the employer has been considered to a lesser extent. If a contract exists between the intern and the host organization, then the latter's responsibilities, such as providing minimum working conditions and ensuring skill development, may be included in that agreement. In some countries, the obligations of the host organization are specified in soft law, such as minis-

¹ This chapter contains material originally published in Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, 'The Regulation of Internships: A Comparative Study' (2018) ILO Employment Policy Department Working Paper No 240.

² European Commission, 'Applying the Quality Framework for Traineeships' (2016) European Commission Staff Working Document 324, 5; Directorate-General for Internal Policies, *Skills Development and Employment: Apprenticeships, Internships and Volunteering* (European Union 2017) 20.

³ Directorate-General for Internal Policies (n 2) 20.

terial determinations and policy directives, but rarely are they mandated by legislation.

As this chapter explains, how ALMP internships are regulated for the purpose of general labour standards varies remarkably between jurisdictions. In some countries, ALMP interns have been expressly excluded from the scope of their labour laws; in others they appear to fall within their ambit; and for some it remains open to question. Perhaps what is more consistent among countries (although there are exceptions) is that occupational health and safety, discrimination and workers compensation laws apply to ALMP interns. Notwithstanding this protection, anecdotal evidence exists of ALMP interns engaging in unsafe practices that have placed their health at serious risk.

The regulation of the quality aspect of ALMP internships has also received increasing attention. While their central purpose is to facilitate the transition of interns into the labour market, in practice many ALMP internships lack the required training dimension as they are geared more towards benefiting the community than enhancing interns' skill levels. In other instances, ALMP interns engage only in the most menial of tasks which do not provide them with the capabilities and skills necessary to facilitate their entry into the modern workforce.

This chapter provides a unique analysis of a range of approaches to the regulation of ALMP internships in seven countries which have differing levels of economic development: Argentina, Australia, Canada, China, Germany, South Africa and the United States. In particular, the chapter explores the extent to which these countries regulate ALMP internships for the purposes of their labour, anti-discrimination, occupational health and safety, and workers compensation standards, before turning to examine how the quality aspect of ALMP internships is regulated. The chapter concludes by considering some future directions for the regulation of ALMP internships from a global perspective.

14.2 LABOUR STANDARDS

There is a myriad of ways in which internships can be and are regulated in practice for the purpose of labour standards. For example, regulation can exist at the local or institutional level and host organizations and intermediaries can develop their own rules and processes to govern the internships. However, the focus of this chapter is on the instrumental state regulation of ALMP intern-

ships for the purpose of labour standards. According to Owens and Stewart at least five approaches may be discerned:⁴

- specific regulation of the use or content of internships;
- regulation by inclusion: regulation that explicitly brings internships within the scope of labour laws by either expressly defining the internships as ‘employment’ or extending employment rights to certain internships;
- regulation by exclusion, that is, regulation that expressly excludes internships from the scope of labour laws;
- strategic enforcement of labour laws by the state; and
- the use of soft law by the state to influence the use and content of internships and the treatment of interns.

Each of these approaches has been adopted in at least one of the countries studied. Indeed, it is not uncommon for a country to adopt more than one for different purposes.

14.2.1 Specific Regulation and Regulation by Inclusion

Argentina has introduced specific legislation to regulate one of its main ALMP internships, the Programa de inserción Laboral. The programme is in part regulated by Resolution MTEySS No 45/06 and Resolution SE No 2186/2010 and is implemented by the Ministry of Labor, Employment and Social Security (MTEySS). The programme is aimed at promoting the insertion of particular groups of unemployed workers into quality jobs by providing economic incentives to employers seeking to increase staff levels. Interns are required to enter into a contract of employment with the host organization, but article 12(1) of Resolution MTEySS No 45/06 cautions that no labour contract exists between the intern and the MTEySS. Employers must comply with the applicable labour and social security laws⁵ but, as interns receive monthly financial assistance from MTEySS, host organizations are permitted only to pay the difference necessary to reach the salary specified in the applicable collective labour agreement.

14.2.2 Regulation by Exclusion

In other countries, ALMP interns have been specifically excluded from some or all of the scope of their labour standards. An example of this approach

⁴ Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 Int Lab Rev 679.

⁵ Resolution SE No 2186/2010, art 44.

can be found in Germany. By way of background, Germany implements two social assistance schemes: one regulated under the Second Book of the Social Code (SGB II) and the other regulated by the Twelfth Book of the Social Code (SGB XII). The SGB II applies to individuals who are unemployed, but capable of working at least three hours per day.⁶ As a condition of receiving financial assistance, the beneficiaries may be obliged to participate in ‘temporary extra jobs’ (*Arbeitsgelegenheiten in der Mehraufwandsvariante*), which typically involve community service and work in public infrastructure.⁷ Under section 16d(7) of the SGB II, temporary extra jobs do not constitute an employment relationship, nor are the individuals taking part in these jobs considered unemployed.⁸ In addition to their welfare benefits, they receive an hourly payment of 1–2 euros from the host organization, and for this reason temporary extra jobs have been dubbed ‘1 euro jobs’. Further, section 15 of the SGB II provides that the job centre must enter into a ‘reintegration agreement’ (*Eingliederungsvereinbarung*) with the beneficiary. According to the Federal Social Court, this agreement must include the work the individual will perform, where the job will take place, the amount of compensation to be paid and the number of working hours per week.⁹ While the SGB II does not specify the number of hours the beneficiary must work, the jobs are typically part-time for a maximum of 30 hours per week.¹⁰

14.2.3 Strategic Enforcement of Labour Laws

For some countries, whether ALMP interns fall within the ambit of their labour laws is less clear, as interns are neither explicitly included in, nor excluded from, their scope. The answer is in part dependent upon a country’s level of labour law enforcement. In Australia, for instance, whether ALMP interns fall within the ambit of the Fair Work Act 2009 (Cth), the main federal labour statute, remains open to question. This is particularly the case in relation to the Prepare-Trial-Hire (PaTH) programme, which provides young job seekers the opportunity to take part in internships. These PaTH internships are not paid by the business, although interns receive a fortnightly allowance in addition to their welfare benefits. Arguably, this fortnightly payment could constitute

⁶ Anja Eleveld, ‘The Duty to Work Without a Wage: A Legal Comparison between Social Assistance Legislation in Germany, the Netherlands and the United Kingdom’ (2014) 16 *Eur J Soc Sec* 204, 210.

⁷ Thomas Walter, *Germany’s 2005 Welfare Reform: Evaluating Key Characteristics with a Focus on Immigrants* (Springer 2013) 79.

⁸ *Ibid* 80.

⁹ *BSG* 16 December 2008 B 4 AS 60/07 R; Eleveld (n 6) 209–10.

¹⁰ Eleveld (n 6) 210–11.

‘remuneration’ for the purposes of the Fair Work Act 2009 (Cth) so as to preclude the operation of the ‘vocational placement’ exception in section 12 of the Act, which is defined to mean an unpaid placement undertaken as a requirement of an education or training course and authorized under a federal, state or territory law or administrative arrangement.¹¹ It is also possible that provisions of the Social Security Act 1991 (Cth), such as sections 544B(8) and 631C, may operate to exclude the possibility of an employment relationship arising, given that the PaTH internship may constitute an ‘approved programme’. However, whether these provisions protect the host business and not just the federal government remains to be seen.

In the United States, New York had taken a similar approach to Australia, at least when it came to the regulation of the Work Experience Program in that state. In 1996 the United States Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which established the federally funded welfare programme Temporary Assistance for Needy Families. One of the express purposes of the PRWORA was to end the dependence of needy parents on government benefits by promoting job preparation and work. To be eligible for federal grants to fund state welfare programmes, the PRWORA required states to ensure that a specific percentage of welfare recipients participated in ‘work activities’, such as on-the-job training. New York enacted a welfare reform statute, the New York State Social Services Law, which complied with the PRWORA requirements and authorized the establishment of the Work Experience Program.¹² As a condition of receiving welfare benefits, recipients in some cases were required to participate in this programme. Though once heralded ‘the largest such program in the nation’, in 2016 it was reported that the Work Experience Program was being phased out.¹³

The number of hours a participant of the Work Experience Program was required to engage in was calculated by the higher of the federal or state minimum wage. That is, participants were required to ‘work off’ their benefits. In *Bruckhman v Giuliani* the Court of Appeals of New York held that participants of the Work Experience Program were not entitled to divide their benefit by the prevailing wage rate (as opposed to the minimum wage) on the

¹¹ See Andrew Stewart and Rosemary Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Fair Work Ombudsman 2013) 75–82.

¹² For a summary of how the Work Experience Program commenced, see *Elwell v Weiss* 2007 WL 2994308 (WDNY 2006).

¹³ Carl Campanile, ‘De Blasio to Nix Workfare Program by End of the Year’ *New York Post* (New York, 3 November 2016), <https://nypost.com/2016/11/03/de-blasio-to-nix-workfare-program-by-end-of-the-year/>, accessed 30 March 2021.

basis that they were not employees for the purposes of article I section 17 of the New York State Constitution.¹⁴ The Court observed: ‘Program participants simply are not “in the employ of” anyone – that is the very reason they are receiving welfare benefits and required to participate in the Program, until they can find or be placed in jobs with the customary array of traditional indicia of employment.’¹⁵

However, following *Bruckman v Giuliani*, a number of cases held that participants of the Work Experience Program were employees within the meaning of Title VII of the Fair Labor Standards Act.¹⁶ Indeed, in *Carver v State of New York*,¹⁷ the New York Court of Appeals cautioned that *Bruckman v Giuliani* should be confined to its facts.

14.2.4 The Use of Soft Law

Where formal, or hard, laws do not reach – that is, laws creating legally binding obligations on individuals and organizations – soft laws formed by governmental and representative bodies can guide action. In the context of the regulation of ALMP internships, an example of this soft-law approach can be found in South Africa and, in particular, in relation to the country’s largest ALMP, the Expanded Public Works Programme (EPWP). South Africa’s Department of Labour has provided a ‘Code of Good Practice for Employment and Conditions of Work for Expanded Public Works Programmes’¹⁸ and ‘Ministerial Determination 4: Expanded Public Works Programmes’ to ensure the effective implementation of the programme. The EPWP is targeted at the unemployed and particularly those from marginalized groups, including low-skilled individuals, people with disabilities, and the urban and rural poor. The interns are employed on a temporary or ongoing basis either by the government, non-government organizations or contractors. According to the Code of Good Practice for EPWPs, the interns are to be afforded the protection of the Basic Conditions of Employment Act and the Labour Relations Act.¹⁹ Arguably, this is because the interns would satisfy the broad definition of ‘employee’ in both Acts, given that they receive remuneration in return for their work, and assist the host organization in carrying on or conducting its business.

¹⁴ 727 NE 2d 116 (NY, 2000).

¹⁵ Ibid 121.

¹⁶ See eg *Stone v McGowan* 308 F Supp 2d 79 (NDNY, 2004); *Elwell* (n 12); *Carver v State of New York* 26 NY 3d 272 (2015).

¹⁷ *Carver* (n 16).

¹⁸ Hereafter referred to as the ‘Code of Good Practice for EPWPs’.

¹⁹ Code of Good Practice for EPWPs, [3.2].

The remuneration that the interns receive must be paid at least monthly, must not be less than the EPWP wage rate, and can be paid either at a daily rate or based on the number of tasks completed.²⁰ Normal hours of work apply, as is customary in the relevant sector, but are limited to 40 hours per week.²¹ The Code of Good Practice for EPWPs also provides that an intern can only be dismissed if: (1) there is a ‘good reason’ for the dismissal (which may relate to the intern’s conduct, such as lateness); and (2) the host organization has followed a ‘fair procedure’, such as by investigating the incident, notifying the intern and allowing them to respond to any allegations made against them.²²

14.2.5 A Mixed Regulatory Approach

A mixed approach to the regulation of ALMP internships can be found in Canada, and in particular in Ontario and Quebec. Ontario’s social assistance programme, Ontario Works, is administered by the Ontario Ministry of Children, Community and Social Services, and includes community participation and employment placements. As the name suggests, community participation requires individuals to take part in community service activities in public or not-for-profit organizations. The placements are unpaid. Section 3(5) of the Employment Standards Act expressly excludes participants of the programme from its scope, while section 73.1 of the Ontario Works Act excludes these individuals from the scope of the Labour Relations Act. Section 73.1 sparked fierce debate in Parliament when it was introduced in 1998 as part of Bill 22, Prevention of Unionization Act (Ontario Works) 1998, as the section prevents individuals engaging in community participation activities from unionizing, bargaining collectively and striking.

A different position exists when it comes to the Ontario Works employment placements, which provide unemployed individuals with on-the-job training. The Ontario Works Directives provide that participants are afforded the protection of the Employment Standards Act and must be paid the prevailing wage rate for the position in which they are hired.²³

In Quebec, Emploi Québec offers two types of financial assistance programme: a Social Assistance Program aimed at individuals who are capable

²⁰ Code of Good Practice for EPWPs, [9.1]–[9.2]; Ministerial Determination 4: Expanded Public Works Programmes annexure, [13.1]–[13.2].

²¹ Code of Good Practice for EPWPs, [10.1].

²² Ibid [15].

²³ Ontario Ministry of Children, Community and Social Services, ‘Ontario Works Directives – 8.5: Employment Placements’ (May 2018), https://www.mcscs.gov.on.ca/en/mcss/programs/social/directives/ow/8_5_OW_Directives.aspx, accessed 30 March 2021.

of being employed and a Social Solidarity Program for people whose capacity to work is severely limited. To achieve the objectives of the programmes, the Minister of Employment and Social Solidarity offers employment-assistance measures, which are described in Title I of the Individual and Family Assistance Act. These employment-assistance measures can include ALMP-type internships, such as placement services and vocational training aimed at increasing workplace-related skills.

The provisions of Quebec's Act Respecting Labour Standards and Labour Code appear to apply to an employment activity engaged in within the scope of an employment measure. However, this is a general position that is subject to a number of exceptions. For instance, by virtue of regulation 6 of the Individual and Family Assistance Regulation, the provisions of these statutes do not apply to:

- work activities not governed by the Labour Code or the Act Respecting Labour Standards;
- work activities carried out under employment-assistance measures focused on training or the acquisition of skills; and
- work activities carried out under employment-assistance measures that include workplace exploration intended to explain vocational orientation or to support entry to the labour market or job preparation, for the first four weeks of each training period.

These exceptions, therefore, operate to exclude most ALMP-type internships from the scope of Quebec's labour laws.

14.3 HEALTH AND SAFETY, WORK-RELATED INJURIES, AND DISCRIMINATION AND HARASSMENT

As the previous section illustrated, it is not uncommon for ALMP interns to be either expressly excluded from or not specifically included in a country's labour laws. Nevertheless, even if ALMP interns do not fall within the scope of a country's employment laws, in most jurisdictions it appears that occupational health and safety, anti-discrimination and workers compensation laws apply to them. In Germany, for example, section 16d(7)VII of the SGB II states that individuals undertaking temporary extra jobs are protected by occupational health and safety laws. In Argentina, article 13(1) of Resolution MTEySS No 45/06 expressly provides that host organizations of the Programa de inserción Laboral may be given financial assistance to ensure that interns of the programme have access to the necessary safety clothes and hygiene items.

In Canada ALMP interns are covered by provincial health and safety, anti-discrimination and workers compensation regimes. In Quebec, for example, section 11(4) of the Act Respecting Industrial Accidents and Occupational Diseases provides that, for the purposes of that legislation, persons performing work as part of a programme under Title I of the Individual and Family Assistance Act are deemed workers of the government (unless the work is performed under the responsibility of the Minister of Employment and Social Solidarity). In Ontario, the Ontario Works Directives state that host organizations of community placements must comply with the Ontario Human Rights Code, the Occupational Health and Safety Act and the Workplace Safety and Insurance Act,²⁴ and that participants in employment placements are afforded the protection of the latter two Acts as well as the Pay Equity Act.²⁵

In South Africa, the Minister of Labour's Code of Good Practice for EPWPs clarifies that host organizations of the EPWP must comply with the Employment Equity Act (chapters 1–2), the Occupational Health and Safety Act, and the Compensation for Occupational Injuries and Diseases Act.²⁶ This is because interns of the EPWP are under the direction and supervision of the host organization and must receive payment for their work, thereby satisfying the definition of 'employee' in these Acts.²⁷

In the United States, New York had adopted a similar approach to the countries discussed previously. Under section 336-c(2)(a), the New York State Social Services Law stated that a recipient of welfare assistance could be assigned to participate in a Work Experience Program only if 'appropriate federal and state standards of health, safety and other work conditions are maintained'. Further, section 336-c(2)(c) required that participants of the programme be provided with 'appropriate workers' compensation or equivalent protection for on-the-job injuries', but not necessarily at the same benefit level that regular employees receive.²⁸ The federal government had also clarified

²⁴ Ontario Ministry of Children, Community and Social Services, 'Ontario Works Directives – 8.6: Community Placements' (May 2016), <https://www.mcscs.gov.on.ca/documents/en/mcss/social/directives/ow/0806.pdf>, accessed 30 March 2021.

²⁵ Ontario Ministry of Children, Community and Social Services, 'Ontario Works Directives 8.5' (n 23).

²⁶ Code of Good Practice for EPWPs, [3.2].

²⁷ See Employment Equity Act (No 55 of 1998), s 1; Occupational Health and Safety Act (No 85 of 1993), s 1; Compensation for Occupational Injuries and Diseases Act (No 130 of 1993), s 1.

²⁸ See also *Kemp v City of Hornell* 672 NYS 2d 537 (NY App Div, 1998); *Covert v Niagara County* NY Slip Op 03870 (2019).

that federal anti-discrimination laws applied to workfare participants.²⁹ Indeed, the New York Court of Appeals for the Second Circuit held that participants of the Work Experience Program were ‘employees’ for the purposes of Title VII of the Civil Rights Code.³⁰

In other countries ALMP interns are expressly excluded from the ambit of their social laws. This situation currently exists in Australia, at least at the federal level, as the Social Security Act 1991 (Cth) exempts a number of ALMP internships from the scope of the Work Health and Safety Act 2011 (Cth) and Safety Rehabilitation and Compensation Act 1988 (Cth).³¹ At the state level, all Australian jurisdictions except Victoria and Western Australia have harmonized their workplace health and safety laws. The model legislation requires host organizations to take reasonable steps to maintain the safety of ‘workers’, a term that is broadly defined to include a ‘trainee’.³² By contrast, workers compensation statutes generally apply only to employees in the common law sense, with few drafted to extend expressly to interns.³³ In relation to PaTH internships this has raised concerns that there may be a ‘[l]ack of adequate safety and protections for participants, including access to workers compensation arrangements’.³⁴

Concerns about health and safety are warranted given that evidence has emerged from other countries of ALMP interns engaging in unsafe practices. An example of this can be found in China. The city of Guangzhou implements a comprehensive workfare programme, which is aimed at unemployed beneficiaries of the Minimum Living Standard Scheme aged 18–50 years (for women) and 18–60 years (for men), and which requires participants to engage in a range of social and community services in order to receive financial assistance.³⁵ There have been circumstances where beneficiaries have been required to engage in community work that puts their physical health at serious risk. For example, one claimant ‘was forced to do community work despite ill health’, while another claimant, who was an acute cancer patient, was required

²⁹ Department of Labor, ‘Labor Protections and Welfare Reform’ (22 May 1997), <https://nclaj.org/wp-content/uploads/2015/11/LaborProtectionsAndWelfareReform.pdf>, accessed 30 March 2021.

³⁰ *United States v City of New York* 359 F 3d 83 (2004).

³¹ See eg *Social Security Act 1991* (Cth), ss 120, 501D(4).

³² See eg *Work Health and Safety Act 2011* (NSW), s 7.

³³ Stewart and Owens (n 11) 105–7.

³⁴ Senate Education and Employment Legislation Committee, *Social Security Legislation Amendment (Youth Jobs Path: Prepare, Trial, Hire) Bill 2016 [Provisions]* (Commonwealth of Australia 2016) 19.

³⁵ Chak Kwan Chan and Kinglun Ngok, ‘Workfare in the Undemocratic States: The Case of China’ (2016) 59 *Int Soc Work* 479.

‘to continue doing a patrol duty in the evenings because the authority could not find someone to swap him’.³⁶

Cases such as these illustrate the importance of ensuring that ALMP interns are afforded the protections of anti-discrimination, occupational health and safety, and workers compensation laws. They also throw into doubt the assumption that ALMP internships are of high quality, at least when compared with open-market internships, owing to the presence of the labour market intermediary. It is this assumption to which this chapter now turns.

14.4 THE QUALITY ASPECT OF ALMP INTERNSHIPS

In 2016, as part of its analysis of open-market and ALMP traineeships (the parlance used in Europe to refer to internships), the European Commission observed:

In the case of open market traineeships there is no third party involved further to the trainee and host organisation, which also means that the quality assurance of the traineeship becomes more difficult. ALMP-type traineeships, on the other hand, are offered to (young) unemployed or those at risk of becoming unemployed, and there is usually a public institution (most often a PES) acting as an intermediary between the host organisation and the trainee. This intermediary institution also has a supervising function in terms of traineeship quality.³⁷

This implicit assumption that ALMP internships have better quality assurance than do open-market internships is arguably more valid for ALMP internships that are specifically governed by regulations or soft laws that set out the content of the internship and the responsibilities of the host organization and intermediary. For example, in Canada the Ontario Works Directives give the host organization of an employment placement incentives to enter into a written agreement establishing, *inter alia*, its responsibility to provide participants with adequate supervision and training.³⁸ In Australia, the federal government has released PaTH internship guidelines that require the provider, host organization and intern to sign a PaTH internship agreement, which must record the supervisor’s details and the activities the intern will complete. The host organization must also guarantee that the internship will not be used to displace existing employees or reduce an employee’s hours of work.³⁹

³⁶ Ibid 485.

³⁷ European Commission (n 2) 4.

³⁸ Ontario Ministry of Children, Community and Social Services, ‘Ontario Works Directives 8.5’ (n 23).

³⁹ Department of Employment, Skills, Small and Family Business, *Guideline: Managing PaTH Internships* (Commonwealth Government 2019).

However, a distinction can be drawn between ALMP internships aimed at providing highly skilled individuals with professional work experience and those targeted at providing lower-skilled individuals with generic work experience. In relation to the latter, concerns have been raised that some of the generic or low-level work that interns must undertake lacks the required training dimension, as it is geared more towards benefiting the community than enhancing skill levels and can result in interns engaging in only the most menial of tasks. For example, the crux of Guangzhou's workfare programme in China is that beneficiaries must engage in a range of community work, including community sanitation, neighbourhood patrols, providing support to the elderly and those with disabilities, and distributing donated goods.⁴⁰ While the contents of the workfare programme must be defined and recipients' attendance is monitored, they are 'not tailor-made programmes for addressing welfare recipients' employment barriers'.⁴¹

Similar concerns can also be raised in relation to Ontario's community placements in Canada, which can require participants to engage in activities such as maintenance work, cleaning and kitchen help.⁴² As Castonguay observes, 'those work-activities in the Ontario Works program take place in a sector which is distant to the regular labour market'.⁴³ There are also no requirements regarding the structure of the community placements. Instead, requirements on participating organizations focus on guaranteeing that: (1) the placements cannot displace any paid employment in the organization; (2) the placements cannot interfere with a participant's paid employment or an opportunity to gain paid employment (such as job searching); and (3) specific standards in relation to labour and social laws are met.⁴⁴

Germany's temporary extra jobs are frequently used for community services, including work on public infrastructure.⁴⁵ While the aim of these jobs is to reintegrate the unemployed into the labour market, an amendment in 2012 revoked the clause in the SGB II which required that the jobs improve recipients' professional knowledge and skills.⁴⁶ What the SGB II currently requires is that temporary extra jobs meet three main conditions. First, they must be of

⁴⁰ Chan and Ngok (n 35) 483.

⁴¹ Ibid 485.

⁴² Julie Castonguay, *Benchmarking Carrots and Sticks: Developing a Model for the Evaluation of Work-Based Employment Programs* (Amsterdam University Press 2009) 233.

⁴³ Ibid.

⁴⁴ Ontario Ministry of Children, Community and Social Services, 'Ontario Works Directives 8.6' (n 24).

⁴⁵ Walter (n 7) 74.

⁴⁶ Eleveld (n 6) 214.

value to society at large, which is on par with the community services aims of Ontario's community placements and Guangzhou's workfare programme. Secondly, the temporary extra jobs must not be in direct competition with jobs that currently exist in the labour market. Thirdly, the temporary extra jobs must be additional; that is, these jobs must not currently exist in the labour market nor will they in the near future. Given this last requirement, how participants of the programme are expected to gain transferable skills is unclear, as employers are requiring other skills, that is, skills relevant to jobs that actually exist in the market.⁴⁷

In the United States, New York had also taken a similar approach in relation to the regulation of its Work Experience Program. The New York State Social Services Law provided that assignments undertaken as part of the programme had to occur in the public or not-for-profit sector and serve a 'useful public purpose'.⁴⁸ Yet some of the assignments that participants undertook included highway maintenance duties,⁴⁹ sorting paper clips and straightening nails.⁵⁰ Also of note was that section 336-c(2)(e) of the New York State Social Services Law required that the assignments undertaken could not constitute 'a substantial portion of the work ordinarily and actually performed by regular employees' nor could they result in 'the displacement of any currently employed worker'. Whether this provision was enforceable in practice was questionable. In *Rosenthal v City of New York*,⁵¹ the Appellate Division of the New York Supreme Court held that, in order to prove a breach of section 336-c(2)(e), a plaintiff employee had to be able to identify the specific Work Experience Program participant that displaced them. However, with varying systems of municipal employment and workfare in New York City it would have been virtually impossible to establish this proof.⁵²

14.5 ANALYSIS AND FUTURE DIRECTIONS

The countries discussed in this chapter have adopted a range of approaches to regulate their ALMP internships. Notwithstanding, it appears uncommon for legislation to be introduced that explicitly brings ALMP internships within the scope of labour laws by either expressly defining the internships as 'employment' or extending employment rights to particular internships.

⁴⁷ Walter (n 7) 80.

⁴⁸ See New York State Social Services Law, ss 336-c(1)(b), 336-c(2)(d).

⁴⁹ Stone (n 16).

⁵⁰ Elwell (n 12).

⁵¹ *Rosenthal v City of New York*, 725 NYS 2d 20 (1st Dept, 2001).

⁵² Don Friedman, *An Advocate's Guide to the Welfare Work Rules* (Empire Justice Centre 2008).

Indeed, in some countries, such as Germany and Canada, ALMP interns are expressly excluded from the scope of their employment laws. The justification for this exclusion (or lack of inclusion) in part stems from the assumption that ALMP internships are designed for the benefit of the unemployed individuals participating in these programmes by assisting their transition into the labour market. More particularly, the interns are assumed to receive a great deal more than that which they offer the host organizations and intermediaries involved; hence the arrangement in place is presumed to lack the necessary *quid pro quo* requirement to give rise to an employment relationship. However, as the European Commission has observed, some ALMP internships have the potential to be misused in practice to displace regular employees.⁵³ In these instances, the interns could be regarded as engaging in productive work that directly benefits the business, which throws into doubt the assumption that there can be no employment relationship between the intern and the host organization or intermediary.

Nonetheless, even if some ALMP internships do not attract the operation of some employment laws, this should not dictate their exclusion from all forms of labour and social regulations. The values of safety and equality at work should be seen as objectives that apply to all forms of work, whether paid or unpaid, and whether or not they are undertaken as part of training. Therefore, there is no reason why regulation and, in particular, hard laws dealing with matters of work safety, workers compensation, discrimination and harassment should not apply to ALMP interns while they are at work. While this is generally true in most countries (such as South Africa) it is not completely so in others (such as Australia). Further, although some countries have chosen to use soft laws to regulate their ALMP internships, which is commendable, this approach would be more effective in assisting host organizations who want to provide interns with some level of employment and social law protection, but perhaps are unsure about what factors need to be considered, as opposed to motivating 'good' practices in organizations where 'bad' practices are entrenched. For example, the impact this type of approach would have on host organizations that deliberately use ALMP interns as a source of cheap labour to displace regular workers is questionable.⁵⁴

At the very least, some modified hard-law entitlements should be established that afford ALMP interns some level of protection. However, in cases

⁵³ Kari P Hadjivassiliou, Emanuela Carta, Tom Higgins, Catherine Rickard, Suzanne Ter-Minassian, Flavia Pesce and others, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report* (European Union 2012) 88.

⁵⁴ Similar concerns have been expressed in relation to quality frameworks. See *ibid* 847–8.

where minimum wages or other employment benefits are modified, it is important that governments bear in mind a significant point of principle articulated by the International Labour Office's (ILO's) Committee of Experts on the Application of Conventions and Recommendations:

Recalling the overarching principle of equal pay for work of equal value, the Committee considers that persons covered by apprenticeship or traineeship contracts should only be paid at a differentiated rate where they receive actual training during working hours at the workplace. In general, the quantity and quality of the work performed should be the decisive factors in determining the wage paid.⁵⁵

The committee went on to urge governments to regulate and monitor 'apprenticeship, internship and other work-experience schemes, including through certification, to ensure they allow for a real learning experience and do not replace regular workers'.⁵⁶ However, as already noted, some ALMP internships, and particularly those aimed at lower-skilled individuals, are geared more towards benefiting the community than enhancing skill levels or ensuring 'a real learning experience', to use the parlance of the committee. That is, the focus is less on supporting the interns' reintegration into regular employment and more on ensuring that they give back to society, which has provided its generosity (welfare payments).⁵⁷

In other instances, the regulations in place prohibit ALMP interns from participating in work ordinarily undertaken by regular employees. The mischief to which this proscription is directed is the use of cheaper or free ALMP interns to displace regular fully paid workers. While regulation that guards against this risk is important, it can at times come with the consequence that ALMP interns engage only in the most routine, low-skilled and menial of tasks. This work can still instil a level of structure and discipline in the interns' work lives, by requiring them 'to get out of bed, shave, dress up and arrive on time',⁵⁸ but it ignores the fact that some welfare recipients already possess extensive previous work experience and it does not provide them with the skills and training necessary to facilitate their entry into the modern workforce. The involvement of the intermediary is not of itself sufficient to assure that ALMP internships will deliver on the promise of useful training and skill development.

⁵⁵ Committee of Experts on the Application of Conventions and Recommendations, *Minimum Wage Systems: General Survey of the Reports on the Minimum Wage Fixing Convention, 1970 (No 131), and the Minimum Wage Fixing Recommendation, 1970 (No 135)* (International Labour Office 2014) [188].

⁵⁶ Ibid.

⁵⁷ Noah D Zatz, 'What Welfare Requires from Work' (2006) 54 UCLA L Rev 373; Amir Paz-Fuchs and Anja Eleveld, 'Workfare Revisited' (2016) 45 Indust LJ 29.

⁵⁸ Paz-Fuchs and Eleveld (n 57) 33.

Increasing labour and social inclusion and introducing regulation to ensure there is sufficient quality assurance might deter the use of ALMP internships. That is, the increased bureaucracy and cost could dissuade some organizations from offering these internships. From one perspective, this would not be an unfortunate consequence because it would assist in closing the door on ALMP internships that are used to exploit interns, displace regular workers and undermine a nation's labour and social regulations. Nor would it be the only potential consequence. ALMP internships should be realigned with the laudable aims of labour and social inclusion and quality assurance to preserve their central purpose of ensuring that the interns, armed with the required skills, capabilities and experience, transition effectively into a modern workforce.

