Interpreting Employment Contracts: Judges, Employers, Workers

ESRC Centre for Business Research, University of Cambridge
Working Paper No. 267

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June 2003

This Working Paper forms part of the CBR Research Programme
on Corporate Governance: www.cbr.cam.ac.uk/research/programme2

Abstract
This paper reports findings from a survey designed to estimate the numbers excluded from employment protection in the UK by the 'employee' test and to examine, through qualitative research, perceptions of the process of employment contracting. The survey evidence shows that approaching one third of the labour force does not fit neatly into the categories of 'employee' and 'self-employed'. The case studies suggest that there is a considerable disjuncture between the assumptions of choice, control and risk that underlie the legal tests, and the perception of these issues by workers whose employment status is most in doubt.

Key words: contract of employment, employee, self-employed, employment protection

JEL codes: J23, K31

Acknowledgements
A version of this paper was presented to a symposium on *Commercial Law and Commercial Practice* at the LSE on 30 November 2002. I am grateful for the comments received from participants in the symposium, in particular Sue Ashtiany.

1. Introduction

The aim of this paper is to compare prevailing judicial interpretations of employment contracts with those of employers and workers. It focuses on a central issue in contemporary employment law, namely the construction of contractual documents and working arrangements for the purposes of determining whether an individual worker is an employee or self-employed. Juridical analysis turns, formally, on the test of 'mutuality of obligation': do the parties to the contract make mutual commitments to make work available (on the part of the employer) and to be available for work (on the part of the employee)? On the face of it, this is an approach to construction which is based on principles of general contract law and, as such, relatively uncontroversial. However, we do not have to dig far below the surface of the mutuality test to see that the test is founded on assumptions about choice, control and risk: *choice*, because the content of the legal relationship is assumed to have been determined by the free will of the individuals concerned; *control*, because the courts continue to understand the essence of the personal employment relationship in terms of the employer's power to direct the employee; and *risk*, because the parties' choice of employment arrangement is seen to embody a particular combination of protections and liabilities. These assumptions are deeply rooted in juridical discourse and can be traced back to earlier tests used by the courts to define employment status.

Recent empirical research in which the author was involved provides an opportunity to compare the prevailing juridical view of employment with the perceptions of employers and workers. Research was carried out for the Department of Trade and Industry in 1998-99 on how far the current tests of employment status were creating uncertainty in practice.[1] This took the form of a large-scale survey designed to estimate the numbers potentially excluded from certain forms of employment protection, and case studies of the current practice of employment contracting. The evidence collected included standard-form employment agreements and accounts by workers of their experience of casual and flexible forms of work. Two conclusions stand out from this research. Firstly, on the basis of survey evidence, there is a large proportion of the labour force that does not fit neatly into the two categories of 'employed' and 'self-employed' which the law uses to classify work relationships. Secondly, the case studies suggest that there is a considerable disjuncture between the assumptions of choice, control and risk which underlie the legal tests, and the perception of these issues by workers whose employment status is most in doubt.

The paper is developed as follows. Section 2 below discusses the legal tests used to determine employment status and the role within them of contractual interpretation. Section 3 outlines the relevant empirical evidence. Section 4 argues, on the basis of the previous two sections, that the law is currently operating dysfunctionally, and considers two possible reforms aimed at enhancing its effectiveness: the use of a different definitional test, based on the 'worker' notion, and the application to standard-form employment contracts of the techniques of legal regulation adopted in consumer contracts. It concludes that while each of these may prove useful in practice there is a danger that, notwithstanding statutory reform, the assumptions underlying the courts' current approach to interpretation are likely to reappear in a new guise.

2. The role of contractual interpretation in determining employment status and statutory employment rights

2.1 The mutuality test

Currently, most rights under the main labour law statutes - the Employment Rights Act 1996 (ERA) and the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) apply only to employees. For this purpose, an employee means 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment' (ERA 1996, s. 230(1), and a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.[2] The substantive meaning of the contract of employment is not made clear by statute; it has been left up to the courts to decide this question, applying common law tests. The four tests that have become best known are 'control', 'integration', 'business reality', and 'mutuality of obligation'.[3] Behind each of these tests lies a set of 'factors', such as the method of payment chosen by the parties, the length and stability of the employment relationship, and the degree of coverage of disciplinary and grievance procedures (see Table 1). The weight that courts attach to any particular factor appears to be a matter of discretion, in part because lower courts are only subject to review if they commit errors of law in their identification of the relevant tests or in their application.[4]

Although the other three tests are still referred to and are by no means irrelevant, the major focus in applying the common law criteria of employee status since the late 1970s has been on the 'mutuality of obligation' test. Where the existence of mutual obligations to provide work (in the case of the employer) and to accept any work which is offered (in the case of the worker) is in doubt, the relationship may be classified as one of self-employment, or

otherwise outside the scope of the 'employee' concept. These exclusionary aspects of the mutuality test adversely affect homeworkers,[5] agency workers,[6] 'zero-hours' contract workers[7] and workers in casualised trades or occupations.[8]

Table 1. *The relationship between factors and tests for classifying employment relationships*

Control	duty to obey orders discretion on hours of work supervision of mode of working
Integration	disciplinary/grievance procedure inclusion in occupational benefit schemes
Economic reality	method of payment freedom to hire others providing own equipment investing in own business method of payment of tax and NI coverage of sick pay, holiday pay
Mutuality of obligation	duration of employment regularity of employment right to refuse work custom in the trade

(Source: Burchell, Deakin and Honey, 1999)

Moreover, because of the way the rules of continuity of employment operate,[9] it is often necessary for an individual to establish not simply that they were employed under a contract of employment at some point, but that the contract remained in force for a sufficient period of time for them to acquire the necessary statutory continuity. Although the continuity rules are more straightforward to apply than used to be the case, following the abolition of the 8-hour and 16-hours thresholds in the mid-1990s,[10] establishing that a contract of employment during periods in between separate jobs remains problematic. Statute itself only allows for a few exceptional periods of non-employment to be counted towards continuity; otherwise, a contract must be implied.

