REDISCOVERING THE CONTRACT OF EMPLOYMENT FOR NON-STANDARD WORKERS IN THE UK COMMON LAW

Julie McClelland

University of Huddersfied, UK

Labour Law Research Network Inaugural Conference
Barcelona
June 13th -15th 2013

Rediscovering the Contract of Employment for Non-Standard Workers in the UK Common Law

Julie McClelland

Introduction

In the UK, common law and legislation determine the rules regulating the employment relationship. Statute sets out different classes of employment and what rights are available to each group. Common law principles of contract are used to determine who can access those rights.

The central concept underlying access to rights is based on a binary divide between contract of service (the employee) and contract for services (independent contractor). The first category is where individuals are in a position of subordination and control to the employer and therefore in need of protection. The second category is the self-employed, an independent actor in charge (theoretically, at least) of their own employment destiny. New classifications of work relationships have been added over time. Interpretation of these new categories is determined through the existing contractual framework.

These new categories do not sit comfortably with the binary classification system. New ways of working may undermine what we traditionally understand as working relationships. As such the usefulness of this system has been questioned.[1] Yet contract remains central. In the lack of any practical alternative it is worth considering whether the interpretation of contract law itself is capable of development.

[1] S Deakin `The Many Features of the Contract of Employment' in J Conaghan, R Fischl and K Klare (eds) *Labour Law in an Era of Globalization, Transformative Practices and Possibilities* (OUP 2002) 178

Whilst literal interpretation may be applied in plain cases, judges must exercise discretion in dealing with more complex cases. In so doing judges may be able to apply a more purposive interpretation to the common law tests and secure more inclusive access. However, there is debate as to how far judges may follow creative lines of interpretation before they stray into the area of policy making rather than policy interpretation. Equally judges are not free to apply new interpretations without taking account of existing legal rules. The doctrine of *stare decisis* requires judicial restraint but this does not prevent future legal development.

Contractual interpretation requires a consideration of wider moral values. Such values go to the purpose of the common law and its relevance to the consideration of employment status. Sir John Laws expressed the values and purpose of common law as to prevent `an abuse of power'… the capacity to `restrain one man's hold over another… the just distribution of power within relationships'.[2] Common law implies terms into contracts to `vouchsafe an insistence on reasonableness'… a requirement to act reasonably `to heed the rules of natural justice, not to act irrationally and not to abuse power?'[3]

The modern law of contract has the potential capacity to redefine the binary divide so that only those who are truly self-employed are excluded from statutory protection. To do this the meaning of `contract of service' would need consider the reality of labour market contracting and take account of the impact of exploitative bargaining strength. This reinterpretation could potentially expand the classification of contract of service to encompass more non-standard workers within the remit of full employment protection in the UK. Such a possibility relies on a consideration of how far the employment tribunal and courts have incorporated a contextual framework into their interpretation of contract and how far any context incorporates wider social values consistent with public law standards of fairness and reasonableness.

A Crisis of Contract

What type of contract governs the work relationship will determine the level of access to employment protection an individual has. Only an individual who is employed under a

[2] Sir J Laws `Public Law and Employment Law: Abuse of Power' [1997] Public Law 455, 455
[3] ibid 457 - 463

contract of service is entitled to the protective rights contained in the Employment Rights Act 1996 (ERA96). [4]

Despite the crucial significance of this contract, the statutes that confer employment protection rights offer little guidance. Employee is defined as: `an individual who has entered into or works under (or where employment has ceased, worked under) a contract of employment.'[5] Contract of employment is defined as: `a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.[6] Clarification, as to when such conditions are met has been left to the courts to determine. The courts have the task of determining what contract, if any, exists.

Statutory intervention has extended some employment protection to a wider definition of "worker".[7] Such workers have a right to the national minimum wage[8], working time protection and access to leave.[9] Other key employment protection rights relating to termination of employment[10] or rights to maternity leave[11] remain reserved for "employees" only. No statute provides guidance as to what this worker-contract is. Worker, as a contractual form, is left "floating" somewhere on the binary divide. It is neither a contract of service nor a contract for services. The worker concept has been `simply bolted on to existing forms in particular the employee concept for employment protection';[12] the tests for determining contractual status remain the same.

In anti-discrimination law, access to rights of protection against discrimination, harassment and victimisation has extended further than a contract of service to the provision of carrying out work personally.[13] Extended protection in discrimination incorporates professionals and independent business. In searching for wider contractual forms the courts have used the

[4] ERA96 Part I – the right to a statement of employment particulars; ERA96 Part X – the right to claim unfair dismissal; ERA96 Part XI – the right to claim a redundancy payment
[5] ERA96 s.230(1)
[6] ERA96 s.230(2)
[7] ERA96 s.230(3). Also TULR(C)A 1992 s.296(1). Also similar definitions in National Minimum Wage Act 1998 (NMWA) s.54(3), Working Time Regulations 1998 (WTR) SI1998/1833 Reg.2(1), Part-Time Workers Regulations 2000 SI 2000/1551 Reg.1(2)
[8] NMWA 1998
[9] WTR 1998 SI1998/1833,
[10] ERA96 Part X
[11] ERA96 Part VIII s 230
[12] S Deakin `Does the Personal Employment Contract Provide a Basis for the Reunification of Employment Law?' (2007) 36 ILJ 68
[13] Equality Act 2010

same conceptual framework to determine "in employment" as "employee". Access to rights is significantly influenced by common law tests for employee and worker and the strict application of those contractual common law tests may at times defeat the policy intention to provide greater protection to a larger group. [14]

The employment relationship for temporary agency workers is also governed by specific legislation in relation to operation of employment agencies. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (CEAEB) specify that agencies must provide a written statement informing individuals of their employment status; they do not specify what that contractual status should be.[15] Under statute, temporary agency workers meet the statutory `worker' definition, but attempts to demonstrate they have contracts of employment with the agency or end-user have been problematic. Under the standard form of agency contract it is unlikely that there will be sufficient elements of control or mutuality of obligation to give rise to a contract of employment with the agency or end-user.[16] In the light of clear contractual documentation accurately describing the relationship with the agency, there will be no necessity to imply any contract of employment with the end-user.[17] For many agency workers the reality of the situation is that they are neither self-employed (certainly with respect to tax and social security provisions) nor classed as employed for the purposes of employment protection.

Casually employed staff will generally qualify as "workers" under the terms of specific legislation and will often be able to make discrimination claims. Even if the job is carried out over a number of years the fact that casual employment relationships are based on an "as and when" basis will usually defeat claims for a contract of employment.[18] Access to employee status and associated employment protection rights will only apply if the worker can establish that each assignment was capable of establishing a contract of employment.[19]

---

[14] *Mingeley* v *Pennock and Ivory t/a Amber Cars* [2004] EWCA Civ 328 - a lack of mutuality of obligation (a test to determine whether a contract of service exists) defeated a race discrimination claim.
[15] CEAEB 2003 SI2003/3319 s15
[16] *Montgomery* v *Johnson Underwood Ltd* [2001] IRLR 269 (CA)
[17] *James* v *London Borough of Greenwich* [2008] IRLR 302 (CA)
[18] *O'Kelly and others* v *Trusthouse Forte Plc [1983*] IRLR 369 (CA) and *Carmichael and others* v *National Power* [2000] IRLR 43 (HL)
[19] *McMeechan* v *Secretary of State for Employment* [1997] ICR 549 (CA)

However, it is unlikely that this group would be able to establish the necessary continuity of service required in order to make some of the main employment protection claims.[20]

As with casual workers, home workers are usually free, at least in terms of any written contract, to choose to accept work offered and any claims for employment status are likely to be defeated by a lack of mutuality of obligation. In the past the courts have found that a long standing relationship with a company can establish an overriding contract of employment.[21] This approach has not been taken in the case of casual workers[22] and in the light of the House of Lords' restatement[23] of the `irreducible minimum' in relation to mutuality of obligation similar cases might not be successful if judged now.