15. Trainees – the new army of cheap labour: Lessons from workfare

Amir Paz-Fuchs

15.1 INTRODUCTION

Over the past decade or so, the status of trainees, apprentices and interns within the labour market has attracted an increased degree of attention. This is presumably owing, in part, to their sheer number within the labour market. A 2018 report in the United Kingdom (UK), for example, indicated that almost half (46 per cent) of employers offer graduate internships, with large employers twice as likely to do so as small businesses.¹ It also found that the understanding that internships are an informal prerequisite is taking hold: 46 per cent of 21–23 year olds report they have completed an internship, compared with 37 per cent of 27–29 year olds. Of these, 70 per cent of internships are unpaid. This trend was noted by the 2017 Taylor Report commissioned by the UK government to review ‘modern workplace practices’.² The report recommended that ‘the Government should ensure that exploitative unpaid internships, which damage social mobility in the UK, are stamped out. The Government should do this by clarifying the interpretation of the law and encouraging enforcement action taken by HMRC [Her Majesty’s Revenue and Customs] in this area.’³ The government responded to the report with admirable rhetoric, noting that ‘Exploitative unpaid internships should not exist and we will work to eradicate these’.⁴

As the number of internships grows significantly, a natural derivative is the concern that not all these positions live up to their putative rationales. In par-

¹ Carl Cullinane and Rebecca Montacute, *Pay As You Go? Internship Pay, Quality and Access in the Graduate Jobs Market* (Sutton Trust 2018), <https://www.suttontrust.com/wp-content/uploads/2019/12/Pay-As-You-Go-1.pdf>, accessed 30 March 2021.

² Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (Department for Business, Energy and Industrial Strategy 2017).

³ Ibid 91.

⁴ HM Government, *Good Work: A Response to the Taylor Review of Modern Working Practices* (HM Government 2018) 46.

ticular, internships are said to address the joint problems of the spectacular rise in youth unemployment in some countries and the enduring complaint from employers that students graduate from the (secondary or higher) education system without the skills and knowledge to integrate smoothly into the workplace environment. The concerns, however, are that some, or perhaps most, modern-day training programmes do not address either of these problems, but instead serve as a source of free or cheap labour. In addition, assertions have been made that interns suffer ill treatment and mental stress,⁵ and that they are abused by employers, who fail to provide trainees with a true first step towards sustainable work.⁶ In these respects – the professed rationales and the scepticism towards their true and honest implementation – trainee schemes have much in common with workfare programmes, which have been discussed more widely. The term ‘workfare’ is used here in its narrow sense, as a sub-species within a wider group of programmes known as welfare-to-work. Developed originally in the United States of America (USA) and Australia, workfare schemes require claimants to work for their benefits⁷ or, with a slightly more critical gloss, condition public benefits on the performance of subpar employment.⁸ Where trainee schemes are, at times, referred to as ‘open market internships’,⁹ workfare schemes are sometimes discussed as active labour market policy internships.¹⁰ The similarities between the two types of programme run deep. Most pressingly, in both cases, participants may be excluded from a large range of employment protections, including the minimum wage.

Focusing on the UK and USA, this chapter shows that the justifications for this exclusion in both schemes are almost identical in the cases of interns and workfare participants (WPs), and serve to enhance each other’s veracity. In particular, the (neoliberal) argument that both interns and WPs receive more than they offer is a prominent rationale for this exclusion.

⁵ Junior Lawyers Division, *Resilience and Wellbeing Survey Report* (Law Society 2018), <http://communities.lawsociety.org.uk/Uploads/p/d/i/jld-resilience-and-wellbeing-survey-report-2018.pdf>, accessed 30 March 2021.

⁶ Carole Lang, Isabelle Schömann and Stefan Clauwaert, ‘Atypical Forms of Employment Contracts in Times of Crisis’ (2013) ETUI Working Paper 2013.03, 21.

⁷ Amir Paz-Fuchs and Anja Eleveld, ‘Workfare Revisited’ (2016) 45 *Indust LJ* 29.

⁸ Amir Paz-Fuchs, ‘Workfare’s Persistent Philosophical and Legal Issues: Forced Labour, Reciprocity, and a Basic Income Guarantee’ in Anja Eleveld, Thomas Kampen and Josien Arts (eds), *Welfare to Work in Contemporary European Welfare States* (Policy Press 2020).

⁹ See eg Paula McDonald, ‘Open Market Internships: What Do Intermediaries Offer?’ (2020) 33(1) *J Educ & Work* 33.

¹⁰ Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, ‘The Regulation of Internships: A Comparative Study’ (2018) ILO Employment Policy Department Working Paper No 240, ch 9.

This insight is all the more important in light of the two schemes not being identical. Notwithstanding their similarities, there are important differences, some institutional and some ideological, which can shed some light on their structure and their constitution. First, workfare is organized and paid for by the government, often in collaboration with business. In contrast, internship programmes are regulated and sometimes (but not often) incentivized financially by governments, but are mainly initiated and organized by businesses. This distinction may plausibly underlie a different perception of, and attitude towards, those involved. The discourse around interns suggests that they have not been equipped with the necessary skills by the education system and therefore have to be, and deserve to be, assisted. The workfare narrative, however, seems to justify these schemes as aiding the participants only as an afterthought. Instead, WPs are asked to give back to the community which bestowed on them its generosity (the benefits), through their work participation, and the retrospective rationalization includes the argument that it is also good for them, as it is a step back into the employment market.

15.2 WORKFARE AND INTERNSHIPS: COMMON MYTHS, COMMON REALITIES

One of the enduring rationales presented in support of both workfare and internships is that the schemes are designed to benefit the participants, who seek (re)integration into the labour market. Where interns are concerned, the explanation is usually that on-the-job training is an excellent way for both parties to assess whether a future relationship would be attractive to both. The intern has the opportunity to discover whether the sector, and/or the particular employer, is what they had in mind for the first (or next) stage in their career. In addition, the intern acquires an important skill set, which will be beneficial in the future, ‘a crucial bridge from being a college graduate to transitioning into the labour market’.¹¹ However, the employer also has much to gain: as employers often explain,¹² internships serve the purpose of (extremely) extensive interviews, and therefore are seen by businesses as part of their recruitment programme. The internship makes sure that the employer need not pay proper wages and offer a full package of benefits before the worker has acquired the relevant skill set. The on-the-job training is, therefore, at the intern’s expense.

¹¹ Kathryn Edwards and Alexander Hertel Fernandez, *Paving the Way through Paid Internships: A Proposal to Expand Educational Opportunities for Low-Income College Students* (Economic Policy Institute 2010) 3.

¹² Eg Evan Davis, ‘The Bottom Line: Internships’ (*BBC Radio 4*, 16 March 2019), <https://www.bbc.co.uk/programmes/m000360n>, accessed 30 March 2021.

In similar fashion, workfare programmes are billed as facilitating the reintegration of the long-term unemployed into the labour market. In contrast to interns, this is rarely seen as offering a particular skill set, but instead as contributing to the very basic level of human capital – instilling discipline and structure: the ability to get out of bed in the morning, the need to shave, dress up and arrive on time. Improving the capacities and capabilities of those outside, or on the fringes of, the labour market, is integral to the human-capital approach, which is particularly prevalent in European jargon.¹³

Yet, the contribution of workfare programmes to participants has been questioned. First, many of the long-term unemployed have had extensive job experience, and have been searching for work, sending curricula vitae (CVs) and going to interviews. They thus have little to no need for discipline-enhancement measures. Second, as Noah Zatz explains, while discipline and structure are fundamental to the successful completion of menial tasks, the modern workplace values and rewards traits such as creativity, spontaneity, flexibility, adaptability and risk-taking, which may be distinct from, and perhaps even in contrast to, discipline and structure.¹⁴ Indeed, the limited research on the matter does not provide evidence of successful reintegration into regular paid employment following participation in workfare.¹⁵

The previous description seems only partly to apply to interns. While they are seeking to enter the labour market, they do often lack experience, at least in the particular role for which they are aiming; and while WPs are expected to gain general employability skills (which, as mentioned, they may already have or not truly require), interns are expected to learn, through practice, the procedures and substance of the sector and the particular business. We find here, then, the limit of the internship scheme, namely, the extent to which the skills gained are transferable. The thousands of different schemes in the public and private sectors make it impossible to generalize but, to the extent that the participant integrates into the operating practice of the firm, and learns ‘how to do things here’, there is a good chance that this knowledge will be of less value elsewhere, and thus less transferable.

This description notwithstanding, we should not over-emphasize the differences between the two. In one American case, the court stressed that the benefit that interns received from their involvement in the scheme also included ‘life lessons on the value of hard work’.¹⁶ This may or may not be the case in reality, and we may question (for WPs and interns) the value of these

¹³ Anton Hemerijck, *Changing Welfare States* (OUP 2013) 142, 277.

¹⁴ Noah Zatz, ‘What Welfare Requires from Work’ (2006) 54 UCLA L Rev 373.

¹⁵ Amir Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (OUP 2008) 173–200.

¹⁶ *Solis v Laurelbrook Sanitarium and School* 642 F 3d 518, 531 (6th Cir, 2011).

‘life lessons’. What is clear is that assuming that interns gain these life lessons serves an important legal purpose. I return to this point later.

Another interesting distinction between WPs and interns concerns the type of engagement. Workfare participants are often engaged in the most menial (blue-collar) jobs, whereas interns take on their role as a stepping stone towards white-collar positions, which are more diverse, require more skill or are better paid – and at times all of these. This is why we associate interns with sectors such as public relations, journalism and media, law, the civil service and the charity sector. Indeed, the problem associated with internships around the turn of the millennium was that they created one of the highest barriers to social mobility.¹⁷ In 2012, the UK Panel on Fair Access to the Professions noted that internships (here probably in their trainee variety) exclude entrants who are unwilling or unable to take unpaid work.¹⁸

Yet, simultaneously, a parallel problem was created, as internships began to spread from white- to blue-collar occupations in the (already) low-paid service economy.¹⁹ Thus, the National Trust was roundly criticized for advertising a six-month, unpaid Apple and Cider Internship involving working in the fields, picking and harvesting apples, and selling cider.²⁰

If the assumptions that interns and WPs gain crucial skills and access to the employment market reveal themselves to be more myth than reality, another myth, which has legal implications, should now be addressed. According to this myth, it is primarily the intern, or WP, who benefits from the scheme, and not the business. Quite apart from the analytic and normative reasons to reject this *cui bono* (‘who is the beneficiary?’) test, which I address later, the myth should be regarded as just that, a myth, simply because it lacks empirical grounding. Instead, it is assumed that interns and WPs benefit far more from the scheme than the businesses or agencies involved. Without serious fieldwork, any observation cannot be more than hypothesizing, based on anecdotes. With that

¹⁷ Cullinane and Montacute (n 1).

¹⁸ Cabinet Office, *Fair Access to Professional Careers: A Progress Report by the Independent Reviewer on Social Mobility and Child Poverty* (Cabinet Office 2012).

¹⁹ Andrew Ross, *No-Collar: The Humane Workplace and its Hidden Costs* (Temple University Press 2004); Gregory Bergman, ‘Unpaid Internships: A Tale of Legal Dissonance’ (2014) 11 Rutgers J L & Soc Pol 552.

²⁰ David Lee, ‘Internships, Workfare and the Cultural Industries: A British Perspective’ (2015) 13 tripleC 459, 462; Chris Johnston, ‘National Trust Criticised for Using Unpaid Interns to Do Admin Jobs’ *Guardian* (London, 11 June 2016), <https://www.theguardian.com/uk-news/2016/jun/11/national-trust-criticised-for-using-unpaid-interns-to-do-admin-jobs>, accessed 30 March 2021; Graduate Fog, ‘Sorry, National Trust – But WTF is a “Cider and Apple Internship”?’ (*Graduate Fog*, 31 July 2014), <https://graduatefog.co.uk/2014/3529/national-trust-internship-apple-cider/>, accessed 30 March 2021.

in mind, here are some of these anecdotes, from the USA and the UK. First, as regards WPs: a court in New York found that a work programme for homeless individuals incorporated participants as replacements for members of council staff who were late or absent, and even required them to work overtime or back-to-back shifts, generating revenue of \$840 000 for the council.²¹ This is an instance of a widespread, global concern, whereby interns are replacing full-time employees and/or preventing others from entering the market.²² In the UK, local councils were found to have benefited from more than 500 000 hours of unpaid labour through a back-to-work scheme in a variety of areas, including cleaning, rubbish collection, parks maintenance and library services. Although the councils denied that the participants in the scheme were deployed at the expense of employees, it was found that jobs were lost during the same period. John McArthur, whose position as a temporary worker was not extended, was sent to occupy his old position, as a participant in a back-to-work scheme, at no expense to the business, for six months.²³

Businesses also benefit significantly from the incorporation of interns. First, even as an extensive and inexpensive 'graduate recruitment scheme' and training programme, it seems quite clear that internships are a cost-saving mechanism for businesses, avoiding the alternative route of taking a risk with a prospective employee only to find later that they are unsuitable; or through training the employee at the business's expense to gain the skills and competence which will enable them to secure the maximum profit for the business. Moreover, a recent report, based on a survey of over 1000 employers and over 2600 interns,²⁴ suggests that either employers seem to benefit more than interns from internships or, at the very least, that there is a strong element of subjectivity in the assessment of 'benefit'. First, 70 per cent of employers responded that interns did 'useful work' in the business.²⁵ More interestingly, however, the survey asked employers and interns to assess the quality and outcome of internships on the basis of five indicators, set by the Living Wage Foundation. The criteria are adequate training and monitoring, on-the-job rotation, a designated mentor or supervisor, a workplace learning plan and a post-internship follow-up. The differences in assessment are revealing: while 25 per cent of interns viewed their internships as exhibiting none of the indicators, the figure was 8 per cent for employers. Also, while 18 per cent of employers viewed

²¹ *Archie v Grand Central Partnership* 999 F Supp 504 (1998).

²² See Chapter 2 in this volume.

²³ S Malik, 'DWP Orders Man to Work without Pay for Company that Let Him Go', *Guardian* (London, 3 November 2014).

²⁴ Cullinane and Montacute (n 1).

²⁵ *Ibid* 41–2.

their internships as meeting all of the criteria, a mere 2 per cent of interns felt the same way.²⁶

It could be argued that the advantages of internships are less tangible, and that they contribute to the employment prospects of those undertaking them. This indeed is the common myth. In reality, however, there are indicators that unpaid internships are not only not beneficial; they may harm employment prospects.²⁷ The previously mentioned report cites findings that completing an unpaid internship is ‘associated with a salary penalty three years later’, while its own survey suggests very moderate gains for those who took one unpaid internship, and those who did more than three unpaid internships ended up with salaries lower than those who did no internships at all.²⁸ Similar figures are found in other jurisdictions. Thus, the American National Association of Colleges and Employers has found, over a period of three years, that 63 per cent of students with a paid internship received at least one job offer, while only 37 per cent of those who took unpaid internships were in the same position, a negligible 1.8 per cent more than those who did not intern at all. Again, those who performed unpaid internships received less pay than those with no internship experience.²⁹ Now, it may well be argued that correlation is not causation (that is, it cannot be established that taking an unpaid internship leads to less beneficial prospects). Yet the study found that graduates who participated in unpaid internship schemes took similar degrees and had similar university grades to graduates who held paid internships. At the very least, it leaves a significant question mark hanging over the knee-jerk assumption that internships are, almost by definition, beneficial to interns, regardless of their characteristics.

We may argue against this insight, in that, if unpaid internships are detrimental to pay and job prospects, then the argument that they present a barrier to social mobility seems weaker. The Sutton Trust report suggests that the answer lies in the complexity of the world of internships. In particular, there is a ‘two-track system’, one of which is paid, openly advertised and provides opportunities, while the other offers no pay, training or development and leads from one internship to another, with negligible advantages, if at all, for eventual salaries.³⁰

²⁶ Ibid.

²⁷ See Chapter 5 in this volume.

²⁸ Cullinane and Montacute (n 1) 44.

²⁹ Jordan Weissmann, ‘Do Unpaid Internships Lead to Jobs? Not for College Students’ *The Atlantic* (Boston, MA, 19 June 2013), <https://www.theatlantic.com/business/archive/2013/06/do-unpaid-internships-lead-to-jobs-not-for-college-students/276959/>, accessed 30 March 2021.

³⁰ Cullinane and Montacute (n 1) 47.

15.3 THE LEGAL IMPLICATIONS OF THE MYTH OF THE (PRIMARY) BENEFICIARY

In the UK and the USA, the insight that interns are the primary beneficiary of their training has been a crucial element in denying them access to employment rights, including the minimum wage.

The origins of the myth are located in the US Supreme Court decision, *Walling v Portland Terminal Co*,³¹ according to which, individuals who were trained for a position of brakeman over seven or eight days were not entitled to minimum wage or maximum hour protection under the Fair Labor Standards Act 1938 (FLSA). The Court's rationale was that the railroad company received no 'immediate advantage' from the work performed by the trainees, whereas the latter were receiving free training, for their own benefit.³² It accepted that, all else being equal, these trainees would have been entitled to employee status, but qualified the general status by stating that the term 'to employ' in the FLSA was 'not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work *for their own advantage* on the premises of another'.³³

As James Brudney explains in Chapter 10 this volume, the *Walling* decision, and the 'primary beneficiary' test which is at its core, remain influential to this day. In 2010, its principles were 'codified' through a six-prong test by the American Department of Labor.³⁴ Moreover, in recent years, the American courts have taken an even more flexible (pro-employer) approach, removing the requirement that an internship be tailored to benefit the participant, and holding that, even when 'the employer receives an immediate advantage from the interns' work',³⁵ the interns may not be considered employees.

Turning to the UK, it is interesting to note that the seminal case *Daley v Allied Suppliers*³⁶ resides in the grey area between back-to-work programmes and business-driven internship schemes. In *Daley*, the scheme was organized by the Manpower Services Commission as part of the Youth Opportunities Programme (YOP). While the claimant was not required to take part in the scheme as a condition of the receipt of benefits, the involvement of the state agencies was far more extensive than in laissez-faire cases of open-market

³¹ *Walling v Portland Terminal Co* 330 US 148 (1947).

³² Ibid 152–3.

³³ Ibid 152 (emphasis added).

³⁴ US Department of Labor, Wage and Hour Division, *Fact Sheet #71: Internship Programs under The Fair Labor Standards Act* (DOL 2010).

³⁵ *Glatt v Fox Searchlight Pictures, Inc.* 791 F 3d 376, 383 (2nd Cir, 2016); *Wang v Hearst Corp* 877 F 3d 69 (2nd Cir, 2017).

³⁶ [1983] IRLR 14.

internships. The Employment Appeal Tribunal held that a trainee under the YOP could not proceed in her claim for race discrimination since, even if there was a contract, it was one for training, and not a contract of employment. Here too, the dividing line between the two rested on the primary purpose of these schemes being to benefit the participant, and not the employer. At the time, Mark Freedland argued that the administrative YOP and the judicial decisions which governed it created ‘a kind of second-class employment citizenship in which the young people concerned engage in work for employers without the benefit of the structure of employment protection legislation which applies to other workers’.³⁷ Similar concerns were raised regarding the 1988 Employment Training Scheme.³⁸

The *Daley* reasoning was recently followed when the Employment Appeal Tribunal (EAT) ruled that a British cyclist was not employed by the British Cycling Federation ‘since what the Claimant was doing was not “work” at all in this context’.³⁹ Citing and agreeing with the Employment Tribunal (ET), the EAT stated that ‘far from this being an arrangement where any service is performed by the Claimant for the Respondent, it was “a contract where services are provided to the Claimant”’.⁴⁰ Why was the claimant not engaged in ‘work’? The answer lies in the ‘dominant purpose’ test. The test was noted in the ET’s decision as helpful when seeking to distinguish a contract of employment from a contract for training,⁴¹ and was discussed more extensively by the EAT.⁴² However, while both tribunals spend some time explaining why the dominant purpose could be relevant in distinguishing the two contract types (employment and training), they offer very little in terms of indices that would enable an observer to scrutinize such a decision. It seems that the tribunal is content to make this type of decision based on its own intuition as to what the relationship ‘looks like’. This notion gains support via the EAT’s agreement with the respondent’s submission that ‘the Agreement was a contract for the provision of services by the Respondent to the Claimant, and not the other way around, “feels right”’.⁴³

³⁷ Mark Freedland, ‘Labour Law and Leaflet Law: The Youth Training Scheme of 1983’ (1983) 12 *Indust LJ* 220, 230.

³⁸ Nick Wikeley, ‘Training for Employment in the 1990s’ (1990) 53 *MLR* 354, 365–6.

³⁹ *Varnish v British Cycling Federation* UKEAT 0022/20/LA(V) (14 July 2020), para 42 (‘*Varnish* EAT’).

⁴⁰ *Ibid.*

⁴¹ *Varnish v British Cycling Federation*, Case 2404219/17 (Employment Tribunal, 16 January 2019) paras 256–257.

⁴² *Varnish* EAT (n 39) paras 59–66.

⁴³ *Ibid* para 53.

15.4 LEGAL AND NORMATIVE PERSPECTIVES

Apart from lacking empirical foundations, as already noted, the reasoning employed by the UK and US courts may be criticized on legal, analytic and normative grounds. First, from a legal perspective, we may ask where this test, which focuses on the identification of benefits, derives from. In the USA, the FLSA explicitly empowers the Secretary of Labor to regulate the incorporation of '[l]earners, apprentices, and messengers' and to issue certificates on the basis of those regulations so they will be entitled to 'such wages lower than the minimum wage'.⁴⁴ However, notwithstanding this general power, it is abundantly clear that not only did the statute not dictate this problematic test, but neither did the Secretary of Labor. It was the courts' decision to do so, thus denying employment rights to those who would otherwise be entitled to them.⁴⁵

However, while in the US there is at least some general power to address the situation of 'learners, etc' in respect of minimum wage and hours worked, no such provision exists in British statutes. Presumably, then, we would fall back on the employment tests, which distinguish an employee (and worker) from someone who is self-employed. Yet, it would seem that the main purpose of this test is to deny employment status to those who, if not for the test, would have gained the relevant status and rights. In the UK, this is actioned without statutory authorization.

Second, analytically, we may question whether this dichotomy between benefits for the company (= work) and activities for the benefit of the worker (= not work) holds in general. Paul Budd offers the example of Jake, who is hired as an unpaid intern by a record label to perform administrative duties. He does not gain much from his role (making coffee and organizing files) but is overjoyed by his weekly, five-minute encounters with Mick Jagger, when the latter comes into the office for meetings.⁴⁶ Would that be a sufficient 'benefit' to Jake to remove him from the scope of employment law protection? In addition, take the case of Daniel, a first-year lawyer in a blue chip law firm. Daniel is trying his best to cope with the work, but is simply overwhelmed, and is a poor employee. However, at the end of the first year he has gained numerous skills, some general (punctuality, proofreading, writing and research), some related to the sector (operating a case management system, attracting and retaining clients) and some related to the particular firm. The firm may decide

⁴⁴ Fair Labor Standards Act 1938 29 USC s 214(a) (2012).

⁴⁵ *Solis* (n 16) 529.

⁴⁶ Paul Budd, 'All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor' (2015) 63 Kansas LR 451, 478.

to discontinue his employment, but would it be reasonable to say that, as he benefited from the work more than the firm did, he should be seen as a trainee? Such a conclusion would seem far-fetched. More generally, to drive the point home, we can turn to the position of the business sector during congressional hearings prior to the enactment of the FLSA in 1937. Mr Lane, an industry executive, expressed the concern that workers who start off in the furniture business would be paid as much as a seasoned worker, since the ‘average beginner ... is for the first 3 months ... an expense rather than an asset; then the next 3 months he might be worth the room he is taking up, part of which we are paying him, and then after that he becomes valuable to us’.⁴⁷

Normatively, this argument makes sense only under a neoliberal paradigm which suggests that regulation should work only to the benefit of business. For it is not as if, when the employee becomes more proficient and the employer is able to charge a higher rate of billable hours for the employee’s work, the employee receives compensation that correlates with that increase. This refutes the premise that the person’s compensation should, at any given time, be commensurate to the benefit derived from the person’s work. The consequences of this type of logic are present in an American case, *McLaughlin*,⁴⁸ in which the majority accepted the claim that the men who had to undertake a week of ‘exposure to tasks’ were entitled to the minimum wage. During that week, they worked between 50 and 60 hours, loading and delivering food, and stockpiling vending machines. It was clear from the evidence that they learned very little and, in effect, performed manual labour, relieving other drivers from work. All routemen who took part in the ‘orientation’ were then ‘hired’ as drivers. Yet, the minority judge in the case still sought to deny the claim, reasoning that while the participants learned skills that had ‘practically no transferable usefulness’, this was ‘of little significance’.⁴⁹ It was enough that they ‘learned to interact with store managers’ and ‘complete some of the paperwork’. This is a clear example of the length someone (a judge) can reach to find a ‘benefit’ that is sufficient to deny access to basic rights.

The reverse case, which only sheds further light on the subjectivity of the test, and its ideological underpinnings, together with the strong connections between internships and workfare schemes, may be observed in the *Archie* case.⁵⁰ Judge Sotomayor (as she was then) followed the *Walling* rationale, and found in favour of the plaintiffs, while acknowledging that the programme provided participants (individuals who were formerly homeless) with skills and

⁴⁷ *Fair Labor Standards Act of 1937: Joint Hearings on S 2475 and HR 7200 before the S Com on Educ & Labor and the HR Comm on Labor*, 75th Cong 481 (1937).

⁴⁸ *McLaughlin v Ensley* 877 F 2d 1207, 1209 (4th Cir, 1989).

⁴⁹ Citing *Donovan v American Airlines* 686 F2d 267 (5th Cir, 1982).

⁵⁰ *Archie* (n 21).

work opportunities to which they would not otherwise have access. However, since the work was not supervised, and the level of training was not high, the benefits to the claimant were minimal. This is a high bar, which is not routinely found, for the participants' benefit. Turning to the employer's benefit, Sotomayor found a strong factor was that participants regularly replaced employees on shifts, and that running the scheme was a prerequisite to win a contract with the New York City Council.

Here we find a clear-eyed, realist outlook: it should not be difficult to find benefits on both sides of internship and work participation schemes. Otherwise, we would imagine, interns and perhaps WPs, and surely businesses, would not take part. These benefits are, at times, tangible (a track to work, on one side; free labour, on the other) and sometimes less tangible (skills and reputation). In some sense, these benefits are incommensurable. Who can say, in the abstract, that the skills gained for interns in general are more important than the benefit of choosing the best prospects for businesses?

Moreover, viewing the benefit of work for the worker as an impediment to employment status would seem to contrast with the 'lifelong learning' slogan, which has become central in European Union social policy, dominates the European discourse on social policy reform, and implies the importance of the worker's personal development, thus normatively incorporating work, education and training.⁵¹ Indeed, we may enquire whether employers should reconsider their obligations to pay full-time employees who are sent for, say, a week-long training programme on new software or to perfect managerial approaches. It is clear that at the time of the training the employer does not benefit from it, and the employees are, by far, the prime beneficiaries (at least, that is the intention). It is not enough, it should be clear, to say that the employer assumes that the gains will be evident in the future, for that is also the case with interns and trainees.

15.5 WHERE TO GO FROM HERE?

The 2018 Sutton Trust report focuses on the approaches towards, and conditions of, internships; but it also notes that 61 per cent of graduate respondents did not take up an internship and, of them, 40 per cent (almost 24 per cent of the whole sample) explained that the reasons for doing so included an inability to afford an unpaid internship in a city.⁵² Unsurprisingly, these figures suggest

⁵¹ For example, see *Lifelong Learning Programme* (2007–2013) Decision 1720/2006 EC of the European Parliament and the Council of 15 November 2006, [2006] OJ L327/45.

⁵² Cullinane and Montacute (n 1) 27.

that unpaid internships present a significant entry barrier to some occupations, and thus to social mobility (in respect of interns) and diversity (in respect of business).

Both internships and work participation schemes highlight a growing trend towards the legitimacy of free labour, and the supposed need to submit to the cries of businesses which claim that imposing labour rights on these schemes would undermine their viability, in a way that would harm the participants. As a general claim, this is not new, but can be tracked at least to the beginning of the twentieth century. So, a historical perspective would probably view this trend as retrograde, another neoliberal attempt to reverse decades of expanding the scope of labour law and regulation. What can be done in response?

In recent years, legislation, case law and scholarship have all, to different degrees, challenged the strict boundaries that constrict statutory employment protection to only some workers. This path, originally identified by Bob Hepple,⁵³ was trail-blazed by Mark Freedland,⁵⁴ and later in conjunction with Nicola Kountouris.⁵⁵ The new project posits the personal work relationship as the central category in labour law, thus doing away with the binary dichotomy between the contract of service and the contract for services. A similar approach suggests that, when assessing statutory protection, we must recognize that ‘each piece of legislation has its own purpose, which corresponds with the general values that labour laws are aimed to protect and promote’.⁵⁶ Following this approach, it may be suggested that equal protection legislation, working time or pay measures, for example, were intended to protect individuals precisely in the position of WPs and trainees. However, the prominence of the dominant purpose test in denying employment status to interns may give us pause before moving to quickly embrace it.

Legislation has played a role in this trend as well. This is made clear in the UK, first and foremost by the fact that the Employment Rights Act 1996 includes the apprenticeship contract within the contract of employment.⁵⁷ While the traditional definition of apprenticeship would suggest that WPs do not fall within its boundaries, it may also be suggested that the substantive

⁵³ Bob Hepple, ‘Restructuring Employment Rights’ (1986) 15 *Indust LJ* 69, 74.

⁵⁴ Mark Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 *Indust LJ* 1; Mark Freedland, ‘Application of Labour and Employment Law Beyond the Contract of Employment’ (2007) 146 *Int Lab Rev* 3.

⁵⁵ Mark Freedland and Nicola Kountouris, ‘Employment Equality and Personal Work Relations: A Critique of *Jivraj v Hashwani*’ (2012) 41 *Indust LJ* 56.

⁵⁶ Guy Davidov, ‘Re-Matching Labour Laws with Their Purpose’ in Brian Langille and Guy Davidov (eds), *The Idea of Labour Law* (OUP 2011) 180–81. See also Guy Davidov, ‘A Purposive Interpretation of the National Minimum Wage Act’ (2009) 72 *MLR* 581; Zatz (n 14) 377.

⁵⁷ Employment Rights Act 1996 s 230(1).

distance between the two categories does not merit the all (apprentice as employee) or nothing (WPs and trainees) legal conclusion. This position is strengthened with the formal introduction of 'worker' as an intermediate category, between the self-employed and the employee; and with the 'bold and radical'⁵⁸ extension of the continuum in the scope of the anti-discrimination laws of the 1970s, which (in the language of the Equality Act 2010) cover all those under a 'contract personally to do work'.⁵⁹ Moreover, legislation has expanded the scope of protective rights to trainees in areas such as health and safety, working time and, perhaps, equal treatment.⁶⁰ The 2018 Sutton Trust report follows this line by recommending that unpaid internships, or training schemes, could last up to four weeks. This is one, partial, solution to the problem. It does not, however, resolve the more challenging problem, which is that, under the pretext of benefiting individuals, businesses are gaining increasing access to free labour.

⁵⁸ Paul Davies and Mark Freedland, 'Labor Markets, Welfare and the Personal Scope of Employment Law' (1999) 21 *Comp Lab L & Pol J* 231, 234.

⁵⁹ Equality Act 2010, s 83(1).

⁶⁰ Respectively: Health and Safety (Youth Training Scheme) Regulations SI 1983/1919, reg 3; Working Time Regulation 1998, reg 42; Equality Act 2010, s 83(2) (a).

16. Extending social security to trainees in Spain, France and Germany: A tale of segmentation

Alexandre de le Court

16.1 INTRODUCTION

A lack of access to social protection and more particularly to social security is one of the problems that have been associated with traineeships or internships in several studies and policy documents.¹ This problem can also be seen in the context of systemic discrimination against youth (the main participants in traineeships) in the world of work, as argued in Chapter 19 of this volume.

The question of trainees' access to social protection, despite being considered problematic, has not been given much attention in comparative legal studies. Therefore, in this chapter I contribute to the literature on the subject by examining three European Union (EU) member states with social security systems based on professional social insurance (which are situated in the conservative capitalist welfare state cluster or its Mediterranean variation²) and that have regulated in part the social security rights of trainees. I also briefly look at international and European standards on the matter.

¹ Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, 'The Regulation of Internships: A Comparative Study' (2018) ILO Employment Policy Department Working Paper No 240; Kari P Hadjivassiliou, Emanuela Carta, Tom Higgins, Catherine Rickard, Suzanne Ter-Minassian, Flavia Pesce and others, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report* (European Union 2012); Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1; Proposal of the European Commission for a Council Recommendation on access to social protection for workers and the self-employed COM/2018/0132 final. In this chapter I use the words trainee and traineeship, as they are used in the EU regulatory framework.

² Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990); Maurizio Ferrera, 'The "Southern" Model of Welfare in Social Europe' (1996) 1 J Eur Soc Pol 17.

I analyse the extent to which trainees are included within social insurance systems. In doing so I start from the idea that we should consider not only day-to-day work-related risks, such as industrial accidents, but also social risks seemingly less connected with the protection needed by young persons, such as old age. The evolution of the regulation of retirement pensions, requiring longer careers for access to and sufficient level of benefits, combined with a greater irregularity of careers, means young people need to start building up pension rights as soon as possible. Another important branch of social insurance is unemployment protection, given the higher unemployment rates among young people. Social assistance as a safety net will also be briefly included in the analysis.

16.2 THE SPANISH CASE: TOWARDS COMPREHENSIVE SOCIAL INSURANCE FOR ALL TRAINEES

One distinctive characteristic of the Spanish case is the existence of a specific fixed-term employment contract for the ‘acquisition of professional practice corresponding to the acquired level of studies or training’. The *contrato en prácticas* (traineeship contract), regulated in section 11 of the *Estatuto de los Trabajadores* (Act on the Status of Employees), can be concluded for a maximum of two years, within five years of obtaining a degree or professional certificate. While it entails recognition of the full array of labour law and social security rights that apply to an employment contract, it allows the employer to pay lower wages than those of employees performing the same tasks (with a minimum of 60 per cent of the reference wage or statutory minimum wage for the first year, and 75 per cent for the second). It has also been deemed to reinforce the ‘chain of precariousness’ of fixed-term contracts,³ among other reasons because they are excluded from the two-year limit in which a worker can be employed on fixed-term contracts by the same company.

In addition to the traineeship employment contract (and the apprenticeship contract, which is not considered here), non-employment traineeships can be considered an integral part of the Spanish world of work. Their regulation is not unified and the scope of that regulation is not clear, so some doubts arise as to the prohibition of some forms of traineeship and the limits of the employment contract.⁴ A strict reading of the regulation suggests there are three reg-

³ Julia López López, Alexandre de le Court and Sergio Canalda, ‘Breaking the Equilibrium between Flexibility and Security: Flexiprecarity as the Spanish Version of the Model’ (2014) 5 Eur Lab LJ 18, 37.

⁴ José Luis Hernández de Luz, ‘Becarios y prácticas no laborales en empresas’ (2017) 128 Revista del Ministerio de Empleo y Seguridad Social 209, 218–23;

ulated modalities of traineeship: (1) traineeships for students of professional training programmes (comparable to an apprenticeship);⁵ (2) traineeships for university students;⁶ and (3) traineeships for young unemployed people who possess a degree or training certificate and have less than three months' work experience.⁷

As regards social protection, Act 27/2011 on the update, adaptation and modernization of the social security system, implemented by Royal Decree 1493/2011, requires companies offering paid traineeships to university or professional training students to affiliate the students with the social security system and pay social contributions calculated on the same basis as an apprenticeship contract. Unpaid traineeships do not involve inclusion in the social security system, but paid trainees are covered for all contingencies (retirement and disability pensions, industrial accidents and work-related diseases, sick leave, maternity/paternity leave and health insurance⁸), except unemployment.

There was a precedent to this system of inclusion in the social security system. Royal Decree 1326/2003 on the Statute of the Research Trainee (that is, PhD students or postdoctoral researchers with fellowships) provided that the university or research centre must pay social contributions for those students and protect them against all contingencies, except unemployment. This exception was challenged before the courts, based on an infringement of the equality principle of section 14 of the Spanish Constitution. The Spanish Tribunal Supremo, however, rejected the application, considering that, even if the General Social Security Act authorizes the government to include classes or groups of people who are not employees, civil servants or self-employed in

Mónica Molina García, 'Régimen jurídico de las prácticas no laborales en las empresas' in Margarita Isabel Ramos Quintana and Gloria Pilar Rojas Rivero (eds), *Transformaciones del Estado Social y Derecho del Trabajo* (Comares 2014) 415; Ana de la Puebla Pinilla, 'Problemas prácticos de la prácticas no laborales en empresas' in Ignacio García-Perrote and Jesús Mercader, *Las reformas laborales y de Seguridad Social* (Lex Nova 2014) 213, 225–32.

⁵ Regulated by Royal Decree 1529/2012, art 28ff, developing the apprenticeship contract and establishing the basis of the dual vocational training system.

⁶ Regulated by Royal Decree 592/2014 on external academic traineeships for university students.

⁷ Regulated by Royal Decree 1543/2011 on non-employment traineeships in companies. Royal Decree 694/2017 implementing Law 30/2015 on the System of Professional Training for Employment also seems to allow the possibility of regulating traineeships for the unemployed in the framework of active labour market policies (ALMPs) at the level of autonomous communities (the latter are competent to develop ALMPs).

⁸ The coverage of health insurance is almost universal in Spain, and does not necessarily depend on inclusion in the social security system and the payment of social contributions.

its scope, the specific provisions on unemployment protection only mention employees and civil servants. Moreover, unemployment benefits are destined to be a substitute for a salary, which the allowance paid to students is not, as it is not paid in consideration of the tasks performed for the university, which are to be considered as secondary to the training of the student, which is the real object of the allowance. Therefore, those students cannot be considered employees.⁹ There is thus no legal or constitutional obligation for the government to provide unemployment protection to people who are not employees or civil servants. This jurisprudence could be considered to make sense if we assume that there is a clear-cut line between research fellowships and employment contracts for research or teaching staff. However, this hypothesis must be questioned. A few years later, Royal Decree 36/2006 on the Statute of the Research Staff in Training (which repealed Royal Decree 1326/2003) provided that the two first years of collaboration of PhD students with their institution would take the form of a trainee fellowship, while further years of collaboration would have to take the form of a fixed-term employment contract, despite there being no difference in the students' tasks. Moreover, Act 14/2011 on Science, Technology and Innovation provided that the collaboration of PhD students with their institution had to take the form of an employment contract from the start, abolishing *de facto* the possibility of traineeships linked to pre-doctoral or postdoctoral training.

Since 2011, paid traineeships (independently of their specific regulation) have involved inclusion in the social security system, with the provider of the training paying social contributions. Unpaid traineeships have not.¹⁰

However, the latter situation is supposed to change. The fifth additional provision of Legislative Royal Decree 28/2018 on the increase of public pensions and other urgent measures in social, work and employment matters¹¹ provides that all trainees are to be included in the social security system (except for protection in case of unemployment), whether their traineeships are paid or unpaid. That provision is not yet in force. This would depend on the adoption of a royal decree for its implementation within three months of the publication of the legislative decree. However, negotiations with universities seem to have

⁹ Tribunal Supremo, sala de lo contencioso-administrativo, judgment of 28 June 2005 (case 150/2003).

¹⁰ Except for health care, owing to its quasi-universal character.

¹¹ The lack of social protection for unpaid trainees is presented in the preamble of the law as one of the justifications of the urgency permitting the government to adopt legislative measures normally reserved for Parliament.

postponed the entry into force of the measure, so that in August 2020, the Royal Decree had not yet been adopted.¹²

The Spanish case is thus an example of a process of cumulative change in the formalization of traineeships as a contractual relationship involving inclusion in the social security system, next to the more traditional categories of workers, such as employees, civil servants and the self-employed. The government is gradually assimilating trainees into the category of employees, applying a general power of assimilation provided by social security law. Inclusion in social security extends to long-term protection (including for old age) and recognition of the existence of traineeships as part of the employment trajectory. Protection does not extend to security for people in transition between jobs, with the consolidated and reiterated exclusion of unemployment protection. In this the Spanish government seems to hide behind the pretext of a strict and formal interpretation of the law and the Constitution to avoid the financial burden of extending unemployment insurance. However, this exclusion is problematic when viewed within the context of a youth unemployment rate of 33.2 per cent in 2019 according to Eurostat. Also, since the young unemployed are generally excluded from social assistance benefit schemes (which, in Spain, are fragmented and different in each autonomous community),¹³ there is a higher risk that there will be no safety net in times of unemployment after a career start in which traineeships have played an important part.

¹² See Conferencia de Rectores de las Universidades Españolas (Conference of Spanish Public University Presidents), ‘Crue lamenta que al Gobierno legisle en al RDL 28/2018 sobre las prácticas académicas externas sin hablar con las universidades y reclama diálogo urgente para abordar conjuntamente esta cuestión’ (*Crue*, 4 January 2019), <https://www.crue.org/2019/01/comunicado-practicas-academicas-externas/>, accessed 30 March 2021; ‘Crue Universidades Españolas agradece la decisión del Gobierno de abrir un diálogo sobre las prácticas académicas externas’ (*Crue*, 16 January 2019), <https://www.crue.org/2019/01/crue-agradece-dialogo-practicas-academicas-externas/>, accessed 30 March 2021. The practice of integrating obligatory traineeships into university degrees is widespread (540 000 students according to the Spanish Ministry of Work), and it is believed that an obligation to pay a social contribution would deter companies from accepting trainees. Moreover, part of those traineeships involves collaboration with the academic or training institutions themselves, and the law provides for the possibility of the institution paying the contributions even for traineeships in companies not linked to the institution.

¹³ The minimum age requirement is 25 in Madrid or 23 in Catalonia, the Basque Country and in relation to the recently approved nationwide *Ingreso Mínimo Vital* (with some exceptions).

16.3 THE FRENCH CASE: THE LEVEL OF THE ALLOWANCE AS A CRITERION OF INCLUSION

Act 2014-788 of 10 July 2014 for the development and regulation of traineeships (*stage*) and the improvement of the status of trainees, reforming the Education Code, was the culmination of a series of measures taken since 2006 to bring the status of trainees closer to that of employees in relation to social rights.¹⁴ The model rests on the strict regulation of traineeships. Traineeships can only occur within the framework of a tripartite training relationship between a company or entity, an educational institution and the student. Open-market traineeships are forbidden,¹⁵ and emphasis is put on the training component of the relationship.¹⁶ The regulation makes it clear that traineeships cannot be used to crowd out formal employment: the code explicitly prohibits the use of trainees for regular tasks corresponding to permanent work, to cover a temporary increase in activity, to perform seasonal work or to substitute for another worker who is on leave.¹⁷ Traineeships of more than two months involve the obligatory payment of a minimum allowance established in the applicable branch-level agreement, or if not by governmental decree, of at least 15 per cent of the *plafond horaire de la sécurité sociale*, a reference amount used for the calculation of particular social benefits. For 2019, the minimum allowance is established at €3.75 per hour, or €577 per month for a full-time traineeship.

Trainees remain affiliated to the social security system under their student status. They are included in the social security coverage for industrial accidents or work-related diseases (with contributions paid by their education institution).¹⁸ However, if the allowance exceeds the minimum allowance fixed by the Education Code, inclusion in social insurance is compulsory and the employer's social contributions are paid by the company hosting the

¹⁴ Christophe Willmann, 'L'assurance vieillesse, face aux difficultés professionnelles des jeunes' (2014) 6/7 *Droit Social* 617, 621.

¹⁵ The *Code du Travail* also provides for traineeships in the framework of long-life training or ALMPs, but they generally involve the payment of a salary or allowance, inclusion within the social security system, and consideration of the traineeship period for the accumulation of retirement pension rights (*Code du Travail*, art L6342-1 ff; *Code de la Sécurité Sociale*, art L-351-3).

¹⁶ *Code de l'Éducation*, art L124-1 also refers to 'placing the trainee in a work situation' (*mise en situation*).

¹⁷ *Ibid* art L124-7.

¹⁸ *Code de la Sécurité Sociale*, arts L412-8, R412-4.

traineeship.¹⁹ The traineeship period will be taken into account for access to maternity/paternity leave and sick leave as well as disability pension.²⁰

The traineeship period can also contribute to access to the retirement pension.²¹ If the trainee receives an allowance above the minimum, contributions are paid for the difference between the allowance and that minimum. These contributions are taken into account in the future assessment of the retirement pension.²² Moreover, if there is no allowance or if the latter is lower than or equal to the minimum, it is possible to ‘validate’ the traineeship period to build pension rights up to a specific limit (two fictive trimesters) if the student pays a set contribution, up to two years after the end of the traineeship.²³ However, few trainees are able to exercise that option, and the general level of the allowances is too low to involve a generalized contribution of traineeships towards pension rights.²⁴

Even when social contributions are paid (that is, the allowance is above the legal minimum) traineeship periods are not taken into account for the right to unemployment benefits, because the trainee is not considered an employee, and only contributions paid on the basis of the salary of an employee are taken into account. The remuneration received by the trainee is explicitly defined as an allowance, or *gratification*, so it does not qualify as a salary.

Concerning general social assistance benefits, the means-tested and means-complementing *Revenu de Solidarité Active* is conditional on reaching the age of 25. There are two exceptions to this: having responsibility for children²⁵ or having worked a specific number of hours (twice the annual threshold from which working hours are considered extra working time, the

¹⁹ Ibid art R412-4.

²⁰ Ibid art L136-1-1(III)(b).

²¹ Willmann (n 14) 620.

²² Fictive trimesters of work are recognized according to thresholds calculated on the basis of a number of hours multiplied by the hourly minimum salary (around €1500 per trimester in 2019). Therefore, reaching the necessary thresholds depends on the combination of hours worked under the traineeship contract and the difference between the minimum allowance and the allowance effectively received.

²³ See *Code de la Sécurité Sociale*, art L351-17.

²⁴ In 2010 around 30 per cent of trainees received an allowance above the minimum (64 000 students), but only 4 per cent were able to ‘validate’ a trimester, with an allowance superior to €1008 per month: Yannick Moreau, *Rapport au Premier ministre: Nos retraites demain: équilibre financier et justice* (Direction de l’information légale et administrative 2013) 121. For the academic year 2016–17, 54 per cent of traineeships lasted two months or more, 46 per cent involved an allowance, but only 28 per cent of the allowances were more than €600 per month: Ministère de l’Enseignement supérieur, de la recherche et de l’innovation, ‘Un tiers des étudiants en université ou établissement assimilé a suivi un stage en 2016–2017’ (2018) Note Flash No 14.

²⁵ *Code de l’Action Sociale*, art L262-4.

latter being 1607 hours) in the three years previous to the request for assistance.²⁶ However, hours worked under a traineeship contract are not taken into account. Also, the French youth guarantee system gives young people between 16 and 25 years of age without sufficient resources access to a benefit which can be combined with a traineeship allowance as long as their income is below a certain threshold.²⁷

16.4 THE GERMAN CASE: A COMPLEX SYSTEM BASED ON THE LINK WITH EDUCATION

The Mindestlohngesetz (Minimum Wage Act) is the main piece of legislation which explicitly defines the legal concept of trainee (*Praktikant/in*). According to its section 22, a trainee is a person who, according to the contractual relationship and its execution, undergoes a specific period of activity in preparation for a profession, to acquire practical knowledge and experience. The definition recognizes the right to the minimum wage, with some exceptions: (1) compulsory traineeships (*Pflichtpraktikum*), which are covered by regulations on training, education and higher education; (2) voluntary orientating traineeships (before vocational training or studies) of less than three months; (3) voluntary traineeships of less than three months during a course of study (that is, when the trainee is enrolled as a student); and (4) traineeships in the context of active labour market policies (ALMPs).

The Minimum Wage Act reflects the differentiation, in terms of regulation, between compulsory (*Pflichtpraktikum*) and voluntary traineeships (*Freiwilliges Praktikum*). In the former, the legal status of enrolled student stands at the heart of the activity, and the relevant rights and obligations are laid down in school regulations and study and examination regulations of colleges and universities,²⁸ which have a public law character and govern the administrative relationship with the place where the traineeship takes place.²⁹ Voluntary traineeships, on the other hand, have a private law character, and fall under the scope of the *Berufsbildungsgesetz*, or Vocational Training Act,

²⁶ Ibid arts L262-7-1, D262-25-1 ff.

²⁷ *Code du Travail*, arts L5131-6 ff, R-5131-16 ff.

²⁸ Tobias Wolfgarten and Markus Linten, 'National Report on Traineeships in Germany' in Kari P Hadjivassiliou, Emanuela Carta, Tom Higgins, Catherine Rickard, Suzanne Ter-Minassian, Flavia Pesce and others, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report* (European Union 2012) 232.

²⁹ Julia Burkard-Pötter and Stephan Sura, 'Das Praktikum im neuen Gewand – Praxiseinblicke zwischen Mindestlohn und prekärem Beschäftigungsverhältnis' (2015) *Neue Juristische Wochenschrift* 517, 518–19.

section 26. Some of its provisions apply to the traineeships it defines (the obligations of the parties related to the object of the contract, the conditions for termination, and the application of labour law provisions in accordance with the characteristics and purpose of the traineeship/vocational training contract). On the one hand, the Vocational Training Act differentiates the traineeships to which it applies from the employment relationship and the vocational training relationship.³⁰ On the other, it defines the ‘private law’ or voluntary trainee as a person who has been hired to acquire professional knowledge, skills, capacities or experience.

Another difference between voluntary and compulsory traineeships is that, in the former, trainees are not considered persons ‘hired for their vocational training’, which is a legal category used to regulate compulsory inclusion in the social security system.³¹ In the latter instances, trainees are considered to be such persons, through the inclusion of compulsory traineeships in the definition of vocational training by the Vocational Training Act (even if they do not fall under the scope of section 26 and are excluded from the extension of labour law provisions).³² The rules of social insurance are thus different for each category.

Social security rights vary according to three main factors: the voluntary or compulsory character of the traineeship, whether it occurs during a course of study or before or after (thus distinguishing between *Zwischenpraktikum* and *Vor-* or *Nachpraktikum*; the former takes place while the trainee is enrolled as a student, while the latter is imposed by training or study regulations before enrolment or after obtaining the degree or diploma), and whether the trainee receives pay or not. The fragmented character of German social insurance, with different regimes for different social risks to be covered, adds to the complexity of the question.³³ However, the situation can be summarized as follows.

In principle, an obligatory traineeship, paid or unpaid, must be covered by pension insurance,³⁴ except if it takes place during the course of study (the

³⁰ As explained in Chapter 7 in this volume, vocational training is intended to impart workplace competencies in an orderly course of training, with vocational school lessons and examinations. The difference from the employment contract resides mainly in that the training and learning is in the foreground. See also Wolfgarten and Linten (n 28).

³¹ See *Sozialgesetzbuch IV* (hereafter, *SGB IV*) on General Provisions on Social Insurance, s 2(2), for the general principle of inclusion.

³² *Berufsbildungsgesetz*, s 3(2).

³³ *Pflegeversicherung*, or nursing care insurance, is not considered here, and follows roughly the lines of health insurance, to which it is connected.

³⁴ *SGB VI*, s 1 (pension insurance).

exception also stands if that *Zwischenpraktikum* is paid).³⁵ The latter type of traineeship is also exempted from compulsory inclusion in unemployment insurance (even if paid),³⁶ while a traineeship before or after a course of study must be included.³⁷

All compulsory traineeships must include health insurance, whether they are paid³⁸ or unpaid.³⁹ However, some benefits, such as sickness benefits, are only available to paid trainees (again with an exclusion for compulsory traineeships during a course of study).⁴⁰ Also, all trainees are covered in case of industrial accidents, whether as ‘hired persons’ (paid or unpaid) or as students following higher education.⁴¹

In compulsory *Vor-* or *Nachpraktikum*, contributions are calculated in the same way as for employees. However, if the allowance is less than €325 per month, which includes unpaid traineeships, only the employer has to pay contributions. The latter have to be at least 1 per cent of the *Bezugsgröße*, a legally defined reference amount for the calculation of social benefits.⁴² This rule applies to pension and unemployment insurance. For health insurance, the principle of payment by the employer in relation to unpaid traineeships is overridden by the application of the health insurance coverage of the family, and another fictive amount is taken into consideration for the calculation of contributions.

As explained previously, voluntary traineeships do not involve inclusion in the social security system of the trainee as a ‘person hired for his or her vocational training’. Therefore, the other general ground of inclusion in the social security system, that is, ‘being hired for remuneration’, applies.⁴³ As a consequence, as there is no explicit rule providing for their inclusion, unpaid voluntary trainees are not compulsorily insured. Therefore, they are not included in pension, health care and unemployment insurance. However, they are included in industrial accident insurance, as receiving remuneration is not a necessary

³⁵ Ibid s 5(3) (pension insurance). This type of traineeship does not give the right to the minimum wage either (it is one of the exceptions in *Mindestlohngesetz*, s 22).

³⁶ *SGB III*, s 27(4) (unemployment insurance). The latter exemption applies to all working students during their studies.

³⁷ Ibid s 25 (unemployment insurance).

³⁸ *SGB V*, s 5(1)1 (health insurance). In this case they are included as persons ‘hired for their vocational training who receive a remuneration’, assimilated to employees.

³⁹ Ibid s 5(1)10. In this case they are included as persons ‘hired for their vocational training without receiving a remuneration’.

⁴⁰ Ibid s 44 (1).

⁴¹ *SGB VII*, s 2(1)8.

⁴² *SGB VI*, s 162(1).

⁴³ *SGB IV*, s 2(2)1.

condition.⁴⁴ In this context, it is also important to remember that voluntary traineeships of more than three months before or during a course of study, as well as voluntary traineeships after study, are entitled to the minimum wage. Also, their inclusion in the scope of part of the provisions of the Vocational Training Act gives trainees the right to ‘adequate compensation’,⁴⁵ which is also subject to social contributions.⁴⁶

Paid voluntary trainees are thus treated like any other employee for social security purposes. However, in line with the system of ‘mini-jobs’, if the remuneration is less than €450 per month (owing to, for example, low ‘adequate compensation’ or a part-time traineeship remunerated at the minimum wage), there is no compulsory inclusion in social insurance,⁴⁷ except for industrial accidents.

Finally, there is a difference between the treatment of young people and the rest of the population in relation to social assistance. Social assistance benefits for people who are able to work (*Arbeitslosengeld II*, also known as *Hartz IV* benefits) and who are under 25 years of age are overtaken by help from their family (therefore, the person needs an authorization from the controlling administration – the job centre – to leave the family home, which is only given in exceptional circumstances) and sanctions in case of non-compliance with obligations related to rapid labour market integration are heavier.

Table 16.1 provides an approximate summary of the situation. It shows that for voluntary traineeships (that is, traineeships that are not required under education or training regulations) pay is a determining factor (notwithstanding the extension of the mini-job regulations to traineeships) in the extension of social insurance to trainees. However, for compulsory traineeships, it is when they take place, and thus their connection with the formal education or training period, that determines the applicable law. During this period, the trainee also has the status of a student. Moreover, it seems that the lack of the right to the minimum wage for compulsory traineeships (which could reflect the need to make them widely available, so that all students can fulfil the conditions of their course of study) is compensated by obligatory insurance and payment of contributions by the employer. Finally, the extended right to minimum pay for voluntary trainees, apart from the mini-jobs system, involves compulsory inclusion in social insurance, and the application of some labour law provisions through the Vocational Training Act. This indicates a strong convergence with

⁴⁴ *SGB VII*, s 2 abs 1 no 1.

⁴⁵ *Berufsbildungsgesetz*, s 17.

⁴⁶ Dirk Schnelle, *Die Berufsbildung der Volontäre und Praktikanten* (Peter Lang 2010) 32.

⁴⁷ *SGB VI*, s 5(2) for pension insurance; *SGB V*, s 7 for health insurance; *SGB III*, s 27(2) for unemployment insurance.

Table 16.1 Summary of social insurance for trainees in Germany

Compulsory traineeship (does not include the right to the minimum wage)	Before or after studies	Compulsory insurance (some benefits not accessible if unpaid)
	During studies	No compulsory insurance
Voluntary traineeship (includes the right to the minimum wage, with exceptions)	Paid and above €450 per month	Compulsory insurance
	Unpaid or under €450 per month	No compulsory insurance

the status of employee, even if there are remaining differences in the level of salary and labour rights. This, together with the difficulty of separating traineeships from employment based on the legal definitions, will not solve the significant problem of disguised employment.⁴⁸

Finally, the segmentation between trainees, while depending on legal technicalities related to the definitions of vocational training or the public or private character of the different traineeship relations, could be systematized by thinking of the link to formal education as a guarantee of the effectiveness of the training tasks (or materially reinforcing that content, and the student status of the trainee). Social protection (including labour law protection) could thus be seen as being inversely proportional to the guarantee of the quality of the training or the importance of the traineeship for the acquisition of the desired capacities.

16.5 THE LACK OF INTERNATIONAL AND EFFECTIVE EU STANDARDS ON SOCIAL PROTECTION FOR TRAINEES

Against the backdrop of a lack of specific international standards for trainees, the restriction of the application of most International Labour Office (ILO) conventions on social security to employees⁴⁹ means that the ILO instruments have little relevance in that matter.

However, at the level of the EU, attention has been given to traineeships in the framework of employment policy. For example, traineeships seem to be the second most used measure proposed by the Youth Guarantee, after employment.⁵⁰ However, the Youth Guarantee does not regulate the traineeships to be provided.

⁴⁸ Burkard-Pötter and Sura (n 29).

⁴⁹ Stewart and others (n 1) 81.

⁵⁰ European Commission, *Traineeships under the Youth Guarantee: Experience from the Ground* (European Commission 2018) 6.

That issue is the object of the Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships. While its recital 9 recognizes that the lack of social security coverage is one of the problems that have been identified, its point 7 only recommends that member states ‘encourage traineeship providers to clarify whether they provide coverage in terms of health and accident insurance as well as sick leave’. Moreover, according to recital 28, the recommendation does not apply to ‘work experience placements that are part of curricula of formal education or vocational education and training’ or ‘traineeships the content of which is regulated under national law and whose completion is a mandatory requirement to access a specific profession’.

Another EU document that might be of interest in the context of this study is the Recommendation of the Council of the European Union of 8 November 2019 on access to social protection for workers and the self-employed.⁵¹ Here, the recitals mention trainees among the categories of workers which in some member states are excluded from social protection schemes.⁵² However, while the recommendation aims ‘to provide access to adequate social protection to all workers and the self-employed in member states’, it seems that not all trainees would be included in its scope. The Court of Justice of the European Union (CJEU) does recognize that trainees can be considered as workers under EU law.⁵³ It seems, however, from that notion that remuneration is a determining element. This view also seems to be confirmed by the definition of worker in the proposal itself, which runs along the lines of the jurisprudence of the CJEU. The scope of application would thus be limited to paid traineeships. This is to be regretted, as its principles, if applied effectively (which is not guaranteed, given the soft law character of the document) would inevitably enhance the social protection of the trainees in its scope. It does not only ask that mandatory coverage be extended (including pension rights and unemployment benefits, which are not envisaged in the Quality Framework), but also that the obstacles to trainees accessing benefits be considered, and that

⁵¹ Recommendation of the Council of the European Union of 8 November 2019 [2019] C387/1.

⁵² See eg recital 18.

⁵³ CJEU, Judgment of 30 March 2006, Case C-10/05 *Mattern*, para 18, where the applicant completed a professional training period as a care assistant. See also Martin Risak and Thomas Dullinger, *The Concept of ‘Worker’ in EU Law: Status Quo and Potential for Change* (ETUI 2018) 34–5; Conclusions of Advocate General Alber in Case C-92/02. In that case, in its judgment of 4 December 2003, the CJEU held that the right to free movement of a postdoctoral assistant receiving a fellowship (considered a worker under EU law) does not imply that these ‘trainees’ should have the right to social insurance in the member state of residence, as long as they are treated equally with the nationals of that member state.

any difference in treatment should be proportionate and reflect the particular situation of the trainees.

The EU framework might thus be seen as fragmented and contradictory, in that it promotes the use of traineeships and at the same time recognizes the deficits in social protection without genuinely reinforcing guarantees of protection.

16.6 THE PROBLEMATIC LOGIC BEHIND SEGMENTATION

The case studies in this chapter suggest a positive trend of extending social security rights to trainees in the light of the general problem of the lack of social protection highlighted in the literature on the subject. However, in all cases, segmentation is an important feature of the regime of protection.

While there is a certain convergence with the protection awarded to employees, trainees do not enjoy the same rights. In an attempt to systematize possible rationales behind the differences, without endorsing the logic of the segmentation, two main elements can be observed. The first is the link, formal or material, with training. In France and in Germany, it is when there is a link with formal education (for all traineeships in France, and for compulsory traineeships in Germany) that trainees are the furthest from enjoying the same rights as employees. In Spain, where there is also a traineeship employment contract, it is the prominent objective of the contract (and the corresponding consideration of the allowance as material help to facilitate the acquisition of skills) which determines the different social security rights. Also, that an allowance is not being classified as a salary is another ground of segmentation, as well as an excuse for jurisprudence to refuse to apply equal treatment frameworks. In light of this, the proposed EU recommendation on workers' access to social protection might prove insufficient to guarantee the extension of that protection.

There is also segmentation between different categories of trainees. Here, the level of the allowance seems to be the determining factor (together with the link with formal education in Germany expressed by the exclusion of compulsory traineeships during a course of study). It is thus the perception of the value of the trainee by the employer which indirectly triggers the protection. Moreover, this would be an incentive for employers not to pay high allowances. From that perspective, the extension of minimum wage rights, as in the German case (although tempered by exceptions and the mini-jobs exemptions), acquires a particular significance, which also shows the general importance of analysing social security rights in connection with labour law.

Finally, the widespread exclusion from unemployment protection of trainees and the difficulties for young adults of accessing social assistance in the

three cases shows that the idea of youth as ‘undeserving’ of social protection still strongly inspires regulation,⁵⁴ and reinforces the systemic discrimination against them.

⁵⁴ For a critique of that idea, in the context of the French *Revenu de solidarité active*, see Juliana Bidadanure, ‘Short-Sightedness in Youth Welfare Provision: The Case of RSA in France’ (2012) 1 *Intergenerational Justice Review* 22.

PART V

Human Rights and Equal Opportunity

17. Fundamental rights broadening the scope of labour law? The example of trainees

Annika Rosin

17.1 INTRODUCTION

According to the Eurobarometer survey from 2013, 46 per cent of respondents aged 18–35 years had had at least one traineeship experience.¹ Even though the positive role of traineeships in enhancing young people's school-to-work transition has been confirmed in several studies,² concerns have been voiced regarding trainees' working conditions and the educational quality of traineeships.

To resolve these problems the Council of the European Union adopted a Recommendation on a Quality Framework for Traineeships (QFT) on 10 March 2014.³ The Council recommended member states improve the quality of traineeships, in particular their learning and training content and working conditions, with the aim of easing the transition from education, unemployment or inactivity to work.⁴

The QFT defines traineeship as a limited period of work practice, whether paid or not, which includes a learning and training component, undertaken in order to gain practical and professional experience with a view to improving employability and facilitating transition to regular employment.⁵ For the pur-

¹ TNS Political & Social, *The Experience of Traineeships in the EU* (Flash Eurobarometer 378, Directorate-General for Employment, Social Affairs and Inclusion, European Commission 2013) 7, http://ec.europa.eu/public_opinion/flash/fl_378_en.pdf, accessed 30 March 2021.

² See eg European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *Apprenticeship and Traineeship Schemes in EU 27: Key Success Factors* (EU 2013).

³ Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1 (hereafter QFT).

⁴ *Ibid* para 1.

⁵ *Ibid* preamble 27.

poses of this chapter, I use the same definition even though I recognize that the concept of traineeship is far from clear.⁶

Although member states were encouraged to take appropriate measures to apply the QFT as soon as possible,⁷ by the end of 2015 the QFT had been only partly implemented by the member states. Out of 28 member states, eight had specific legal regulations on active labour market policy (ALMP) and open-market traineeships. All member states had some regulation concerning ALMP traineeships, but open-market traineeships were unregulated in most member states.⁸

Hence, the QFT has not solved the problems connected to traineeships. In addition, the scope of the QFT is limited to ALMP and open-market traineeships, excluding placements forming part of educational curricula, so it can be argued that the QFT on its own cannot ensure the quality of traineeships.⁹ Other possibilities need to be found to guarantee that traineeships are educational experiences, not an opportunity to use cheap or free labour.

The European Union (EU) has regulated many areas of labour law, usually through directives that need to be implemented through national measures and only apply to relationships defined as employment in the law of the member states. As traineeships include working and learning components and therefore differ from the traditional employment relationship, their inclusion in national and EU labour law has been problematic.

