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TOPIC 2
LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE ASPECTS) AND PRODUCTIVE DECENTRALIZATION

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Labour Law and Productive Decentralization

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1. GENERAL.

Is there a trend toward increased productive decentralization of enterprises? Both types of productive decentralization of enterprises appear to be increasingly common in the UK. Businesses and government often contract out services to independent businesses, and in all sectors there is increasing use of externalisation of manpower supply and resources typically through the use of temporary employment agencies, which supply and manage the personnel aspects of the labour force.

In particular, project-based business organisation has been observed to flourish in a 'network economy'.[1] Under this model, a team of professionals with different skills is assembled to complete a particular project, such as an advertising campaign, a film, a CD, a research project, a design project, a construction project, or a book. Once the project has been completed the team disbands and moves on to other projects. This pattern of working differs from the large vertically integrated business that used to manage these projects internally; now the core company contracts the task out to a specially formed project based

[1] D. Marsden, 'The "Network Economy" and Models of the Employment Contract' (2004) 42:4 *British Journal of Industrial Relations* 659-684.

group of professionals and managers. Workers under these projects may be regarded as independent contractors, but they may also be treated as employees of a company that has been created for the project. These contracts of employment are likely to be fixed-term for the period of the project and to include payment system linked to the success of the project, such as a share of the profits (which may be achieved in a variety of ways such as shares in the company or royalties on sales of the product).

In the public sector there has been increasing use of 'Public Private Partnerships'. Under this scheme, a private company builds and maintains and new building such as a hospital or a school, and leases it for a long period to a public authority which uses it to provide a public service. One significant employment law consequence has been that some of the workers, that is the maintenance staff, are employed by the private company, whereas the remainder of the workers will be public sector workers employed by the public authority. These two groups of workers often work side by side in the same building. Frequently the public sector workers are unionised with collective bargaining arrangements, whereas the private sector workers are not and often have poorer terms and conditions. This creates a concern about a 'two-tier workforce'.[2] Unions have tried to insist that workers employed by the private sector employer are paid the same or similar terms and conditions to those enjoyed by the public sector workers in the same hospital, school, etc. Strike action by the public sector workers in pursuit of that goal may, however, prove to be unlawful secondary action, as it is a dispute about the terms of employment offered by another employer (the private company) to its own employees.[3]

With respect to externalisation of manpower, temporary work agencies (or more correctly employment businesses) have grown in size in recent years and there is a marked trend toward supply contract where a large number of workers are supplied each day by an agency.[4] These agencies still provide the service of meeting immediate and urgent needs for labour, but the pattern has emerged of employers using such agencies to supply on an indefinite basis major segments of their workforces. In the National Health Service, for instance, nurses are either permanent staff, or supplied by an independent employment agency, or by a subsidiary but separate public sector organisation that can supply nurses from a 'bank'. Workers under these arrangements may work for the client employer for many years on an indefinite basis, though receive their wages from the agency. These workers usually lack the occupational pensions and other fringe benefits of permanent staff of the client employer. Owing to the nature of the contractual arrangements between the worker and the agency, it is often doubted whether these workers qualify for employment protection rights because they are not regarded always as 'employees' of either the agency or the client employer,[5] though they may qualify as 'workers' for the purpose of enjoying European employment rights.[6]

It is unclear that there is any general pattern regarding the kinds of work that may be outsourced by these different methods. It is certainly a widespread practice, however, to outsource cleaning and catering, even in hospitals. With the widespread use of employment agencies, any job from chief executive to security guard may be performed by a person who is not employed by the core client employer.

The impact of the managerial strategy of outsourcing on individual labour relations has led to payment of wages fixed not by reference to the core employer's internal labour

[2] P. Maltby and T. Gosling, *Ending the 'two-tier' workforce* (London: Institute for Public Policy Research, 2003).

[3] *University College London Hospitals NHS Trust v UNISON* [1999] ICR 204, CA; *UNISON v United Kingdom* [2002] IRLR 497, European Ct of Human Rights.

[4] C. Forde, 'Temporary Arrangements: the Activities of Employment Agencies in the UK' (2001} 15 *Work, Employment and Society* 631-644; J. Purcell, K. Purcell and S. Tailby, 'Temporary Work Agencies: Here Today, Gone Tomorrow?' (2004) 42:4 *British Journal of Industrial Relations* 705-727.