Different classifications of employment relationships have emerged over time. Statutory definition is vague and the courts have had to interpret these new forms of work. Interpretation has often relied on the common law tests of status. Tests developed for a more distinct world of work.

It has been argued that judges have a `strong intuitive understanding of what amounts to employment and what does not'; but the underlying reasoning behind their judgment is often `difficult to supply'.[24] The law offers an `elephant test' in that the contract of employment is `an animal too difficult to define, but easy to recognise when you see it'.[25] Yet this intuitive understanding lacks precision. A hierarchy of rights exists but there is a lack of clarity regarding the intent of this hierarchy or any clear underpinning contractual rationale. For many non- standard workers the task of demonstrating that they are employed under a contract of service has proved to be a very high hurdle. Although many are engaged in work relationships that look to an outsider like any other employee they may often find they are not employed at all. Rather than being a matter of the obvious – something you recognise when you find it – for atypical workers in the UK, the contract of employment is more like a unicorn than an elephant – a fictional beast.

---

[20] ERA 96 s212

[21] *Airfix Footwear Ltd* v *Cope* [1978] IRLR 396 (EAT) - In this case the individual sustained a relationship with the company over a seven year period, generally working 5 days per week. And approving *Aifix*, *Nethermere (St Neots) Ltd* v *Gardiner and anor* [1984] ICR 612 (CA)

[22] *O'Kelly* [1983] n 18 above In this case the waiters worked for 50 weeks in the proceeding year and were working in excess of 35 hours per week

[23] *Carmichael* [2000] n 18 above

[24] D Brodie `The Contract for Work' (1998) 2 *Scottish Law and Practice Q*uarterly 139

[25] Lord Wedderburn *The Worker and the L*aw (3rd edn, Penguin 1986) 116

The contractual framework would seem incapable of adequately addressing new forms of work relationships leading to the claim of a `crisis in fundamental concepts'.[26] The structure of the labour market has changed with a growth in flexible forms of employment. Increased qualification standards have provided professional autonomy at the expense of contractual subordination. Part time and female employment has increased significantly. The standard model has been eroded through global competition, advances in technology and demographic and societal changes. [27] Yet common laws rules determining who is an employee and who is self-employed seem trapped in an old style view of work relationships. Many non-standard workers are frequently in an equivalent position of subordination and economic dependence to that of standard employees. They have a similar need of employment protection rights yet are excluded by virtue of not qualifying as employees. As well as problems distinguishing between dependent, semi-dependent and independent labour, the forms of employment have changed. With outsourcing of production and the increasing use of temporary agency workers, regulating a triangular relationship between the user firm, the sub-contractor and its workers has emerged as a problem that common law has found difficult to address.

Application of common law has at times been seen to result in the exact opposite of perceptions of legislative intent. Rather than grant employment protection to those who are vulnerable and in need, the impact of the common law tests of employment status have excluded those groups. A growing sense of "unfairness" has emerged. The binary divide does not effectively encapsulate the range of employment relationships that exist today. However that is not conclusive evidence that the contractual framework is not capable of development to encapsulate a greater range of employment relationships. Such development would be driven by how the courts choose to interpret the contract of service taking account of changes in the contracting market.

[26] M Freedland *The Personal Employment Contract* (2003) 26
[27] A Supiot *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (OUP, Oxford 2001) 2

Escaping the long reach of classical law

The classical law of contract has its origins in the 18th and 19th centuries. Embodying libertarian principles, the traditional dogma of classical theory is that parties are free to make their own bargains. Individuals are free to enter into whatever contract they choose. In the event of dispute the Courts will act as `the umpire to be appealed to when a foul is alleged, but the Court has no substantive function beyond this'.[28] The deep roots of classical theory are seen clearly in the doctrine of freedom of contract. Freedom of contract derives from the fundamental belief that contracting parties are best left to their own devices. Free to make their own deals, people will rationally make agreements where at least one person is better off and neither are worse off. The ideal of freedom of contract is that one takes on contractual liability to the extent that one has freely chosen to do so.

The typical contract which emerges from the classical theory is an exchange of promises.[29] Each side gives something in exchange for the promises of the other party to the contract. In practice most contracts are not of this kind. Parties, even in commercial contexts, can rarely be said to have equal bargaining. If unequal in negotiating the contract, how freely is consent given? Contracting relationships are seldom discrete, once in a moment happenings. Relationships change and develop over time which fundamentally affects the reasonable expectations of the contracting parties. A contract of service, determining access to employment rights, is much more than a simple exchange of labour for payment of wages. Freedom of contract `can ring very hollow when used to defend a grossly unfair contract secured at the expenses of a person of little bargaining skill'.[30]

Such values resonate with a neo-classical model of the labour market. The market is judged as efficient when the free movements of demand and supply are allowed to operate unhindered by external intervention. Any attempt to interfere in the free market should be kept to a minimum and only in response to market failure. In consequence the growth of non-standard patterns of work is perceived as a rational supply side response to the market. New patterns of work naturally emerge in response to new forms of market demand for different types of labour productivity. The logic of classical contract theory dictates that if individuals are willing and agree to undertake non-standard work, a legitimate contract has been agreed.

[28] Atiyah PS *The Rise and Fall of Freedom of Contract* (Clarendon 1979) 404
[29] Stone R *The Modern Law of Contract* (6th ed, Cavendish 2005) 2-3
[30] R Hillman *The Richness of Contract Law. An Analysis and Critique of Contemporary Theories of Contract Law* (Kluwer 1997) 133

An exchange has occurred in keeping with the assumed rationality of contracting parties in the free market. The courts have no role in judging the value or appropriateness of the contract form. As free agents, individuals agree a bargain and then should be held to that bargain.

The persistence of neo-classical market assumptions reinforces the neutral position the courts believe they are asked to take in determining contractual status. A strictly classical interpretation of contract encourages judges to stick to the plain meaning of the written documents which make up the contract. If the contract documentation states that the parties have agreed to enter a `contract for services' then a formalist perspective will encourage courts to accept this on face value as the intention of the parties.

But the reality of the labour market does not match the theoretical model of perfect competition. The labour market is full of imperfections not governed by the logic of the market.[31] Neither is the work relationship a discrete exchange relationship. `Over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem.'[32]

Judicial interpretation of contract, in practice, reflects this to some extent. Contract interpretation still has freedom of contract as a central concern but in contrast to classical theory, neo-classical theory assumes that the intentions of the parties must be balanced by social values and policies. The intentions of the parties must be understood in terms of the context out of which they arise and to some extent recognises the dynamic nature of exchange relationships.[33] This interpretative approach is more in sympathy to the reality of employment relationships.

[31] Peck J *Workplace: The Social Regulation of Labour Markets* (Guildford Press 1996) 4
[32] *Johnson v Unisys Ltd* [2001] 2 WLR 1076 (HL) 1091 (Lord Hoffman)
[33] Roehling M `Legal Theory: Contemporary Contract Law Perspectives and Insights for Employment Relationship Theory in Coyle-Shapiro J et al (eds) *The Employment Relationship Examining Psychological and Contextual Perspectives* (OUP 2004) 77

However, what context is considered and how it is interpreted will have a major impact on the outcome of an individual's status as employee, worker or self-employed. What is the legitimate context for contractual interpretation in determining work relationships?