With the adoption of the Charter of Fundamental Rights (ECFR)¹⁰ in 2000, at the EU level some labour rights gained the status of fundamental rights.¹¹ The role of the ECFR became even more important with the ratification of the Lisbon Treaty, when it attained the same legal status as the founding treaties.¹² As treaty provisions are directly applicable¹³ and need no national implementation, the ECFR has the potential to contribute to the labour law protection of trainees. In this chapter I explore whether the ECFR can improve the protection of trainees by broadening the scope of national labour laws or EU labour directives, or by creating new labour rights directly applicable to trainees.

⁶ See eg Annika Rosin, 'Labour Law Protection of Trainees' (PhD thesis, University of Turku 2017) 12–13.

⁷ QFT (n 3) para 19.

⁸ European Commission, 'Applying the Quality Framework for Traineeships' (2016) European Commission Staff Working Document 324, 5.

⁹ Educational internships are discussed in Chapter 13 in this volume.

¹⁰ Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

¹¹ Damian Chalmers, *European Union Law: Text and Materials* (3rd edn, CUP 2014) 255.

¹² Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 6.

¹³ Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 183–8.

I argue that, despite the fundamental nature of many important labour rights, the limitations to the application of the ECFR, as well as the restrictive interpretation of its provisions, reduce the ability of the charter to improve the rights of trainees. However, the ECFR is a useful tool for the Court of Justice of the EU (CJEU) to broaden the personal scope of secondary EU legislation, and to contest national limitations to the application of fundamental labour rights. If EU and national labour law provisions are consciously interpreted in the light of fundamental rights, the rights of trainees would improve slightly.

I limit my analysis to labour rights in the strict sense and discuss the most important ECFR provisions for trainees, including: the freedom of assembly and association; the right to participate in collective bargaining and action; and the right to fair and just working conditions. I start by discussing the general application of the ECFR and the distinction between rights and principles in the charter. I then analyse the personal scope of fundamental labour rights and their influence on trainees. Finally, I discuss each fundamental labour right separately in the light of traineeships.

17.2 GENERAL LIMITATIONS TO THE APPLICATION OF THE ECFR

Before analysing whether the ECFR can broaden the labour law protection of trainees, some preliminary issues concerning the overall scope of the charter need to be resolved. According to ECFR article 51(1), ‘the provisions of this charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. Article 51(2) explains that ‘the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties’. Therefore, the scope of the rights and principles in the ECFR is limited to the situations governed by EU law,¹⁴ and the adoption of the ECFR does not broaden the competence of the EU. Even though article 51 appears to regulate the scope of the ECFR, the application of this provision in practice is complicated.

It is unclear what comprises ‘implementing Union law’. It has been argued that, although article 51(1) uses narrow wording, the explanations, some language versions and the aim of the adoption of the ECFR prove that

¹⁴ Massimiliano Delfino, ‘The Court and the Charter: A “Consistent” Interpretation of Fundamental Social Rights and Principles’ (2015) 6 *Eur Lab LJ* 86.

there was no intention to challenge the existing practice of the CJEU.¹⁵ Even though the charter uses the term ‘implementation’ in the same way as it was used in *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*,¹⁶ that does not mean that article 51(1) must be interpreted as strictly as in this case. In *Wachauf* the CJEU limited the scope of application of the ECFR to situations in which the member states have enacted laws based on EU regulation.¹⁷ The classic example is directives that require implementation by national law.

However, after *Wachauf*, the CJEU broadened its interpretation of the scope of fundamental rights. For example, in *ERT v Dimotiki Etairia Pliroforissis and Others*¹⁸ the CJEU held that, when a member state relies on express treaty derogations, they must be interpreted in the light of fundamental rights. The Court talked about fundamental rights scrutiny within the scope of EU law, not only when the member state is implementing EU law.¹⁹

The practice of the CJEU after the adoption of article 51(1) shows it aims to confirm earlier case law.²⁰ In *Åklagaren v Åkerberg Fransson*²¹ the CJEU found that EU fundamental rights apply if national legislation falls within the scope of EU law. Fundamental rights become applicable even if national legislation is not adopted to implement a directive, if the member state intends to implement an obligation imposed by the Treaty on the Functioning of the European Union (TFEU).²²

Hence, even though article 51 limits the scope of the charter to situations in which the member states implement EU law, the term ‘implementation’ has been interpreted broadly by the CJEU. The national laws that are scrutinized from a fundamental rights perspective are not only those adopted to implement directives; national measures pursuing objectives covered by EU law also need to be in accordance with the ECFR. This broad interpretation implies that the charter does not only codify existing rights but can improve the national protection of rights covered by the ECFR. It has also been argued that, owing to

¹⁵ Jukka Snell, ‘Fundamental Rights Review of National Measures: Nothing New Under the Charter? (European Charter of Fundamental Rights, 2000)’ (2015) 21 Eur Pub L 285.

¹⁶ Case 5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609.

¹⁷ Snell (n 15) 290–91.

¹⁸ Case 260/89, *ERT v Dimotiki Etairia Pliroforissis and Others* [1991] ERC I-02925.

¹⁹ Snell (n 15) 289.

²⁰ Ibid 291.

²¹ Case 617/10, *Åklagaren v Åkerberg Fransson* (CJEU, 26 February 2013).

²² Snell (n 15) 292–3; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

the obligation of EU institutions and member states to promote the application of fundamental rights, it forms a cause of action.²³

This is especially important from a labour law point of view. Fundamental labour rights, mainly found in the solidarity chapter of the charter, are only partly found in the constitutions of the member states. Therefore, the charter gives a fundamental character to particular labour rights, until now only protected by labour law. As national measures adopted to attain the objectives covered by EU law need to comply with fundamental rights, the ECFR might strengthen the protection of some labour rights.

Another limitation to the impact of the charter concerns the distinction between rights and principles. Art 52(5) foresees that ‘the provisions of this charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law’. The ECFR does not specify which articles contain rights and which principles. According to explanations of the ECFR, subjective rights need to be respected, and principles observed. Principles can be implemented through legislative or executive acts and they do not give rise to direct claims in the courts. It is explained that this is in accordance ‘with the approach of the Member States’ constitutional systems to “principles”, particularly in the field of social law’.²⁴ This implies that social rights are to be regarded as principles, not rights.

Academics argue that the intention of article 52(5) was to distinguish between justiciable negatively orientated civil and political rights and non-justiciable positively orientated economic and social rights.²⁵ In *Association de médiation social v Union locale des syndicats CGT (AMS)*, Advocate General Villalón differentiated between rights and principles, and found that “‘principles” contain obligations upon the public authorities, thus contrasting with “rights”, whose purpose is the protection of directly defined individual legal situations’.²⁶ He went further by analysing social rights, and argued: ‘The group of rights included under the title “Solidarity” incorporates mainly rights regarded as social rights with respect to their substance ... That means that there is a strong presumption that the fundamental rights set out in that title belong to the category of “principles”’.²⁷ Hence, labour rights that are set out under the

²³ Craig and de Burca (n 13) 397.

²⁴ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation of art 52.

²⁵ Craig and de Burca (n 13) 398.

²⁶ Case C-176/12, *Association de médiation social v Union locale des syndicats CGT (AMS)* Opinion of AG Villalón (18 July 2013), para 50.

²⁷ *Ibid* para 55.

solidarity chapter are principles, not rights. These are not directly enforceable, but need further implementation.

Neither the CJEU nor all academics agree with this interpretation. In *AMS* the Court interpreted ECFR art 27 and found that the wording of this article means it must be given more specific expression in EU or national law to be fully effective. The CJEU compared the wording of article 27 with the wording of article 21 and concluded that ‘the principle of non-discrimination on grounds of age ... laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.’²⁸ The CJEU refrained from categorizing all rights in the solidarity chapter as principles. Also some academics note that regarding the right to take part in collective bargaining and action (article 28) under the solidarity chapter as a principle would mean that it needs to be implemented by legislative and executive acts of the EU, which would be impossible owing to the EU has no competence to legislate in the field of strikes.²⁹

As an alternative, in *AMS* the CJEU seemed to suggest that rights and principles should be recognized on the basis of the wording of the rules. Precise and unconditional provisions give rise to individual rights that can be invoked, while provisions with more indeterminate content need to be implemented by EU or national law.³⁰ Some academics find that, on that basis, only one provision belongs to the first category: article 30, as ‘the protection against unjustified dismissal is not recognized “in the cases and under the conditions provided for by Union law and national laws and practices”’.³¹ Others argue that rights relating to the employment sphere, such as articles 27–28 and 30–33, expressly include actions of private parties, in addition to the possible obligations on member state and EU institutions, and should therefore be horizontally applicable.³²

However, this approach has also been questioned. It has been argued that if negative rights that do not need further legislative action belong to the group of rights-conferring provisions, and provisions that refer to national laws and practices to non-rights-conferring provisions, a two-tier system of the provisions of the ECFR is created. This creates a hierarchy between the provisions of the charter, although the ECFR does not see fundamental rights as hierarchical. This hierarchy again impacts the solidarity chapter more than

²⁸ Ibid paras 45, 47.

²⁹ Delfino (n 14) 90.

³⁰ Ibid 91.

³¹ Ibid 91–2.

³² Eleni Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21 Eur LJ 657.

other chapters. In addition, negative rights can be meaningless if there is no cause of action to protect them.³³

It can be concluded that the difference between fundamental rights and principles in the ECFR is far from clear. Although rights-conferring provisions are directly applicable and therefore can straightforwardly influence the labour rights of an individual, principles are also important in improving the labour status of certain categories of workers. In implementing EU law, EU institutions and member states need to consider the fundamental principles.

17.3 TRAINEESHIPS AND THE PERSONAL SCOPE OF FUNDAMENTAL LABOUR RIGHTS

Having discussed the general limitations of the application of the ECFR, I return to the question of whether the ECFR can strengthen trainees' labour protection. The charter can either broaden the personal scope of certain labour rights by including trainees, or change their material scope by broadening their content.

The inclusion of trainees in the personal scope of labour laws has, owing to the different features of traineeships, been problematic.³⁴ First, traineeships include both working and learning components, which makes it difficult to determine whether they are a working or educational experience. Second, trainees often do not receive monetary remuneration, which is one of the most important conditions of a traditional employment relationship. Third, in some traineeships three parties are involved: the educational institution/unemployment agency, the host organization and the trainee, which complicates the determination of the employer. Finally, a formal traineeship agreement can exempt trainees from the scope of national labour laws.

Even though traineeships fulfil the most important condition of employment, subordination, owing to the interpretation of 'employment relationship' through the lens of traditional employment, trainees are often left outside the protection of national labour laws. The ECFR could improve the protection of trainees if its personal scope was interpreted more broadly than that of national labour laws.

The personal scope of fundamental labour rights is determined in two ways. Labour rights that are included other than in the solidarity chapter, for

³³ Eleni Frantziou, 'Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 *Eur Const L Rev* 332.

³⁴ Annika Rosin and Merle Muda, 'Labour Law Status of a Trainee: The Case of Estonia with Comparative Insights from the US, Finland and France' (2013) 4 *Eur Lab LJ* 292.

example, freedom of assembly, are granted to everyone. Labour rights found in the solidarity chapter, such as the right to fair and just working conditions, are provided to workers. The ECFR is silent concerning the definition of ‘worker’. It is unclear whether ‘worker’ is defined according to national labour law, or whether it has an EU meaning. If an EU meaning should be used, is it the definition worked out by the CJEU in cases concerning free movement or is it a new concept that needs interpretation by the CJEU? At the same time, the meaning of the term ‘worker’ is crucial in determining the personal scope of fundamental labour rights.

One option is to use the concept of ‘worker’ used by the CJEU in free movement cases. The core of this concept has been determined by three decisions. In *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*³⁵ the CJEU held that the term ‘worker’ for the purposes of TFEU article 45 has a European Community meaning and is broader than the concept of ‘employee’. In *Levin v Staatssecretaris van Justitie*³⁶ the Court found that a person can be considered a ‘worker’ even if they earn a wage that is below the minimum level guaranteed in the sector under consideration, if they pursue economic activity that is effective and genuine, and not merely marginal and ancillary. In *Lawrie-Blum v Land Baden-Württemberg*³⁷ the Court found that ‘worker’ must be defined in accordance with objective criteria distinguishing the employment relationship. The Court stated that ‘the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’.³⁸ Hence the defining characteristics of the employment relationship (‘worker’) include the continuity of the relationship, subordination and the receipt of remuneration. Although the member states use similar criteria, the CJEU appears to give more weight to the continuity of the relationship and interprets the content of other characteristics differently.³⁹

In my earlier research I analysed the criteria used by the CJEU and legislators and courts in Finland, Estonia and France to determine the ‘worker’ and ‘employee’ status of trainees. I detected three mismatches. First, the CJEU and the member states evaluate the remuneration criterion differently. While

³⁵ Case C-75/63, *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 00177.

³⁶ Case C-53/81, *Levin v Staatssecretaris van Justitie* [1982] ECR 01035, paras 16, 17.

³⁷ Case C-66/85, *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 02121, para 17.

³⁸ *Ibid.*

³⁹ Annika Rosin, ‘Cross-Border Trainees and the Personal Scope of Labour Law: The Puzzle of National, EU and Private International Law’ (2017) 42 EL Rev 848.

national labour laws regard the relationship as employment even if no remuneration is paid, for the CJEU payment is obligatory to classify the person as a 'worker'. Second, while national labour laws allow the classification of trainees as 'employees' regardless of the duration of the traineeship, the CJEU insists on continuity in the relationship. However, the duration needed is up to national courts to decide. Third, the educational nature of traineeships can exempt trainees from the category of 'employees' but not from the category of 'workers'.⁴⁰

Regardless of the CJEU's confirmation that the concept of 'worker' is broader than 'employee', in the case of traineeships it is not that clear cut. Depending on the conditions of the traineeship, a trainee can be classified as both a 'worker' and an 'employee', or only as a 'worker' or an 'employee'. For example, Erasmus+ trainees who fulfil the condition of subordinate work, remuneration and continuity are likely to be classified as 'workers', but not as 'employees', because the traineeship forms part of an educational curriculum. Unpaid open-market trainees are probably classified as 'employees', but not as 'workers', because the remuneration criterion is not fulfilled. If they receive some compensation or payment in kind, they can be classified both as 'workers' and 'employees'.⁴¹ In contrast, if open-market trainees are not paid, but the traineeship includes learning objectives, they may fall outside both the scope of national labour law and the category of 'worker'.

Therefore, carrying over the concept of 'worker' from the CJEU free movement practice to the field of fundamental rights would not necessarily improve the labour position of trainees. It is also unlikely that the CJEU will start to work out a separate EU concept of 'worker' for the application of fundamental rights, since this would contravene the unity of EU law.⁴²

Another option is to return to national definitions of 'worker'. This is supported by the EU concept having been developed to ensure the right to free movement, not to infringe on the determination of the scope of national labour laws. This again is confirmed by the directives and the practice of the CJEU in applying national laws using national concepts of 'employee'.⁴³ However, in discussing the scope of the ECFR, the Court has emphasized the need to protect the unity, primacy and effectiveness of EU law, and avoid the varying protection of fundamental rights in the member states.⁴⁴ This would be the result if national concepts were used. In the context of traineeships, using

⁴⁰ Ibid 859–60.

⁴¹ Ibid 860.

⁴² Case 206/13, *Siragusa v Regione Sicilia* (CJEU, 6 March 2014).

⁴³ Brian Bercusson, *European Labour Law* (2nd edn, CUP 2009) 372.

⁴⁴ *Siragusa* (n 42) paras 31–32.

national concepts would not solve the existing problems connected to the application of labour laws to trainees.

It seems that we have two poor options in defining the concept of ‘worker’. Irrespective of whether we use the EU concept or national concepts, some groups of trainees can end up being exempt from the scope of fundamental labour rights. Nevertheless, using the EU concept appears to be more promising. Since the CJEU has repeatedly stressed the importance of interpreting the concept of ‘worker’ broadly, more ‘workers’ can be included in the scope of fundamental labour rights than can ‘employees’. To ensure this outcome, the CJEU should keep in mind its own recommendation and avoid interpreting ‘worker’ through the lens of traditional employment. If the concept is interpreted according to its substance, the main characteristic of a ‘worker’ would be subordination to the employer. Fulfilling the subordination criterion is not problematic for trainees, since a traineeship is a supervised learning process in a workplace and not the performance of independent work. The CJEU should consider whether the special features of traineeships, such as the non-receipt of monetary remuneration or a short term, are sufficient reason to exempt trainees from the category of ‘worker’.

17.4 FUNDAMENTAL LABOUR RIGHTS APPLICABLE TO TRAINEES

If the CJEU interprets ‘worker’ broadly, trainees would most probably be covered by the personal scope of fundamental labour rights. However, it is not clear whether these rights are broader than those already guaranteed to trainees regardless of their labour law status by national or EU law. Although trainees can be exempted from the category of ‘employees’, they are sometimes entitled to limited labour rights if the scope of some labour laws or provisions is explicitly broadened to include trainees or a wider group of workers.

17.4.1 Collective Rights

According to ECFR article 12(1), everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of their interests.

Article 12(1) confers the right to form or to join trade unions on everyone. Although at first it may appear that article 12(1) is applied regardless of a person’s employment status, trade unions aim to protect interests connected to working, so the right to form and join trade unions seems to be reserved to people who work. However, it is not clear how this should be defined.

International Labour Organization (ILO) Convention No 87 grants the right to join and found organizations to workers and employers.⁴⁵ In interpreting the term ‘worker’, the Freedom of Association Committee of the Governing Body of the ILO has stated that the status under which workers are engaged with the employer, as apprentices or otherwise, should not have any effect on their right to join workers’ organizations and take part in their activities. The committee has also found that persons hired on training agreements should have the right to organize.⁴⁶

Although most of the member states have accepted the Convention, the explanations of the ECFR avoid citing the Convention in support of article 12, and therefore its scope cannot be straightforwardly drawn from the Convention.⁴⁷ Nevertheless, it is reasonable to assume that the personal scope of article 12(1) will be determined according to the EU concept of ‘worker’. As this concept has the potential to include trainees, article 12(1) could improve the labour rights of trainees in some member states. For example, in France, trainees can join associations but not trade unions since they are regarded as students, not as individuals engaged in a trade or occupation.⁴⁸ For the CJEU the educational content has not been a reason to exempt trainees from the category of ‘worker’. In *Lawrie-Blum*, the CJEU held that

any person who, even in the course of vocational training and whatever the legal context of that training, pursues a genuine and effective economic activity for and under the direction of an employer and on that basis receives remuneration which can be perceived as the consideration for that activity must be regarded as a ‘worker’ for the purposes of Community law.⁴⁹

Article 12(1) cannot be discussed without reference to ECFR article 28, which states that workers and employers, or their respective organizations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

⁴⁵ ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) art 2.

⁴⁶ ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, ILO 2006) 258–9.

⁴⁷ Bernard Ryan, ‘The Charter and Collective Labour Law’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003).

⁴⁸ Jean Pélissier, Gilles Auzero and Emmanuel Dockès, *Droit du travail* (25th edn, Dalloz 2010) 965.

⁴⁹ *Lawrie-Blum* (n 37) para 34. See also Rosin, ‘Cross-Border Trainees’ (n 39) 858.

The personal as well as material scope of article 28 is broader than that of national laws. First, article 28 applies to ‘workers’, not to ‘employees’, which could improve the collective rights of trainees in some member states. For example, in Finland, the conclusion of collective agreements is reserved for ‘associations of employees’.⁵⁰ Although trainees have a right to form and to join trade unions, these trade unions cannot conclude collective agreements.

Article 28 also foresees the right to collective bargaining and action. National laws and international instruments, such as ILO Convention Number 98, refer to voluntary negotiations between employers or employers’ and workers’ organizations with the aim to regulate terms and conditions of employment by means of collective agreements.⁵¹ To avoid conflict between the right to collective bargaining and trade union freedom, it has been proposed that article 28 needs to be interpreted in the light of freedom of association. This means that the right to collective bargaining includes the freedom to choose whether to initiate negotiations or not, and whether to conclude any agreement. Nevertheless, article 28 reinforces the right to collective agreements by insisting both contracting parties act in cooperation and good faith to reach the agreement and abstain from any conduct limiting the enjoyment of the right.⁵²

Even though article 12(1) and article 28 appear to improve trainees’ collective rights by broadening their right of association and collective bargaining and action, as well as reinforcing the content of the latter, the general limitations to the application of the ECFR can reduce this effect. According to article 51 the scope of the rights and principles in the ECFR is limited to the situations governed by EU law. Treaty on the Functioning of the European Union article 153(5) sets out that ‘The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.’ This prevents the social policy power of the EU from being used to lay down minimum standards concerning the right of association, the right to strike or the right to impose lock-outs. However, it has been argued that the assumption that the matters listed in TFEU article 153(5) fall exclusively to the competence of the member states is questionable. The EU has competence to act in these areas under other treaty provisions.⁵³ Two possible alternatives include TFEU articles 115 and 352. Article 115 confers on the EU power to adopt directives for the approximation of such laws, regulations or administrative provisions

⁵⁰ Työehtosopimuslaki 436/1946, s 1.

⁵¹ ILO Right to Organise and Collective Bargaining Convention, 1949 (No 98) art 4.

⁵² Bercusson, *European Labour Law* (n 43) 327–8.

⁵³ Brian Bercusson, ‘The Role of the EU Charter of Fundamental Rights in Building a System of Industrial Relations at EU Level’ (2003) 9 *Transfer* 209.

of the member states that directly affect the establishment or functioning of the internal market. Yet, it is unlikely that the freedom of association and right to strike directly affect the functioning of the internal market.⁵⁴ Treaty on the Functioning of the European Union article 352(1) enables the EU to adopt appropriate measures if action by the EU is necessary, within the framework of the policies defined in the treaties, to attain one of the objectives set out in the treaties, and the treaties have not provided the necessary powers. Nevertheless, the CJEU has stated that ‘other articles of the Treaty may not ... be used ... in order to circumvent the express exclusion of harmonisation’.⁵⁵ Therefore, it is questionable whether the EU can adopt measures concerning the right to association and right to strike under other treaty provisions.

Next, the rights and principles distinction can reduce the potential of fundamental collective rights to improve trainees’ labour conditions. Although there is no express denial of EU competence over the right of collective bargaining, the wording of article 28 shows that this is a principle not a right. The condition ‘in accordance with Union law and national laws and practices’ indicates that it is not horizontally applicable but binds only the member states and the EU. Even if article 28 were interpreted as being horizontally applicable because it consists of express rights of workers and employers and their respective organizations, the ability of article 28 to improve trainees’ collective rights would be questionable. As Voogsgeerd argues, the real problem is that the condition ‘in accordance with EU law and national laws and practices’ is so wide that potentially anything decided at the EU or national level can interfere with the right to collective bargaining.⁵⁶

17.4.2 Right to Fair and Just Working Conditions

Another important provision that could influence the labour rights of trainees is article 31. According to ECFR article 31(1) every worker has the right to working conditions which respect their health, safety and dignity. Article 31(2) sets out that every worker has the right to a limitation on their working hours, to daily and weekly rest periods, and to an annual period of paid leave.

According to the explanations of the ECFR, there is already EU legislation in the fields of fair and just working conditions.⁵⁷ First, the EU has adopted Directive 89/391/EEC (the Framework Directive) to encourage improve-

⁵⁴ Ryan (n 47) 85.

⁵⁵ Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

⁵⁶ Herman Voogsgeerd, ‘The EU Charter of Fundamental Rights and Its Impact on Labor Law: A Plea for a Proportionality-Test Light’ (2012) 4 Goettingen J Int L 313.

⁵⁷ Explanations (n 24) explanation of art 31.

ments in the safety and health of workers at work.⁵⁸ The personal scope of the Framework Directive is problematic from the viewpoint of trainees. Even though ‘worker’ is defined broadly as ‘any person employed by an employer, including trainees and apprentices but excluding domestic servants’,⁵⁹ the legal definition of ‘employer’ appears to delimit the personal scope of the directive. According to the directive, ‘employer’ is ‘any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment’. Therefore, an ‘employer’ is responsible only for the health and safety of ‘workers’ with whom they have an employment relationship. As a consequence, only trainees who can be regarded as ‘employees’ belong to the scope of the Framework Directive.⁶⁰

Here article 31(1) could broaden the personal scope of the Framework Directive. The ECFR confers the right to the protection of health and safety on every ‘worker’. If ‘worker’ has the European Community meaning and is interpreted broadly, it should extend this right compared with earlier legislation. The personal scope of the Framework Directive could be then broadened to include trainees. This is also supported by the Framework Directive explicitly including trainees in the definition of ‘worker’. When the Framework Directive was adopted, problems concerning the employment status of trainees were probably not foreseen and it is unlikely that the definition of ‘employer’ aimed to exclude non-employee trainees from the scope of the directive. That trainees are learning by working does not mean that their health and safety in the workplace should not be protected.

The second part of article 31 concerns working time limitations, rest periods and the right to annual leave. According to the explanations of the charter, article 31(2) is based on Directive 93/104/EC. This directive has been replaced by Directive 2003/88/EC (the Working Time Directive, WTD),⁶¹ which does not include a definition of ‘worker’. In *Syndicale Solidaires Isère v Premier ministre and Others*⁶² the CJEU stated that the WTD makes no reference to either the definition of a ‘worker’ in the Framework Directive or the definition of a ‘worker’ derived from national laws and/or practices. The Court held

⁵⁸ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1, art 1(1).

⁵⁹ Ibid art 3(a).

⁶⁰ Annika Rosin, ‘Precariousness of Trainees Working in the Framework of a Traineeship Agreement’ (2016) 32 Int J Comp Lab L & Indust Rel 131.

⁶¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

⁶² Case C-428/09, *Syndicale Solidaires Isère v Premier ministre and Others* [2010] ECR I-09961.

that, for the purposes of applying the WTD, the concept of a ‘worker’ has an EU meaning, referring to the concept of ‘worker’ applied in free movement cases.⁶³

In *Fenoll v Centre d’aide par le travail ‘La Jouvene’ and APEI*⁶⁴ the CJEU was asked to interpret the concept of ‘worker’ for the purposes of WTD article 7 and ECFR article 31(2). The CJEU found that ‘as regards the application of Directive 2003/88, the concept of a “worker” may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law’. The Court linked the concept of ‘worker’ used in the WTD to the definition of ‘worker’ in the ECFR by stating that ‘that finding applies also with regard to the interpretation of the term “worker” within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter, in order that the uniform scope of the right of workers to paid leave *rationae personae* may be ensured’.

Therefore, the concept of ‘worker’ used in the WTD parallels the definition of ‘worker’ in the ECFR. In this regard the ECFR does not straightforwardly improve trainees’ labour rights, because if they are classified as ‘workers’ they already enjoy the protection of the WTD.

However, as Hunt notes, regarding particular labour rights as fundamental can lead to a more extensive reading of existing measures.⁶⁵ For example in *The Queen v BECTU*⁶⁶ the Court examined the question of short-term workers’ rights to annual leave and ruled that Directive 93/104 did not allow a member state to adopt national rules under which a worker does not begin to accrue rights to paid annual leave before completing a minimum period of 13 weeks’ employment with the same employer. The Court held that the assumption that a short-term worker has been able to take an adequate period of rest before entering into a new employment relationship does not necessarily hold true in the case of workers employed on a succession of short-term contracts.⁶⁷

Although the CJEU did not mention the ECFR in the ruling, Advocate General Tizziano read the relevant provisions of the directive in the light of fundamental rights. He stated that, ‘in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; ... the Charter provides us with the most reliable and definitive

⁶³ See also Rosin, ‘Precariousness of Trainees’ (n 60) 156.

⁶⁴ Case C-316/13, *Fenoll v Centre d’aide par le travail ‘La Jouvene’ and APEI* (CJEU, 26 March 2015).

⁶⁵ Jo Hunt, ‘Fair and Just Working Conditions’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003).

⁶⁶ Case C-173/99, *The Queen v BECTU* [2001] ECR I-4881.

⁶⁷ *Ibid* para 63.

confirmation of the fact that the right to paid annual leave constitutes a fundamental right'.⁶⁸

Since traineeships are temporary, the decision in *BECTU* also influences the labour rights of trainees. According to *BECTU*, the limited duration of a traineeship should not be a basis for denying trainees' right to annual paid leave. If the traineeship is organized during a period of study or in between academic study periods, and it is impossible to grant the leave, the employer should pay an allowance for the unused leave at the end of the traineeship.⁶⁹

Although trainees may not benefit from the broader personal scope of article 31(2), they can benefit from the more extensive reading of existing legislation. Not allowing national limitations to the entitlement to leave seems to be largely based on the argument that there is a fundamental right in question. However, the CJEU and Advocate General returning to a purposive interpretation of the WTD makes this conclusion questionable. The promising start to interpreting secondary legislation in the light of fundamental rights has also been followed by the case law returning to a purposive interpretation. According to O'Connor, this shows that the ECFR has had a neutral impact on the interpretation of the directive. He also finds that the purposive approach has not always led to employee-protective interpretations.⁷⁰ Hence, the influence of ECFR article 31(2) on trainees seems to depend on the willingness of the CJEU to interpret the rights contained in the WTD more from a fundamental than a purposive viewpoint.

17.5 CONCLUSION

The adoption of the ECFR conferred fundamental right status on several important labour rights. Ideally it could counterbalance the increasing flexibility of labour law as well as promote the labour protection of the expanding group of atypical workers. Among others, a growing number of trainees have been exempted from the scope of national labour laws. Having the same legal status as a treaty, the ECFR could be assumed to have a direct influence on the rights of trainees. Unfortunately, the application of the charter to trainees is complicated.

To begin with, the general limitations on the scope of the ECFR means it does not broaden the competence of the EU in the same manner as do the founding treaties. This means that additional labour rights found in the charter

⁶⁸ Case C-173/99, [2001] ECR I-4881, Opinion of AG Tizziano, para 28.

⁶⁹ Rosin, 'Precariousness of Trainees' (n 60) 157.

⁷⁰ Niall O'Connor, 'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?' (2017) 8 Eur Lab LJ 193.

rather than in secondary legislation are not directly enforceable. Also, not all provisions consist of directly applicable rights, but only principles that need further implementation by the EU or its member states.

If general limitations leave open some possibilities of improving trainees' labour rights, the application of concrete provisions to trainees brings forward more obstacles. First, the general scope of the labour rights in the ECFR is unclear, which makes it difficult to determine whether trainees are protected by the charter. Trainees are most likely to belong to its scope if the EU concept of 'worker' is used. However, in the case of traineeships, the concept of 'worker' is not always broader than that of 'employee'. To ensure that trainees are classified as 'workers', the CJEU should interpret the concept according to its substance, relying mainly on the subordination characteristic.

Second, although the ECFR appears to improve trainees' collective rights compared with national law by conferring on them the rights of association and collective bargaining and action, as well as reinforcing the content of the latter right, the general limitations to the application of the ECFR and the wording of article 28 can reduce this effect. The TFEU prevents the social policy power of EU from being used to lay down minimum standards concerning the right of association, the right to strike or the right to impose lock-outs. Also ECFR article 28 makes the right of collective bargaining conditional upon its conformity with existing EU law and national laws and practices.

Third, ECFR article 31 aims to ensure fair and just working conditions, which has potential to improve the protection of the health and safety of trainees and set limitations on their working time. Bringing trainees into the scope of directives regulating health and safety requires a genuinely broad interpretation of the concept of 'worker'. Trainees could also benefit from a more extensive reading of the WTD. For example, the CJEU has forbidden national limitations on the entitlement to leave in case of temporary employment, based on the argument that this right is regarded as fundamental. However, the Court's return to a purposive interpretation might reduce this effect.

In conclusion, the influence of the ECFR on the labour rights of trainees is limited but existent. The charter could be a useful tool for the CJEU to broaden the personal scope of secondary EU legislation, and to contest national limitations to the application of fundamental labour rights. If EU and national labour law provisions are consciously interpreted in the light of fundamental rights, the rights of trainees will be slightly improved.