For 'zero hours contract' workers and others whose working patterns are irregular or interrupted, this is a major problem. Hence in *Carmichael v. National Power plc*,[11] the issue was whether the applicants, who worked periodically as tour guides at a power station, had contracts of employment

between ad hoc hirings; the House of Lords, restoring the ruling of the employment tribunal, ruled that they did not. This meant that they could not claim the right to receive a written statement of particulars of employment from their employer, for which one month of continuous employment is required.

It is not a straightforward matter in general to determine how far the parties to an employment relationship are free to determine the status of the supplier of labour. On the one hand, the courts have said many times that they will disregard a 'label' attached to the relationship by the parties. Hence, if other considerations (of the kind considered above) clearly point towards employee status, an agreement between the parties to the effect that the individual is self-employed will have no legal effect. The 're-labelling clause' will only carry much weight if other factors do not clearly point in one direction or another.[12]

Legislation governing waivers is also relevant here. Any agreement by the individual to waive his or her protective rights under ERA 1996 or TULRCA 1992 is void.[13] On the other hand, there is an unfortunate element of circularity about arguments from the prohibition on waivers - the anti-waiver law is only effective if the individual comes under the protection of the statute, but that is the very issue at stake when the court or tribunal is deciding issues of employment status.[14]

A more intractable problem is that, for all their talk of disregarding 'labels', the courts have also reiterated that there is nothing to prevent the parties *voluntarily* accepting an arrangement which, *objectively speaking*, is one of self-employment: '[a] man [sic] is without question free under the law to contract to carry out certain work for another without entering into a contract of service. Public policy has nothing to say either way.'[15] In principle, the form in which labour is contracted is a matter for the parties themselves and not for the law to decide. In practice what this means is that the issue will be settled according to the approach taken by a particular court or tribunal towards construction of the contractual arrangements in question, without regard to considerations of public policy concerning the desirability of ensuring a clear and uniform application of protective legislation. Those few cases in which the courts have said that they will take notice of this public policy point all concern to the interpretation of the protective statutes themselves – not the construction of 'private' contractual arrangements.[16]

2.2 Decoding 'mutuality of obligation'

Contractual waivers and exclusions aimed at denying employee status or, in situations where this status is not in doubt, placing obstacles in the way of

employees achieving the necessary continuity of employment to qualify for protective rights, can only work if the courts take a particular approach towards the interpretation of employment agreements. This is that contracts made between workers and employers are agreements made by the individual parties at arm's length, and which therefore fall to be interpreted according to normal canons of contractual construction. That this is the prevailing approach of the courts is evident from numerous decisions. It does not take very much imagination to see that many of the clauses inserted into standard-form agreements were put there by the employer to deflect employee status. This is the case, for example, with clauses that purport to grant the worker the right to appoint a substitute to take their place if they are unable to work (which we may call a 'substitution clause'). If read literally, this would amount to a denial not just of employee status (since mutuality of obligation would be lacking) but, going further, of the essential element of a personal commitment to provide labour which is also present in the contract for services. Another technique is to assert that the employer is under no obligation to provide work, nor for the employee to accept it (let us call this a 'no mutuality clause'). If, in practice, there is evidence that work is carried out continuously, and that the worker does not regard him- or herself as having discretion to take time off or to appoint a substitute whenever they feel like it, it should be open to a court to treat the clause as nothing more than the boilerplate which it so clearly is.

But in several recent decisions, courts have taken these clauses at face value. The trend began with a 'substitution clause' in *Express and Echo Publications Ltd.* v. *Tanton*[17]and continued with a 'no mutuality clause' in *Stevedoring & Haulage Services Ltd.* v. *Fuller*.[18] There, the employment tribunal had taken the view that it could look to the practice of employment in order to establish what the parties must have intended the terms of the contract to be. On that basis, it implied an agreement between the two parties, which would have satisfied the mutuality test. This approach, while admittedly heterodox from the viewpoint of general contractual construction, has highly respectable antecedents in employment law.[19] Yet the tribunal's decision was reversed, the Employment Appeal Tribunal ruling was that it was not possible to have regard to the practice or conduct of the employment relationship where the wording of the express contract was clear. Behind the mutuality test, then, is the assumption we may refer to as *consent*: the courts take the view that an express agreement, even one which is plainly based on a standard form proffered by the employer, represents a *consensus ad idem* between the two parties.

There other more or less tacit assumptions at work here. In dealing with cases of casual workers, the courts are in effect using the contractual language of reciprocity to revive the old test of *control* in a new form. As we have seen,

unless the worker agrees to be available for work on a continuing basis, and in this extended sense *at the disposal of the employer*, the agreement is said to lack the necessary mutuality of obligation. What counts here is not reciprocity in exchange as such, but a particular form of mutuality under which the worker must cede autonomy to the employer over the timing and physical location of the work in order to count as an employee.

Thus in the employment sphere, 'mutuality of obligation' does not bear its normal meaning in contract law. A contract to work in return for pay will not lack 'mutuality' in the sense of the reciprocal promises needed for consideration as one of the elements in the formation of a contract. However, if the judgments in *O'Kelly* v. *Trusthouse Forte plc*[20] are to be believed, such an arrangement, without more, will not be a contract *of employment*. The mutuality of obligation test only *looks as if* it has a connection to mainstream contract law. In truth, it is a test which emerged in the particular context of employment law, and which functions above all to exclude casual forms of work from the coverage of protective legislation. Although it can be traced back to nineteenth century decisions on the application of master and servant law (itself a further clue as to its true lineage),[21] the test is not mentioned in leading twentieth century decisions up to the late 1970s. Its emergence can be dated to the time[22] that modern employment protection legislation began to occupy a major place in the practice of employee relations, and when the difficulty of fitting employment rights into the framework of casual work was becoming a live issue.