Intentions and Expectations

Although modern rules of contract interpretation encourage judges to examine contract in context the formalist tradition, sticking to the plain meaning of words, maintains a strong hold in contractual interpretation. If there is plain meaning of the words used, then meaning is clear and it requires no further interpretation. In consequence, judges limit themselves to dealing with only the formal expressions of the parties - `the paper deal'.[34] Hart drew a distinction between the core of certainty of a rules application and the `penumbra of doubt' that arose because of the open texture of language.[35] The plethora of cases regarding the determination of employment status considered by the UK tribunals each year would clearly indicate that this issue lies within Hart's `penumbra'. The definitions of contract of service or contract for services have no plain meaning. Context is important.

An examination of contract in context requires the courts to determine not just what the parties expect but what societal norms frame those expectations. In *Investors*[36] Lord Hoffman articulated a shift in favour of contextual interpretation in his restatement of the principles of contractual interpretation.[37] The courts should seek:

> `the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.[38]

This was not claimed as something new. Lord Diplock had previously stated `if detailed semantic analysis of words in commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'.[39] Before that

[34] Macauley S `The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 MLR 44, 44
[35] Hart HLA *The Concept of Law* (2nd edn, OUP 1994) 123
[36] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 (HL)
[37] ibid 114 (Lord Hoffman)
[38] ibid
[39] *The Antaios* Cia Nauiers SA v Salen Rederierna AB [1984] 3 All ER 229 (HL) 234 (Lord Diplock)

Lord Wilberforce talked of the need for interpretation to be guided by the `matrix of fact'.[40] Lord Reid, `[T]he more unreasonable the result the more unlikely it is that the parties can have intended it'.[41] Simon Brown LJ: `the more unreasonable the result of a given construction, the readier should the courts be to adopt some less obvious construction on the words'.[42]

So what is implied by a standard of `reasonableness'? Whilst such terms may appear vague, lacking transparency,[43] sitting from a position on the "Clapham omnibus' one might equate reasonableness to some sense of "fair dealing". Whilst defending the right of individuals to choose who they contract with (freedom of contract) the reasonable person may also want to have an understanding of what promises they were making and the consequences of any promises made.

Within an employment context issues of personal autonomy, upon which freedom of contract rests, are questionable. Individuals are free to decide to work or not. Such freedom is theoretical since for the majority, work is a basic economic necessity. Individuals are free to decide whether to work for others or work for themselves. In reality economic, social and intellectual deficits may restrict any freedom to set up in business or be able to truly negotiate the terms of an employment relationship.

Given the reality and complexity of employment relationships could (or should) we expect the majority of individuals to fully understand what the future impact is on their employment rights by the way they work on a day by day basis? Equally, it is reasonable to expect people to understand the consequence of how their contractual work relationship as formed affects their subsequent employment rights? Patricia Dacas[44] worked as a cleaner for Wandsworth Council for a number of years. She was deployed by a temporary employment agency, paying tax and national insurance as an employee. When she was dismissed could she reasonably be expected to know that because of the terms of the contract she had agreed

[40] *Prenn v Simmonds* [1971] 3 All ER 237 (HL) 239 (Lord Wilberforce) and referring to `factual matrix' in *Reardon Smith Line Ltd v Hansen-Tangen,* [1976] 3 All ER 570 (HL) 575
[41] *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) 251 (Lord Reid)
[42] *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 All ER 545 (CA) 552 (Simon Brown LJ)
[43] Lord Hoffman `Anthropomorphic Justice: The Reasonable Man and his Friends' (1995) 29 The Law Teacher 127, 134
[44] *Dacas v Brook Street Bureau (UK) LTD* [2004] IRLR 358 (CA)

with the agency she had no employment status? When Eric Muschett[45] agreed to contract to work for the prison service as a temporary agency worker did he understand that he also lost any rights to pursue a claim of discrimination? An observer on the "Clapham Omnibus" might find it difficult to foresee these outcomes as reasonable expectations. Common sense attitudes to reasonableness would seem to imply a sense of fairness.

Contractual documents may be brief and vague and fail to record many of the expectations of the party. Some expectations may only be tacit assumptions – what I would have said if I thought about it at the time. Recollection of what was intended when the contract was formed is inevitably tainted by subsequent experience. In issues of dispute there may be no explicit agreement at all as to what was intended. Judges will not have sensitive and precise information about the parties' relationship and if the parties have different perspectives how are judges to decide? There will need to be an appeal to some external values.

A judge cannot always depend on external business norms and conventions, as these often will not exist in the form of clear rules.[46] Within an employment context, implied business norms may also be explicitly designed to defeat expectations of workers and avoid statutory protective provisions. In *O'Kelly*, [47] a group of wine waiters complained to the employment tribunal that they had been unfairly dismissed by reason of trade union membership. Such a claim requires no service provisions but requires the claimants to be employees. In determining status the Court of Appeal considered a large numbers of factors and gave explicit weight to the employment practice norms operating in the industry. The waiters were engaged as "regular temps" and the custom in the hospitality industry at the time was that such engagements were not considered as contracts of service. If business norms are created as a means of defeating employment status claims, the use of those norms by the courts to consider status becomes something of a "catch-22" situation for the claimants.

In *Carmichael*[48] great emphasis was placed on a common understanding of the parties' expectations of their mutual obligations. The House of Lords, regarded it as proper to interpret the contract in the light of the way in which it had operated as evidence as to how it

[45] *Muschett v HM Prison Service* [2010] IRLR 451 (CA)
[46] Bernstein L `The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 Uni Chi L Rev 710, 715
[47] *O'Kelly* [1983] n 18 above
[48] *Carmichael* n18 above

had been understood. The House of Lords rejected the idea that the views of the parties were just subjective belief but `the evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed.'[49] Although in this case the claim for employee status was defeated by a lack of mutuality of obligation it did establish precedent for looking to the interpretation of contract in the day to day reality of the relationship.

Looking at the relationship in practice means we may form a very different understanding than that presented in contractual documentation. In *National Grid and Electricity Transmission Plc v Wood*, [50] the fact that the temporary agency worker entered into direct negotiations with the end-user over pay, notice, holidays combined with the fact that there was no right in the agency contract to provide a substitute indicated he had entered into a direct contractual relationship with the client and the Employment Appeal Tribunal held that the worker's original terms with the agency had been superseded by a different contractual nexus. In *Harlow District Council v O'Mahony,*[51] the subsequent conduct of the temporary worker and the end-user showed a high degree of communication and co-operation with the agency merely acting as an initial recruiter rather than maintaining an on-going relationship. Where a worker can provide evidence of a more direct personal relationship with the end-user the tribunals can conclude that an implied contract has arisen.[52]

Contextual interpretation demands more flexibility than the rigid doctrinal structure and a more individualised approach to the parties' dispute. Collins states: `If the courts wish to do justice between the parties rather than referee the quality of the lawyers in devising comprehensive risk allocation, they should not attach such weight to the paperwork but concentrate their energies on an investigation of the context, the market conventions and the assumptions of the parties in forming the core deal'.[53]

The contract remains critical in the interpretation of employment status by the courts. To fail to interpret contractual written terms without reference to the context will produce an incomplete picture. The express terms fix the outer limits of managerial discretion but such

[49] ibid 47 (Lord Hoffman)
[50] *National Grid and Electricity* Transmission Plc v Wood [2007] UKEAT/0432/07
[51] *Harlow District Council v O'Mahony* [2007] UKEAT/0144/07
[52] Wynn M `End of the Line for Temps?' (2008) 158 NLJ 352,
[53] Collins H *Regulating Contracts* (OUP 1999) 165

discretion is not absolute.[54] That discretion is set within the social and economic context. The employer's explicit expectation concerns co-operation. The employee's implicit expectation is fair treatment. Neither provides a determinate guide to employment protection; neither is likely to be articulated in any detail in the express terms of the contract. However, if either expectation is undermined, a breach of the "psychological contract" occurs and this will often adversely affect the efficient performance of the contract.[55] If judges are to protect the reasonable expectations of the parties it is the psychological contract which needs to be understood and the values implicit in that relationship which are applied. Are such values external to the common law interpretation of contract or an implied standard?