18. Working at the edges of legal protection: Equality law and youth work experience from a comparative perspective¹

Alysia Blackham

18.1 INTRODUCTION

Youth work experience occupies the edges of legal protection, generally falling beyond the scope of established labour law. While there is growing academic and regulatory consideration of how youth work experience might be regulated, and how it might best be categorized,² these discussions have rarely encompassed equality law in any depth.³ This is surprising, as equality law could have particular significance for those undertaking work experience or other forms of unpaid labour. Drawing on comparative legal doctrinal analysis of the law in Australia and the United Kingdom (UK), with a particular focus on Great Britain (GB), this chapter considers the extent to which unpaid work experience is likely to be covered by equality law. It considers the potential relevance of equality law to work experience (section 18.2), then canvasses the scope of equality law in Australia and the UK, and the extent to which it might protect or exclude those undertaking work experience in various forms (section 18.3). Issues of enforcement are flagged in section 18.4, and section 18.5 concludes.

¹ This research was funded by the Australian Government through the Australian Research Council's Discovery Projects funding scheme (DE170100228). The views expressed herein are those of the author and are not necessarily those of the Australian Government or Australian Research Council.

² Andrew Stewart and Rosemary Owens, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Fair Work Ombudsman 2013).

³ Though, in relation to work-integrated learning, see Anne Hewitt, Rosemary Owens and Andrew Stewart, 'Mind the Gap: Is the Regulation of Work-Integrated Learning in Higher Education Working?' (2018) 44 Monash UL Rev 234.

18.2 THE RELEVANCE OF EQUALITY LAW TO YOUTH WORK EXPERIENCE

Equality law could have substantial relevance to those undertaking unpaid work experience. First, for those with a disability, the ability to obtain reasonable adjustments in the workplace can make the difference between success and struggle in a trial position.⁴ Reasonable accommodations understandably improve employee retention for those with disabilities,⁵ and reflect a social and organizational obligation to address discrimination.⁶ Access to reasonable adjustments, as provided for under equality law, is fundamental for those with a disability undertaking unpaid work experience, and necessary to ensure they are able to effectively participate in the workplace.

Second, given those undertaking unpaid work experience are more likely to be young⁷ and comparatively inexperienced at work, and occupying temporary and vulnerable work positions, there are likely to be substantial situational power differentials in the workplace. This puts those undertaking unpaid work experience at risk of sexual harassment and other forms of discrimination at work.⁸ Indeed, in the USA, a 2018 survey of former interns found that the vast majority of the 22 respondents (82 per cent) had been aware of their colleagues experiencing sexual harassment, and half had personally experienced sexual harassment in their internships.⁹ There is growing recognition that many well-known interns – such as Monica Lewinsky – have been subjected to a

⁴ See generally Catherine Elizabeth Georgiou, Shima Espahbodi and Lorraine Hilary De Souza, 'Preparing for the World of Work: An Exploratory Study of Disabled Students' Experiences of Work Placement' (2012) 25 J Educ & Work 523.

⁵ Richard V Burkhauser, JS Butler and Yang Woo Kim, 'The Importance of Employer Accommodation on the Job Duration of Workers with Disabilities: A Hazard Model Approach' (1995) 2 Lab Econ 109.

⁶ Sharon L Harlan and Pamela M Robert, 'The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation' (1998) 25 Work & Occupations 397, 398.

⁷ Damian Oliver, Paula McDonald, Andrew Stewart and Anne Hewitt, *Unpaid Work Experience in Australia: Prevalence, Nature and Impact* (Department of Employment 2016) 5, 24, https://www.ag.gov.au/sites/default/files/2020-03/unpaid_work_experience_report_-_december_2016.pdf, accessed 30 March 2021.

⁸ Alexandra Natale, 'Why Sexually Harassed Interns Can't Fight Back' (*Mic*, 27 August 2013), <https://mic.com/articles/60377/why-sexually-harassed-interns-can-t-fight-back>, accessed 30 March 2021.

⁹ BA Rudolph Foundation, *Rise Up: Interns, Their Workplace Rights, and the Tools to End Sexual Harassment* (BA Rudolph Foundation 2018), <https://empowherwomen.org/wp-content/uploads/2019/10/RISE-UP-White-Paper-and-Fact-Sheet-Final-for-Release-June-26-2018.pdf>, accessed 30 March 2021.

‘gross abuse of power’ in the workplace.¹⁰ Thus, existing protections for those undertaking internships or work experience are of growing importance to public discussion and discourse.

Third, there is concern that individuals have disparate access to unpaid work experience, particularly when it is obtained through personal or familial connections. In Oliver and others’ Australian survey of 3800 respondents, many young people (29.3 per cent of those aged 18 to 29 years) organized work experience through a family member, friend or someone in their personal network.¹¹ The likelihood of participating in unpaid work experience also increased with respondents’ socio-economic status.¹² Fifty-nine per cent of those who undertook unpaid work experience said that they found their experience helpful for finding paid employment.¹³ This raises questions about the extent to which participating in unpaid work experience impairs social mobility, especially if access is closed off to those from non-traditional backgrounds who do not have access to strong personal networks. In a labour market where there is growing competition to obtain and retain work, participating in unpaid work experience may offer individuals a substantial competitive edge. Given not everyone has access to these opportunities,¹⁴ this flags major issues for discrimination and equality law, particularly if access to work experience is a gateway to later paid employment: discrimination in work experience may have flow-on effects that affect the labour market as a whole.¹⁵

The negative social consequences of unpaid internships are becoming a focal point of law reform in the UK.¹⁶ The risks of unpaid internships were recognized in the Taylor Review of Modern Working Practices, which described them as ‘an abuse of power by employers and extremely damaging to social mobility’.¹⁷ The Taylor Review found, however, that there was no

¹⁰ Associated Press, ‘Monica Lewinsky Says Bill Clinton Affair Was “Gross Abuse of Power”’ *The Guardian* (London, 2 February 2018), <http://www.theguardian.com/us-news/2018/feb/27/monica-lewinsky-says-bill-clinton-affair-was-gross-abuse-of-power>, accessed 30 March 2021.

¹¹ Oliver and others (n 7) 36.

¹² Ibid 5, 24.

¹³ Ibid 9, 50.

¹⁴ International Labour Organization (ILO), *Global Employment Trends for Youth 2013: A Generation at Risk* (ILO 2013) 64.

¹⁵ See eg Andrew Francis and Hilary Sommerlad, ‘Access to Legal Work Experience and Its Role in the (Re)production of Legal Professional Identity’ (2009) 16 *Int J Legal Profession* 63.

¹⁶ UK Social Mobility Commission, ‘Unpaid Internships Are Damaging to Social Mobility’ (*Gov.UK*, media release, 23 October 2017), <https://www.gov.uk/government/news/unpaid-internships-are-damaging-to-social-mobility>, accessed 30 March 2021.

¹⁷ Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (Department for Business, Energy and Industrial Strategy 2017) 91.

need for additional regulation of internships – in most cases, ‘If a person is obtaining something of value from an internship, [the intern is] most likely to be a worker and entitled to the National Minimum or Living Wage’.¹⁸ Thus, the issue is one of enforcement, not gaps in legal regulation.

In 2017, a private members’ bill passed the UK House of Lords seeking to ban unpaid work experience or internships of more than four weeks in duration, by requiring employers to pay the national minimum wage beyond this period.¹⁹ The bill did not progress beyond a first reading in the House of Commons. However, HM Revenue & Customs ‘launched a crackdown on unpaid internships’ in February 2018, including by sending warning letters to employers in particular sectors, setting up an enforcement team and issuing guidance to employers about their obligations.²⁰ There are also calls for unpaid internships to be publicly advertised, to increase transparency and reduce reliance on informal networks for recruitment.²¹ Thus, interns are increasingly being recognized as ‘workers’ in the UK, and may slowly start receiving the same employment rights as other workers, including under equality law.

Fourth, even if individuals can access unpaid work experience, questions are increasingly being raised about the terms and conditions being offered to those involved. In Oliver and others’ survey, men (at 26.4 per cent) were significantly more likely than women (at 16.3 per cent) to receive financial compensation during their work experience, including via an allowance or honorarium. Men were also more likely (27.4 per cent of respondents) to receive reimbursement for their expenses than women (18.2 per cent of respondents).²² It is arguable that this is because men and women tend to do work experience in different industries, which have different normative arrangements around when compensation and reimbursements should be paid to those undertaking work experience. However, in the context of substantial and enduring gender pay gaps in the economy as a whole, it is concerning that women are experiencing a substantial payment gap even in their participation in work experience. Again, this flags important issues for equality and discrimination law, particularly around equal pay.

¹⁸ Ibid.

¹⁹ Unpaid Work Experience (Prohibition) Bill [HL] 2017–19.

²⁰ Sarah Butler, ‘Initiative to Crack Down on Unpaid Internships Launched in UK’ *The Guardian* (London, 9 February 2018), <http://www.theguardian.com/society/2018/feb/08/initiative-to-crack-down-on-unpaid-internships-launched-in-uk>, accessed 30 March 2021.

²¹ ‘Unpaid Internships and Living Costs “Prevent” Social Mobility’ *BBC News* (London, 30 January 2018), <https://www.bbc.com/news/uk-42863951>, accessed 30 March 2021.

²² Oliver and others (n 7) 46.

Fifth, in Oliver and others' survey some respondents, in noting their negative experiences of unpaid work experience, reported that they had experienced discrimination, racism or sexual harassment in the workplace.²³ This suggests that discrimination law has a substantial role to play in protecting those undertaking unpaid work experience.

18.3 SCOPE OF EQUALITY LAW

Unpaid work experience could variously be described as: work-integrated learning, supervised work experience or practicum placements; volunteering; internships; (unpaid) traineeships; and unpaid trial work.²⁴ The various ways in which unpaid work experience might be conceived, and subsequently regulated, poses a particular challenge for the scope of legal regulation. The extent to which unpaid work experience is covered by equality law varies markedly depending on how the work experience itself is viewed.

18.3.1 Employment Relationship

If there is an employment relationship,²⁵ then the work experience 'employee' is covered by equality law in both the UK and Australia. In the UK, the prohibition of discrimination in section 39 of the Equality Act 2010 (UK) (EqA), as it relates to work, is limited to 'employers' in relation to 'employment'. 'Employment' is defined in the EqA as 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'.²⁶ Unpaid interns in the UK are increasingly being recognized as 'workers',²⁷ which forms a third category in UK labour law (together with employees and independent contractors). In *Halawi v WDFG UK Ltd*,²⁸ Arden LJ recognized that EU equality law (which the EqA implements) applies to 'employees' in the extended meaning of that term (that is, it extends to 'workers' as well as 'employees').²⁹ The Court held that, to be covered by EU equality law,

²³ Ibid 59.

²⁴ Ibid 13.

²⁵ Stewart and Owens (n 2).

²⁶ Equality Act 2010 (UK), s 83; see also s 212(1). In Northern Ireland, see similarly, eg, Employment Equality (Age) Regulations (Northern Ireland) 2006 SI 2006/261, regs 2(3), 7.

²⁷ See eg *Hudson v TPG Web Publishing Ltd* [2011] UKET 2200565/11.

²⁸ *Halawi v WDFG UK Ltd* [2014] EWCA Civ 1387, [2015] 1 CMLR 31.

²⁹ Though, in that case, it was held that the claimant was not a worker. See Alysia Blackham, "'We Are All Entrepreneurs Now': Options and New Approaches for Adapting Equality Law for the 'Gig Economy'" (2018) 34 Int J Comp Lab L & Indust Rel 413.

the putative employee must (1) agree personally to perform services, and (2) be subordinate to the employer (that is, generally bound to act on the employer's instructions).³⁰ Thus, interns and those completing unpaid work experience may be covered by equality law, if they are classed as 'workers' and perform the work personally. However, as Fredman and Du Toit argue, this is a fragile protection, which may be circumvented by employers 'find[ing] new ways to reconfigure the relationship'.³¹

In Australia, for employees, the adverse action provisions in the Fair Work Act 2009 (Cth) (FWA) prohibit discrimination by 'an employer' against employees or prospective employees on the basis of protected characteristics.³² In relation to equality law, the Age Discrimination Act 2004 (Cth) (ADA) section 5 defines 'employment' as including 'part-time and temporary employment' and 'work under a contract for services'. There is a similar definition in the Sex Discrimination Act 1984 (Cth) (SDA) section 4 and the Equal Opportunity Act 1984 (WA) section 4. The definition of 'employee' in the Equal Opportunity Act 2010 (Vic) (EOA) extends to those 'employed under a contract of service' and 'engaged under a contract for services',³³ but explicitly excludes an unpaid worker or volunteer for the purposes of the Act, except for part 6 which relates to sexual harassment (see further section 18.3.7 in this chapter). Similar provision is made in section 22B of the Anti-Discrimination Act 1977 (NSW), which covers 'workplace participants', including a 'volunteer or unpaid trainee', but only for the purposes of sexual harassment.

Thus, it appears that in the UK, at the federal level in Australia, and in Victoria, Western Australia and New South Wales, it is unlikely that those undertaking unpaid work experience are covered by the same discrimination provisions as regular employees, unless they can establish that an employment relationship is in place³⁴ or, in the UK, that they are a 'worker'.

³⁰ *Halawi* (n 28) para 4.

³¹ Sandra Fredman and Darcy Du Toit, 'One Small Step Towards Decent Work: *Uber v Aslam* in the Court of Appeal' (2019) 48 *Indust LJ* 260, 273.

³² Fair Work Act 2009 (Cth), s 351(1). 'Employee' and 'employer' are defined in s 335 as having 'their ordinary meanings'.

³³ Equal Opportunity Act 2010 (Vic), s 4.

³⁴ See eg the successful claim in *GLS v PLP* [2013] VCAT 221, [51]. In that case, the claimant was paid at a day rate.

This limited scope can be compared with the broad coverage of some state and territory legislation in Australia. The Queensland Anti-Discrimination Act 1991 defines 'work' to include:

- (e) work under a work experience arrangement within the meaning of the *Education (Work Experience) Act 1996*, section 4;
- (ea) work under a vocational placement;
- (f) work on a voluntary or unpaid basis; and ...
- (h) work under a guidance program, an apprenticeship training program or other occupational training or retraining program.

'Employment' is defined as including unpaid work in South Australia,³⁵ the Australian Capital Territory³⁶ and Tasmania;³⁷ and 'work' is defined in the Northern Territory to include that 'under a guidance program, vocational training program or other occupational training or retraining program'.³⁸

The limited scope of equality law at the federal level in Australia would have been resolved to some extent by the proposed (though subsequently abandoned) Human Rights and Anti-Discrimination Bill 2012 (Cth), which would have consolidated the various equality law statutes at the federal level in Australia. The proposed bill would have extended 'employment' to include 'voluntary or unpaid work'.³⁹

While there is, at first glance, limited protection offered to those undertaking work experience under equality law, there are other ways of potentially achieving coverage under the various Acts, depending on whether the work experience participant is seen as a volunteer, a prospective employee, undertaking a vocational placement, undertaking unpaid work experience, or perhaps even receiving a service. These options are considered in turn.

18.3.2 Volunteering

Oliver and others explicitly exclude volunteering from the scope of 'unpaid work experience', owing to the different benefits involved in each activity: volunteering benefits an altruistic cause while work experience is designed to benefit an individual.⁴⁰ The line between the two, however, is often blurred, meaning it is important to consider the place of volunteers in equality law.

³⁵ Equal Opportunity Act 1984 (SA), s 5(1).

³⁶ Discrimination Act 1991 (ACT), dictionary.

³⁷ Anti-Discrimination Act 1998 (Tas), s 3: 'employment or occupation in any capacity, with or without remuneration'.

³⁸ Anti-Discrimination Act 1992 (NT), s 4(1).

³⁹ Human Rights and Anti-Discrimination Bill 2012 (Cth), s 6(1).

⁴⁰ Oliver and others (n 7) 13.

In Australia, the Fair Work Ombudsman describes a ‘genuine volunteering arrangement’ as having as its main purpose the benefit of someone (or, perhaps, something) else, where the parties did not intend to enter a legally binding employment relationship, the volunteer is not obliged to attend the workplace or perform work, and the volunteer does not expect to be paid.⁴¹

If work experience participants are genuine volunteers, then they will not be seen as employees, and do not easily fall within the scope of equality law in most jurisdictions.⁴² Indeed, volunteers are explicitly excluded from the definition of ‘employee’ in the EOA,⁴³ except as it relates to sexual harassment (see section 18.3.7 in this chapter).

This has been emphasized in the UK by the Supreme Court decision in *X v Mid Sussex Citizens Advice Bureau*.⁴⁴ That case considered whether the Disability Discrimination Act 1995 (UK) (which preceded the EqA) applied to volunteers.⁴⁵ The Supreme Court held that equality law only applies to those with a contract of employment; volunteers without contracts are not covered by equality legislation, and a volunteer agreement is not sufficient.⁴⁶

Further, the scope of EU law – and, in particular, the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁴⁷ – is not broader than UK legislation in this context. While the directive covers ‘employment’ and ‘occupation’, the Supreme Court held that the reference to ‘occupation’ in the directive was intended to refer to the ‘higher level’ concept of ‘access to a sector of the

⁴¹ Fair Work Ombudsman, ‘Unpaid Work’, <https://www.fairwork.gov.au/pay/unpaid-work>, accessed 30 March 2021.

⁴² Though see the broader definitions of ‘employment’ and ‘work’ in some Australian states and territories.

⁴³ Equal Opportunity Act 2010 (Vic), s 4.

⁴⁴ *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59. For further discussion of the position of volunteers in UK labour law, see Sam Middlemiss, ‘The Cost of Kindness: Voluntary Workers and Intern’s Rights under Employment Law’ [2014] Int J Bus L 130.

⁴⁵ The Supreme Court did not explicitly consider whether its reasoning also applied to the Equality Act 2010 (UK). However, the definition of employment in the Disability Discrimination Act 1995 (UK), s 68(1) (‘employment under a contract of service or of apprenticeship or a contract personally to do work’) is substantially similar to that in the Equality Act 2010 (UK), s 83(2) (‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work’).

⁴⁶ *X v Mid Sussex Citizens Advice Bureau* (n 44) paras 2, 10.

⁴⁷ [2000] OJ L303/16.

market, rather than to particular employment or self-employment'.⁴⁸ Thus, the directive might cover:

areas in which a professional qualification of some nature or other is either required or advantageous, or a restrictive condition requires to be satisfied, if a worker is to undertake particular work or to advance in a particular sphere, whether as an employee or on a self-employed basis. They range from, for example, qualification as a doctor or lawyer to possession of a heavy goods vehicle licence.⁴⁹

Access to an occupation or profession generally is covered by the directive; access to a particular post or position of employment is not. Thus, the term 'occupation', read in context, did not extend the scope of the directive to volunteers. Indeed, the European Parliament considered, but ultimately rejected, the possibility of explicitly including unpaid and voluntary work within the scope of the directive.⁵⁰ This was influential in the Supreme Court's reasoning.

This implies, however, that EU equality law may apply to some individuals working without a wage, such as those undertaking vocational training or practical work experience, where that training or work is necessary to obtain access to a profession or occupation. This is developed in section 18.3.4 of this chapter.

18.3.3 Prospective Employees

It is evident that prospective employees have some protection under equality law, at least in the making of employment decisions. The EqA section 39(1)(a) makes it unlawful for an employer to discriminate 'in the arrangements [it] makes for deciding to whom to offer employment'. It is also unlawful to victimize a person in those arrangements.⁵¹ If unpaid work experience (or volunteering) is used as a way of assessing an individual's suitability as a potential employee, then it is likely that those arrangements are covered by equality law.

Similarly, under the FWA section 341(3), a prospective employee 'is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer'. Further, discrimination and adverse action against prospective employees is prohibited,⁵² at least to the extent that the prospective employer refuses to employ the prospective employee, or discriminates against the prospective employee in the

⁴⁸ *X v Mid Sussex Citizens Advice Bureau* (n 44) para 30.

⁴⁹ *Ibid* para 29.

⁵⁰ *Ibid* paras 39–41.

⁵¹ Equality Act 2010 (UK), s 39(3)(a). In Northern Ireland, see similarly, eg, Employment Equality (Age) Regulations (Northern Ireland) 2006 SI 2006/261, reg 7.

⁵² Fair Work Act 2009 (Cth), s 351.

terms or conditions offered.⁵³ While the FWA therefore appears to offer some protection to prospective employees, this is more limited than that under the EqA. Indeed, there is limited scope for interpreting unpaid work experience as falling within the ambit of the FWA.

The prohibition under federal equality law in Australia is closer to that under the EqA. The ADA section 18 makes it unlawful for an employer to discriminate on the basis of age ‘in the arrangements made for the purpose of determining who should be offered employment’.⁵⁴ Similar provision is made in the SDA section 14(1)(a). Again, as in the UK, it is arguable that this encompasses unpaid work experience, to the extent that it is used to determine whether a worker is suitable for further employment.

The Victorian EOA section 16 also prohibits discrimination against job applicants in determining who should be offered employment; the terms on which employment is offered; refusing or deliberately omitting to offer employment; or denying access to a guidance programme, an apprenticeship training programme, or other occupational training or retraining programme. It is possible that this is also broad enough to capture unpaid work experience.

The key factual debate, however, is whether unpaid work experience is really a way of testing people’s suitability for later employment, so that it is part of the ‘arrangements ... for deciding to whom to offer employment’. This will vary from case to case. However, Oliver and others’ survey found that 27 per cent of respondents were subsequently offered paid employment by the organization in which they undertook unpaid work experience.⁵⁵ This implies that a substantial pool of employers are using unpaid work experience as a way of testing and recruiting employees. Thus, equality law provisions that protect prospective employees may well apply to those undertaking unpaid work experience.

18.3.4 Vocational Placement

Unpaid work experience could also be part of an educational programme, including as a formal experience built into a higher education programme of study. The FWA makes explicit provision for ‘vocational placements’ as a lawfully unpaid form of work, where the person is not regarded as an employee,⁵⁶ and is not entitled to the benefits or entitlements under the FWA. Presumably, someone on a vocational placement would also not be regarded

⁵³ Ibid s 342.

⁵⁴ Age Discrimination Act 2004 (Cth), s 18(1)(a).

⁵⁵ Oliver and others (n 7) 51.

⁵⁶ Fair Work Act 2009 (Cth), s 15.

as a prospective employee. The FWA does not make provision for alternative protections or entitlements for those undertaking vocational placements. However, the restrictive definition of ‘vocational placements’ in the Act potentially excludes a large number of people undertaking unpaid work experience. Thus, the impact of the vocational placements exception may be limited.⁵⁷

Those undertaking work experience as part of an educational course may, however, be protected by equality law against discrimination by the educational provider itself. For example, the Victorian EOA section 38(2) makes discrimination by an educational authority against a student unlawful in ‘denying or limiting access to any benefit provided by the authority’ or ‘by subjecting the student to any other detriment’. This might include limiting access to any work experience or vocational placement.

The EqA includes a similar provision in the context of further and higher education. Section 91 prohibits discrimination against students in:

- the way education is provided or not provided;
- affording (or not affording) access to a benefit, facility or service; and
- any other detriment.

This is likely to extend to the provision of vocational training as part of an educational programme.

These provisions reflect the broad scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,⁵⁸ which explicitly prohibits discrimination against those undertaking vocational training. Under article 3(1)(b), the directive applies to ‘all persons, as regards both the public and private sectors, including public bodies, in relation to: ... access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience’.⁵⁹

In *X v Mid Sussex Citizens Advice Bureau*, the UK Supreme Court noted that the ‘intern hoping to learn and impress ... might well fall within article

⁵⁷ See Stewart and Owens (n 2) 75–82.

⁵⁸ [2000] OJ L303/16.

⁵⁹ See similarly Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23, art 14(1)(b); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/23, art 3(1).

3(1)(b)'.⁶⁰ In *Fletcher v Blackpool Fylde & Wyre Hospitals NHS Trust*,⁶¹ this prohibition of discrimination was held to apply to working conditions during training, as well as access to training. Thus, both vocational training and work experience appear to fall within the scope of EU and UK equality law.

18.3.5 Unpaid Work Experience

According to the Australian Fair Work Ombudsman, unpaid work experience is acceptable when:

- the person is not doing 'productive' work;
- the main benefit of the arrangement is for the person doing the placement; and
- the person is receiving a meaningful learning experience, training or skill development.⁶²

There is limited explicit provision made for unpaid work experience in Australian equality law, though 'unpaid work' generally is covered in some jurisdictions (see section 18.3.1 in this chapter). This may be compared with the EqA, where 'work experience' is protected as part of the regulation of employment service providers. Section 55 of the EqA prohibits employment service providers from discriminating in the provision of an employment service. Under section 56(2), 'provision of an employment service' is defined as including provision of vocational training and vocational guidance, and making arrangements for their provision. Section 56(6) defines 'vocational training' to mean training for employment, or work experience. Discrimination is prohibited in:

- arrangements for selecting persons to whom to offer or provide the service;
- the terms on which the provider offers or provides the service;
- not offering to provide or not providing the service;
- terminating the provision of the service; and
- in relation to any other detriment.⁶³

⁶⁰ *X v Mid Sussex Citizens Advice Bureau* (n 44) para 20.

⁶¹ *Fletcher v Blackpool Fylde & Wyre Hospitals NHS Trust* [2005] IRLR 689, 705. This view was endorsed in *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust* [2016] EWCA Civ 607, para 29.

⁶² Fair Work Ombudsman (n 41).

⁶³ Equality Act 2010 (UK), s 55.

Harassment and victimization by service providers is also prohibited.⁶⁴ Importantly, service providers also have a duty to make reasonable adjustments, except in relation to the provision of a vocational service.⁶⁵

This regulation of employment service providers, including those providers that offer work experience, could be of fundamental benefit to those undertaking unpaid work experience. The interpretation of these provisions was considered by the UK Court of Appeal in *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust*,⁶⁶ which related to discrimination against a nursing student undertaking a placement in a unit operated by an NHS Trust, as required by her university degree. The student requested shifts that would accommodate her childcare responsibilities; her offer of a placement was subsequently withdrawn by the NHS Trust. The student argued that the withdrawal of her placement was indirect sex discrimination by the NHS Trust.

The Court was asked to consider the jurisdictional point of whether this amounted to discrimination at work (which could be pursued in the Employment Tribunal) or discrimination in education (which had to be pursued in the County Court).⁶⁷ Overturning the Employment Tribunal and Employment Appeal Tribunal, the Court of Appeal held that the Employment Tribunal did have jurisdiction to hear the claim. The Court of Appeal held that, if the student was prevented from making a claim against the NHS Trust, this could potentially create a lacuna in the law, as the discriminatory conduct was allegedly by the NHS Trust in the course of the placement, and not by the university in affording access.⁶⁸ Therefore, sections 55 and 56 needed to be re-formulated to give effect to the directives.

In his decision, Underhill LJ categorized claims in relation to educational placements as being either in relation to access to a placement or occurring in the course of a placement. If the claim is about access, it is primarily a claim against the educational institution, and should be brought in the County Court. However, if the claim is about discrimination by the provider in the course of the placement (here, the NHS Trust), then the provider is potentially liable

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ *Blackwood* (n 61).

⁶⁷ This was at issue because s 56(5) states that s 56 'does not apply in relation to training or guidance for students of an institution to which section 91 applies in so far as it is training or guidance to which the governing body of the institution has power to afford access'. Thus, if the prohibition of discrimination in education in s 91 applied, then the student could not proceed under s 55.

⁶⁸ *Blackwood* (n 61) paras 43–45.

as a principal under section 55, and the correct forum is the Employment Tribunal.⁶⁹

The case was referred back to the Employment Tribunal to determine the merits of the claim. While section 55 might raise complex jurisdictional points, it offers a significant improvement on existing protection of work experience under federal Australian and Victorian equality law.

18.3.6 Receipt of a Service

Even if those undertaking unpaid work experience are not explicitly covered by equality law as employees, volunteers or in their own right, they may still be entitled to protection as recipients of a service. This suggestion was put forward by the GB Equality and Human Rights Commission as a means of protecting volunteers: if they are not employees, then ‘it is possible that, when you are providing a volunteering opportunity for someone, this counts as providing them with a service’.⁷⁰ While this has not been legally tested, it offers an interesting alternative route for securing protection for those undertaking unpaid work experience, as recipients of a ‘work experience service’. This echoes the regulation of employment service providers in the EqA (discussed in section 18.3.5 of this chapter).

The EqA section 29 provides that the provision of a service to the public or a section of the public – whether for payment or not – must not discriminate:

- by not providing the person with the service;
- in the terms on which the service is provided;
- by terminating the service; or
- by subjecting the recipient to any other detriment.

Harassment and victimization of those who require or receive a service is also unlawful. Further, the duty to make reasonable adjustments applies to a service provider.

The prohibition of discrimination in service provision does not apply to any discrimination that is prohibited as part of the prohibition of discrimination in work.⁷¹ Thus, it is unlikely to apply to those undertaking work experience,

⁶⁹ Ibid para 61. See the similar decision in *Garrard v Governing Body of the University of London* [2013] EqLR 746, where the claimant was held not to be a student, meaning the claim had to be made under s 55.

⁷⁰ Equality and Human Rights Commission, ‘How Your Organisation Should Treat Volunteers’ (19 February 2019), <https://www.equalityhumanrights.com/en/advice-and-guidance/how-your-organisation-should-treat-volunteers>, accessed 30 March 2021.

⁷¹ Equality Act 2010 (UK), s 28.

as they are likely to be covered by section 55. However, it may open up new avenues for relief for those seen as volunteers.

The issue, though, is whether the provision of work experience or volunteering is really providing a 'service'. In Oliver and others' survey, 14.6 per cent of respondents organized their work experience through an external agency or broker and 12.5 per cent of respondents paid money to a broker, agent or the organization itself to take part in the work experience.⁷² At least in some cases, then, the provision of work experience is almost certainly a 'service', and may involve additional third parties in its provision.

If this hurdle can be overcome, and work experience is regarded as a 'service', this may offer a potential avenue for protection under federal Australian discrimination law as well. For example, the ADA defines 'services' as including 'services of the kind provided by the members of any profession or trade'.⁷³ This could foreseeably cover many forms of work experience offered by professions and trades. Discrimination in the provision of services, whether for payment or not, is made unlawful by section 28 of the ADA, which prohibits age discrimination in:

- refusing to provide the services;
- terms or conditions on which the services are provided; and
- the manner in which the services are provided.

Similar provision is made in sections 4 and 22 of the SDA.

The potential for volunteers to be protected as recipients of a service is explicitly acknowledged by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in the context of the EOA.⁷⁴ Section 4 of the EOA defines 'services' as including 'services of any profession, trade or business, including those of an employment agent', but does not include education and training in an educational institution. The EOA prohibits discrimination in service provision, whether or not for payment:

- by refusing to provide a service;
- in the terms on which the service is provided; and
- by imposing any other detriment.⁷⁵

⁷² Oliver and others (n 7) 36, 45.

⁷³ Age Discrimination Act 2004 (Cth), s 5.

⁷⁴ VEOHRC, *Volunteers and the Equal Opportunity Act 2010: Discrimination Fact Sheet* (VEOHRC 2011).

⁷⁵ Equal Opportunity Act 2010 (Vic), s 44.

Sexual harassment in the provision of services is also prohibited.⁷⁶ According to the VEOHRC, an organization offering a volunteering opportunity may be providing a 'service' to their volunteers where it has a structured volunteering programme, and the volunteer is required to undertake training or skill development before volunteering, or the volunteer undertakes an assessment, gains an accreditation or gains professional experience as part of their volunteering.⁷⁷ These broad requirements could encompass many forms of unpaid work experience.

18.3.7 Sexual Harassment

In some jurisdictions, protection against sexual harassment is broad enough to encompass those undertaking unpaid work experience, even if they are not entitled to the protection of equality law generally.

Under the SDA, it is unlawful 'for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons'.⁷⁸ However, 'workplace participant' is defined narrowly to include an employer or employee, commission agent or contract worker, or partner in a partnership.⁷⁹ This is unlikely to assist those participating in unpaid work experience. However, the SDA also prohibits sexual harassment in the provision of services;⁸⁰ if the provision of work experience is a 'service' then sexual harassment may well be prohibited by federal discrimination law.

The Victorian EOA explicitly extends protection from sexual harassment to 'an unpaid worker or volunteer' as if they were an employee.⁸¹ Further, the EOA offers broad protection from sexual harassment through the prohibition of harassment in 'common workplaces'. Under section 94, 'A person must not sexually harass another person at a place that is a workplace of both of them'. This applies whether or not they are both employees, or employed by the same or different employers.⁸² 'Workplace' is defined broadly as 'any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment'. Again, this appears broad enough to encompass those undertaking unpaid work

⁷⁶ Ibid s 99.