The third set of assumptions embedded in the mutuality test concerns *risk*. The parties to an employment agreement – whether it is a contract of employment or a contract for services – are understood to be opting into a schema of protections and liabilities, with one set traded off against the other. Thus in entering into a contract of employment, the employee trades off 'subordination' or acceptance of the employer's right to give instructions and to organise the carrying out of the work, in return for certain protections: at a basic level, a regular wage which a self-employed person would not expect to receive; at a more extended level, the full set of income and job security rights which go with continuous service under the current provisions of employment protection legislation. By contrast, an independent or autonomous worker employed under a contract for services cannot look to the employer for security of income or employment, but is able to take advantage of a more favourable tax and social security regime (in the sense that income tax is paid net of work-related expenses and National Insurance contributions are paid at a lower rate), as well as the autonomy of being able to decide when, where and how to work.

The risk perspective can be viewed either negatively or positively. In older authorities under the 'control' test, the courts treated the trade-off involved in employment sceptically, regarding the implicit loss of autonomy as inappropriate for workers who exercised discretion over the performance of tasks. Thus in *Simpson* v. *Ebbw Vale Steel, Iron & Coal Co.*, decided in 1905 at the dawn of modern social protection legislation, the Court of Appeal, when deciding that the Workmen's Compensation Act 1897 had no application in the case of a colliery manager who was killed in a mining accident, said of the legislation:

It presupposes a position of dependence; it treats the class of workmen as being in a sense 'inopes consilii', and the Legislature does for them what they cannot do for themselves: it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves. In no sense can such a principle extend to those who are earning good salaries.[23]

Almost a century later, we find the Employment Appeal Tribunal returning to the theme of dependence in *Byrne Bros*. v. *Baird* when attempting to determine the scope of the Working Time Regulations 1998, which impose maximum limits on weekly working hours:

The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.[24]

In *Byrne Bros*., in contrast to its predecessor of 1905, the court of 2002 took a functional view of the legislation that was before it, and gave a broad interpretation to its scope.[25] In that sense, judicial attitudes towards social legislation have clearly changed in the course of the past one hundred years. Yet the two judgments have one crucial factor in common: the idea that it is possible to distinguish clearly between two different groups, on the one hand those subject to a regime of managerial coordination in return for protection from the risks of employment, and on the other those whose autonomy (in either a personal or an economic sense) takes them outside the coverage of social protection. In this respect, the contemporary tests of employment status continue to reflect the notion of a 'binary divide'[26] between employment and

self-employment that is at the foundation of modern legislation on employment protection, social insurance and income taxation.

2.3 Beyond mutuality? The 'worker' concept and the regulation of agency work

Dissatisfaction with the mutuality test has been one of the moving forces behind the recent attempt to extend the scope of employment legislation through the use of the concept of the *worker*. Under the Employment Rights Act 1996, section 230(3), a worker is defined as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) - (a) a contract of employment, or (b) any other contract, whether express or implied and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by the individual'.[27] Similar definitions have been used in the context of recent legislation on the national minimum wage[28] and the organisation of working time.[29]

In *Byrne Bros.* v. *Baird*,[30] the leading case to date on the 'worker' definition, the Employment Appeal Tribunal took a policy-orientated view of the statutory concept, holding that it was intended 'to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business.' At the same time, the Court recognised that the 'wording of limb (b) [that is, the extended 'worker' definition] gives no real help on what are the criteria for carrying on a business undertaking in sense intended by the Regulations - given that they cannot be the same as the criteria for distinguishing employment from self-employment'. The EAT then went on to say this about the distinction between a worker and an independent contractor falling outside the scope of protection altogether:

Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services - but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

This is a frank acknowledgement that the test for determining 'worker' status may well not be fundamentally different from that which is applied to the 'employee' – if there is a difference it is one of degree, not kind. The outcome in this case, in which the court found that the applicants were 'workers' and rejected an argument that a 'substitution clause' in their contracts prevented this outcome, suggests that the introduction of the 'worker' concept may just tip the balance in certain cases. But if the dictum just quoted is any guide, it is highly likely that the same assumptions of choice, control and risk which underlie the court's approach to the 'employee' issue will continue to be relevant in the changed statutory context of the 'worker' test.

Agency workers are also the focus of specific statutory intervention. Under legislation regulating employment agencies and businesses, they are regarded as akin to employees for the purposes of tax and national insurance contributions.[31] However, this legislation does not stipulate what their status should be for other purposes, including employment protection. At common law, it is sometimes said that their contractual position is unique, and falls outside the normal classifications,[32] but this unduly neglects the possibility that they may be employees of either the agency or the user. The normal approach is to regard them as contracted to the agency. However, a number of decisions suggest that unless they are guaranteed continuous work by the agency (which is unlikely), they will lack mutuality of obligation and hence be employed under contracts for services.[33] In relation to the user, the mere presence of control, in the sense of managerial coordination, is not sufficient to give rise to a contract of employment, in the absence of additional evidence of a contractual nexus.[34] However, both the user and the agency may be required to treat agency workers equally with respect to sex, race and disability discrimination.[35] In addition, agency workers have been brought under the scope of minimum wage and working time legislation by imposing the relevant obligation on either the agency or the user, depending firstly on which of the two of them is contracted to pay them and, failing that, on which one actually does pay them.[36]

The problem posed by agency work is that the idea of the trade-off of 'subordination' for 'security' is undermined by the form of the contractual relationship: the 'coordination' function vests in the user while a residual 'risk' function is left with the agency. The resulting problems of attribution of responsibility can be overcome only by legislative intervention, but this is complex in its effects, and cannot necessarily deal in advance with all the problems that may arise. In truth, the attitude of the UK legislature to agency work is ambiguous. It falls short of installing the kind of protective regime that would ensure, through a combination of independent and concurrent liabilities, that either the user or the agency, or both together, assume the normal

responsibilities of the single employer. It fails to take this step because to do so would no doubt operate as a deterrent to the use of agency work in some cases. However, the question is whether it is *legitimate* to make use of the agency option in cases where the principal reason for doing so is simply the greater opportunity it offers, by comparison with direct employment, to offload risks on to the individual worker, rather than greater flexibility in the organisation of work.