Looking for Standards

The English doctrine of precedent has a strongly `coercive nature'[56] and an uncritical acceptance of legal rules may lead to harsh outcomes. For most courts there is no discretion; judges are obliged to follow previous case precedent regardless of whether they believe this to be the "right" thing to do.[57] Within employment status cases judges have commented that the application of precedent can result in the exact opposite of what legislation intended to do.[58] Even when courts acknowledge that the approach is too restrictive they feel bound to follow previous rulings.[59]

Despite reservations that some decisions may be harsh a rules based approach is firmly rooted in English law. A rules based approach implies that judges `treat like cases alike' preventing judicial usurpation of power.[60] Such an approach brings an element of certainty in judicial decision making. This is a cherished principle. Most people would expect to know what laws apply to them, how those laws affect them and the consequences of being in breach of those laws. Equally there are common expectations that the law should be fair.

---

[54] Collins H `Flexibility and Stability of Expectations in the Contract of Employment' (2006) 4 Socio-Economic Review 139, 140
[55] Stone KVW `The New Psychological Contract: Implications of the Changing Workplace for Labour and Employment Law' (2001) 48 UCLA Law Review 519
[56] R Cross and JW Harris *Precedent in English Law* (4th ed) (Clarendon Press 1991) 3
[57] *Mingeley* [2004] n 14 above 376 (Buxton LJ)
[58] For examples see *Dacas* [2004] n 44 above 361 (Mummery LJ) and 368 (Sedley LJ); *James* [2008] n 17 above 308 (Mummery LJ)
[59] *Mingeley* [2004] n 14 above 376 (Buxton LJ)
[60] K Sullivan `The Justice of Rules and Standards' (1992) 106 Harv L Rev 22, 64

Whilst the principle that `justice is blind' may appeal to our fundamental belief that the law shall treat us equally, such blind justice means there is no consideration of the `merits, purpose or context' of a case.[61] A blanket application of rules may imply equality but the reality of most contracting relationships is that we are not equal. Some parties to the contract have more bargaining strength and will be able to use that authority to exploit others. If a contextual interpretation of contract is accepted an expectation of absolute certainty in judicial decision making is unrealistic. The influence of contextual interpretation must inevitably introduce some element of standards.

Laws are enacted for a reason.[62] If the courts fail to take those reasons into account they fail to apply a proper contextual interpretation of any case. Where employment rights rest on the contractual interpretation of status any interpretation of the correct contractual position would also need to apply the same policy considerations. To simply apply legal rules and ignore the intent of the legislation would appear to undermine the sovereignty of Parliament. As Denning LJ said a judge must:

> `set to work on the constructive task of finding the intention of parliament, and he must do this not only from the language of the statute, but also from the consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.'[63]

A contextual interpretation of the contractual relationship might lead to a greater willingness on the part of judges to consider standards based on wider social issues, including policy intent, as part of the consideration of the matrix of fact. On occasion the Courts have concluded that the intent of legislation is sufficient to be a main issue within the interpretation of employment status. In the construction industry the Court of Appeal, by majority decision, failed to accept the employers' argument that labour-only contractors were self-employed because the parties had agreed a contract that explicitly assigned the relationship as one of self-employment.[64] To accept the traditional pattern of standard form contracting used as an industry norm would imply acceptance of legislative avoidance. This decision was not unanimous. Lawton LJ, dissenting, highlights the continuing unease with this approach:

---

[61] J Adams and R Brownsword `The Ideologies of Contract' (1987) 7 Legal Studies 205, 214
[62] G Davidov `Freelancers: An Intermediate Group in Labour Law' in J Fudge, S McCrystal and K Sanharam (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart 2012) 171, 174
[63] *Seaford Court Estates Ltd v Ashes* [1949] 2 KB 481 (CA) 498 (Lord Denning)
[64] *Ferguson v John Dawson* [1986] 3All ER 817 (CA)

> `I appreciate that there are powerful arguments for thinking that working on the lump is socially undesirable… but these considerations are not sufficiently strong to make labour bargains of this kind void as being against public policy'.[65]

This unease was not restricted to a single voice of dissent. Three years earlier, the Court of Appeal in *O'Kelly*,[66] used standard form industry contracting practice as a reason to uphold the contractual bargain as written, notwithstanding the same policy concerns that had existed in *Ferguson*.

A standard based approach requires `the judge to both discover the facts of a particular situation and to assess them in terms of the purpose or social values embodied in the standard'.[67] This is not an advocacy for a judicial "free for all". Certainty in law is required through both transparency in its operation and where judicial discretion is exercised there should be a clear rationale. Reliance on precedent should maintain consistency by ensuring that similar cases are decided in similar ways. A rigid doctrine of *stare decisis* should provide certainty and consistency. Yet in cases of employment status the result has often been the opposite. In considering the position of temporary agency workers, as an example, they have been found to be employed by the end user;[68] employed, or not, by the agency, depending on the wording of standard contractual documentation;[69] potentially employed by both (subject to accepting an extension of dual responsibility of various liability in tort);[70] and employed by no one.[71]

Equally the lack of consistency may be an outcome of judicial interpretation and how far the courts are willing to use interpretative devices to extend and limit the scope of judgments. A lack of agreed standards applicable to the interpretation of contractual status adds to uncertainty. The task of interpretation, of identifying which rules are binding on later decisions, is complicated by the level of generality or abstraction applying to the earlier case. The more general the statement of facts, the greater the number of subsequent cases which will fall within the ambit of the precedent and the wider the *ratio* is.

---

[65] ibid 829 (Lawton LJ)
[66] *O'Kelly* [1983] n 18 above
[67] D Kennedy `Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1685, 1688
[68] *Cable & Wireless* v *Muscat* [2006] IRLR 354 (CA)
[69] *James* [2008] n 17 above
[70] *Viasystems (Tyneside) Ltd* v *Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 (CA)
[71] *Montgomery* [2001] n 16 above

Distinguishing cases does not imply the earlier case is wrong but can reduce the `coercive' power of precedent. It permits previous cases to be considered within a wider contextual framework. The contextual framework allows for previous legal rules to be re-examined in the light of wider standards. It introduces an element of creative judicial interpretation but this is sometimes at the cost of opaqueness in reasoning.

The grounds for distinguishing cases are not always obvious. The Court of Appeal in *McMeechan,*[72] found that in the case of temporary agency workers it was possible to construe a contract of employment with the end-user for each individual employment placement. The Court distinguished between general engagements, the overarching terms operating between the agency and the temporary agency worker, and specific engagements with end-users which make up the general engagement. Whilst claims that the general engagement constituted a contract of employment may often be defeated by a lack of mutuality of obligation, in considering `the terms of an individual self-contained, engagement, the fact that the parties are not obliged in future to offer – or to accept- another engagement with the same, or a different, client must be neither here not there'.[73] There was nothing which prevented the employment status of an agency worker differing between the various parties. The analysis of status of the employment relationship would change depending on whether the court was looking at the general terms of engagement between the individual and the agency or considering the specific terms of engagement for each placement between the individual and the end-user.