⁷⁷ VEOHRC (n 74).

⁷⁸ Sex Discrimination Act 1984 (Cth), s 28B(6).

⁷⁹ Ibid s 28B(7).

⁸⁰ Ibid s 28G.

⁸¹ See the definition of 'employee', 'employer' and 'employment' in Equal Opportunity Act 2010 (Vic), s 4.

⁸² Ibid s 94(2).

experience or internships. Similar provision is made in section 22B of the *Anti-Discrimination Act 1977* (NSW), which covers ‘workplace participants’, including a ‘volunteer or unpaid trainee’, but only for the purposes of sexual harassment.

18.3.8 Reasonable Adjustments

The EqA extends the duty to make reasonable adjustments to employment service providers, except in relation to the provision of a vocational service.⁸³ This, then, imposes a duty to make reasonable adjustments on those providing vocational training and work experience.

The situation in Australia is less clear cut. The Disability Discrimination Act 1992 (Cth) builds the provision of reasonable adjustments into the definition of disability discrimination; that is, it is direct discrimination to not make reasonable adjustments if the failure to do so means the person is treated less favourably.⁸⁴ Further, the inherent requirements exception for disability discrimination in employment only applies if, ‘because of the disability, the aggrieved person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person’.⁸⁵ Thus, reasonable adjustments are limited to those covered by the prohibition of disability discrimination, namely, those in ‘employment’,⁸⁶ education⁸⁷ and accessing services.⁸⁸ Given the Disability Discrimination Act adopts a limited definition of employment,⁸⁹ similar to other federal discrimination statutes, those undertaking unpaid work experience will only have an entitlement to reasonable adjustments if they can establish that they are an employee, in education or receiving a service. Thus, the above-mentioned considerations are likely to apply to those seeking reasonable adjustments as well.

18.4 DISCUSSION

In summary, equality law offers a patchwork of rights that have the potential to protect those undertaking unpaid work experience. It is likely that unpaid work experience is covered in at least some way, and potentially multiple

⁸³ Equality Act 2010 (UK), s 55.

⁸⁴ Disability Discrimination Act 1992 (Cth), s 5(2).

⁸⁵ *Ibid* s 21A.

⁸⁶ *Ibid* s 15.

⁸⁷ *Ibid* s 22.

⁸⁸ *Ibid* s 24.

⁸⁹ *Ibid* s 4.

overlapping ways, in each jurisdiction. However, as this discussion has shown, there are different ways in which unpaid work experience can be conceived, and different legal models for protecting those undertaking this type of work. More particularly, unpaid work experience could be covered by:

- conceiving of work experience participants as ‘employees’ or ‘workers’;
- viewing unpaid work experience as part of the process of recruitment, making participants prospective employees;
- expanding the definition of ‘work’ or ‘employment’ to include unpaid or voluntary work (as in some Australian states and territories, including in the area of sexual harassment);
- prohibiting discrimination in education; and/or
- regulating unpaid work experience as a service, either specifically (as in the UK) or as a service generally (as in Australia).⁹⁰

The complexity of this legal coverage makes the enforcement of equality law particularly fraught in this context. Those participating in unpaid work experience are unlikely to be able to navigate this complex array of (potential) rights without costly legal assistance. This is something they are particularly ill-equipped to obtain, given the unpaid nature of many positions. Thus, legal reform becomes particularly important in this context, to ensure that rights are clear and capable of enforcement.

The most straightforward way of resolving this difficulty would be to explicitly amend the definition of ‘employment’ or ‘work’ to include unpaid work and volunteers within the scope of equality law, as has occurred in some Australian states and territories. Given the fundamental importance of unpaid work experience in securing transitions to employment, it is desirable from a normative perspective that discrimination law encompass this form of work. The potential repercussions of not protecting unpaid work experience – for social mobility, inclusion of non-traditional workers and addressing the gender pay gap – make this type of reform a key priority.

Accompanying this, however, there needs to be a greater focus on enforcement, to ensure work experience participants can be assisted and encouraged to assert their rights. As I have explored elsewhere, young workers rarely assert their rights under age discrimination law.⁹¹ Those undertaking unpaid work experience are even less likely to pursue legal redress, especially given

⁹⁰ Cf the approach of labour law generally: Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155 *Int Lab Rev* 679, 688.

⁹¹ Alysia Blackham, ‘Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law’ (2020) 42 *Syd L Rev* 1.

the costs of exit and finding a new work experience position are likely to be far lower than those of pursuing legal avenues. As in the UK, then, there is a need for government agencies to proactively assert the rights of those undertaking unpaid work experience. The activities of HM Revenue & Customs – in sending warning letters to employers in particular sectors, setting up an enforcement team and issuing guidance to employers about their obligations⁹² – are a step in the right direction, but will need to be rigorously pursued in the future to be effective. Extending this action to equality law is likely to be a challenge for the GB Equality and Human Rights Commission, given its already stretched budget and mandate. In Australia, this is an area that could be well managed by the Fair Work Ombudsman, with appropriate additional resourcing. However, legal reform to bring unpaid work experience within the scope of the FWA adverse action provisions is a necessary first step for this to be effective.

18.5 CONCLUSION

Unpaid work experience is likely to be an issue of growing significance in the years to come. While there are moves in the UK to recognize all unpaid interns as workers – entitled to the national minimum wage and the protection of equality law – the trend in Australia is to exclude unpaid work experience from legal protection, at least at the federal level. Unpaid work experience raises substantial challenges to equality and social inclusion, particularly in the need for reasonable adjustments, addressing power imbalances, promoting social mobility and remedying the gender pay gap. The inherent complexity of unpaid work experience, which can be conceived of in multiple ways within the legal framework, has led to a patchwork of (potential) legal coverage under equality law. The challenge for law-makers and policy-makers now is to clarify and simplify this legal regime, in a way that makes room for more effective enforcement of equality rights.

⁹² Butler (n 20).

19. Traineeships and systemic discrimination against young workers

Julia López López

19.1 THE NEW SKILLS AGENDA: TRAINING AND COMPETITIVENESS

During the past decade, European Union (EU) employment policy has put a great deal of emphasis on facilitating the path of young people from education into employment. The complex strategy developed by the EU prioritizes a New Skills Agenda for Europe with the goal of ‘working together to strengthen human capital, employability and competitiveness’.¹ A central component of this policy is the 2017 European Pillar of Social Rights,² an initiative launched by the European Commission. In its chapter 1 on equal opportunities, education and training, and access to the labour market, the European Pillar of Social Rights declares: ‘Everyone has the right to quality and inclusive education, training and life-long learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market.’³ The text also stipulates that ‘young people have the right to continued education, apprenticeship, traineeship or a job offer of good standing within 4 months of becoming unemployed or leaving education’.⁴

It is worth noting that in this text and elsewhere apprenticeships and traineeships are considered a means to facilitate labour market entry. Apprenticeships and traineeships appear to be regarded as equally valuable as the traditionally accepted pathways of continued education or receiving a job offer of good standing in the transition into the labour market. This overlooks significant

¹ European Commission, *A New Skills Agenda for Europe: Working Together to Strengthen Human Capital, Employability and Competitiveness*, COM(2016) 381 final.

² European Parliament Resolution of 19 January 2017 on a European Pillar of Social Rights, 2016/2095 (INI).

³ Ibid ch 1, 1.

⁴ Ibid ch 1, 4b.

differences in the consequences of engaging in a traineeship or apprenticeship and working in a job, including the rights that attach to each.

Apprenticeships, traineeships and internships are regulated differently in different member states. There are, however, important references at the EU level. These include the Council Recommendation of 15 March 2018 on a European Framework for Quality and Effective Apprenticeships.⁵ That recommendation recognizes that quality apprenticeships ‘lead to a combination of job related skills, work based experience and learning, and key competences facilitate young people’s entry in the labour market, as well as adults’ career progression and transition into employment’ and calls upon member states to implement ‘criteria for quality and effective apprenticeships’. The EU calls on member states to develop this agenda. The results have varied among countries especially in the regulation of rights.⁶ Here I take up the case of regulation in Spain, framing the issues involved through the lens of systemic discrimination linked to unpaid and precarious work.

My argument is that creating and normalizing legal opportunities for unpaid traineeships and poorly paid apprenticeships creates a dynamic of cheap labour which predominately affects the young in the labour force. For many, this crystallizes in a series of precarious post-traineeship contracts, which has significant and concerning consequences for young people’s professional careers and social security rights. Together, these amount to a pattern of increasingly entrenched systemic age discrimination that affects the growing numbers of young people who are struggling to enter the labour market.

19.2 THE CIRCLE OF SYSTEMIC DISCRIMINATION AND YOUNG WORKERS: INFORMAL EMPLOYMENT AND PRECARIOUS WORK

In recent decades, the development and implementation of policies that are directly or indirectly linked to the pressure to liberalize labour regulation have increased the prevalence of systemic age discrimination.⁷ Systemic discrimi-

⁵ Council Recommendation of 15 March 2018 on a European Framework for Quality and Effective Apprenticeships [2018] OJ C153/1.

⁶ See Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, ‘The Regulation of Internships: A Comparative Study’ (2018) ILO Employment Policy Department Working Paper No 240.

⁷ On age as a factor of discrimination, see Ann Numhauser-Henning, Jenny Julén Votinius and Ania Zbyszewska, ‘Equal Treatment and Age Discrimination: Inside and Outside Working Life’ in Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Edward Elgar 2017); Julia López López, ‘Age as Factor of Discrimination and Collective Dismissals’ in Mia Rönnmar and Jenny Julén Votinius (eds), *Festskrift till Ann-Numhauser Henning* (University of Lund 2017); Julia López

nation is a pattern, practice or policy of discrimination that has a broad impact on a class or category of persons within an industry, profession, company or geographic area. For example, older workers are pushed out of labour markets because of age and younger workers are inserted with unfavourable conditions, such as unpaid or precarious contracts. Both are examples of age-based systemic discrimination.

Systemic discrimination has been explored in Canada and the USA in response to the pervasive issue of race discrimination. However, this analysis can potentially be useful in identifying and responding to cases of age discrimination in Spain.

The Equal Employment Opportunity Commission (EEOC), a federal agency charged with enforcing laws that prohibit job discrimination in the USA, defines systemic discrimination as particular patterns of practices or policies that offer a wide spectrum of discrimination in a sector or in a type of work. The EEOC encourages employers to prevent discrimination by taking a careful look at the practices they use to recruit, hire, promote, train and retain employees. The EEOC is expanding its efforts to collaborate with advocacy groups, state and federal agencies, employer groups and other organizations to identify and address discriminatory practice.

The Ontario Human Rights Code defines systemic discrimination as policies or practices that appear to be neutral on their surface but that may have discriminatory effects on individuals based on one or more code grounds.⁸ Systemic discrimination can overlap with other types of discrimination, such as harassment, and may arise from stereotypes and biases. The definition of systemic discrimination used by the Ontario Human Rights Commission includes the following three elements: patterns of behaviour, policies or practices; part of the social or administrative structures of an organization; and a position of relative disadvantage created for persons identified by the code. This highlights policies or practices that create or perpetuate racial inequality.

Establishing the existence of systemic discrimination requires the use of data that quantify inequality, policies, practices and decision-making processes. Systemic discrimination may not explicitly or consciously take into account the factor of discrimination but instead may be conditioned by widespread general patterns that involve, among other factors, the cultures of organizations and institutions. The identification and analysis of systemic discrimination allows us to formulate a more accurate diagnosis of systemic inequalities and to specify actors and institutions that may contribute to over-

López, 'Systemic discrimination y políticas de igualdad efectiva de género' [2019] *Revista del Ministerio de Empleo y Seguridad Social* 133.

⁸ Human Rights Code, RSO 1990, ch H-19.

coming such outcomes. These actors and institutions include the state, other public institutions, representatives of workers and employers, and a number of sources, standards, collective agreements and equality plans.

The national labour reforms in the member states applying the recent EU flexisecurity model have had a significant negative impact on social rights and, crucially, they have increased the level of fragmentation within the labour force. This fragmentation has generated inequalities based on several types of differentiation: between formal and informal work, stable work and precarious work, in wage levels and working conditions (both fair and unfair), in employee rights that allow work–life balance or the absence of them, and in rights of social protection or lack of protection in this field. In this long list of types of differentiation in labour market conditions, age discrimination is relevant.

It is in this context that traineeships assume special importance. Traineeships or internships have helped to constitute a pattern of systemic discrimination against young workers. Employment relations that are presented as training or internships have become, in many instances, new forms of precarious work in which young people enter the labour force with a training contract that leads to long-term conditions of precarious work or informality. In these instances, traineeships or internships can be seen as the formalization of precarious work in a specific contract type, with important consequences for young workers.

This growth in precarity for young workers highlights a significant limitation in the prohibition of age discrimination in some jurisdictions. For example, in the USA, prohibitions on age discrimination are directed exclusively to older workers. The federal Age Discrimination in Employment Act (ADEA)⁹ forbids age discrimination against people who are aged 40 or older. However, it does not protect workers under the age of 40, although some states have enacted additional laws that protect younger workers from age discrimination. The limited protections of the ADEA also mean it is legal for an employer to favour an older worker over a younger one, even if both workers are aged 40 or older.

Similarly, in the Charter of Fundamental Rights of the European Union,¹⁰ article 21 prohibits discrimination based on age, among other factors. However, this prohibition only protects elderly people: ‘The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and participate in social and cultural life.’ The limitation of this protection is problematic, as age is not a factor of discrimination only for senior workers,

⁹ Age Discrimination in Employment Act 29 USC ss 621–634.

¹⁰ Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

for example in collective dismissals.¹¹ Age is also a factor of discrimination for young people since unpaid work and precarious forms of employment disproportionately expose young people to the termination of employment.

In the Spanish context, the various levels of regulation – including the International Labour Organization (ILO), the EU and the national level – recognize the principle of equality and non-discrimination, and explicitly include age as one type of prohibited discrimination.¹² However, the prohibition has typically been seen as protecting older workers only. As emphasized here, in reality, age discrimination exists not only for the oldest workers but also for the youngest workers. I argue that in Spain the growth and legal recognition of internships and apprenticeships is entrenching this problem by creating patterns of systemic age discrimination.

In principle, some forms of internships and traineeships are understood as a point of transition between education and work. However, in practice, trainee or intern status poses significant questions and creates tensions about the difference between paid and unpaid work and, related to that, about the concept of the worker. A relevant trend here is the formalization of systemic discrimination against young workers, in part because the regulation of traineeships has contributed to practices that forge a chain of precarious work arrangements for individuals, combining training and work. The framing of informal work as a traineeship inserted into the academic curriculum, and the evolution of other forms of informality that are combined with precarious training contracts, have placed young people in a systemic network of discrimination. The point of departure for understanding this phenomenon is the extremely high level of unemployment for young people in several member

¹¹ On collective dismissal in Spain and decisions of the Constitutional Court, see Julia López López and Chelo Chacartegui, 'Age Discrimination and Labour Law in Spain: The Vision from the South' in Ann Numhauser-Henning and Mia Rönnmar (eds), *Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond* (Wolters Kluwer 2015).

¹² See the ILO Discrimination (Employment and Occupation) Convention, 1958 (No 111); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework on equal employment and occupation [2000] OJ L303/16; Spanish Constitution arts 9, 14. Art 9.2 of the Spanish Constitution states:

It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.

Art 14 of the Spanish Constitution states:

Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance'.

states. High unemployment has been one of the major challenges for a number of European economies in recent decades, with differing intensity by country, but with the common point that young workers have suffered the most negative consequences.

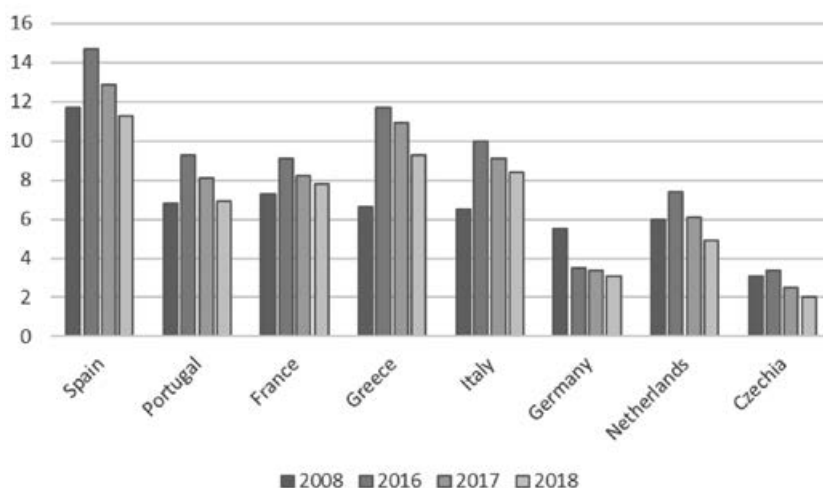
In the EU, despite some reduction in the youth unemployment rate after the end of the Great Recession, the problem continues to exist. In Spain, where youth unemployment is among the highest in the EU, measures that were ostensibly introduced to reduce youth unemployment have created a chain of systemic age discrimination in which young workers move from one precarious position or status to another. The integrated employment guidelines¹³ for member states encouraged them to work with renewed vigour to build employment pathways for young people. These guidelines stressed the strategy of adapting education and training systems in order to raise quality, broaden supply, diversify access, ensure flexibility, and respond to new occupational needs and skills requirements. The guidelines also called for action to increase female participation and reduce gender gaps in employment and pay, through better reconciliation of work and private life and the provision of accessible and affordable childcare facilities and care for other dependents, to ensure that by 2020 every unemployed person would be offered a job, apprenticeship, additional training or another employability measure. The strategy specified the goal of working towards 25 per cent of the long-term unemployed participating in training, retraining, work experience or other employability measures by 2020. As part of these flagship initiatives, the EU presented 'A New Skills Agenda for Europe',¹⁴ which proposed a range of policies intended to lower youth unemployment, including measures aimed at education and training institutions.

Figure 19.1 shows there are countries, such as Spain, that have failed to achieve the objective of a maximum of 10 per cent youth unemployment. Indeed, Spain has the highest youth unemployment in the EU.

Another important point to underline is that the number of persons employed on a temporary basis varies greatly among EU member states. The highest percentages of persons with a temporary contract in 2017 were in Spain (26.4 per cent), Poland (25.8 per cent) and Portugal (21.5 per cent). In contrast, the lowest shares of temporary contracts can be found in Romania (1.2 per cent), Lithuania (1.6 per cent) and Estonia (2.8 per cent). In 2017, 2.2 per cent of men and 2.1 per cent of women aged 20–64 years in the EU28 had a precarious employment situation (having a work contract of only up to three months).

¹³ European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020 final.

¹⁴ European Commission, *A New Skills Agenda* (n 1).



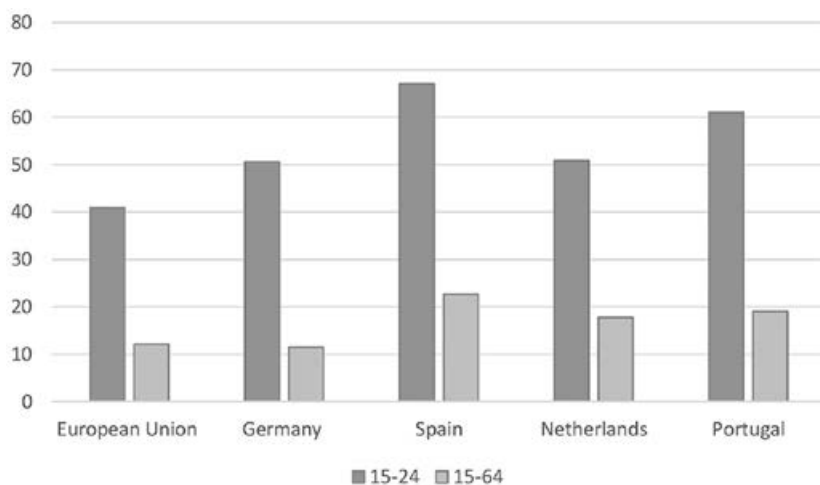
Source: Own elaboration from Eurostat 2018.

Figure 19.1 Youth unemployment ratio (percentage)

The overall proportion of persons in precarious employment was the highest in Croatia, Spain, Slovenia and France, as well as the candidate countries Serbia, Montenegro and Turkey. The differences between men and women are lower than 1 per cent in all countries except in Croatia (1.2 per cent), Serbia (1.3 per cent) and Turkey (2 per cent). Women are slightly more likely than men to have a precarious employment situation in eight EU member states (Belgium, Czech Republic, Spain, Malta, the Netherlands, Sweden, Slovenia and Finland).¹⁵ High unemployment and precarious contracts affect young workers more than others in all EU countries, but in some countries, such as Spain, the gap is especially great (see Figure 19.2).

Another important issue when considering precarious employment is involuntary part-time employment. The highest proportions of involuntary part-time work across the EU were recorded in Greece (70.2 per cent of persons employed part-time) and Cyprus (67.4 per cent), followed by Italy (62.5 per cent), Spain (61.1 per cent), Bulgaria (58.7 per cent), Romania (55.8 per cent), Portugal (47.5 per cent) and France (43.1 per cent). In contrast, involuntary part-time work represented less than 10 per cent of total part-time

¹⁵ European Commission, 'Temporary and Part-Time Jobs on the Rise' (*Eurostat*, 13 August 2018), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/WDN-20180813-1>, accessed 30 March 2021.



Source: Own elaboration from Eurostat 2018.

Figure 19.2 Proportion of temporary workers

employment in Estonia (7.5 per cent), Belgium (7.8 per cent), the Netherlands (8.2 per cent), the Czech Republic (9.1 per cent) and Malta (9.6 per cent).¹⁶

It is critical to consider how pervasive unemployment, involuntary part-time work and precarious work are, as precarious work is linked to poverty.¹⁷ The risk of poverty is connected with the type of contract.¹⁸ Data such as these permit us to conclude that precarious work situations – for example, part-time work or temporary contracts – are not the choice of the workers. Precarious work status is involuntary. Spain has suffered greatly from precarious work, as reflected, for example, in the very high level of involuntary part-time young workers. An especially negative consequence of this fragile status of the young in the labour market is, as suggested above, the impact of precarious work status on poverty.

¹⁶ European Commission, 'Involuntary Part-Time Employment as Percentage of the Total Part-Time Employment, by Sex and Age (%)' (*Eurostat*, 31 January 2020), https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_eppgai&lang=en, accessed 30 March 2021.

¹⁷ See the analysis of the connection between precarious contracts and poverty in Sergio Canalda Criado, 'Precarización de la contratación atípica y pobreza laboral' (2018) 8 *Revista de Información Laboral* 41.

¹⁸ European Commission, 'In-Work Poverty in the EU' (*Eurostat*, 16 March 2018), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180316-1>, accessed 30 March 2021.

19.3 TRAINEESHIPS IN SPAIN: THE EMPLOYABILITY MODEL AND THE COMMODITIZATION OF YOUNG WORKERS

The strategies proposed in *Europe 2020*¹⁹ signified an important change in EU labour market policy, from a focus on employment to an emphasis on employability. This has promoted the goal of converting soft-law regulation into hard law at the national level. Moreover, this shift in the European model from employment to employability implies a transposition of responsibilities from the state to employees and the proliferation of new requirements for gaining a job. The new approach shifts the emphasis in gaining a job from hard skills to soft skills (including communication skills, the ability to work in a team, leadership, creativity, self-motivation, the ability to make decisions, time management and problem-solving), which are more related to personality than traditional qualifications. The European Employment Strategy has installed the model of ‘flexisecurity’ within national market reforms, but in practice in Spain the system has developed into one characterized by flexiprecarity.²⁰

The analysis of training contracts in Spain should be framed within this context. Starting with the Green Paper on the modernization of labour law²¹ the segmentation of employment status has imposed a wide range of employment contract types. At the same time, the division between unpaid and paid transitions has increased. One of the characteristics of Spanish labour market regulation is segmentation of labour status and decreasing labour rights.²² The EU employment model reduces the role of labour contracts and creates a dynamic of segmentation of the labour market and labour regulation. The promotion of self-employment is an important axis of this strategy. All these goals create a cluster of policies in which education and training are inserted within the notion of employability.

In order to identify the chain of discrimination and exclusion of the young in formal labour market regulation, the first crucial point is that traineeships are permitted without being formalized as labour contracts.²³ Those eligible

¹⁹ European Commission, *Europe 2020* (n 13).

²⁰ See Julia López López, Alexandre de le Court and Sergio Canalda, ‘Breaking the Nexus between Flexibility and Security: Flexiprecarity as the Spanish Version of the Model’ (2014) 5 *Eur Lab LJ* 18.

²¹ European Commission, *Green Paper: Modernising Labour Law to Meet the Challenges of the 21st Century*, COM(2006) 708 final.

²² Julia López López, ‘Formalizing the Segmentation of Workers’ Rights: Tensions among Regulatory Levels’ (2015) 36 *Comp Lab L & Policy J* 281.

²³ Royal Regulation 1543/2011, 31 October. The Spanish regulations on curricular and extracurricular training arrangements are found in RD 592/14, 11 July and RD

for traineeships are unemployed persons between 18 and 25 years old or until 29 years old if the young worker is part of the Youth Guarantee programme.²⁴ The young workers have to demonstrate that they are unemployed, have a university degree or professional title, and have professional experience. The ostensible goal of traineeships for those who qualify is to provide experience and develop employability. The firm signs an agreement with the worker under the supervision of the regional service of employment. The duration is between three and nine months without the possibility to extend it. The trainees will receive at least 80 per cent of the *El Indicador Público de Renta de Efectos Múltiples* (IPREM, Multiple Effects Public Income Indicator) and they are entitled to social security rights. The IPREM 2020 monthly pay is €537.84, which is below the minimum wage.

The second step in systemic discrimination against youth operates through training contracts, which are also not understood as creating an employment relationship. These arrangements are founded on a Spanish labour regulation²⁵ that stipulates that, within a period of seven years after graduation from university, graduates can be hired on a training contract with a duration of six months to two years. The training contract salary is 60 per cent of the collective bargaining salary during its first year and 75 per cent in the second year.

A complementary labour contract, defined by age, is the apprenticeship contract.²⁶ An apprenticeship contract is ostensibly aimed at combining training and work, and requires that the worker be between 16 and 25 years of age and not have a university degree. The duration of the apprenticeship contract is between one and three years. Apprenticeships usually contain 25 per cent training during the first year, for which apprentices are unpaid, and they continue to include 15 per cent unpaid training time in the second and third years of the apprenticeship.

Both traineeships and apprenticeships engage young people in extended periods of precarious work. For example, a recent university graduate who obtained their undergraduate degree at the age of 21 can be hired until the age of 28 under a series of training contracts with a maximum duration of two years each. This means that the graduate will potentially be engaged in

1493/2011. Since 31 August 2018 it has not been necessary for foreign students who are not EU citizens to have a training agreement with a university to engage in extracurricular internships which are not formalized through a labour contract. The idea of this Royal Decree is to attract talent to Spain, which helps companies to hire foreign nationals who have studied at a university or for a master's degree.

²⁴ Council Recommendation of 22 April 2013 on Establishing a Youth Guarantee [2013] OJ C120/1.

²⁵ RD 2/2015, 23 October, Code of Labour, art 11.1.

²⁶ Ibid art 11.2.

precarious work until they reach the age of 30. For those lacking a university degree, this precarious status under a series of apprenticeship contracts may extend until they are 28 years old. Age has been enacted in the law as a limit on the use of these precarious forms of employment, but in a way that creates systematic discrimination because it fosters a circle of evolving precarious status for young workers. The first part of the professional career of those young workers holding this status is invisible because the legislation calls this stage ‘training’ rather than work.

19.4 THE CONCEPT OF THE WORKER AND THE ILO: DECONSTRUCTING SYSTEMIC DISCRIMINATION IN THE EMPLOYMENT OF YOUNG PEOPLE

With the erosion of a common platform of labour rights, the segmentation of labour markets and of regulation in employment status is a fundamental feature of the current regulation of employment. In some instances this segmentation nourishes systemic discrimination, and very evidently so for young people.²⁷

The ILO regulations could be very important in deconstructing the invisibility and precarity of traineeships and apprenticeships. The process of formalization of the notion of the worker as an employee is a fundamental feature of the ILO regulatory system. There are extensive examples of this in the ILO regulations that unambiguously define the concept of the worker or employee in the application of norms. For example in ILO Convention No. 172²⁸ the term ‘the workers concerned’ means workers employed within establishments to which the Convention applies pursuant to the provisions of article 1, irrespective of the nature and duration of their employment relationship. However, each member may, in the light of national law, conditions and practice and after consulting the employers’ and workers’ organizations concerned, exclude certain categories of workers from the application of all or some of the provisions of the Convention. The Social Security (Minimum Standards)

²⁷ See Mark Freedland and Lucy Vickers, ‘Age Discrimination and EU Labour Rights Law’ in Alan Bogg, Cathryn Costello and ACL Davis (eds), *Research Handbook on EU Labour Law* (Edward Elgar 2016).

²⁸ For more examples, see the definition of workers in dock work or protection of port workers in ILO Convention No 32, art 1(2): the term ‘worker’ means any person employed in the processes of loading and unloading boats. ILO Convention No 152, art 3(a): the term ‘worker’ means any person engaged in dock work. ILO Recommendation 178, para 1(b): the term ‘night worker’ means an employed person whose work requires the performance of a substantial number of hours of night work which exceeds a specified limit. This limit shall be fixed by the competent authority after consulting the most representative organizations of employers and workers or by collective agreements.

Convention, 1952 (No 102) stipulates that protection must be provided for prescribed classes of ‘employees’, the ‘[economically] active population’ or ‘residents’. Similarly, the Holidays with Pay Convention (Revised), 1970 (No 132) refers to ‘employed persons’ in order to emphasize that only dependent workers are covered. However, the minimum age instruments tend to make use of the dual terminology ‘employed or work’ to ensure that all forms of economic activity are covered. The process of formalization of employment relations is critical to break the process of systemic discrimination, which starts with traineeship or apprenticeship relations.

Another important ILO reference to traineeships is Convention No 189 on domestic workers.²⁹ This Convention removes the informality of an important group of workers. The preamble sets out the ILO’s commitment to promoting decent work for all, through the achievement of the goals of the ILO Declaration on Fundamental Principles and Rights at Work³⁰ and the ILO Declaration on Social Justice for a Fair Globalization.³¹ The Convention also considers that

domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights.³²

This is a powerful idea, underlining the effort of the ILO to formalize sectors of activity in order to recognize social rights. This ILO recognition of work as productive, with a concern for vulnerable workers, could also be applied to traineeships. This idea is further explored in the ILO White Paper *A Framework for Quality Apprenticeships*.³³

There are also relevant references in the Charter of Fundamental Rights in the European Union. For example, article 24 considers the rights of the child. It is also important to mention the Chapter of Solidarity’s article 31 on fair and just working conditions for every worker, and article 32 on the prohibition of child labour and protection of young people at work, which sets out that ‘young people admitted must have working conditions appropriate to their age

²⁹ See Adelle Blackett, ‘Regulatory Innovation on Decent Work for Domestic Workers in the Light of International Labour Organization Convention No. 189’ (2018) 34 *Int J Comp Lab L & Indust Rel* 141.

³⁰ Adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

³¹ Adopted by the International Labour Conference at its 97th Session, Geneva, 10 June 2008.

³² ILO Domestic Workers Convention, 2011 (No 189), preamble.

³³ ILO, *A Framework for Quality Apprenticeships* (Report IV(1), ILO 2019).

and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education’.

Traineeships as a form of informal work violate these rules and promote the devaluation of the youngest workers’ status. Fair globalization entails the recognition of fundamental rights including both collective rights and the right to be protected against discrimination.

All forms of employment that are combined with training should be recognized as part of the employment market, with implications for the development of a decent agenda for young workers. The existence of poorly paid work with limited rights has negative consequences for sustainable welfare state systems. Age discrimination is prohibited but labour market regulation has trapped young people in a dynamic of systemic age discrimination through a circle of precarious work. The invisibility, for many, of their work and precarious labour conditions has limited the responses to this problem. It is important to break this vicious circle and apply a decent agenda for young workers, recognizing not only their status in the labour market, but also their citizenship rights and the importance of guaranteeing fair working conditions.