3. Empirical evidence

3.1 The empirical project

We turn now to the findings of the empirical research. The principal objectives of the research carried out for the DTI were to estimate the number of individuals who might be affected by the wider adoption of the concept of 'worker' in employment law and to identify the sources of uncertainty in the application of the current legal tests of employment status. To tackle these research questions required a multi-method approach, involving a large, representative sample of individual respondents and detailed, qualitative studies of employment practice in a small number of cases of flexible or 'non-standard' work.

The first wave of data was collected from a representative sample of 4,006 members of the British workforce who were interviewed in January and February 1998. After an initial screening to exclude those who were unambiguously employees or self-employed, 1,182 were asked a range of questions about the nature of their employment relationships. The aim here was to go beyond the 'self reporting' method that is used to assess the number of employees and self-employed in the quarterly Labour Force Survey (LFS). The LFS relies entirely on respondents' own perceptions of their employment status. In practice, as many of the cases which reach the courts only too clearly indicate, an individual's own understanding of his or her status may diverge significantly from that of a court or tribunal.

In an attempt to get round this problem, the questionnaire was drafted in such a way as to reproduce, through specific questions, the kind of issues which a court or tribunal would take into account. Individual responses were then analysed to see how far respondents could be categorised as *unambiguous* employees or self-employed. Respondents were regarded as 'clearly employees' if they defined themselves as such; were paid a salary or wage; held what they regarded as a permanent job; *and* had no non-standard working patterns (such as fixed-term, casual or part-time work). Conversely, they were 'clearly self-employed'

if they were either a director or partner in their own business, *and/or* employed others. On this basis, 64% of all respondents were classified as clearly employees, and 5% were clearly self-employed. This compares to the 86% of the sample that saw themselves as employees, and 13% who saw themselves as self-employed (a result which corresponds to that of the LFS for the same period). The first result of the empirical research, then, was to show that a large proportion of the national labour force, 30% on this estimate, was employed under terms and conditions which created some degree of uncertainty over their employment status.

The next step was to try to arrive at an estimate of how many individuals could be classified as 'workers' under the extended definition of that concept. For this purpose, the analysis focused on the group of individuals that would remain outside the 'worker' definition, that is to say, the 'independent self-employed'. These were identified as those respondents who had worked for more than one employer in the six months prior to the questionnaire, and who 'passed' the tests of 'economic reality' for autonomous work: in other words, they were able to sub-contract, they were not paid a wage or salary, they paid their own income tax and national insurance contributions, and they were not entitled to receive either sick pay or paid holidays. This group constituted 8% of the total sample, leaving a figure of 92% of the labour force as 'workers'. But, of this 92%, many would be affected by uncertainty as to their status because they, in turn, would only 'fail' perhaps one or two of the economic reality tests. When this factor was taken into account, the proportion of the total labour force that could be classified as *clearly* in the 'worker' category fell to only 80%.[37]

The message coming out of the quantitative phase of the study is therefore the following: whichever concept is used, 'employee' or 'worker', the nature of modern employment relations is such that there will inevitably be a large group of individuals whose employment status is in an unclear 'grey zone' between employment and self-employment. The 'worker' concept, in so far as it can be assumed to map reasonably closely on to the test of 'economic reality', reduces the size of the 'grey zone' but does not eliminate it.

The second wave of data collection involved re-visiting a small proportion of that part of the sample whose employment status was uncertain or ambiguous in order to gather more in-depth information in less structured discussions, and to analyse their written contracts of employment or terms and conditions of employment. These qualitative case studies were based on a combination of focus groups and individual semi-structured interviews, involving altogether 36 respondents. The interviews were carried out in the spring and summer of 1998.

Documentary evidence, including individuals' contracts of employment and written statements of terms and conditions, was also obtained.

A full analysis of all the cases of uncertain employment status in the qualitative wave of the research has been carried out elsewhere.[38] What follows is an analysis of how the issues of *choice*, *control* and *risk* were viewed by those who were interviewed.

3.2 *Choice*: the use of standard form contracts to deflect employee status

The case studies provide abundant examples of employers using standard-term employment agreements as devices to insert terms that have the effect of altering employment status. Thus it was common to find contracts entered into by agency workers with their agency containing both a 're-labelling' clause and a 'no mutuality clause'. In one case, the re-labelling clause stated that,

'for the avoidance of doubt, these terms shall not give rise to a contract of employment... and therefore the [worker] will not have the statutory rights accorded to employees'.

This was unlikely to have negatived employee status since it simply represented the view of one of the parties as to the agreement's legal effect. The 'no mutuality' term stated:

'The [worker] acknowledges that it is the nature of temporary work that there may be periods when no suitable work is available and agrees (a) that suitability shall be determined solely by the [agency and user] and (b) that the [agency and user] shall incur no liability towards the [worker] should they fail to offer opportunities to work...'

This term stands a much greater chance of excluding employee status, so long as the court takes it at face value, and does not permit evidence of any contrary practice of regular work to be set up against it.

In another case, several specimen contracts with agencies were obtained. The specimen contracts all contained clauses that appeared to be aiming at the exclusion of employee status by a variety of means. One was to deny that the arrangement constituted a legally binding contract of employment between the worker and either the agency or the user (instead the arrangement was stated to be a contract for services); another was to stipulate that the worker was not required to accept any assignment, nor was the agency required to find an assignment for the worker (the mutuality of obligation point). Similar

techniques can be seen in the contractual documentation analysed by the Employment Appeal Tribunal in the *Pertemps* case.[39] In that case, the EAT considered that the terms of the formal written contract were an important indicator that the agency worker concerned was not an employee.