In the later case of *Bunce* v *Postworth Ltd t/a SkyBlue*,[74] considering similar issues the Court of Appeal restricted its consideration to the matter of the general engagement between the individual and the agency. The Court found that even if there was a contract between the agency and the temporary agency worker for each specific engagement there was an insufficient element of control exercised by the agency to be a contract of employment. To secure this result, the Court specifically distinguished the facts from the earlier decision in *McMeechan* where the contract referred to the individual taking instruction from either the agency or the end-user. In *Bunce,* the individual only took instruction from the end-user and

[72] *McMeechan* [1996] n 19 above
[73] ibid 561 (Waite LJ)
[74] *Bunce* v *Postworth Ltd t/a SkyBlue* [2005] IRLR 557 (CA)

as such the agency `lacked the necessary control over the appellant for him to be seen as their servant'.[75]

The difference in wording in standard form documentation clauses seems a little `flimsy' to justify such a fundamental difference in outcome.[76] In reality the majority of temporary agency workers by necessity take instructions from the end-users and the agency. The agency allocates the placement and once *in situ* the individual will need to accept instructions from the end-user as to the way work is carried out on a day to day basis. Whilst *Bunce* adopted a rules based approach interpreting status according to the rules of contract control, *McMeechan* took a more purposive approach to interpretation by considering the contextual reality.

A strict system of precedent confines creativity in judicial interpretation, but it does not stultify it. Not every step taken by a court will be covered by an existing rule.[77] Cases may be similar, may be treated in a similar way but a recognition of context may provide grounds for distinguishing the facts. By this process the rules of precedent change incrementally. *Stare decisis* may at times maintain outcomes which appear at odds to legislative intent or public opinion but the possibility that the doctrine should be abandoned or relaxed is probably unthinkable in the minds of the English judiciary.[78] Precedent rules like other features of judicial practice are subject to evolution rather than revolution.

In applying reasonable expectations in contractual interpretation, judges express both the socio-economic and the legal aspects of the economic exchange.[79] The search for the reasonable expectations of the parties goes beyond determining what was intended either at the point of contract formation and/or subsequent contract performance. There is an implied moral dimension in determining what standards the parties must observe in their contractual dealings.[80] The appeal to reasonable expectations disguises what is in reality an ascription of

[75] ibid para 29 (Keene LJ)
[76] M Rubenstein *Highlights* [2005] IRLR 502
[77] N Duxbury *The Authority of Precedent: Two Problems* http://www.mcgill.ca/files/legal-theory-workshop/Neil-Duxbury-McGill-paper.pdf (last accessed 15/05/13) 9
[78] R Cross and JW Harris *Precedent in English Law* (4th ed, Clarendon Press 1991) 226
[79] C Mitchell `Leading a Life of Its Own? The Role of Reasonable Expectations in Contract Law' (2003) 23 OJLS 639, 648
[80] ibid

moral responsibility.[81] Such moral responsibility must involve the courts in a consideration of fairness and reasonableness.

The Unfair Bargain

The modern law of contract has some recognition that each person enters the market from a different position and that to ignore those differences in knowledge, expertise, command over resources is not to treat people equally but to treat `unlike cases alike'.[82] Discussions as to how contractual terms are to be interpreted taking account of inequality of bargaining are long standing. In *Young and Woods Ltd v West*[83] a case involving someone paid as self-employed, the Court of Appeal upheld the tribunal's decision to look beyond the contractual expression of the relationship as a matter of fact as to whether the individual was an employee. Without closer scrutiny of the contract those with limited bargaining power were vulnerable to being pushed into accepting terms of self-employment. Taking account of the bargaining "pressures" that might arise from inequality of bargaining the Court needed `to see whether that expression correctly expresses the true nature of the facts behind it'.[84] In *Ferguson v John Dawson & Partners (Contractors) Ltd,* considering the case of a self-employed sub-contractor, the Court of Appeal stressed the need to look behind the formulation of the written document to ensure that the parties to a contract, either by agreement or unilaterally, opted out of statutory provisions. 'It should not be open to the parties themselves by their own whim, by use of verbal formula, unrelated to the relationship' to decide whether statutory regulations applied to the relationship.[85]

A number of recent cases, culminating in the Supreme Court judgment in *Autoclenz Ltd v Belcher and others,*[86] have reconsidered the influence of inequality of bargaining on the legitimacy of contractual terms which relate directly to status issues. The Supreme Court in *Autoclenz* found that the relative bargaining strength of the contractors is a relevant factor in determining the parties' legal obligations. In reaching this decision the Court resolved

[81] PS Atiyah *Promises, Morals and Laws* (Clarenden Press 1981) 64
[82] H Collins (2003) n 53 above 32
[83] [1980] IRLR 201 (CA)
[84] *Young and Woods Ltd v West* [1980] IRLR 201 (CA) 204 (Stephenson LJ)
[85] [1976] IRLR 346 (CA) 825 (Megaw LJ)
[86] [2011] UKSC 41

outstanding issues that had emerged in two other cases, *Kalwak v Consistent Group Ltd*[87] and *Protectacoat Firthglow Ltd v Szilagyi*.[88]

The ruling means that where one party challenges the genuineness of the written terms the tribunal will be required to have regard to extrinsic evidence to determine what was actually agreed between the parties. This is an objective test and one which must not put undue emphasis on the parties' subjective intentions. The ruling pursues a contextual approach. The judgment has extended the matrix of facts to include a consideration of relative bargaining power. However, the leading judgment falls short of actually requiring a consideration of substantive fairness. In considering employment relationships the Courts still appear reluctant to create the general principle that issues of substantive fairness must be relevant questions for contractual enquiry.

The Supreme Court ruling prevents the obvious and deliberate abuse of a strong bargaining power to insert terms into written contracts with the sole intent of denying access to statutory rights. The direction provided to look beyond the written documentation redresses the previous tendency to take standard form contracts at face value. Yet without specific guidance as to how the `purposive approach' is implemented by tribunals there is a danger that courts and tribunals fall back on orthodox rules of contractual interpretation.

Alan Bogg suggests that there are three meanings for purposive interpretation.[89] The first meaning is the shared commercial purpose of the contracting parties. This would involve the courts adopting a contextual approach to interpretation as opposed to a literal approach. [90] At a basic level, if a contextual interpretation is confined to what the "reasonable man" might understand from the contract, the analysis takes no account of the wider purpose.

This is perhaps reflected in Bogg's second meaning. This involves the courts in interpreting what the parties really meant - `savvy' interpretation.[91] Courts are advised to be `realistic and worldly wise',[92] to have a sense of what is real and what is `window-dressing'[93] and to use

[87] [2008] IRLR 505 (CA); [2007] UKEAT/0535/06/DM
[88] [2009] IRLR 365 (CA); [2007] UKEAT/0435/07/DA
[89] A Bogg `Sham Self Employment in the Supreme Court' 41 ILJ (2012) 328
[90] ibid, 342
[91] ibid
[92] *Autoclenz Ltd v Belcher* [2009] IRLR 70 (CA) 92 (Aiken LJ)
[93] ibid 104 (Sedly LJ)

`their industrial sense to smell a rat in the written documentation'.[94] This approach requires the courts to look beyond the written documentation at the reality of the contract in practice. The Supreme Court judgment in *Autoclenz*[95] demonstrates that how far the courts search out that reality remains uncertain. The decision could be interpreted as calling on tribunals to take account of unequal bargaining in determining the validity of contractual clauses which would defeat claims of employee status. The *Autoclenz* decision fell short of instructing the tribunals to interpret the whole contractual relationship itself through the lens of unequal bargaining.