PART VI

Internship Regulation: Into the Future

20. Developing new standards for internships

Andrew Stewart, Rosemary Owens, Niall O'Higgins and Anne Hewitt

20.1 THE NEED FOR REGULATION

As the various contributions to this book have highlighted, internships have assumed an increasingly important role in the pathways that promise to lead from education, unemployment or other forms of employment into paid jobs in a wide range of professions and other occupations – especially (but not solely) in developed economies.

On the broadest understanding of the term, and recognizing that it may be called something different in particular locations or contexts (such as a traineeship, placement or practicum), an internship may be undertaken as part of, concurrently with, or after a formal programme of education and training. It may be created and advertised by an organization for its own purposes, or established at the request of an education or training institution, or arranged at the intern's own initiative. It may take place in the intern's home country, or elsewhere. The internship may be sourced directly, or with the assistance of some form of broker or intermediary. It may seek to impart, enhance or offer the opportunity to utilize particular skills or knowledge. It may offer a chance to gain experience of working in a particular organization or sector, or to make contacts that will be valuable to career progression. Alternatively, it may serve simply as a rite of passage that everyone is expected to go through in a particular industry, regardless of how much the work involved actually resembles what the intern may ultimately be hoping or expecting to do if they find paid employment.

In previous literature on internships, as briefly reviewed in Chapters 1 and 2 of this volume, four general and to some extent overlapping concerns have been identified with such arrangements, especially (though not exclusively) when undertaken in the open market; that is, without a connection to a formal programme of education, training or labour market assistance. The first concern is that internships do not always deliver on the promise of

useful training and skill development. Secondly, and contrary to perception, internships do not necessarily create a bridge from education to paid work, especially when no remuneration is provided. Thirdly, the cost of undertaking unpaid or low-paid internships is likely to be harder to bear for those from less advantaged backgrounds, especially if it is necessary to travel to an expensive location to complete them. Fourthly, the availability of interns as a source of cheap labour creates an incentive for the displacement of paid entry-level jobs and the evasion of minimum wage laws.

To us, the various contributions in this book do nothing to assuage these concerns. Instead, they underscore them. More research is needed to understand how many internships are being undertaken, how they are structured, what role they play, whom they benefit, the extent to which there is any quality assurance in relation to their content, delivery or oversight, and how (if at all) compliance is ensured with any relevant regulation – just to name a few of the questions on which detailed evidence is still lacking in many countries. However, what we believe can be gleaned from the data quoted or presented in Chapters 2–6 of this volume is that structured, formal and, by extension, regulated internships are likely to be more successful in providing an effective bridge to long-term employment, as opposed to a gangplank to long-term work insecurity and income insecurity. Internships vary in their effectiveness but, broadly, the vast majority of analyses contained here and elsewhere which examine their efficacy support this view. When properly conceived and monitored, educational internships, as well as internships undertaken as part of governmental active labour market programmes (ALMPs), are capable of producing better outcomes than unregulated open-market internships. Structure and formality are needed to ensure that interns acquire useful skills and that employers, whether potential or those offering internships themselves, obtain information about the interns and their competencies.

Moreover, while it is evident that educational internships can and often do provide an entry point to subsequent employment, the importance of internships in providing signals to employers – as identified in a number of the early chapters – raises the question, what happens when all or most young people undertake internships? If all young people have been interns, how can participation in an internship provide a signal to employers? Already many young people undertake multiple internships, since one internship appears not to be enough for many employers. The issue of deflation in the signalling value of internships must also be faced. The point also serves to emphasize that the acquisition of work-based competencies does not, of itself, guarantee employment, let alone decent work. Skills development needs to go hand in hand with

adequate job creation, as has been emphasized repeatedly by the International Labour Organization (ILO) and others.¹

So, regulation is needed to ensure the quality and effectiveness of internships; but which type of regulation, and by whom? A great deal of the book is given over, either explicitly or implicitly, to the analysis and discussion of this issue, and in this chapter we build upon both our own earlier work in this field and the insights of everyone else who has contributed to this volume to advance some suggestions about the development or refinement of regulatory standards for internships.² We divide our discussion into three main parts, considering first the present and possible future role of international or regional labour standards, then the potential for state (national or subnational) regulation and, finally, the role that non-state actors (such as businesses, trade unions and educational institutions) can and do play. Where relevant, we refer to examples provided or suggestions made in the earlier chapters. We conclude both the chapter and the volume by offering some suggested principles to guide the regulation of internships and respond to the policy challenges they present.

20.2 INTERNATIONAL OR REGIONAL LABOUR STANDARDS

By virtue of their subject matter, many of the labour standards adopted by the ILO are particularly relevant to young people.³ To date, however, no legal instruments have been adopted by the ILO to ‘explicitly guide the regulation of internships/traineeships’.⁴ This is part of a broader gap in relation to training arrangements that involve or include the performance of work. Apprenticeships did once have their own standards, in the form of the Apprenticeship Recommendation, 1939 (No 60), and later Part X of the Vocational Training Recommendation, 1962 (No 117). However, when the

¹ To take just one example, see ILO, *Global Employment Trends for Youth 2020* (ILO 2020). The point can be found in more or less all of the preceding editions of that publication, as well as in other contributions from the ILO, and in innumerable contributions from other experts and organizations.

² The chapter reproduces material originally published in an earlier report prepared for the ILO: Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis, ‘The Regulation of Internships: A Comparative Study’ (2018) ILO Employment Policy Department Working Paper No 240, chs 10–11.

³ See eg ILO, ‘International Labour Standards Relevant to Youth Employment’ (2020), www.ilo.org/global/topics/youth-employment/standards/lang--en/index.htm, accessed 30 March 2021.

⁴ Ana Jeannet-Milanovic, Niall O’Higgins and Annika Rosin, ‘Contractual Arrangements for Young Workers’ in Niall O’Higgins (ed), *Rising to the Youth Employment Challenge: New Evidence on Key Policy Issues* (ILO 2017) 145.

latter was replaced by the more general Human Resources Development Convention, 1975 (No 142), together with its accompanying Recommendation (No 150), the detailed treatment of apprenticeships disappeared, and was not restored when the Human Resources Development Recommendation, 2004 (No 195) was adopted in place of Recommendation No 150.⁵

This is not to say that interns may not be covered by existing international labour standards. Two instruments mention internships explicitly. Article 2(a) (ii) of the HIV and AIDS Recommendation, 2010 (No 200) expresses an intention to cover ‘all workers working under all forms or arrangements, and at all workplaces, including ... those in training, including interns and apprentices’. Article 2(1) of the newest standard, the Violence and Harassment Convention, 2019 (No 190), likewise expresses an intention for the instrument to apply to ‘persons in training, including interns and apprentices’.

It is also important to appreciate that many ILO standards, including the core conventions that underpin the ILO’s Declaration on Fundamental Principles and Rights at Work (1998),⁶ ‘apply to all “workers” in the broadest sense of the term: that is, they apply irrespective of the kind of contractual arrangement (if any) under which individuals are engaged and, with very limited exceptions, irrespective of the sector of the economy in which they work’.⁷ The ILO’s supervisory bodies have taken the view, for example, that persons hired under training agreements should have the right to organize, regardless of whether they are ‘employed’.⁸

However, some ILO conventions are specifically framed to apply only to employment relationships.⁹ Furthermore, even in those instruments which *are* broad enough to cover interns and other trainees, regardless of their employment status, there is very little specific guidance as to how and to what extent

⁵ As to the extent to which apprenticeships are mentioned in, or covered by, other instruments, see ILO, *A Framework for Quality Apprenticeships* (ILO 2019) 20–23.

⁶ These are the Forced Labour Convention, 1930 (No 29), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), the Right to Organise and Collective Bargaining Convention, 1949 (No 98), the Equal Remuneration Convention, 1951 (No 100), the Abolition of Forced Labour Convention, 1957 (No 105), the Discrimination (Employment and Occupation) Convention, 1958 (No 111), the Minimum Age Convention, 1973 (No 138), and the Worst Forms of Child Labour Convention, 1999 (No 182).

⁷ Breen Creighton and Shae McCrystal, ‘Who is a Worker in International Law?’ (2016) 37 *Comp Lab L & Pol J* 691, 706.

⁸ See eg ILO, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (6th edn, ILO 2018) para 394.

⁹ Creighton and McCrystal (n 7) 723–4.

their provisions should apply to these workers. An exception is article 6 of the Minimum Age Convention, 1973 (No 138), which provides as follows:

This Convention does not apply to work done by children and young persons in schools for general, vocational or technical education or in other training institutions, or to work done by persons at least 14 years of age in undertakings, where such work is carried out in accordance with conditions prescribed by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist, and is an integral part of:

- (a) a course of education or training for which a school or training institution is primarily responsible;
- (b) a programme of training mainly or entirely in an undertaking, which programme has been approved by the competent authority; or
- (c) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.

Ostensibly, these provisions appear to suggest that work undertaken in those circumstances should somehow be outside regulatory oversight – an assumption that is challenged by many of the contributors to this volume, and an issue to which we return in the final section of this chapter.

Happily, there may soon be an opportunity for the International Labour Conference to consider whether specific standards should be adopted for the regulation of internships and other training arrangements. As noted in the opening chapters of this volume, the ILO has released a report about the formulation of a possible new convention and/or recommendation.¹⁰ This would not just fill the gap in the regulation of apprenticeships left by the human resources development instruments, but address in a more limited but still significant way the regulation of ‘traineeships’. That term is defined as including ‘internships’ and extending to ‘any form of on-the-job learning, which enables a person (the “trainee”) to acquire work experience with a view to enhancing their employability’.¹¹ The questionnaire to member states that accompanies the report specifically contemplates the possibility of requirements for a written traineeship agreement, adequate remuneration, controls on working hours, paid holidays, sick leave, accident compensation and other benefits for interns, as well as the same protections and training as for others in the workplace in relation to health and safety or discrimination, violence and harassment.¹²

The original plan had called for a ‘double discussion’ of any possible new standard(s) at the 2021 and 2022 sessions of the International Labour

¹⁰ ILO, *A Framework for Quality Apprenticeships* (n 5).

¹¹ Ibid 80.

¹² Ibid 97–8.

Conference.¹³ With COVID-19 being responsible for the deferral of the 2020 session, that timeframe has now been revised. Member States have been given until 31 March 2021 to respond to the questionnaire.¹⁴ If there is no further delay, this suggests that a new instrument or instruments could potentially be adopted in 2023.

At a regional level, there is already one example of supra-national standards concerning internships, the Quality Framework for Traineeships promulgated in 2014 by the Council of the European Union (EU).¹⁵ The framework is focused primarily on open-market traineeships; it does not cover ‘work experience placements that are part of curricula of formal education or vocational education and training’, nor traineeships whose content is regulated under national law and which must be completed to enter a particular profession, such as medicine or architecture.¹⁶ This reflects the finding from an earlier review, which revealed that most existing laws and regulations within the EU relate specifically to traineeships undertaken as part of formal education and training courses, or ALMPs, rather than the open-market arrangements identified as being in the greatest need of attention.¹⁷

The framework requires a prior written agreement for traineeships setting out (among other things) the educational objectives and duration of the arrangement, working conditions, whether the trainee is to be remunerated or compensated, and the parties’ rights and obligations. It seeks to ensure that, where applicable, any limits set by national or EU laws on working time and rest periods are respected, together with holiday entitlements, and encourages traineeship providers to clarify whether they offer health and accident insurance, as well as sick leave. The framework also requires traineeships to have a reasonable duration that will not generally exceed six months, clarifies the circumstances in which a traineeship may be extended or renewed, and encourages the parties to make clear the circumstances under which the arrangement may be terminated. It encourages a supervisor to be designated and advocates the recognition, assessment and certification of the knowledge, skills and competences acquired during a traineeship. It also promotes transparency, by

¹³ Ibid 3.

¹⁴ ILO, *Minutes of the 338th Session of the Governing Body of the International Labour Office*, Governing Body, 338th Session, Geneva, GB.338/PV(Rev.4) (28 August 2020) para 353(g).

¹⁵ Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships [2014] OJ C88/1.

¹⁶ Ibid, preamble, para 28.

¹⁷ Kari P Hadjivassiliou, Emanuela Carta, Tom Higgins, Catherine Rickard, Suzanne Ter-Minassian, Flavia Pesce and others, *Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report* (European Union 2012).

encouraging advertisements and other information to specify both the terms and conditions of a traineeship, and the number of trainees typically recruited into ongoing employment.

It is easy to understand why standards of this kind should be considered appropriate for at least some types of training. However, aside from the need to determine at what point a work experience arrangement becomes sufficiently substantial to warrant this level of formality and prescription, the EU framework leaves unresolved the issue of whether, and to what extent, interns should also enjoy the protection of general labour or social laws. It encourages any applicable rules to be observed, but does not say which rules do or *should* apply. Arguably, this is a major deficiency. As Annika Rosin discusses in Chapter 17 of this volume, it is possible that the EU's Charter of Fundamental Rights could be used to improve the protection of interns. However, that depends on a genuinely broad interpretation of the concept of a 'worker' being adopted, something which cannot be assumed.

20.3 STATE REGULATION

At a national or subnational level, at least five different approaches to state regulation of internships can be identified – where any regulation exists at all.¹⁸ These are:

1. Specific regulation of the use or content of internships.
2. Regulation by inclusion, that is, expressly bringing internships within the operation of labour or social laws, either by defining them as employment or extending employment rights to certain training arrangements.
3. Regulation by exclusion, that is, expressly exempting internships from the operation of labour or social laws.
4. Strategic enforcement of labour or social laws by the state, even in the absence of any specific extension or exclusion.
5. Systematic use by the state of soft law, such as codes of practice, to influence the use and content of internships in government and/or non-government organizations.

In a comparative study of 13 countries undertaken for the ILO and published in 2018,¹⁹ four (Argentina, Brazil, France and Romania) were found to have introduced specific legislation to regulate internships. Significantly, the first three of those have effectively outlawed open-market internships, by requiring

¹⁸ Rosemary Owens and Andrew Stewart, 'Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern' (2016) 155 *Int Lab Rev* 679, 688.

¹⁹ Stewart and others (n 2).

a tripartite agreement involving the intern, the host organization and an educational institution. The French approach in particular is singled out as being worthy of consideration by several contributors to this book, including Paula McDonald, Andrew Stewart and Damian Oliver in Chapter 5 and Anne Hewitt in Chapter 13.

In many of the other countries covered by the 2018 study, including Germany (considered in more detail by Bernd Waas in Chapter 7 of this volume), interns have expressly been brought within the coverage of particular labour or social laws. However, it is just as common for ALMP or (especially) educational internships to be excluded from the operation of such laws, in the same fashion as the EU Quality Framework for Traineeships. Neither is much typically done to ensure that these arrangements attract the type of governance or quality assurance that is often assumed to follow from the involvement of educational institutions or public employment services, a point emphasized by Anne Hewitt (Chapter 13) and Irene Nikoloudakis (Chapter 14). As Alexandre de le Court and Julia López López note too, in Chapters 16 and 19 respectively, accepting the legality of unpaid or low-paid internships can segment the labour market and institutionalize discrimination against the young.

The 2018 study also found that in many countries it remains an open question whether internships, especially but not solely those arranged in the open market, are covered by general labour laws that make no explicit reference to these arrangements. The answer would generally depend on a court, tribunal or government agency determining whether an intern falls into the often undefined category of ‘employee’ or subordinate worker. In some jurisdictions, the number of cases testing this issue has risen in proportion both to the use of internships and to the critical attention devoted to them by government agencies, academics, the media and intern groups. Australia appears to be the only country in which a government agency (the Fair Work Ombudsman) has systematically and publicly pursued sanctions against businesses or other organizations involved in the use of potentially unlawful internships.²⁰ However, even there, as Rosemary Owens explains in Chapter 11 of this volume, the status of many interns cannot be taken as settled.

The same uncertainty can be found in other common law systems, as Wil Hunt and Charikleia Tzanakou (Chapter 6), James Brudney (Chapter 10) and Amir Paz-Fuchs (Chapter 15) demonstrate in their respective contributions. Brudney’s discussion of the USA represents a particularly cautionary tale, in the way in which coverage of the Fair Labor Standards Act, with its deliberately broad definition of ‘employ’, has been progressively eroded by

²⁰ See eg *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140; *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024.

the judiciary.²¹ Indeed, even where legislative regimes seem broad enough to cover interns, as Alysia Blackham notes in discussing equality laws in Chapter 18, the cost and uncertainty of enforcement proceedings may mean they are not considered worth the risk.

20.4 THE ROLE OF NON-STATE REGULATORY ACTORS

There are various ways in which internships can be – and are in practice – regulated, other than by the state. Organizations that host or engage interns will often develop their own rules and processes (whether formal or informal) for selecting those who will participate, for designing and supervising whatever tasks interns are invited or required to perform, and for ensuring interns adhere to the organization's policies and procedures. Educational institutions are also likely to have internally generated rules that govern the administration and assessment of educational placements, as discussed, for instance, by Joanna Howe and Anne Hewitt in Chapters 12 and 13, respectively.

At a broader level, other bodies or groups may seek to influence the use, content or treatment of internships. In many countries, private codes or guidelines have been put forward by peak bodies or industry groups. In the UK, for instance, the National Council of Voluntary Organisations has developed a guide for internships in the voluntary sector, emphasizing the difference between employment and 'true' volunteering, canvassing the arguments about the appropriateness of taking on volunteer interns, and suggesting 'principles of good practice'.²² Pressure groups representing young people have also been very active in this space. For example, the European Youth Forum has developed an Employers' Guide to Quality Internships which has been endorsed by a number of major companies.²³

Trade unions, too, may be involved in helping to set minimum wages and other conditions for interns, through collective bargaining. It has been reported that collective agreements play a significant role in regulating traineeships (at least of particular kinds) in many European countries.²⁴ Examples of this prac-

²¹ See eg *Glatt v Fox Searchlight Pictures, Inc* 811 F 3d 528 (2016).

²² National Council of Voluntary Organisations, *Voluntary Internships in the Voluntary Sector: Review and Guidance* (National Council of Voluntary Organisations 2015).

²³ See European Youth Forum, European Quality Charter on Internships and Apprenticeships, www.youthforum.org/quality-internships/, accessed 30 March 2021.

²⁴ Hadjivassiliou and others (n 17) 62, 95–8; European Commission, 'Applying the Quality Framework for Traineeships' (2016) European Commission Staff Working Document 324, 6.

tice from Germany and Sweden are provided by both Bernd Waas in Chapter 7, and Jenny Julén Votinius and Mia Rönnmar in Chapter 9. The latter in particular highlight the positive influence of the ‘social partners’ (trade unions and employer associations) in helping to ameliorate some of the negative aspects of internships commonly identified in other jurisdictions. However, even in Sweden, as they note, there are signs that the role accorded to collective bargaining is under challenge. At a time when union density and collective agreement coverage are in decline in many parts of the developed world,²⁵ it is hard to envisage the social partners coming to play a prominent part in regulating internships in countries where they do not already do so. Even in countries with a strong tradition of social dialogue, there may still be questions about whether the laws and processes governing collective bargaining can apply to interns who are not regarded as employees.²⁶

20.5 SIX PRINCIPLES FOR THE REGULATION OF INTERNSHIPS

As Paula McDonald, Andrew Stewart and Damian Oliver note in Chapter 5, it is hard to imagine even unpaid internships being banned in the foreseeable future; but this is not to say that they cannot or should not be appropriately regulated. The central policy challenge which internships present is to balance the positive contribution they can potentially make with the reality that they may represent a form of precarious work.²⁷ In this concluding section, and building on previous work,²⁸ we suggest six principles to guide the design of new laws for this purpose, or indeed the framing of new international standards.

1. *Certain types of internship, however they are labelled by the parties, should attract the same entitlements and protections as an ‘ordinary’ employment relationship.* The possibility that internships may, if misused, constitute ‘disguised employment relationships’ has recently been noted by the ILO’s Committee of Experts on the Application of Conventions

²⁵ See OECD (Organisation for Economic Co-operation and Development), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work* (OECD 2019) 33–48.

²⁶ See eg Annika Rosin, ‘Precariousness of Trainees Working in the Framework of a Traineeship Agreement’ (2016) 32 Int J Comp Lab L & Indust Rel 131, 147–51; see also the same author’s discussion in Chapter 17 of this volume on the applicability of the collective rights recognized in the EU’s Charter of Fundamental Rights.

²⁷ Joseph F Turcotte, Leslie Nicholls and Lisa Philipps, *Maximising Opportunity, Mitigating Risk: Aligning Law, Policy and Practice to Strengthen Work-Integrated Learning in Ontario* (Higher Education Quality Council of Ontario 2016) 5.

²⁸ Owens and Stewart (n 18) 704–5.

and Recommendations.²⁹ As Rosemary Owens notes in Chapter 11, it is important that the determination of employment status involves a robust assessment which eschews both subjectivity (that is, the parties' own statements about the nature of their relationship) and formalism (such as an assumption that because a process for gaining practical experience is part of a structured course of study or training it should not be regarded as 'work'). It may well be appropriate to exclude internships from being treated as employment relationships, and thus as subject to general labour laws, if they are part of a well-regulated scheme of education and training. Otherwise, where productive work is undertaken as part of an internship for a business or organization, the mere fact that the interns have 'volunteered' their services or are gaining useful experience or contacts should not disqualify them from labour protections.

2. *Even if a particular type of internship should not attract the operation of specific employment standards, this should not dictate its exclusion from all forms of labour or social regulation.* We see no reason why laws dealing with matters such as work safety, accident compensation, discrimination and harassment should not apply to interns while they are at work, even when undertaking a placement as part of an educational course or an ALMP. Arguably, the values of safety and equality at work should be seen as objectives that apply to *all* forms of work, whether paid or unpaid, and whether or not undertaken as part of education or training. The same should be true of the other 'core' standards recognized as part of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, including freedom of association and the right to engage in collective bargaining.
3. *Even in the case of educational or ALMP internships that are excluded from the operation of particular employment standards, such as minimum wages, it may be appropriate to establish modified entitlements or protections, especially for programmes that extend beyond a particular duration.* This is something that some countries already do. In France, for example, the length of internships is capped at six months, and for any arrangement exceeding two months the intern is entitled to compensation (although this is expressly stated not to be a salary). Interns are

²⁹ ILO, *Promoting Employment and Decent Work in a Changing Landscape*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (B), International Labour Conference, 109th Session, International Labour Office 2020 92.

also granted a range of other workplace protections, including limits on daily and weekly working hours.³⁰ However, if interns are to be entitled to something less than the regular minimum wage, this should only be the case if they are receiving ‘actual training during working hours’, with the ‘quantity and quality of the work performed’ remaining a decisive factor in determining what they are paid.³¹

4. *There should be minimum standards for the documentation of educational or ALMP placements, their duration, hours of work, requirements for specific learning outcomes to be achieved and the need to monitor what is happening at the relevant workplace.* As a number of contributors to this book have argued, it should not simply be assumed that the mere involvement of an educational institution or public employment service will be sufficient to assure these objectives. Once again, France provides a useful model here, at least in relation to educational arrangements. The agreement that must exist between intern, host organization and educational institution must state the activities the intern will undertake and the skills they will develop. In addition, the intern must be supervised by both the institution and the host; and, in order to ensure effective supervision, there are strict limitations imposed on the numbers of interns that supervisors can oversee.³² This approach recognizes that it may be just as important to structure and appropriately regulate the learning component of an internship as the working component.³³
5. *Agencies responsible for the enforcement of labour standards and other social protections should be aware of the particular issues associated with internships, provide information and assistance to interns, educational institutions and organizations hosting internships, and take appropriate action against exploitative and unlawful arrangements.* As previously noted, this is something that Australia’s Fair Work Ombudsman has done over recent years, but seems to be far less true in other countries.³⁴ In Chapter 10 of this book, James Brudney shows what an enhanced

³⁰ Code de l’éducation, arts L124-5, L124-6.

³¹ *Minimum Wage Systems: General Survey of the Reports on the Minimum Wage Fixing Convention, 1970 (No 131) and the Minimum Wage Fixing Recommendation, 1970 (No 135)* Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (1B), International Labour Conference, 103rd Session, International Labour Office 2014 para 188.

³² Code de l’éducation, arts D124-3, D124-4(4), L124-2(2)–(3), L124-9, R124-13.

³³ Jeannot-Milanovic and others (n 4) 161.

³⁴ Stewart and others (n 2) 41–3.

approach by the labour inspectorate could look like in the USA. Among other things, he highlights the importance of clear administrative guidance to employers wishing to sponsor interns, close cooperation with educational institutions to ensure they have in place meaningful protections for student interns, and prohibitions on the displacement of regular employees. Similarly, in her consideration of equality laws in Chapter 18, Alysia Blackham calls for an increased focus on enforcement, to ensure interns are assisted and encouraged to assert their rights.

6. *Efforts should be made to improve access to good quality internships for those from disadvantaged backgrounds.* Mahlatse Maake-Malatji's contribution to this volume, Chapter 8, reminds us that securing decent work experience is seldom as simple as just attending to the scope of labour regulation; it demands action and reforms that take account of the broader social, economic and cultural contexts. This is also stressed by Charikleia Tzanakou, Luca Cattani, Daria Luchinskaya and Giulio Pedrini in Chapter 4, where they write of the importance of ensuring that recruitment for internships does not simply reproduce structured inequalities in the labour market.

Given the benefits that internships may offer in relation to employability, but the potential barriers they may also create (or raise) for disadvantaged students, graduates or job seekers, it seems to us that addressing this issue should be an important component of any effective regulatory regime. Banning unpaid internships in the open market would be a step forward in this respect. However, there is also much to be recommended for reducing the opportunity cost for those from lower socio-economic groups in undertaking work experience as part of educational programmes, and 'improving provision of information to students and early graduates about the likelihood of different outcomes from internships in key fields'.³⁵ In this respect, we see great value in a set of proposals put forward for British higher education.³⁶ If broadened from the specific context in which they were originally advanced, they could include ensuring that educational institutions prioritize disadvantaged students in brokering work placements; overcoming geographical barriers by funding 'residential internship' opportunities for young people from remote areas;

³⁵ Angus Holford, 'Access to and Returns from Unpaid Graduate Internships' (2017) ISER Working Paper Series 2017-07, 30, <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2017-07>, accessed 30 March 2021.

³⁶ Carys Roberts, *The Inbetweeners: The New Role of Internships in the Graduate Labour Market* (Institute for Public Policy Research 2017), <https://www.ippr.org/publications/the-inbetweeners>, accessed 30 March 2021.

using a training levy to help employers offer high-quality placements; and banning placements of longer than a certain duration, unless they involve paid employment.

There is no single right way to regulate internships, and regulation cannot in any event solve every problem in the burgeoning field of work-based learning. However, if work experience is not simply to be a charter for exploitation, and if the promise of internships as an effective bridge from education to work is to be truly realized for more than just a privileged few, the principles we have outlined seem to us to provide a worthwhile starting point in meeting one of the great policy challenges in the world of work.

Index

- ACEN (Australian Collaborative Education Network) 238
- active labour market programme, *see* ALMP
- advocacy groups 88
- age discrimination 12, 13, 151, 307, 311, 316, 319, 323, 324, 325, 333, 342
- ALMP (active labour market programme) 4, 5, 17, 32, 53, 199, 205, 206, 239, 244, 340, 342, 345, 346
 - interns 11, 240, 241, 242, 246, 247, 248, 249, 252, 253
 - internships 25, 40, 43, 239, 240, 241, 244, 245, 246, 248–54, 336, 345
 - quality assurance 249–51
 - traineeships 25, 249, 276, 286, 340
- apartheid 9, 130, 133, 144
- applicability of labour law 12, 115, 118, 119–21, 122, 128, 129, 226, 241, 288, 294–300, 340, 341
- apprenticeships 3, 8, 10, 19, 22, 30, 32, 51, 53, 67, 109, 145–62, 321, 325
 - contract 330
 - definition 20, 21, 23
 - difference to internships 21, 177, 181
 - formal 109
 - informal 20, 21
 - low paid 13, 322
 - quality apprenticeship 33, 322
 - regulation 151, 337, 338, 339
 - Sweden 145–62
- Australia 7, 11, 26, 85, 89, 181, 185, 189–206, 212, 248, 256, 316, 319
 - Age Discrimination Act 2004 (Australia) 307, 316
 - Anti-Discrimination Act 1977 (NSW) 307, 318
 - Disability Discrimination Act 1992 (Australia) 318
 - education–work boundary 194–6
 - Equal Opportunity Act 1984 (WA) 307
 - Equal Opportunity Act 2010 (Vic) 307
 - equality law 12, 302, 306, 308, 311, 313, 315
 - Fair Work Act 2009 (Australia) 242, 307
 - Fair Work Ombudsman (FWO) 110, 309, 313, 320, 342, 346
 - graduate transition 139
 - international educational internships 210–11, 213, 214, 215
 - labour law cases 191–3, 199, 200, 201–3
 - PaTH internship 249
 - Queensland Anti-Discrimination Act 1991 308
 - regulation 11, 209, 223, 224, 240
 - Sex Discrimination Act 1984 (Australia) (SDA) 307
 - traineeships 21–2, 190
 - universities 11, 213, 220, 222, 223–38
 - unpaid work experience 27, 30, 32, 79, 81, 83, 320
 - WIL (work integrated learning) 85, 223, 224, 226–33, 237
- Basic Conditions of Employment Act 1997 (South Africa) 136, 244
- basic vocational training 114, 115
- black graduates 132, 138, 139, 140, 141, 144
- brokers 5, 15, 25, 213, 214, 217, 218, 219, 220, 221, 316, 335
- career satisfaction 40, 44, 98
- cheap labour 8, 13, 19, 252, 255–68, 322, 336

- CLEA (Clinical Legal Education Association) 186
- codes of practice 7, 108, 341
- collective bargaining 10, 19, 128–9, 145–8, 150–54, 155–60, 162, 287, 290, 296–7, 301, 330, 343–5
- common law 10, 184, 190–93, 198, 205, 248, 342
- Confederation of Swedish Enterprise 157, 159
- Council of the European Union (EU) 7, 18, 223, 226, 281, 285, 340
- Covid-19 3, 11, 13–16, 340
- Disability Discrimination Act 1992 (Australia) 318
- Disability Discrimination Act 1995 (UK) 309
- discrimination 23, 86, 184, 225, 303, 304, 306, 310, 313, 315, 319, 345
- age 12, 13, 151, 307, 311, 316, 319, 323, 324, 325, 333, 342
- anti-discrimination 165, 184, 185, 205, 212, 240, 246–9, 268, 307, 308, 318
- disability 318
- employer 317, 323, 324, 331
- employment 133, 304, 323
- law 165, 184, 212, 240, 268, 304, 305, 306, 307, 308, 311, 312, 316, 317, 318, 319
- protection 109, 185, 205, 307, 333, 339
- race 263, 323
- sex 307, 314
- systemic 12, 13, 269, 283, 321–33
- USA 184–5, 323, 324
- dismissal protection 128
- ECFR (European Charter of Fundamental Rights) 12, 286–301, 324, 332, 341
- education
- education–work boundary (Australia) 194–6
- education–work boundary (UK) 197–9
- formal 4, 12, 20, 24, 27, 78, 79, 89, 229, 233, 279, 280, 281, 282, 340
- further 67, 95, 197
- higher, *see* higher education
- internships as part of 8, 9, 36, 37, 66, 68, 70, 71, 72, 105, 118
- labour law 191–203
- one-cycle system 63
- parental 46, 48
- postgraduate 97
- regulation 11, 223, 224, 226, 229, 230, 231, 233, 237, 238, 276
- school 118
- secondary 67, 79, 149
- tertiary 11, 36, 196, 237, 238
- two-cycle system 61, 62, 63
- vocational 24, 27, 79, 82, 281, 311, 340
- education-to-work transitions 2, 8, 9, 13, 17, 31, 55, 62, 86, 88, 90, 103, 130, 133, 139–42, 227, 325, 336, 348
- employability 8, 9, 31, 39, 41, 59, 66, 77, 80–84, 87–90, 93, 144, 157, 210, 214, 258, 321, 326, 339, 347
- developing 85, 99, 108, 330
- enhancing 22, 87, 142
- graduate 72, 78, 80, 106, 142
- improving 21, 76, 89, 285
- model 329–31
- skills 85, 142, 258
- employee
- concept of 205, 292, 331
- definition 135, 169, 171, 189, 244, 247, 306, 307, 309
- equality law 306–8
- future 168, 174
- new 157, 178
- non-employee 129, 165, 167, 175, 298
- paid 5, 19, 23, 174, 176, 177, 179
- potential 156, 171, 176, 307, 310
- prospective 260, 307, 308, 310–11, 312, 319
- regular 49, 53, 83, 164, 165, 167, 169, 176, 178, 187, 188, 247, 251, 252, 253, 307, 347
- rights 324
- status 173, 262, 292, 293