[5] *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217; [2004] ICR 1437 (CA); *McMeecham v Secretary of State for Employment* [1997] ICR 549, CA.

[6] Case C-256/01 *Allonby v Accrington & Rossendale College* [2004] ICR 1328, ECJ.

market but by reference to external market rates, and in addition these measures have tended to depress the fringe benefits received by outsourced workers.

With respect to collective labour relations, as is well know there has been a significant decline in the UK in union membership and effective collective bargaining in the last quarter of century. Outsourcing as a managerial strategy tends to place the outsourced workers outside the scope of any bargaining unit recognised by the core employer, with the effect that these workers are likely to drop out of the scope of collective bargaining arrangements altogether.

2. GROUPS OF COMPANIES AND UNITY OF ENTERPRISE.

As a general principle, UK law respects the separateness of companies and does not pierce the corporate veil except in unusual circumstances. In labour law, however, for the purposes of the determination of many employment rights, two or more companies may be regarded as linked together as 'associated employers' if '(a) one is a company of which the other (directly or indirectly) has control, or (b) both are companies of which a third person (directly or indirectly) has control': Employment Rights Act 1996 section 231; Trade Union and Labour relations (Consolidation) Act 1992, section 297. Using the concept of 'associated employer', for example, an employee retains continuity of employment for the purposes of qualifying for employment rights despite transfers between associated employers in a group of companies.[7] Similarly, in calculating the total number of employees for the purpose of determining whether various statutory rights apply or fall within an exclusion for small businesses, it is usual to include associated employers in the count of employees. The courts have interpreted the word 'control' in the statutory definition of associated employers to refer to ownership of shares. For two companies to count as associated employers, either a single legal entity has to own 51% of shares in both companies, or a group of persons, which always acts in concert, has similar voting control by virtue of share ownership in two companies.[8] It is clear that outsourcing arrangements will rarely fall within this concept of an 'associated employer'.

To the extent that some employment rights are founded on European law, groups of companies may be handled differently if the scope of the Directive is defined by reference to the concept of 'undertaking'. An undertaking is an economic entity, which might be larger or smaller that a particular corporate entity. For example, a worker in a group of companies might be part of the entity which is transferred to another employer, even though technically the sale was concerned with the assets of a company which was not his employer and not an associated company in the technical sense.[9]

3. TRANSFER OF UNDERTAKING

The European Acquired Rights Directive 2001/23 (its latest version) has been in force in the UK since the Transfer of Undertakings (Protection of Employment) Regulations 1981 SI No 1794. In the light of the revisions to European law in the 2001 Directive, the UK government has introduced proposed major revisions to the national regulations, which are likely to be approved by Parliament as a new comprehensive piece of legislation named the Transfer of Undertakings (Protection of Employment) Regulations 2006. The new regulations will address many of the issues concerned with outsourcing, thereby not only clarifying the law but also changing it materially. In this discussion, it will be assumed that the government will

[7] Employment Rights Act 1996 s. 218(6).
[8] *South West Launderettes Ltd v Laidler* [1986] ICR 455.
[9] *Sunley Turriff Holdings Ltd v Thompson* [1996] IRLR 184, EAT.

implement in substance the draft Regulations published in 2005, though it is clear that the detailed wording of the final Regulations may differ in some respects.

The definition of transfer of an undertaking. As well as copying the EU definition of a transfer of an undertaking, the new regulations include an additional provision that tries to determine when there is a transfer of an undertaking in the context of outsourcing. The transfer in this context is defined as a 'service provision change'.

> **Draft Transfer of Undertakings (Protection of Employment) Regulations 2005/6 Regulation 3.**
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> (1) These Regulations apply to a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another employer where there is a transfer of an economic entity which retains its identity;
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> a service provision change, that is a situation in which – acitivities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor",
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> activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf, or activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf and in which the conditions set out in paragraph (3) are satisfied.
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> (2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
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> (3) The conditions referred to in paragraph (1)(b) are that:
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> before the service provision change there is an organised grouping of employees situated immediately before the change in the United Kingdom which has as its principal purpose the carrying out of the activities concerned on behalf of the client, the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task; and the activities concerned do not consist wholly or mainly of the procurement or supply of goods for the client's use…

In the above definition, the provisions in 3(1)(b) are designed to include most instances of outsourcing of service provision, and include second generation transfers of outsourced operations from one contractor to another. The limitation in 3(3)(b) is intended to exclude suppliers of components or goods to the core employer.