Bogg's third meaning seeks to address this by aligning a purposive approach with the purpose of the legislation.[96] He illustrates the strong purposive approach through the judgment in *Byrne Brothers* where interpretation of the work relationship sought to further the protective reach of the statute in favour of those making the claim.[97] The policy consideration behind the extension of certain rights to the statutory category of "worker" extended protection to vulnerable workers who would not be categorized as employees and were excluded from the provisions of employment legislation.[98] In *Byrne Brothers* `the reason why employees are thought to need such protection is that they are in a subordinate and dependent position *vis-a-vis* their employers: the purpose of the Regulations is to extend protection to workers who are, substantially and economically in the same position'.[99]

Did Underhill P correctly interpret the legislative intent of Parliament in establishing the category of statutory worker as a means of extending rights to vulnerable individuals in work relationships? This is itself a matter of political interpretation. The category of worker was launched at a time when the government of the day was introducing flexible working practices. Rather than extending rights to vulnerable workers, this new category might also be interpreted as a means of restricting access... creating a tiered workforce of core and peripheral workers… each with their own set of defined rights.[100]

---

[94] A Bogg n 89 above, 343
[95] *Autoclenz* [2011] n 86 above
[96] A Bogg n 89 above 344
[97] Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 96 (EAT)
[98] S Vettori The Employment Contract and the Changed World of Work (Ashgate 2007) 166
[99] *Byrne Brothers* [2002] n 97 above para 2 (Underhill P)
[100] The government of the day explicitly rejected any extension of the definition of employee - DTI *European Commission Green Paper, Modernising labour law to meet the challenges of the 21st century. UK Response* (DTI: London 2007) 8 or use its powers under Employment Relations Act 1999 (ERelA) s23

If purposive interpretation rests on judges' attempts to interpret the intent of labour law it is doomed to failure. Labour law, like any law, is a product of the political system. It is the result of compromise, economics and by necessity subject to change. However, if interpretation rests on Bogg's second meaning – the "savvy" judgment – how far can values embodied in common law be used to extend the context of contractual interpretation in employment.

Preventing Exploitation

`Why should the common law not impose on those who exercise monopoly power… a more general duty to act reasonably, for instance, to heed the rules of natural justice, not to act irrationally and not to abuse power?'[101] Employers *per se* will never approach a monopoly position but the weight of market power will more likely rest with them. The employer may not need to control the market for exploitation to occur; it arises because of one party's weakness.[102] At the margins of the employment relationship - casual workers, fixed term and temporary agency workers – a lack of economic choice and knowledge of alternatives, adds to their relative weak bargaining position. Faced with a standard form contract which denies statutory rights it is difficult to ascertain what market power an individual might exercise to renegotiate the contractual terms. They could choose not to accept the contract. They are certainly under no duress (in legal terms, if not necessarily by economic and social circumstances). They are constrained through a lack of alternative choices determined by economic circumstances and/or a lack of knowledge or capacity. Ultimately the courts need to consider how far the weakness of the individual was exploited by the employer and what level of market exploitation is acceptable. Such a consideration is consistent with the values of common law.

Although there is an acceptance of a disparity in bargaining power in most contractual settings[103] there has been reluctance to establish any general principle in contract law.

[101] Sir J Laws [1997] n 2 above 463
[102] S Thal `The Inequality of Bargaining Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 OJLS 17, 29
[103] Even within commercial settings the courts have been prepared to consider inequality of bargaining positions, for example, *Phillips Products v Hyland* [1987] 2 All ER 620 (CA) where the fact that the hirer

Without this different emphasis has been placed on the contextual impact of inequality of bargaining in different areas.

In *Schroeder Music Publishing Co Ltd v Macauley*,[104] the House of Lords gave some support for a general doctrine of inequality of bargaining based on relative market power. The case involved restraint of trade provisions in standard form contracts made between a music publishing house and a songwriter. *Macauley* drew a distinction between those standard forms that have been negotiated for use in a particular trade by parties `whose bargaining power is fairly matched' and those that have negotiated in a `one-sided manner'.[105] The issue for enquiry was whether at the time the contract was made the publisher had used superior bargaining power to exact from the song writer promises that were `unfairly onerous'.[106]

> `Was the bargain fair? The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promise and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration'.[107]

Determining superior bargaining power required an analysis of market power and the impact that any imbalance had on the formation and operation of standard form contracts.

The *Macauley* Court of Appeal determined that there are two kinds of standard form contracts. The first are widely used in commercial transactions, resulting from extensive prior negotiation of the parties and are adopted because they `facilitate the conduct of trade'.[108] Accepting standard terms based on prior knowledge, experience and standard norms operated by a specific trading community makes sense to all parties as it decreases transaction costs. There is a strong presumption that the terms of these contracts are fair and reasonable because they are used by parties `whose bargaining power is fairly matched'.[109] The second kind arises from `the concentration of particular kinds of business in relatively few hands.'[110] They have been dictated by the party whose bargaining power

---

of a JCB was offered a take it or leave situation was decisive in the courts determination that the term under question was unreasonable

[104] [1974] 1 WLR 1308 (HL)
[105] ibid 1316 (Lord Diplock)
[106] ibid 1315 (Lord Diplock)
[107] ibid 1316 (Lord Diplock)
[108] ibid
[109] ibid
[110] ibid

enables them to say these are the only terms available – accept the terms offered with no (or minimal) negotiation or do not contract..

Yet the capacity to bargain, or not, does not necessarily equate with fairness of the agreement. Standard form contracts are used in countless contexts where there is no significant degree of market concentration e.g. hotel registration forms, restaurant set priced menus. The fact that goods are traded on a take it or leave it basis is evidence of not market power but a recognition that neither parties' interests are served by incurring costs involved in negotiating every transaction.[111] The issue of fairness is not whether there is a lack of bargaining but whether this is by reason of market efficiency or market exploitation.

The distinctions made by *Macauley* resonate with the contracting practice in employment relationships. Employees are generally weak *vis-a-vis* their employers. They often have constrained choice. They may choose poor terms against continued unemployment. They may have insufficient knowledge of alternatives in the market. They may fail to understand or appreciate the consequences of the contractual choices offered. Employers rarely create the circumstances of constrained choice; only exploit it.[112] The real measure of market power is not whether a contractor presents contractual terms on a take it or leave it basis but whether the individual who decides to leave it has any real alternatives.[113]

If preventing exploitation of the weaker party is a legitimate concern of the common law then the courts must consider and intervene on questions of fairness. Traditionally Courts intervene in contractual arrangements to maintain an individual's right to freedom to contract when individuals are unable or incapable of determining their own contracts, but some areas of contractual interpretation have gone further.

This presumption of inequality of bargaining has been developed in UK housing case law to prevent exploitation of tenants by denying them access to statutory rights. The notion of

[111] MJ Trebilcock `The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 University of Toronto LJ 359, 364
[112] A Bagahi `The Myth of Equality in the Employment Relation' Public Law and Legal Theory Research Paper Series 2009) http://lsr.nellco.org/upenn_wps/265/ (accessed 15/05/13)
[113] MJ Trebilcock' (1976) n111 365

pretence in the landlord/tenant domain is policy driven and issues of equality are central.[114] In *Street v Mountford,*[115] Lord Templeman commented 'the court should… be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts'. In *Antoniadis v Villier,*[116] Lord Templeman stated `[p]arties to an agreement cannot contract out of the Rent Acts; if they were able to do so the Acts would be a dead letter because in a state of housing shortage a person seeking residential accommodation may agree to anything to obtain shelter'.[117] In *Johnson v Moreton,*[118] Lord Hailsham stated:

> `it can no longer be taken as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament where that Act, through silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength'.