- employer
 - agreement with learner/employee
 - 20, 157, 160, 165, 176, 202
 - benefits to 170, 171, 172, 173, 174, 175, 176, 178, 180, 200, 260, 263, 265, 266
 - best practice 94
 - collective agreements 128–9, 152, 153, 157, 295, 296
 - demand 66
 - discrimination 317, 323, 324, 331
 - Employers' Guide to Quality Internships 343
 - equality law 306–7, 310, 311, 323
 - health and safety 122, 298
 - internships 27, 30, 37, 58, 60, 64, 66, 71, 73, 74, 85, 109, 110, 134, 164, 179, 180, 183, 184, 186, 208, 235, 255, 257, 261, 336, 348
 - minimum wage 109, 110, 166, 167, 168, 175, 282, 305
 - overseas 212, 214, 215
 - payment by 67, 88, 109, 110, 129, 136, 146, 174, 176, 266, 270, 278, 282, 300
 - prospective 37, 41, 44, 80, 180, 310
 - recruitment 25, 145, 210
 - risk of exploitation by 77, 103, 108, 135, 150, 165, 166, 167, 175, 235, 256, 304
 - social contributions 274, 278, 279
 - social partner 19, 147, 151, 156, 344
 - standards 164, 191
 - subsidized employment 150, 241
 - value of work experience 36, 37, 41, 42, 78, 87, 89, 96, 140, 257
- employment
 - arrangements 28
 - contract 115, 119–22, 128, 135, 153, 157, 159, 192, 196, 197, 213, 270, 272, 282, 329
 - employment-based training 21
 - graduate 9, 59, 65, 68, 81, 225
 - law 133–6, 215, 246, 252, 264
 - opportunities 30, 32, 40, 45, 60, 62, 86, 167
 - outcomes 37, 38–40, 42, 43, 58–61, 64, 65, 68, 75–7, 81–4, 87–90, 181
 - paid 3–5, 8, 31, 32, 44, 45, 78, 80, 88, 186–7, 250, 258, 304, 311, 335, 348
 - permanent 44, 157, 181
 - policy 15, 43, 280, 321
 - prospects 9, 37, 38, 40, 45, 53, 58, 181, 261
 - regular 21, 253, 285
 - relations 6, 324, 332
 - relationship 22, 94, 114–15, 119–21, 124–9, 134–5, 170, 197, 199–203, 205, 211–12, 242, 243, 252, 277, 286, 291–2, 298–9, 306–9, 330, 331, 338, 344, 345
 - status 10, 29, 136, 192, 205, 264, 266, 267, 294, 298, 329, 331, 338, 345
 - student 42
 - temporary 301, 307
 - youth 13, 14, 19, 32, 43, 75, 77, 87
- Employment Rights Act 1996 (UK) 267
- entering the labour market, *see* labour market entry
- entry-level jobs 4, 5, 78, 79, 108, 109, 131, 132, 142, 178, 179, 181, 184, 186, 336
- Equal Employment Opportunity Commission (EEOC) 323
- equality 127, 205, 252, 271, 324, 325, 345
 - of access 140
- Equality Act 2010 (UK) 268, 306, 309, 310, 311, 312, 313, 315, 318
- ECFR (European Charter of Fundamental Rights) 12, 286–301, 324, 332, 341
- equality law 12, 212, 302–20, 343, 347
 - employment relationship 306–8
 - enforcement 319, 343, 347
 - prospective employees 31–11
 - reasonable adjustments 318
 - receipt of a service 315–17
 - relevance to youth work experience 303–6
 - scope 306–20
 - sexual harassment 317–18
 - UK 12, 302, 305, 306, 309, 313
 - unpaid work experience 313–15
 - vocational placement 311–13

- volunteering 308–10
- EU employment policy 321
- Eurobarometer survey 42, 47–52, 285
- European Framework for Quality and Effective Apprenticeships 322
- exploitation 6, 7, 45, 67, 80, 82, 108, 109, 126, 156, 161, 167, 175, 186, 202, 225, 226, 237, 333, 348
- Fair Internship Initiative (FII) 35, 38, 43, 45, 46–7, 83
- Fair Labor Standards Act 1938 (US) (FLSA) 7, 163–8, 170, 172, 176, 177, 179, 187, 244, 262, 264, 265, 342
- Fair Work Act 2009 (Australia) 242, 243, 307
- Fair Work Ombudsman (FWO) 7, 110, 203, 309, 313, 320, 342, 346
- family connections 43
- FLSA, *see* Fair Labor Standards Act 1938 (US)
- formal education programmes 4, 335
- A Framework for Quality Apprenticeships* (ILO) 21, 332, 339
- fundamental labour rights 12, 287, 289, 291–300, 301
- Germany 42, 38–40, 120, 242, 250, 342, 344
 - collective agreements 128
 - graduates 37
 - health and safety 246
 - intern 115, 116, 252
 - internships 115, 118
 - labour protection 88
 - minimum wage 126
 - Minimum Wage Act 116, 276
 - regulation 9, 11
 - social security 269, 276–80, 282
 - traineeships 26, 113, 114, 117, 118, 124, 126, 127, 282
 - vocational training 114–15, 276, 277, 278, 279, 280
- global citizens 25
- Global Commission on the Future of Work (ILO) 10, 139, 189, 190
- governance 24, 108, 342
- graduate labour market 41, 68, 81, 88, 186
 - Italy 62, 64, 65, 66, 75
 - UK 91, 97
- graduates 5, 8, 20, 25, 27, 41, 75, 78, 110, 143, 215, 256, 330
 - Australia 139
 - black graduates 132, 138, 139, 140, 141, 144
 - challenges 137–9
 - creative 79, 82, 86, 92, 97, 98, 100, 103, 106
 - employability 72, 78, 80, 87, 106, 142
 - France 41
 - Germany 37
 - internship while studying 36, 37, 66, 68, 70, 71, 72, 105
 - internships 91–3, 94–7, 98, 99, 100, 103, 104, 105, 106, 107, 255
 - Italy 59, 65, 66, 68, 70, 71, 72, 73, 74
 - jobs 65, 66, 69, 72, 74, 97, 104, 106, 108
 - labour market 41, 62, 64, 65, 66, 68, 75, 81, 88, 91, 97, 186
 - outcomes 41, 57, 58–61, 65, 68, 72, 75, 106
 - paid internships 106, 107, 182, 186, 261
 - pay 31, 72, 84, 87, 105, 107
 - postgraduate 17, 41, 42, 44, 92, 97
 - social segregation 44, 86, 266–7, 347
 - South Africa 131
 - tertiary 36, 43
 - transitions 36, 37, 41, 56, 130, 133, 139–44, 239
 - UK 32, 36, 44, 66, 71, 72, 73, 74, 86, 91–7
 - undertaking an internship 27, 32, 37, 73
 - unemployment 131, 132, 133, 136
 - unpaid internships 44, 78, 79, 84, 87, 95, 96, 97, 99, 100, 102, 102, 103, 104, 105, 106, 182, 186, 261, 266
 - USA 139
 - vocational 43

- work-integrated learning (WIL) 76, 225
- health and safety 12, 246–9, 268, 298, 301
 - laws 212, 246, 248
 - occupational 122, 215, 217, 240, 246, 249
 - Occupational Health and Safety Act (South Africa) 247
 - protections 109, 298, 301
 - regulations 67, 94
 - requirements 89
 - risks 216
 - workplace 12, 248, 298, 339
- higher education
 - internships as part of 8, 11, 36, 37, 39, 41, 44, 55–75, 93, 118
 - Italy 61, 62, 67
 - South Africa 141, 144
 - UK 56, 61, 63, 67, 91, 93, 235, 236, 347
 - WIL (work-integrated learning) 5, 78, 86, 89, 226–33, 237, 238
 - work experience 36, 37, 41, 42, 55, 62, 77, 85, 96, 103, 169, 170, 202, 213, 215, 216, 226, 311, 312, 340
- Higher Education and Research Act 2017 (UK) 235
- Higher Education Support Act 2003 (Australia) 226, 229, 232
- higher-income countries 3, 17, 46
- ILO (International Labour Organization)
 - 3, 8, 10, 337, 341
 - Centenary Declaration for the Future of Work 189, 191
 - collective rights 295, 296
 - Declaration on Fundamental Principles and Rights at Work 332, 338
 - Declaration on Social Justice for a Fair Globalization 332
 - A Framework for Quality Apprenticeships* 21, 332, 339
 - Global Commission on the Future of Work 10, 139, 189, 190
 - internships 19, 20, 33, 337
 - regulation 325, 331–3, 337, 339
 - social protection 280, 332
 - South Africa 138
 - Spain 325
 - ‘The Youth Employment Crisis’ 13
 - unemployment 138
 - youth 15, 337
 - immigrants 10, 134, 147, 148, 152, 158, 159, 160, 162
 - impact evaluation 41, 43, 44, 61, 81, 82, 110, 226
 - inequality 9, 10, 60, 75, 80, 138, 141, 142, 144, 148, 161, 323, 324, 347
 - informal apprenticeship 20, 21
 - in-house training 5, 184, 219
 - intern 3, 5, 19, 25, 47, 49, 87, 119, 121, 132, 134–6, 164, 175, 177, 178, 249, 259, 346
 - advocacy 88
 - ALMP 11, 239, 240, 241, 242, 246, 247, 248, 249, 252, 253, 345
 - duties 122
 - employability 81
 - Germany 115, 116
 - labour law 192, 193, 245, 342
 - paid 23, 49, 51, 257
 - pay 8, 52, 67, 122, 123, 129, 245, 345
 - primary beneficiary 200
 - protection 7, 10, 12, 94, 122, 187
 - regulation 212, 234, 335, 341
 - unpaid 7, 95, 145, 165, 174, 182–3, 184–7, 264
 - vulnerabilities 6, 95, 143, 257
- Intern Nation* 2, 6, 163
- International Classification of Status at Work (ICSaW-18) 29
- International Classification of Status in Employment (ICSE 18) 28, 29
- International Labour Conference 13, 19, 32, 339
- International Labour Organization, *see* ILO
- international labour standards 8, 13, 338
- international students 209, 210, 211, 213, 227
- internships
 - advantage 76, 79, 87, 144

- ALMP 25, 40, 43, 239, 240, 241, 244, 245, 246, 248–54, 336, 345
- as a bridge between education and employment 17, 18, 31, 103–7, 336
- as part of higher education 8, 11, 17, 36, 37, 39, 41, 44, 55–75, 93, 118
- brokers 5, 15, 25, 213, 214, 217, 218, 219, 220, 221, 316, 335
- causality 41, 45, 52, 53, 84
- conditions 7
- Covid-19 14, 15
- creative jobs 9, 79, 86, 92, 101, 102, 104, 105, 108, 137
- definitions 3, 8, 17, 19–23, 111
- duration 21, 49, 50, 51, 53, 88, 345
- during higher education 8, 11, 36, 37, 39, 41, 44, 55–75, 93, 118
- educational 11, 24, 38–40, 41, 208–22, 223, 224, 336, 342
- formal 8, 21, 31, 49, 53, 336
- formal agreement 7
- future of 13–16
- gender 52, 72, 74, 75, 185
- Germany 115, 118
- graduate 91–3, 94–7, 98, 99, 100, 103, 104, 105, 106, 107, 255
- growth 2, 5–8
- impact 30, 33, 36, 38, 39, 40, 41, 44, 46, 47, 52, 53, 59, 61, 81, 165
- importance of 13, 19, 54, 56, 319
- Italy 39, 56, 57, 66–8, 69, 70, 71, 72, 73, 74, 93
- low paid 5, 6, 8, 32, 186, 336, 342
- mandatory 37, 44, 60, 66, 69, 118
- open market 8, 9, 17, 24, 27, 31, 35, 36, 44–6, 52, 56, 69, 77, 81–3, 88, 89, 92–7, 98, 103, 107, 108, 111, 234, 249, 256, 262, 336, 341, 347
- outcomes 36, 42, 46, 49, 50
- paid 23, 29, 31, 35, 42, 43, 45, 46, 47, 50, 53, 83, 101, 103, 104, 106, 107, 181–2, 261
- PaTH 249
- postgraduate 40, 41, 44, 45
- post-internship 8, 9, 36, 42, 44, 46, 49, 50, 52, 53, 260
- potential problems 31–3
- prevalence of 17, 26–8, 56, 79, 92, 108
- purposes of 17, 137, 208
- regulation 2, 6, 9–11, 13, 16, 23, 24, 28, 45, 54, 57, 66–8, 72–5, 88, 110, 130–44, 223–4, 233, 305, 337, 339, 341, 344–8
- remote 14, 16
- rise of 5
- risks 8, 9, 10, 19, 32, 82, 156, 161, 177, 186, 210, 216, 219, 221, 304
- role 8, 9, 55, 74, 75, 85, 86, 97
- schemes 4, 96, 258, 261, 262
- segmented approach 9
- sham internships 9, 30, 121, 126, 205
- social-class effect 87, 90
- structured 8, 36, 49, 51, 53, 54, 181, 213
- Sweden 149–51
- transnational 25–6
- types 23–6
- UK 9, 20, 27, 31, 40, 56, 57, 59, 64, 66–8, 69, 70–72, 73, 74, 84, 85, 91, 93, 94–7, 255, 259, 343
- unpaid 5, 8, 9, 23, 30–32, 35, 38, 40, 42–6, 53, 83–6, 88, 91–111, 137, 145, 149, 164, 165, 177–80, 181–7, 191–3, 255, 261, 266–8, 304, 344, 347
- USA 6, 10, 17, 20, 35, 37, 43, 46, 79, 93, 137, 179
- use and content 7
- value 2, 4, 5
- voluntary 37, 60, 91, 119
- weekly hours worked 47, 48
- Italy 8, 42
 - graduate labour market 62, 64, 65, 66, 75
 - higher education 61–3
 - internships 39, 56, 57, 66–8, 69, 70, 71, 72, 73, 74, 93
 - labour market outcomes 56, 57, 58, 59, 64–6, 75, 83
- job search 37, 38, 39, 41, 43, 44, 182, 250

- job seekers 4, 5, 7, 13, 17, 58, 59, 242, 347
- judges 195, 196, 204, 265
- labour costs 5
- labour law 2, 6, 7, 9, 10, 13, 127, 129, 146, 189–206, 212, 282, 285–301
 - Australia 191–6, 222, 242
 - contracts 115, 119, 196, 198, 270
 - enforcement 242–4
 - internships 120–21, 122
 - protection 151, 155, 189, 193, 200, 280, 286, 287, 289
 - provisions 277, 279, 287, 301
 - scope 10, 12, 151, 155, 189, 190, 193, 205, 220, 240, 241, 246, 251, 267, 285, 286, 291, 293, 294, 300, 302
 - soft law 244–5
 - Sweden 10, 145, 151, 154, 155, 160
 - UK 197–9, 306
- labour market 4, 15, 17, 28, 47, 56, 80, 97, 106, 110, 140, 145, 146–51, 159, 161, 186, 250, 335
- active labour market programmes, *see* ALMP
- advantage 9, 76, 78, 84, 304
- choices 41
- demands 31, 80
- education–labour market link 64
- entry 13, 25, 37, 41, 54, 58, 61, 62, 96, 103, 108, 110, 125, 142, 246, 258, 321, 322
- experience 8, 35, 36, 68, 87, 110
- foreign 210
- global 214
- graduate 41, 57, 61, 62, 64, 65, 66, 68, 75, 81, 88, 91, 97, 186
- inclusion 10, 147, 152, 156, 160, 162
- inequalities 75, 185, 323, 324, 347
- opportunities 87
- orientation 41
- outcomes 8, 9, 31, 35–7, 39, 41, 42, 51, 52, 53, 55–60, 61, 64–70, 72, 74, 75, 83, 96, 108
- performance 44
- policy 16, 149, 150, 161, 329
- regulation 67, 138, 329, 331
- segmentation 148, 329, 331, 342
- Sweden 146–9, 150, 153, 156, 157
- transitions 137, 149, 252, 257, 258, 321
- labour migration 26
- labour regulation 6, 108, 120, 129, 200, 211–13, 267, 322, 329, 330, 347
- labour standards 8, 13, 25, 32, 89, 164, 176, 187, 199, 206, 240–46, 337–41, 346
- learnership 22
- long term unemployed 4, 10, 150, 158, 159, 160, 161, 258, 326
- migration 219, 220
 - agent 26, 217
 - labour 26
 - law 11, 219–20, 221, 222
 - regulations 221
- Minimum Wage Act 2014 (Germany) 116, 276
- myths 86, 257–61, 262
- National Association of Colleges and Employers (US) 14, 42, 181, 261
- national minimum wage (UK), *see* NMW
- National Work Integrated Learning Strategy (Australia) 85
- nature and prevalence of internships 17–33
- NMW (national minimum wage) (UK) 27, 67, 94, 95, 96, 97, 99, 109, 110, 305, 320
- non-standard employment 6, 35
- non-state regulators 13, 337, 343–4
- not-for-profit 17, 22, 245, 251
- occupational safety and health, *see* health and safety
- on-the-job 247, 260
 - instruction 3
 - learning 30, 339
 - training 19, 29, 55, 169, 171, 172, 180, 243, 245, 257
 - work experience 85, 183
- open-market internships 8, 9, 17, 24, 27, 31, 35, 36, 44–6, 52, 56, 69, 77, 81–3, 88, 89, 92–7, 98, 103, 107, 108, 111, 234, 249, 256, 262, 336, 341, 347

- open-market traineeships 25, 249, 274, 286, 340
- permanency of employment 44
- political party 22, 103
- positive outcomes 38, 53, 74, 75, 81
- poverty 9, 10, 130, 131, 141, 143, 144, 328
- The Precariat* 6
- precarious work 13, 23, 98, 107, 193, 270, 322–8, 330, 331, 333, 344
- pre-employment screening 5
- primary beneficiary test 164, 172–9, 187, 200, 204, 262–3
- PRWORA (Personal Responsibility and Work Opportunity Reconciliation Act) (US) 243
- QFT (Quality Framework for Traineeships) (EU) 7, 13, 18, 24, 25, 223, 281, 282, 285–6, 340, 342
- quality apprenticeships 33, 322
- Quality Assurance Agency for Higher Education (UK) 67
- Quality Code for Higher Education 236 (UK)
- Quality Framework for Traineeships) (EU), *see* QFT
- Race Relations Act 1976 (UK) 199
- reality shock 139
- reasonable adjustments 303, 314, 315, 318, 320
- regulation
 - ALMP 240, 244
 - Australia 223, 228–33
 - educational 11, 223, 224, 226, 229, 230, 231, 233, 237, 238
 - employment service provider 313, 314, 315
 - government 157, 190
 - ILO 331
 - internship 9, 10, 11, 13, 28, 57, 66–8, 72–5, 88, 110, 130–44, 223–4, 233, 305, 337, 339, 341, 344–8
 - labour 6, 108, 120, 129, 200, 211–13, 267, 322, 329, 330, 347
 - legal 286, 305, 306
 - national 190, 337
 - need for 335–7
 - non-state 13, 337, 343–4
 - regulatory actors 191, 232, 237, 343–4
 - regulatory approach 9, 167, 224, 233, 245–6
 - regulatory compliance 228, 231, 232, 233, 237, 238
 - regulatory framework 75, 108, 229, 230, 232, 235, 236, 237, 238
 - regulatory regime 9, 24, 206, 224, 225, 226, 230, 236, 237, 238, 347
 - South Africa 9, 11, 130–44, 240, 244, 247, 252
 - state 9, 13, 88, 240, 341–3
 - UK 64, 66–8, 94, 97, 108
 - WIL 223, 224, 225, 226–33, 233–7, 238
 - work experience 191, 209, 212, 235, 302, 314, 341
 - workplace 238
- religious institution 22
- school-to-work transition 35, 285
- scope of labour law 10, 12, 151, 155, 189–90, 193, 205, 220, 240–41, 246, 251, 267, 285–6, 291, 293–4, 300, 302
- segmentation 12, 148, 269, 280, 282–3, 329, 331
- SETA (Sector Education and Training Authorities) (South Africa) 136
- sham internships 9, 30, 121, 126, 205
- skills development 5, 133, 136, 140, 336
- social insurance 269, 270–73, 274, 277, 279, 280
- social mobility 8, 32, 60, 91, 161, 185, 255, 259, 261, 267, 304, 319, 320
- Social Mobility and Child Poverty Commission (UK) 85
- social partner involvement 10, 19, 145, 146, 147, 150, 151, 152, 153, 155–60, 161, 162, 189, 344
- social security for trainees 12

- France 274–6, 282
- Germany 276–80, 280, 282
- segmentation 282–3
- Spain 270–73, 282
- standards 280–82
- socio-economic status 32, 304
- soft law 7, 94, 108, 239, 241, 244–5, 249, 252, 281, 329, 341
- South Africa
 - Basic Conditions of Employment Act 1997 136, 244
 - employment law on internships 133–6
 - learnerships 22
 - regulation 9, 11, 130–44, 240, 244, 247, 252
 - SETA (Sector Education and Training Authorities) 136
 - soft law 244–5
 - South African Board for People Practices 134
 - unemployment 138
 - Youth Employment Service 134
- Spain 13, 39, 42, 83, 326, 327, 328
 - age discrimination 323, 325, 326, 329, 330
 - precarious employment 326, 327, 328, 329–31
 - regulation 322, 325, 329, 330
 - social security for trainees 270–73, 282
- state regulation 9, 13, 88, 240, 341–3
- statutory minimum wage 126–7, 129, 153, 166, 175, 270
- study abroad 210, 214, 220
- Sweden 10, 145–62, 327, 344
 - collective bargaining 151, 152, 153, 154, 155–60, 344
 - immigrants 147
 - internships and apprenticeships 149–51
 - labour law 10, 145, 151, 154, 155, 160
 - labour market 146–9, 150, 153, 156, 157
 - social partner involvement 155–60
 - vocational training 147, 149, 158
 - young people 148–9, 156, 157, 158
- Swedish Public Employment Service 149, 150, 158, 160
- Swedish Trade Union Federation 156
- systemic discrimination 12, 269, 283, 321–33
- temporary 160, 244, 274, 300, 301, 303, 328
 - extra jobs 242, 246, 250, 251
 - internship 115, 125
 - labour migration 26
 - workers 260, 326, 328
- tertiary education 11, 36, 196, 237, 238
- Tertiary Education Quality and Standards Agency (TEQSA) (Australia) 226, 227, 228, 229, 232, 233, 238
- Tertiary Education Quality and Standards Agency Act 2011 (Australia) 226
- trainee 3, 21, 122, 127, 135, 173, 248, 256, 263, 265, 275, 276, 279, 280, 291, 293, 325, 339, 340
 - contract 121, 195
 - inclusion 278
 - nurses 194, 196
 - protection 199, 282
 - rate 109
 - rights 12
 - Royal Decree 1326/2003 on the Statute of the Research Trainee (Spain) 271, 272
 - teachers 196
 - unpaid 29, 277, 307, 318
 - voluntary 277
- traineeships 3, 7, 12, 20, 21, 26, 28, 31, 93, 129, 138, 145, 272, 282, 321, 335, 341
 - agreement 33, 66, 129, 291, 339
 - ALMP 25, 249, 276, 286, 340
 - Australia 21–2, 190
 - compulsory 276, 277, 278, 279, 280, 282
 - contracts 270, 282, 322, 329
 - discrimination 321
 - Eurobarometer survey 47–52, 285
 - formal 273, 291, 324
 - Germany 113, 114, 117, 118, 124, 126, 127, 282
 - labour law 9, 277, 286, 291–4, 300
 - open market 25, 249, 274, 286, 340
 - paid 15, 27, 271, 272, 279, 281
 - post-traineeship 322
 - purpose of 24

- quality 18, 24, 25, 83, 223, 249, 285, 286
- Quality Framework for Traineeships 7, 13, 18, 24, 25, 223, 281, 282, 285–6, 340, 342
- regulation 10, 24, 191, 208, 271, 274, 275, 280, 281, 322, 325, 337, 339, 340, 342
- social security 269, 276
- Spain 270–73, 329–331
- systemic discrimination 321–33
- UK 190
- unpaid 13, 18, 27, 30, 79, 191, 225, 271, 272, 278, 306, 322
- voluntary 276, 277, 278, 279, 280
- wage 126, 127, 279
- training and skill development 11, 31, 253, 336
- UK 57, 88, 92, 107, 193, 199, 200, 260, 262, 264, 305, 314
- apprenticeships 198, 267
- education–work boundary 197–9
- employers 36
- equality law 12, 302, 305, 306, 309, 313
- graduate labour market 91, 97
- graduates 27, 31, 38, 39, 44, 56, 59, 63, 68, 69, 84, 86
- higher education 61, 63, 63, 68, 72, 98, 236
- internships 9, 20, 27, 31, 40, 56, 57, 59, 64, 66–8, 69, 70–72, 73, 74, 84, 85, 91, 93, 94–7, 255, 259, 343
- jobs 38
- labour law 197–9, 306
- labour market 8, 58–61, 64–6, 67, 91, 97
- labour market outcomes 9, 39, 57, 59, 64, 72, 74, 75
- law 10, 93, 94, 110, 193, 198, 262, 302, 304, 306
- regulation 64, 66–8, 94, 97, 108
- social mobility 85, 255
- soft law 108
- traineeships 190
- wages 72, 74, 84, 89, 262
- work experience 36, 62, 307, 311, 319, 320
- workfare 11, 256, 260
- unemployment 9, 10, 18, 84, 144, 149, 157, 159, 285, 291, 326, 328, 335
- adult 65
- benefits 27, 149, 272, 275, 281
- graduate 131, 132, 133, 136
- insurance 278
- long-term 4, 10, 150, 158, 159, 160, 161, 258, 326
- protection 12, 270, 272, 273, 282
- rate 64, 65, 130, 131, 134, 138, 140, 142, 146, 147, 148, 270, 273
- social security 271
- youth 13, 65, 134, 140, 145, 148, 156, 157, 158, 256, 273, 325, 326, 327
- unpaid
 - internships 5, 8, 9, 23, 30–32, 35, 38, 40, 42–6, 53, 83–6, 88, 91–111, 137, 145, 149, 164, 165, 177–80, 181–7, 191–3, 255, 261, 266–8, 304, 344, 347
 - traineeships 13, 18, 27, 30, 79, 191, 225, 271, 272, 278, 306, 322
 - work 5, 9, 22, 29, 30, 71, 77, 83, 87, 88, 97, 98, 102, 106, 193, 210, 211, 221, 259, 308, 313, 319, 325
 - work experience 27, 32, 44, 76, 77–81, 84–5, 87, 88, 190, 192, 193, 200, 201, 213, 302–8, 310–15, 317, 319
- USA 10, 11, 38, 200, 204, 264, 347
- discrimination 184–5, 323, 324
- FLSA (Fair Labor Standards Act) 1938 7, 163–87, 244, 262, 342
- graduate transition 139
- interns 14, 28, 35, 89, 163, 262, 303
- internships 6, 10, 17, 20, 35, 37, 43, 46, 79, 93, 137, 179
- social mobility 185
- Supreme Court 167–8, 169–71, 262
- workfare 256, 260
- vocational qualification 20
- vocational training 61, 78, 116, 117, 119, 127, 128, 136, 170, 177, 239, 246, 308, 310, 312, 337

- applicability of rules 119
- basic 114, 115
- contract 114, 115, 277
- equality law 313, 318
- Germany 114–15, 276, 277, 278, 279, 280
- regulation 118, 129
- relationships 114–15, 116, 118, 120, 128, 129
- Sweden 147, 149, 158
- volunteering 9, 22, 95, 100, 110, 111, 145, 220, 306, 308–10, 315, 316, 317, 343
- wages 7, 10, 37, 46, 69, 80, 108, 151, 161, 165, 169, 195, 257
 - collective bargaining 151–3, 157, 159, 162
 - higher 37, 38–40, 58, 60
 - impact of internship on 37, 41, 58, 60, 72, 73, 74, 83
 - lower 159, 160, 270
 - minimum 32, 89, 157, 201, 205, 212, 253, 343, 345
 - national minimum wage 27, 67, 94, 95, 96, 97, 99, 109, 110, 165, 305, 320
 - post-graduation 42
 - statutory minimum wage 126–7, 129, 153, 166, 175, 270
 - wages–work bargain 193
- Walling v Portland Terminal Co* 1947
 - 167–8, 170, 171, 172, 173, 174, 175, 177, 178, 187, 262
- web of interests 6
- WIL (work-integrated learning) 5, 77, 78, 82, 85, 211, 224–8, 233–7, 238, 306
 - Australia 85, 223, 224, 226–33, 237
 - England 224, 235–6, 237, 238
 - equity of access 85, 86
 - experiences 224, 227, 229, 231
 - France 224, 233–5, 237, 238
 - higher education 78, 86, 89, 226–33, 237, 238
 - quality 226, 227, 229, 237, 238
 - Quality Code (UK) 236
 - regulation 223, 224, 225, 226–33, 233–7, 238
 - risks 225, 237
 - unpaid 86
 - work experience 4, 19, 21, 23, 24, 31, 39, 47, 67, 73, 75, 132, 137, 138, 140, 201, 204, 225, 253
 - access 85–7, 88, 89, 97, 304, 312
 - ALMP 199, 250
 - Australia 27, 32, 209, 210, 213, 308, 313, 316, 320
 - contract 192, 193, 199, 200
 - during education 36, 37, 41, 42, 55, 62, 77, 169, 170, 202, 213, 215, 216, 226, 311, 312, 340
 - employability 80–84, 142, 311, 326, 339
 - equality law 302, 303–6, 313, 315, 316, 317, 318
 - gender pay gap 305
 - labour law 190, 192, 193, 205, 206, 212, 341
 - overseas 26, 210, 211, 213, 214, 215, 216
 - paid 15, 106
 - pathway to employment 76
 - perception 31, 203
 - policy 87–90
 - postgraduate 41
 - quality 7, 281, 340
 - regulation 191, 209, 212, 235, 302, 314, 341
 - socio-economic status 32, 348
 - UK 32, 57, 66, 313, 314
 - unpaid 27, 32, 44, 76, 77–81, 84–5, 87, 88, 190, 192, 193, 200, 201, 213, 302–8, 310–15, 317, 319
 - USA 243
 - youth 302–20
- Work Experience Program (US) 243, 244, 247, 248, 251
- work placement 4, 9, 20, 66, 67, 69, 70, 71, 72, 73, 78, 79, 82, 92, 93, 96, 103, 104, 105, 106, 108, 110, 347
- ‘work ready’ 5
- work-based learning 5, 8, 15, 20, 25, 51, 53, 67, 236, 348
- work-integrated learning, *see* WIL
- worker, concept of 292, 293, 294, 295, 299, 301, 325, 331–33, 341

- workfare 11, 239, 248, 250, 251, 255–68
- work-related
 - activities 70, 71
 - competencies 53
 - diseases 271, 274
 - injuries 246–9
 - risks 270
 - skills 4, 36
- young workers 14, 19, 152, 156, 157, 158, 159, 162, 319, 321–33
 - commoditization of 329–31
 - informal employment/precarious work 322–9
 - systemic discrimination 322–9, 331–3
 - youth employment 13, 14, 19, 32, 43, 53, 75, 77, 87
 - Youth Guarantee (EU) 12, 43, 276, 280, 330
 - youth unemployment 13, 65, 134, 140, 145, 148, 156, 157, 158, 256, 273, 325, 326, 327
 - youth work experience 302–20