The contractual documents of agency workers also indicated that once each assignment was accepted by the worker, the worker came under a number of stated obligations, for example to cooperate with the user's staff and to follow the work rules of the user. There are dicta to suggest that making such obligations explicit could be seen as evidence that the relationship with the agency was *not* based on a contract of employment, for the very reason that such obligations are normally implied into such a contract; if the worker were truly an employee, it may be argued, there would be no need to spell them out.[40] An alternative view is that there is nothing to prevent an employer (or any other party) seeking to make explicit what would otherwise be implicit. On this basis it could be said that spelling out the obligations of obedience and care does not help to settle the issue of status either way.[41] In the present, confused state of the law, however, it is not surprising that employers seek to take advantage of judicial dicta which open the way to a finding that the worker is self-employed.

In another case, the respondent worked as a freelance copy-editor for a publishing house. Under a highly detailed and lengthy contract issued by the publishing house, a clear distinction was drawn between 'freelances' and 'employees': the documentation referred to the importance of this distinction from the point of view of complying with Inland Revenue and Contributions Agency rules on tax and national insurance contributions. The documentation spelt out the *employer's* view that the distinction between freelances and employees was part of what made freelance work attractive to both sides, and specified reasons for the view that the respondent was not employed as its employee: as a freelance she would not normally work on the employer's premises; she controlled when the work was done, within agreed completion dates; the contractual relationship between the employer and the respondent only began when an order was placed and ended when the employer paid for the completed work; the respondent did not have an email, telephone number or desk at the employer's place of work; and she was paid only on presentation of an invoice for work done. The *respondent's* account of her working relationship, given during her interview, suggests that she was uncertain as to its effects. When asked whether the employer had a duty to provide her with work she replied 'absolutely', suggesting that she saw herself as having what a lawyer would refer to as 'mutuality of obligation'. However, on the basis of her agreement, she concluded that she did not have a continuing or 'global' contractual relationship with the employer. She also stated in her initial survey

interview that she could if necessary hire others to work with her, which would count in favour of her being independently self-employed.

Overall, the case studies suggest that employers make frequent use of standard-form contractual documentation that is drafted with the case-law on employee status in mind. These documents are meant to shield employers from legal liability by providing evidence that can rebut a claim of employee status. This type of documentation is also used as a signal to workers that they have self-employed status. The contents of documents may bear little relationship to the *practice* of a particular employment relationship; indeed, they may contradict it. There is very little evidence that either employers or employees see this type of documentation in the way that it is viewed by the courts, namely as embodying a contractual *consensus ad idem*.

3.3 *Control*: perceptions of managerial power

The juridical divide between employment and self-employment is founded on an assumption that employees are subject to a degree of managerial coordination or control that does not apply to independent contractors. However, the case studies suggest that, in practice, perceptions of control and accountability are much more complex than a simple division between employment and self-employment would imply. Self-employed respondents commented that they came under pressure to accept work from particular clients and had to operate to very tight deadlines. Similarly, respondents employed on zero-hours or on-call contracts saw themselves as being required to respond to the employer's demands, even if their contracts suggested that they had the right to turn down work offered to them. A freelance who had no formal commitment to a regular client, and had no formal contractual expectation of receiving continuous work, commented that in practice it was often difficult to refuse work:

'*So what you're basically saying is you are free to decide when you work and for whom or are you free to decide when you work?* Well, I'm free in as much as I'm not free - well, to be honest, no - I'm free to decide when I work, I'm not free to decide who I work for at the moment because I have to take whatever I can get. I always pretty much have had to take whatever I can get. So I'm not free to decide who I work for.'

In turn, very long hours, unsocial hours working and variability of working hours were problems both for employees and for the self-employed. For certain employees, including managerial and professional workers, hours were perceived as being flexible in the employer's favour. A charity manager said

that while her contracted hours were 37 a week, she normally worked 60 or more hours, with adverse consequences for her health:

'Yes, its 37 hours in theory, and flexible. If I do evenings and weekends, in theory I have time off in lieu. One of the reasons I am not well now is that I have been overdoing it over 2 years and I look around the voluntary sector and see a lot of people under stress and getting ill because they are trying so hard to make ends meet and do the job with limited resources and be everything to everybody and fulfil bottomless demands – so you end up doing excess hours.'

Some agency workers considered that their status was a flexible one, which gave them the option of refusing work. However, there were also cases in which respondents employed through agencies worked for long periods alongside permanent staff doing very much the same work. Here, there was no sense in which agency employment gave the worker greater 'control' over his own working arrangements:

'*Do you look upon yourself as being basically your own boss, so that you can decide whether you want to stay with them or not?* No, I wouldn't say my own boss because you know you are working for a firm – if it wasn't them, it would be another agency. *Would you rather have a job with a firm or are you quite happy working for an agency?* I would prefer a permanent job, yes, if [the client] said OK we'll take you on permanently, I would say yes. *What would the advantages be?* There would be a more stable sort of environment and you would also have a pension scheme and … the benefits that go with [being with] a company…'

In short, the predominant view among those interviewed was that under non-standard working arrangements, control over when and how work was done very often vested with the employer or client, regardless of the legal form of the relationship in question.

3.4 *Risk*: the flexibility-security 'trade off' and the experience of non-standard work

As we have seen, the approach of the courts is based on the assumption that individuals trade off security for autonomy and flexibility when opting for non-standard work or self-employment in place of employment as employee. This found an echo in the comments made by some respondents. Some explicitly identified with the idea of a 'trade off' between the stability and security of employee status, on the one hand, and the greater autonomy of self-employment. Freelance workers and the self-employed contrasted the

'control' to which they had had to submit when they were employees, with the greater freedom but also the responsibility which being self-employed entailed:

'The advantages of being employed over self-employed are obvious in that you've got a regular income coming in and the buck doesn't stop with you! Although I've always had fairly senior positions, there was always somebody who I could offload on to, if you like. And so there were advantages in that. I was made redundant once when the company closed down… it was completely out of my hands and I don't like that. I like to be in control, so the advantage of being self-employed there - I was in control. And of course, I've worked for large companies and small companies' (child minder).