The approach in consumer cases goes beyond protecting the weak or disadvantaged. The purpose has been to secure a fair deal for consumers, regardless of relative wealth or individual capacity.[119] The law operates with a principle that there should be no abuse of a stronger bargaining position.[120] Lord Reid in considering exemption clauses in standard form consumer contracts commented:

> the customer has no time to read them, and if they did read them would probably not understand them. And if he did understand or object to any of them, he would generally be told he could take it or leave it. And then if he went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.[121]

An individual seeking work, particularly with few skills or where labour demand is low, may be placed in a similar bargaining position to that of the tenant. Such an individual is also in a

---

[114] Previous precedent on sham contract terms was that for a term to be considered a sham it was necessary that the parties had sought to deceive a third party for a sham clause to exist. *Snook v London and West Riding Investment Ltd* [1967] 2 QB 786 (CA)
[115] *Street v Mountford* [1985] AC 805 (HL) 825 (Lord Templeman)
[116] *Antoniadis v Villier* [1990] 1 AC 417 (HL)
[117] ibid 463
[118] *Johnson v Moreton* [1980] Ac 37 (HL) 60
[119] *Morris v CW Martin and Sons Ltd* [1965] 2 All ER 725 (CA) concerning the theft of a mink coat by specialist cleaners ; *Mendelssohn v Normand Ltd* [1969] 2 All ER 1215 (CA) concerning loss of luggage from a car parked in a garage; *Levison v Patent Steam Carpet Cleaning C Ltd* [1977] 3 All ER 498 (CA) concerning the theft of a Chinese carpet from a specialist cleaners
[120] R Brownsword `The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract' in R Brownsword, G Howells and T Wilhelmsson (eds) *Welfarism in Contract Law* (Dartmouth 1994) 21, 41
[121] *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) 406

similar position to Lord Reid's assessment. Most employers now offer standard term contracts which are often long and complex referring to other documents or referring to arrangements that the individual will not hope to understand until after work has started. Few individuals read the detail. Fewer understand the detail. If they do not want to accept terms offered, what choices do they have? They could maintain a position of unemployment or seek employment from other alternative employers and be met with similar (if not identical) terms. There appears little conscious consent to the terms.

Any explicit assumption that employers should not be allowed to exploit their superior bargaining strength to draft contracts with the purpose of denying access to statutory employment protection rights is still missing from the case law in employment. Both Elias P in the *Kalwak* Employment Appeal Tribunal and Sedley LJ in the *Autoclenz* Court of Appeal addressed the wider principle of preventing abuse of a stronger bargaining position. The foundation of protective employment regulation is that by the nature of their unequal bargaining position, employees and workers need some protection from an unfettered use of the employers' superior bargaining power. `The main object of labour law has always been… a countervailing force to counteract the inequality of bargaining power which is inherent in, and must be inherent in the employment relationship'.[122] That presumption requires looking at the reality of the employment relationship and how it operates. Preventing exploitative abuse of an unequal bargaining power might imply that courts need to apply a common standard of reasonableness to the work relationship bargain… a standard of good faith contracting.

Establishing Good Faith

There is no direct legally imposed duty on contractors to act in good faith in the laws of England.

> `In many civil law systems… the law of obligations recognises an overriding principle that in making and carrying on contracts, parties should act in good faith… English law has, characteristically, committed itself to no such overriding principle, but has developed piecemeal solutions in response to demonstrated problems of unfairness'.[123]

[122] O Kahn-Freund *Labour and the Law* (2nd ed) (Stevens 1977) 6
[123] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (HL) 439 (Lord Bingham)

English law is in a minority in this respect. European contract law takes good faith to mean `honesty and fairness in mind' and fair dealing to mean `observance of fairness in fact'.[124] Similar expectations are found in international trade where `the parties' behaviour throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing.'[125]

Any doctrine of good faith has been resisted in English law in part because it challenges the classical model, underpinned by an adversarial ethic, where `each party to the negotiations is entitled to pursue his own interest as long as he avoids misrepresentation'.[126] If it is accepted that bargaining strength is not equal and autonomous consent is unrealistic a principle of good faith has the potential to provide an overarching unifying standard of fairness and reasonableness. For Lord Steyn an umbrella principle of good faith was the starting point in protecting the contractors' reasonable expectations.[127] The evolution of mutual trust and confidence as an overarching implied term is consistent with the general duty of co-operation and good faith.[128]

The Employment Appeal Tribunal first accepted the implied term of mutual trust and confidence in 1979, in a case considering a claim of constructive dismissal.[129] In this case, the Employment Appeal Tribunal accepted that `it was an implied term of the contract that employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'.[130] The overarching term of mutual trust and confidence was born. There was no explicit business necessity which underpinned the implication of the term.

In *Imperial Group Pension Trust v Imperial Tobacco Ltd,* Browne-Wilkinson VC in considering the exercise of discretions within a company pension scheme, expressed approval that the

[124] B Lando and H Beale *The Principles of European Contract Law: Part I* (Martinus Nijhoff 1995) 55
[125] UNIDROIT *General Principles for International Commercial* Contracts (UNIDROIT 1994) Article 1.7
[126] *Walford v Miles* [1992] AC 128 (HL) 138 (Lord Ackner)
[127] Lord Steyn `Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 439
[128] D Brodie `Legal Coherence and the Employment Revolution' (2001) 604 LQR 605
[129] *Coutaulds Northern Textiles v Andrews* [1979] IRLR 4 (EAT)
[130] ibid 85 (Arnold J)

term be accepted as a feature of every contract of employment.[131] Furthermore Browne-Wilkinson referred to the implied term as `the implied obligation of good faith'.[132] The term was adopted as a requirement in all contracts of employment as a consequence of the nature of the employment relationship not as a requirement of business necessity.

There is a wide range of employment situations that fall under the remit of the implied term. In *United Bank Ltd v Akhtar,* considering a mobility clause*,* there was `an over-riding obligation… which is independent of, and in addition to, the literal interpretation of the action which are permitted to the employer under the terms of the contract'.[133] In *Scally v Southern Health and Social Services Board* the implied term meant that the employer had a duty of disclosure with reference to employees' rights to purchase added years of pensionable service as information was not readily available.[134] In *Malik v BCCI* the House of Lords extended the principle of the implied term to cover claims for stigma damages resulting from the mismanagement of the company.[135] In *Malik*, Lord Steyn commented that `the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited'.[136] Lord Nicholls regarded it as a device to prevent employers mistreating employees by `harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below standards set by the implied trust and confidence term'.[137]

The implied term of mutual trust and confidence has emerged as a direct consequence of the employment relationship. The implication recognises that some contractual relationships require protection to ensure fair practice. The implied obligation of mutual trust and confidence constitutes judicial recognition that the employment contract is not just about economic exchange but also social and personal relations.[138]

---

[131] *Imperial Group Pension Trust v Imperial Tobacco Ltd* [1991] IRLR 66 (HC) 70 (Browne-Wilkinson VC)
[132] ibid
[133] *United Bank Ltd v Akhtar* [1989] IRLR 507 (EAT) at 512
[134] *Scally v Southern Health and Social Services Board* [1991] IRLR 522 (HL)
[135] *Malik v BCCI* [1997] IRLR 462 (HL)
[136] *Malik v Bank of Credit and Commerce International SA* (1998) AC 20 (HL) 46 (Lord Steyn)
[137] ibid 38 (Lord Nicholls)
[138] D Brodie `Mutual Trust and the Values of the Employment Contract' (2001) 30 ILJ 84, 88

There would appear to be no obvious reason why the worker would not share the concerns of the employee with regard to fair treatment or any less imperative not to protect the worker from harsh or oppressive managerial behaviour. Implied terms reflect the judicial view as to the appropriate balance of rights and obligations in the employment relationship.[139] Terms implied by law with the purpose of preventing exploitative behaviour would be equally relevant to types of contracts within the wider range of employment relationships. Yet there appears to be passive resistance to fully embrace these concepts and apply them to determinations of employment status. To intervene in contractual disputes in order to prevent `harsh and oppressive behavior'[140] implies that judges apply fair dealing standards to all work relationships.