The case law that had evolved in relation to the earlier 1981 regulations had already anticipated the inclusion of outsourcing as a 'transfer of an undertaking', and had arguably gone further in expanding coverage to include some cases where in fact no assets or workers were in fact transferred to the new contractor providing the service. For example, in *RCO Support Services Ltd v UNISON*, [10] a hospital trust, which operated two hospitals, proceeded by stages to close down the 'in-patient' service at one (Walton) and replace it by new wards at the other (Fazakerley). After the in-patient service at Walton had been closed, the hardest legal issue in the case was whether there had been a transfer of an undertaking with respect to the ancillary cleaning staff formerly employed at Walton. The cleaners had

[10] [2002] EWCA Civ 464, [2002] ICR 751 (CA).

been employed by a contractor (Initial Hospital Services) at Walton, but none of them accepted an offer from RCO, the cleaning contractors at Fazakerley, that if they would resign from their jobs with Initial they would be offered similar jobs on different terms of employment at Fazakerley. Upholding the decision of the employment tribunal and EAT, the Court of Appeal unanimously held that there had been a transfer of an undertaking even though no tangible assets or staff had in fact transferred to RCO.

The protection of workers' rights in connection with a transfer. Under the regulations (both old and new), which implement EU law, the principal protections are that the contracts of employment and rights under it are automatically transferred to the new employing entity, that any dismissal in connection with the transfer is automatically unfair, and that a relevant collective agreement will continue to apply as if it had been negotiated with the transferee employer.

Under UK law, dismissals in connection with a transfer are effective to terminate the employment relation,[11] but the legislation states that the dismissal should be regarded automatically as unfair,[12] with the consequence that the dismissed employee should receive not only a basic award/redundancy payment but also a compensatory award that is 'just and equitable',[13] and which reflects all the employee's economic losses flowing from the dismissal,[14] up to a statutory maximum of about £55,000.[15] The payment of a compensatory award can only be avoided if the transferor or transferee (who are both liable for the payment) can point to an economic, organisational, or technical reason entailing changes in the workforce. This provision tries, albeit not clearly, to exclude the additional compensatory award in excess of the basic award where the employee would have been made redundant regardless of the transfer of the undertaking.

Consultation requirements. The Regulations contain mandatory requirements for consultation with the workforce in the event of a transfer of an undertaking, including outsourcing. They contain a duty upon the transferor and the transferee to consult a recognised trade union or, in the absence of a recognised trade union, other workforce representatives. This duty comprises consultation with a view to seeking the agreement of the representatives of the workforce, and expressly includes a duty to consider representations. It is much debated whether 'consultation with a view to seeking agreement' is really the same as 'negotiation', but it does seem to amount to a lesser obligation than a duty to negotiate in good faith, which implies the possibility of proposals and counter-proposals. The sanction for the employer in failing to comply with this duty is the payment of compensation to 'affected employees' to the amount which a tribunal considers 'just and equitable having regard to the seriousness of the failure of the employer to comply with his duty', but not exceeding thirteen weeks' pay: TUPE 1981 Regulation 11(11).

> Transfer of Undertakings (Protection of Employment) Regulations 1981, Regulation 10
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> (1) In this Regulation . . . references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or transferee (whether or not employed in the undertaking or the part of the undertaking to be transferred) who may be affected by the transfer or may be affected by measures taken in accordance with it; and references to the employer shall be construed accordingly.
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> (2) Long enough before a relevant transfer to enable the employer of any affected employees to consult all the persons who are appropriate representatives of any of those affected employees, the employer shall inform those representatives of—

[11] *Wilson v St. Helens Borough Council; British Fuels Ltd v Baxendale* [1999] 2 AC 52, HL.
[12] Transfer of Undertakings Regulations 1981, regulation 8; draft regulations 2005/6 regulation 7.
[13] Employment Rights Act 1996 s. 123.
[14] *Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36, [2004] ICR 1052, HL.
[15] Employment Rights Act 1996 s. 124(1).