'The only good thing about working for an employer is that you don't take any of the strain, you start work at 8.30 and you finish at 5.30 - you don't have to worry about what happens overnight. Here, I sort of think "Oh, you know, who's got the keys to the next venue", because we swap around, and like today, I was worried about [an employee] because she was very quiet this morning and I thought "Oh, I've upset her"' (health promotion worker).

The downside of being self-employed was, according to one respondent, 'being poor' but the advantages included: 'you do the job and as long as you're doing the job, people don't worry about what you're doing at that precise moment they walk past your desk'.

Freelance workers appeared to value the autonomy to arrange a pattern of working which suited their needs:

'I find that I have developed a way of working, over a series of fifty or so contracts, that I feel very happy with. I wasn't given guidance, but I didn't find that a problem.. I could work out the best way to do things and interact with the office...I don't even have to tell them [clients] really**.** I just take the product that they give me, and then return it to them and hopefully that's what is required, and then I'm done' (freelance editor).

'I like the fact that I'm my own boss. To a certain extent, you set your own hours because if people come and they want you to start at 6 in the morning if they're nurses or they do shift work, you can always say no, you don't work those hours. It's nice to be at home in the summer. It's nice to call the tune, basically' (child minder).

At the same time, the case studies suggest that choice is conditioned by factors which include the need to fit in with family arrangements; the cost of retraining

following time spent out of full-time work; the time and complexity of setting up a business; discrimination against older workers; and the unavailability of regular work. The need to fit working hours around childcare requirements was one of the principal factors which motivated those who had taken up childminding:

'I had a good job once! I started doing this when I had my own children, you see, and it's difficult when you've got children. I didn't want to put mine with a childminder, so you incorporate an extra one into the home and when your children are at school, you need a job that will put you here when they're here and in school holidays.'

Age discrimination was also cited as a factor in the context of a return to full-time employment after a break for child-rearing. The difficulty of getting a regular job made agency work attractive for one individual in this position:

'Initially I did hope to get another permanent job, either full-time or part-time, but I knew my age was against me. I really think equal opportunities is a name only .... that's with age, disablement. Yes, they'll call you for an interview because there are equal opportunities. But you know full well that you are not going to get it. So I am quite content with now, the way I am working and making a life for myself and paid of course' (agency worker).

This respondent was in her late 50s and had returned to work after a break of almost 20 years raising her children. She was also registered as disabled.

In addition, many respondents saw non-standard work as inferior to regular working arrangements. Agency workers and fixed-term contract workers, in some cases, took these forms of work because permanent work was not made available to them. One respondent had been dismissed by his employer and re-employed on a self-employed basis. Once this happened he decided to set up his own business but had not previously considered doing so.

Moreover, on the balance of evidence of the interviews there was no straightforward division between the perceptions of employees, who might have been expected to have feelings of security, and those of the self-employed, who might have been expected to accept insecurity in return for the prospect of greater reward. Many employees had concerns about the inherently insecure nature of their jobs, concerns that were largely outside their control. This was particularly the case with fixed-term contract workers. A manager of a charity commented on:

'the anxiety and insecurity of it all and I can keep telling myself, well, in the commercial sector this is the fact of life, if you don't sell what you do, you don't survive… We have to sell what we are doing to fund us and if we don't do that successfully then we don't deserve to carry on'.

A hospital doctor employed on a fixed-term contract as part of his training referred to a growing lack of security of employment:

'medicine's always been looked on as having a lot of job security, but I think as things are changing and the market environment's creeping in then that really is going'.

This respondent had a three-year contract, about which he said:

'It gives you a bit of stability but even three years isn't that long and after that I may not be able to get a job at all. It's not common in medicine but it does happen'.

A further problem associated with employment on a series of fixed-term contracts was lack of clarity of the legal position.[42] A clerical worker in the public sector told us:

'I was a bit concerned but I didn't want to mention it because I didn't know whether at the time my boss knew about the two year rule and I thought well, if he keeps me on longer, I'll keep quiet! But he knew - he obviously knew about it - because I saw a note from him asking the admin person there - when is [X's] second anniversary, you know.'

Agency workers, likewise, had concerns with insecurity and also with difficulties of working alongside permanent staff who were paid more than they were:

'Those sorts of people - the ones that don't like agency workers - have they indicated why they don't like them?' 'I think it was because they felt threatened first of all, because they were actually training us to do what they were doing and human nature being what it is, you're going to think - I'm going to train these, they're paying them less than me, I'm going to be out! I think once they have had redundancies but it was voluntary and the people who wanted to go went. The other people are still there. And I think over the time of being there, their fears gradually eased off.'

For some agency workers, difficult relations with the permanent staff were tempered by the feeling 'if you weren't doing this, you could be on the dole'. Even then, there was the possibility that the employment relationship could be brought to an end at very short notice; the same respondent described how:

'one Monday morning we were working in the city centre and as we went in there were two of our [agency] supervisors there and they had a list and saw who was coming in… They were just literally stopping people at the door, sending them over, and I think in one go they got rid of about 150 people that morning.'

Respondents on both sides of the employee/self-employed divide expressed concerns about health and safety. An agency worker reported difficulty in obtaining compensation after suffering an injury at work for which neither the agency nor the user would take responsibility. A self-employed construction worker commented on the high health and safety risks facing subcontractors on building sites:

'… a lot of companies do this now. They put a scaffold up for brickwork or for people to put the roof on and then you want to go on the scaffolding after to put the window in, as soon as they've finished the roof… because they've put the scaffolding up for the roofers, they've put a sign on it saying "not suitable for anything else". So if you go on after them and you fall off that scaffolding, it clears them of liability for your injuries. Which is common practice now.'