Calls for Activist Interpretation

Judicial activism has a bad name. In the UK, there is often an implication that activist judges overstep `the constitutional boundary of their role'.[141] This view is premised on an assumption that judges should operate only to the extent that they apply the existing law. This is unrealistic. New law develops through judicial precedents.[142] Under a common law system judges have always been law makers. The process of applying, and distinguishing, previous precedent is a task of interpretation. When courts interpret unclear statutory provisions, judges exercise a creative role in modifying and developing the law.[143] In a contextual framework of interpretation judges must inevitably translate current norms into law.[144]

Generally, the presumption is that judges do not take sides in matters of policy, deferring to the legislative supremacy of Parliament. Lord Hailsham LC: `Public policy and concepts of what is right and what is wrong… are difficult horses for the judiciary to ride, and, where

[139] J Fudge `New Wine into Old Bottles? Updating legal forms to reflect changing employment norms' (1999) 33 U. Brit. Col L Rev 129, 135
[140] See Lord Nicholls comments n 137 above
[141] A Kavanagh `A New Supreme Court for the United Kingdom: Some Reflections on Judicial Independence, Activism and Transparency' University of Oxford Legal Research Papers Series 58/2010 4
[142] Lord Bingham *The Rule of Law* (Allen Lane 2010) 45
[143] A Kavanagh (2010) n 141 above 5
[144] Lord Devlin `Judges and Law Makers' 39 (1976) MLR 1, 6

possible, are arguably best left to the legislative to decide'.[145] There is concern that judge-made law is undemocratic. This is over stated. Given the evolutionary nature of judge-made law it could be argued that there is democratic consensus, or at least a passive acceptance, that judges should continue this role. Such consensus rests on an understanding of the ultimate sovereignty of Parliament. The legislative has the power to change the law. Ultimately if Parliament disagrees with the decisions of the courts it has the constitutional authority to change the law.

The strongest argument for judicial activism is not that it is the best method of law reform but that for many areas it is the only method.[146] Judges cannot be passive actors. Within a common law system they have a responsibility to ensure that the law develops in keeping with the norms and customs of the day. Judicial activism is therefore necessary and unavoidable. It allows the courts to develop the law in line with changes in society and gives them some flexibility in arriving at the most just outcome in the individual case.[147] It is an inevitable outcome of the English common law system.

The perception of a judge as an independent and neutral force of adjudication is unrealistic and has probably never existed in reality. Judges are decision makers. There are expectations that they seek to secure practical justice. Lord Devlin observed `the true spirit of the common law is to override theoretical distinctions when they stand in the way of practical justice'.[148] Practical justice requires a certain amount of creativity on the part of judges. Judicial pragmatism is more of ` a grab bag of reasoning methods that includes deliberation, interpretation, reliance on authority, tacit knowledge and much more besides'.'[149] The facts of the case need to go beyond the written documentation to determine the reality of the work relationship. Interpretation of contract needs to take account of the widest context to appreciate the reality of contracting practice in employment relationships. In areas of doubt, in hard cases, principles of common law intended to prevent abuse of power need to guide decisions.

[145] For example, changes to the Offences Against the Persons Act 1861 were introduced (majority decision) in *R* v *Cunningham* [1981] 2 All ER 863 (HL) and subsequently approved by Parliament
[146] Lord Devlin (1976) n 147 above 12
[147] A Kavanagh `(2010) n 141 above 5
[148] *Ingram v Little* [1961] 1 QB 31 (CA) per Lord Devlin at 73
[149] R Posner `The Jurisprudence of Scepticism' (1988) 86 Mich L Rev 827, 890

Conclusion

The binary divide between the dependent employee (contract of service) and the independent contractor (contract for services) does not reflect the variety of employment relationships that now exist. Rather than extending rights, interpretation of new contractual forms of work using common law tests has at times led to the exclusion of some of the most economically vulnerable workers from wider employment protection. The supposed inability of the common law to adequately interpret the range of employment relationships that exist has cast doubt on the value of the contractual framework itself.

The contract of employment has emerged over time and any evolutionary process takes time to catch up with changes in society and the economy. Doctrinal change has occurred in other areas of law and there is no reason why the contractual framework applied to work relationships is incapable of development to remain relevant and useful in determining access to employment protection rights.

The historical burden of classical theory in contract interpretation still reverberates. At the root of contract interpretation is the concept of freedom of contract. The capacity of individuals to strike a “deal” and be held to it continues to hold sway. The reality of contracting practice in work exchange relationships is far from the idealised model of autonomous individuals agreeing a bargain. The exchange relationship is complex and the parties are unequal. Contract interpretation, the determining factor in what levels of employment protection is secured needs to embrace the reality of contracting practice in the labour market. Interpretation must be informed by context.

Any contextual analysis needs to establish boundaries. What should courts consider in the `matrix of fact’… actual practice, business contracting norms, legislative intent or wider legal values?

The acceptance of contextual interpretation of contract now means that courts are more willing to examine the employment relationship in terms of how it actually operates as opposed to how it is said to operate in contractual documentation. However, the tendency for lower level courts to revert to a formalist reading of documentation should not be

underestimated. Clear standards as to how courts should interpret context in terms of wider standards of reasonableness and fairness remain obscure.

Any contextual analysis that places weight on the business norms of contracting practice must also recognise who determines those norms. Employment relationships rarely represent equal bargaining partnerships. The employer usually has more power in negotiating terms. Without any recognition of exploitative abuse of unequal bargaining power the courts would simply collude with the status quo.

The purpose of legislation may not always be clear. Intent behind different legislative enactments may change over time and may also appear to be in conflict. Labour law is no exception. Labour laws may be seen to be enacted to advance distributive justice and promote equality in employment rights. Equally, labour laws may be enacted to facilitate free markets and promote a hierarchy of employment rights. There is no united purpose and the aims of each approach may conflict. In common law disputes, an appeal to the higher social values of the law may resolve issues of difficulty. Regardless of whether the political purpose underlying legislation aims to enhance distributive justice or market flexibility, such intent needs to be interpreted through values of fair dealing and a requirement to prevent unreasonable exploitation of bargaining power.

If the purpose of the law is the achievement of justice, social policy considerations upon which rules and doctrines of common law are based must be applied. Rather than try to ignore social policy there needs to be explicit acknowledgement by the judiciary that contextual interpretation of contract needs to include the economic, political and social imperatives that informed the statutory environment. By seeing the employment relationship in this wider context the pragmatic judge may truly take a purposive stance.

Julie McClelland*
j.mcclelland@hud.ac.uk

* University of Huddersfield. I am grateful to Pascale Lorber and Oxana Golynker, University of Leicester, for their comments on an earlier draft of this paper. Responsibility for all errors and omissions is mine