(a) the fact that the relevant transfer is to take place, when, approximately, it is to take place and the reasons for it; and

(b) the legal, economic and social implications of the transfer for the affected employees; and

(c) the measures which he envisages he will, in connection with the transfer, take in relation to those employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures which the transferee envisages he will, in connection with the transfer, take in relation to such of those employees as, by virtue of Regulation 5 above, become employees of the transferee after the transfer or, if he envisages that no measures will be so taken, that fact.

(2A) -For the purposes of this Regulation the appropriate representatives of any employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, which ever of the following employee representatives the employer chooses:—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this Regulation, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by them, for the purposes of this Regulation, in an election satisfying the requirements of Regulation 10A(1).

(3) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d) above . . .

(5) Where an employer of any affected employees envisages that he will, in connection with the transfer, be taking measures in relation to any such employees he shall consult all the persons who are appropriate representatives of any of the affected employees in relation to whom he envisages taking measures with a view to seeking their agreement to measures to be taken.

(6) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8A) If, after the employer has invited affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to each affected employee the information set out in paragraph (2).

The main gap in coverage of this Regulation concerns sales of the business that take the legal form of a sale of shares or a take-over. These sales are excluded, because the legal and contractual rights of employees are unaffected by the change in ownership of shares. Yet a change in ownership in shares and control over a company will obviously raise

important questions in the minds of the workforce about possible workforce reductions and restructuring, just as much as if there had been a sale of the assets of the business.

The principal importance of these consultation provisions concerns situations where the transferee employer is likely to introduce variations in terms and other changes in the organisation including outsourcing of part of the business. This situation presents the difficulty that the transferor may not know of these plans and the transferee will be unwilling to disclose them for reasons of commercial confidentiality. The transferor, whilst employer, has to give information about those plans, and the transferee is under a legal duty to disclose that information, but the transferor does not have to consult the workforce representatives about any such plans, because they are not the plans of the transferor. Nor can the transferor compel disclosure by the transferee of such information. At best, the workforce may complain that the duty to supply information was breached by the transferor. The transferor may join the transferee to the proceedings for the purpose of paying compensation for that breach of duty on the ground that it was not reasonably practicable for the transferor to supply that information because the transferee did not disclose it to the transferor. Thus the transferee has a good chance of keeping its plans quiet and does not have to consult about these plans until immediately after the sale, at which time, of course, they will be implemented without delay. It must be doubted, therefore, whether these information and consultation requirements can have much effect in the case where they matter the most. It should be noted, however, that if the transferor is held liable to pay compensation for failure to inform and consult prior to the transfer, that liability to pay a compensatory award to employees will transfer as a liability connected to their contracts of employment under Regulation 5, so that the transferee may eventually find itself liable to pay compensation for the defaults of the transferor (whether or not it caused them).[16] Under Article 3.1 of the Directive, national governments have the option to make both transferor and transferee jointly and severally liable for obligations arising prior to the transfer, a provision which, if implemented as expected in the proposed Draft TUPE regulations 2005/6, would enable tribunals to have a general power to link liability to responsibility for defaults in providing information and consultation.

How are relations between the transferor and the transferee enterprises organized when the latter continues to operate in the former's premises? It is unclear to the reporter that any particular problems arise in this situation. The transferee may lease part of the premises, or alternatively be given a contractual license to use the premises for business purposes, as in the case of a concession in a shop. In such a case, the transferee will be the employer of the staff, as in the case of a concession within a shop's premises. The transferee will therefore pay wages and assign tasks.

1. THE LEGAL SITUATION OF THE EMPLOYEES OF CONTRACTORS AND OTHER AFFILIATED ENTERPRISES VIS A VIS THE PRINCIPAL/PARENT ENTERPRISE.

(a) With respect to liability for personal injuries and health and safety risks, the enterprise that controls the premises/workplace will be responsible in addition to the direct employers of the workers, even if those employers are completely independent contractors. This result is achieved in the regulatory legislation by the Health and Safety at Work Act 1974, section 3(1) 'It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.' Section 4(2) of the same Act applies a similar duty on anyone who has to any extent control over non-domestic places of work. These general duties are enforceable only by criminal

[16] *Alamo Group (Europe) Ltd v Tucker* [2003] IRLR 266 (EAT).

sanctions. However, civil liability for injuries can usually be established in the same circumstances under claims for liability for tortuous (delictual) negligence, liability for dangerous premises, or for breach of particular statutory duties imposed on employers.