A majority of the respondents also associated the work they were doing with the absence of long-term financial security. Several agency workers, casual and zero-hours contract workers, fixed-term contract workers and self-employed construction workers had no access to an employer's pension scheme and had made no provision for themselves. In turn, the downside of being an employee, however, was not simply a degree of inflexibility over working arrangements, but also, in many cases, the lack of any compensating security:

'As an employee you have set times and you are tied down to that job and in all honesty employers mess you about, because they know that if they were to get rid of you within a matter of days they could get someone else doing the same job. So they don't care for the worker like they should because they know there is someone there to replace them and that is one of the reasons why I set up on my own. I used to always get laid off at Christmas time.' (self-employed construction worker)

In short, the qualitative wave provided rich evidence on individuals' reasons for choosing particular forms of work and their perceptions of flexibility and autonomy, on the one hand, and of insecurity and risk, on the other. Some respondents saw the advantages and disadvantages of particular forms of work in terms of trade-offs between flexibility and security, suggesting that they exercised a degree of choice in weighing up which form of work to adopt. In numerous cases, however, the choice of non-standard work was seen as influenced and constrained by external pressures, the most important of which were family commitments, retraining costs, age and disability discrimination, and the lack of availability of alternative work. In particular, for those with family obligations, it was a matter of necessity to find employment that offered them the opportunity to arrange their work around domestic commitments. Those returning to employment after a period of unemployment or after family commitments chose non-standard work because of the costs of acquiring or re-acquiring skills of the kind needed for a more stable and permanent position. There was a perception that it was easier for older workers to get employment with an agency than with an employer looking for a longer-term commitment.

Although many respondents clearly identified particular advantages and disadvantages with the form of work in which they were engaged, there was a blurring of the division between standard and non-standard work, and between employment and self-employment. Hence self-employment could result in a considerable restriction of personal autonomy in practice and to long and intense working hours, thanks to the need to meet tight deadlines and maintain reputation with clients. Employees in non-standard employment, conversely, commented on growing insecurity and stress caused by uncertainty over their future job prospects.

Both employees and the self-employed reported being affected in different ways by financial insecurity. Agency workers and the self-employed often had no access to pension schemes, and this was also a problem for employees working on fixed-term or task contracts. Many of the social and economic risks for which employment legislation makes provision were perceived as being common to both employment and self-employment; these include low pay, insecurity of work, health and safety risks and absence of long-term financial security.

4. Conclusion: aligning employment law with employment practice

Evidence of individuals' experience of non-standard work suggests that the legal division between employment and self-employment does not correspond to *social perceptions* of a clear divide between these different forms of work. In

the context of these forms of non-standard work, then, the notions of choice, control, and risk that underlie the approach of the courts are significantly out of synch with the way employment relationships are viewed on the ground. This does not mean that the approach of the courts is, in itself, illegitimate. The tests used by the courts are the product of a long process of emergence that is largely internal to legal doctrine.[43] It does however suggest that employment law, at a social and economic level, is currently operating dysfunctionally.

One possible solution, which the legislature has adopted in recent years, is, as we have seen, to alter the basic definitional test for dependent labour, by substituting 'worker' for 'employee'. Whether this will be successful remains to be seen; as yet, there are too few decided cases for the issue to be clear. There is a danger that the same assumptions that shape judicial attitudes to the employment contract will simply re-emerge in a new form. Thus there may be certain types of work relationship that the courts will be reluctant to interpret as giving rise to protected status, whatever word is used to describe that status. If, however, the courts are prepared to use the criterion of 'economic reality' to shape the 'worker' concept, the empirical evidence obtained from the quantitative wave of the DTI study suggests that significantly fewer of those who currently think of themselves as 'employees' would be affected by uncertainty over their legal status. This would mark a significant change.

The main obstacle to aligning the courts' interpretation of employment contracts with those of the parties themselves is the rigid and artificial 'mutuality of obligation' test. Under these circumstances, progress in making employment law less dysfunctional depends upon the courts changing their approach to the construction of contractual documents and working arrangements. A first step (but only the first) would be to cease taking standard-form employment agreements at face value, and to consider applying to them the same kind of sceptical scrutiny that is applied to similar agreements in the consumer sphere. The courts cannot apply directly to employment contracts the provisions of the Unfair Terms in Consumer Contract Regulations 1999, nor does it seem that the Unfair Contract Terms Act 1977 will be of much use in the employment sphere.[44] But it is open to employment tribunals, as a matter of contractual construction, to have regard to the practice of employment as a guide to interpreting the terms of express agreements. It is surprising that they do not take this route more often, given recent dicta in the House of Lords encouraging them to do so.[45]

Certain legislative changes might assist the courts and employment tribunals in arriving at a more effective approach to construction. In the context of the employer-employee relationship, the effect of the written statement law in

section 1 of the Employment Rights Act 1996 is that documentation issued by the employer is not regarded as a definitive account of the contract; it is only the employer's view of the contract terms, and can be contradicted by other potential sources of the contract including collective agreements and custom and practice.[46] Thus section 1 is the functional equivalent, in employment law, of the principle, in consumer law, of judicial control of standard-form agreements. Section 1, however, has no effect if the document in question is interpreted as giving rise to a relationship of self-employment. It makes no sense to allow the courts to intervene once the nature of the employment has been established, but to give the employer a more or less free rein to determine the legal status of the relationship in the first place. Thus there is a clear case for extending the courts' power to review and regulate standard-form employment agreements to include control over documents that purport, directly or indirectly, to determine employee status.

Notes

[1] See Burchell., Deakin and Honey, 1999.

[2] See e.g. Employment Rights Act [ERA] 1996, s. 230(3).

[3] See Deakin and Morris, 2001: 146-168.

[4] See *O'Kelly v. Trusthouse Forte plc* [1983] IRLR 396.

[5] *Airfix Footwear Ltd v. Cope* [1978] ICR 1210**;** *Nethermere (St Neots) Ltd v. Taverna and Gardiner* [1984] IRLR 240.

[6] *Wickens v. Champion Employment Agency* [1984] ICR 365; *Ironmonger v. Movefield Ltd* [1988] IRLR 461; *Pertemps Group plc v. Nixon,* 1 July 1993, unreported, EAT/496/91.

[7] *Clark v. Oxfordshire Health Authority* [1998] IRLR 125.

[8] *O'Kelly v. Trusthouse Forte plc* [1983] IRLR 369; *Carmichael v. National Power plc* [1998] IRLR 301, [2000] IRLR 43.

[9] For the source of the rules governing continuity of employment, see ERA 1996, Part XIV, Ch. 1; and for discussion of the relationship between contract and continuity, Deakin and Morris, 2001: 203-208.

[10] By 1995/1. See generally Deakin and Morris, 2001: 193-198.

[11] [2000] IRLR 46.

[12] See *Cataraman Cruisers Ltd* v. *Williams* [1994] IRLR 386.

[13] See ERA 1996, s. 203; Trade Union and Labour Relations (Consolidation Act [TULRCA] 1992, s. 288.

[14] See Deakin and Morris, 2001: 152-154.

[15] *Calder* v. *H. Kitson Vickers & Sons (Engineers) Ltd*. [1988] ICR 232, 250 (Ralph Gibson LJ).

[16] See *Jones v. Tower Boot* [1997] IRLR 168, 171-172; *Harrods Ltd. v. Remick* [1997] IRLR 583,583; *MHC Consulting Ltd. v. Tansell* [1999] IRLR 677, 679, and on appeal sub. nom. *Abbey Life Assurance Co. v. Tansell* [2000] IRLR 387, 390. Significantly, these were all decisions under the anti-discrimination Acts, where considerations of human rights at work appear to be more in the forefront of the judges' minds than is the case when they are deciding issues of employment protection law.

[17] [1999] IRLR 367; cf. *McFarlane* v. *Glasgow City Council* [2001] IRLR 7 and *Byrne Bros.* v. *Baird* [2002] IRLR 96, discussed further, below, section 2.3.

[18] [2001] IRLR 627.

[19] See in particular the judgments of Browne-Wilkinson J. in *Jones* v. *Associated Tunnelling Ltd.* [1981] IRLR 477 and Lord Hoffmann in *Carmichael* v. *National Power plc* [2000] IRLR 43.

[20] [1983] IRLR 369.

[21] See Deakin, 2001: 20-21, for discussion of this case law.

[22] See in particular *Airfix Footwear Ltd*. v. *Cope* [1978] ICR 1210.

[23] [1905] 1 KB 453, 458 (Collins MR).

[24] [2002] IRLR 96.

[25] The case turned on the meaning of the 'worker' concept: see the discussion in the next subsection of the text.

[26] See Freedland, 1995.

[27] See also TULRCA 1992, s. 296(1).

[28] National Minimum Wage Act 1998, s. 54.

[29] Working Time Regulations 1998, reg. 2.

[30] [2002] IRLR 96.

[31] Employment Agencies Act 1973 and Conduct of Employment Agencies and Employment Businesses Regulations 1976, SI 1976/715.

[32] *Construction Industry Training Board* v. *Labour Force Ltd*. [1970] 3 All ER 220.

[33] *Wickens* v. *Champion Employment Agency Ltd.* [1984] ICR 365; *Ironmonger* v. *Movefield Ltd.* [1988] IRLR 461; *Montgomery* v. *Johnson Underwood* [2001] ICR 819.

[34] *Hewlett Packard Ltd.* v. *O'Murphy* [2002] IRLR 4.

[35] See, in the case of the user or 'principal', Sex Discrimination Act 1976, s. 5, Race Relations Act 1976, s. 7, Disability Discrimination Act 1995, s. 12, and *Abbey Life Assurance Co. Ltd*. v. *Tansell* [2000] IRLR 387; in relation to the agency, see Sex Discrimination Act 1975. s. 15, Race Relations Act 1976, s. 14, and Disability Discrimination Act 1995, s. 68(1). It is far from clear whether the user is required to maintain the principle of equal treatment of agency workers with regard to other, directly employed workers in that employment unit: see *Allonby* v. *Accrington and Rossendale College* [2001] IRLR 364.

[36] National Minimum Wage Act 1998, s. 34; Working Time Regulations 1998, reg. 36.

[37] For the precise basis of this calculation, and an explanation and justification of the methodology used to arrive at it, see Burchell, Deakin and Honey, 1999: 43-46.

[38] Burchell, Deakin and Honey, 1999: chs. 5 and 6.

[39] Unreported, 1 July 1993, Appeal No. EAT/496/91.

[40] This was the view of the EAT in the *Pertemps* case, ibid.

[41] This was the approach taken by the Court of Appeal in *McMeechan* v. *Secretary of State for Employment* [1997] IRLR 353.

[42] At the time of the study, an employee employed under a fixed-term contract could lawfully waive his or her entitlement to claim unfair dismissal or redundancy compensation upon the expiry of the contract (ERA 1996, s. 197); in addition, an employee, whether employed under a fixed term or not, could not acquire general protection against unfair dismissal, or the right to redundancy compensation, until they had acquired two years of continuous employment.

[43] See Deakin, 2001.

[44] For discussion of the reasons for the limited usefulness of the 1977 Act in this context following the judgment of the High Court in *Brigden* v. *American Express Bank Ltd.* [2000] IRLR 94, see Deakin and Morris, 2001: 269.

[45] In Lord Hoffmann's judgment in *Carmichael* v. *National Power plc* [2000] IRLR 43.

[46] *System Floors (UK) Ltd.* v. *Daniel* [1982] ICR 54; *Robertson* v. *British Gas Corp*. [1983] ICR 351; Deakin and Morris, 2001: 256-258.

Bibliography

Burchell, B., Deakin, S. and Honey, S. (1999) *The Employment Status of Individuals in Non-Standard Employment* EMAR paper no. 6 (London: DTI) www.dti.gov.uk/er/emar/emar6.pdf

Deakin, S. (2001) 'The contract of employment: a study in legal evolution' *Historical Studies in Industrial Relations*, 11: 1-36.

Deakin, S. and Morris, G. (2001) *Labour Law* 3rd. ed. (London: Butterworths).

Freedland, M. (1995) 'The role of the contract of employment in modern labour law', in L. Betten (ed.) *The Employment Contract in Transforming Labour Relations* (Deventer: Kluwer).