In contrast, it is unlikely that the principal/parent enterprise will ever be liable for the conduct of contractors towards their employees with respect to wages and other terms and conditions of employment. As a matter of general principle only the direct employer will be held responsible for conformity with relevant labour standards such as equal pay and the minimum wage. That principle may also be found in European law with the 'single source' doctrine in equal pay law.[17]

An exception to this general principle may arise in the context of anti-discrimination laws. Under section 9 of the Sex Discrimination Act 1975,[18] it is unlawful for a principal to discriminate against a woman who is a contract worker employed not by the principal but by an independent contractor in the terms on which he allows her to do that work. This provision may apply discrimination laws to a variety of situations in which the principal shares the duties of an employer with a contractor or uses the contractor as an intermediary. It was applied, for instance, under the analogous race discrimination legislation to an instance where the principal in effect compelled the contractor to dismiss its employee by refusing to permit that employee to enter the premises of the principal's shop where the contractor exercised a concession.[19] But this provision does not appear to go so far as to permit a claim against the principal for conduct by the contractor which is outside the principal's control, such as the terms of employment agreed between worker and contractor without any negotiation with the principal.

There is no duty to inform the employees of the contractor and other affiliated enterprises of the identity of the principal company for which they provide services of components.

As a general principle there cannot be a direct employment relationship between the principal company and the employees of its contractors or other affiliated companies. There are some anomalous decisions in the courts, however. The best known is *Catamaran Cruisers Ltd* v. *Williams*.[20] The case concerned a claim for unfair dismissal in the context of a business restructuring. A preliminary issue was whether Mr Williams was an employee of Catamaran Cruisers. At the suggestion of the employer, Catamaran Cruisers, he had formed a limited company (Unicorn Enterprises) with his mother through which he provided his personal services to the employer. The employer paid Unicorn Enterprises a fee and did not deduct income tax or national insurance contributions, though at one point it offered Mr Williams 'holiday pay' and 'sick pay'. Under the normal principles of company law, Unicorn Enterprises represents a separate legal entity. Mr Williams, if he was the employee of any company, should have been the employee of Unicorn Enterprises (as well as a director and major shareholder.[21] Any contract entered into by Catamaran Cruisers was plainly with Unicorn Enterprises, not directly with Mr Williams, so logically not only did Mr Williams not have a contract of employment with Catamaran Cruisers, he probably had no contractual relation at all. Notwithstanding this logical problem, the tribunal, whose decision was upheld by the EAT, found that Mr Williams had on the special facts of this case a contract of employment with Catamaran Cruisers. But this was an unusual case where the tribunal pierced the corporate veil because in this case it was plainly just a sham invented to reduce the tax liabilities of the principal employer, and it was clear that previous to the creation of the

[17] Case C-256/01 *Allonby v Accrington and Rossendale College* [2004] ICR 1328, ECJ.

[18] Also Race Relations Act 1976 s.7; Employment Equality (Sexual Orientation) Regulations 2003 reg 8; Employment Equality (Religion and Belief) Regulations 2003 reg 8; Disability Discrimination Act 1995, s.12.

[19] *Harrods Ltd v Remick* [1997] IRLR 583, CA. See also *Abbey Life Assurance Co Ltd v Tansell* [2000] IRLR 387, where the principal was alleged to have engaged in disability discrimination when terminating its contract with an intermediary employment agency which had supplied the services of the applicant.

[20] [1994] IRLR 386 (EAT).

[21] see *Bottrill* v. *Secretary of State for Trade and Industry* [1999] IRLR 326 (CA).

sham company the worker had been a direct employee. In the vast majority of cases, however, the courts will not ignore the corporate structure and the pattern of contracts.

5. LEASE OF WORKERS AND OTHER FORMS OF SUPPLY OF WORKERS.

Lease of workers.

There does seem to be a practice of 'lease of workers', which is usually called 'secondment'. It involves an employee going to work for a different organisation with the permission of the employee's main employer. This might occur in a group of companies with temporary transfers to a different company in the group, or it might occur in the public sector between different divisions or ministries of government. It can occur as between completely independent businesses, perhaps in the context of a joint venture or a quasi-integrated supply chain. As far as the reporter knows, the arrangement is not a 'lease' in any sense, but rather the employee is given permission for temporary absence (though this might be for several years) in order to work for another employer. The contract of employment of the original employer is therefore apparently put into suspension,[22] in the sense that for a period no obligations of work or payment are required, but will revive when the period of secondment has been completed. The worker will have a separate contract of employment with the new employer, typically for a fixed period of time. At all times the worker will have a contract of employment and thus enjoy most employment law rights. There must be question, however, about whether during the period of suspension the employee has any rights against the original employer other than to return at the end of the period. There is also a question about whether the employee has acquired the necessary qualifying period for protection in relation to certain rights (eg one year's continuous employment for protection against unfair dismissal) against the new employer. These issues have not been addressed in reported cases.

Regulation of Temporary Work Agencies.

In general, arrangements by which temporary work agencies supply workers for employers are permitted and this is a thriving business in the UK. Estimates of the numbers of workers under a contractual engagement with a temporary work agency (technically called an 'employment business') differ, but the number is somewhere between 500,000 and 1 million.[23]

The reporter is not aware of any special legal restrictions on the types of work that may be performed by agency workers.

Under the Employment Agencies Act 1973 (as amended), there is no licensing system, but a Secretary of State may apply to a tribunal to issue a 'prohibition order' against named individuals or a body corporate prohibiting them from conducting an employment business. The grounds for seeking a prohibition order will be either violation of some of the basic safeguards for workers provided by the statute or regulations issued under the statute, in particular Conduct of Employment Agencies and Employment Businesses Regulations 2003.[24] The main provision of the statute is to prohibit as a criminal offence an employment business from charging the work-seeker for its service.[25] The detailed Regulations impose

[22] M. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003) 464ff.

[23] Department of Trade and Industry, *Proposal for a Directive of the European Parliament and of the Council on Working Conditions for Temporary Agency Workers – Regulatory Impact Assessment*.

[24] SI 2003/3319; see G. Morris, 'England', in R. Blanpain and R. Graham (eds) *Temporary Agency Work and the Information Society* (The Hague: Kluwer Law International, 2004).

[25] The Regulations create exceptions to this prohibition which permit the charging of a commission on earnings from work secured by the agency for the work-seeker in certain professions including: acting, music, singing, dancing, writers, artists, directors and other workers in the film and television industries, fashion model, and

requirements for employment businesses about the disclosure of information and the keeping of records. In particular, an employment business must agree terms with the work-seeker that cover the following topics: whether the worker will be an employee or the employment business or an independent contractor, the terms and conditions of the contract between them, a guarantee by the employment business to pay the worker (even if the hirer in fact pays the wages directly), the notice period to be given on either side before termination of particular assignments with hirers, that rate of remuneration, the periods between payment, and details of any holiday and leave entitlements.[26]

This emphasis on disclosure in the Regulations reveals also that there is no legal restriction on the types of contractual arrangements under which the agency worker may work. In particular, there is no requirement that the agency worker should be regarded as an employee of either the employment business or the hirer. In practice it seems to be normal that the contractual arrangement between the employment business and the worker purports to construct a contract for services or independent contracting arrangement. Here are the terms of the engagement between the worker and the employment business considered in one litigated case, *McMeechan* v. *Secretary of State for Employment.*[27]

> 'Conditions of Service (Temporary Self-Employed Workers)
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> (1) You will provide your services to the contractor as a self- employed worker and not under a contract of service. (2) You will provide your services commencing on the date shown on the timesheet until the end of the same week or such earlier date as the hirer (referred to below as 'the client') may determine. (3) The contractor agrees to offer you the opportunity to work on a self-employed basis where there is a suitable assignment with a client but the contractor reserves the right to offer each assignment to such temporary worker ('temporary') as it may elect in cases where that stated above assignment is suitable for one of several temporaries. (4) The contractor shall pay your wages calculated at the rate stated above payable weekly in arrears subject to deductions for the purposes of National Insurance, PAYE or any other purpose required by law. An overtime premium will be paid provided this is agreed in writing by the client. (5) You are under no obligation to accept any offer made under paragraph (3) but if you do so you are required to fulfil the normal common law duties which an employee would owe to an employer as far as they are applicable. In addition, you will at all times when services are to be performed for a client comply with the following conditions. You will: (a) not engage in any conduct detrimental to the interests of the contractor; (b) upon being supplied to the client by the contractor not contract with any other contractor, consultant or agency for the purpose of the supply of your temporary services of what ever nature to the client unless a period of 13 weeks has elapsed since the time that you ceased to be supplied to the client by the contractor; (c) be present during the times, or for the total number of hours, during each day and/or seek as are required by the contractor or the client; (d) provide to the client faithful service of a standard such as would be required under a contract of employment; (e) take all reasonable steps to safeguard your own safety and the safety of any other person who may be affected by your actions at work; (f) comply with any disciplinary rules or obligations in force at the premises where services are performed to the extent that they are reasonably applicable; (g) comply with all reasonable instructions and requests within the scope of the agreed services made either by the contractor or the client; and (h) keep confidential all information which may come to your notice whilst working for the client and keep secret all and any of the client's affairs of which you may gain knowledge. (6) The contractor is not obliged to provide and you are not required to serve any particular number of hours during any day or week. In the event of your declining to accept any offer of work or failing to

sports persons: Regulation 26 and Sched 3.

[26] Regulation 15.

[27] [1977] ICR 549, CA.

> attend work for any reason for any period, this contract shall terminate. (7) You are not entitled to payment from the contractor for holidays (including statutory holidays) or absence due to sickness or injury. The contractor provides no pension rights. (8) The contractor shall be responsible for making all statutory deductions relating to earnings related insurance and income tax under Schedule E in accordance with the Finance (No 2) Act 1975 and transmitting these to the Inland Revenue. (9) You acknowledge and confirm that the nature of temporary work is such that there may be periods between assignments when no work is available. (10) The contractor may instruct you to end an assignment with a client at any time on summary notice to that effect, without specifying any reasons. (11) Following a decision by the contractor that your services are no longer required on a self-employed basis you shall have the right to request a review of the decision by the relevant branch manager. (12) If you have any grievance connected with the offered assignment or relations with client or any employee of the client, you shall have the right to present the grievance to the manager of the branch of the contractor through which you are offered work. If no conclusion satisfactory to you is reached at this stage you may present the grievance for ultimate decision to the area manager. (13) The qualifying days for statutory sick pay shall be Monday to Friday or the days in the week when you would be available for work and when a suitable assignment had been offered but in any event shall not exceed Monday to Friday inclusive. (14) You are required to inform the contractor by no later than 10 am on the first qualifying day of sickness so that the contractor can make arrangements to provide alternative workers to the client' . . .

The issue in this case was whether the worker had a contract of employment or a contract for services with the employment business in the context of the insolvency of the employment business and a claim against the state guarantee fund for wages. Despite clause (1) of the contract the Court of Appeal concluded that there was a contract of employment with the employment business for each particular assignment on which the worker was dispatched to a hirer (though not a contract of employment persisting through a number of assignments). In short, the legislation permits general freedom of contract between the parties to the triangular relationship, but the courts will not necessarily accept the particular labels attached to the relationships by the parties themselves in their contracts.

Given this freedom of contract, in principle the contracts might be arranged to exclude agency workers from most employment law standards. To counter this risk, detailed provisions in the relevant legislation ensures that agency workers will fall within its scope. In particular, the Working Time Regulations 1998,[28] provide that the general provisions regarding holidays, maximum hours, rest breaks, etc., apply to agency workers even if they are not as a result of their contracts 'workers' as defined by the legislation governing the scope of the regulations. Similarly, the minimum wage law is also extended to cover agency workers.[29] In both cases the legal obligation applies to the entity that actually pays the worker, which is normally the employment business in practice. But not all legislation contains such extensions, and in particular the law of unfair dismissal only applies to a contract of employment.

This restriction can apparently lead to the possibility under the contractual arrangements that the worker does not have a contract of employment with either the employment business or the client, and therefore when dismissed from an assignment the worker will have no possible claim for unfair dismissal against any business. The courts have been reluctant to accept this conclusion, though it is hard to see how it can be evaded within the legal conceptual framework. As we have seen, the employment business usually constructs the contractual arrangement to try to treat the worker as an independent contractor, so that no claim for unfair dismissal is possible. With respect to a claim against the hirer the glaring problem is that there is no express contract at all between the hirer and

[28] Regulation 36.
[29] Minimum Wage Asct 1998 s.34.

the worker, and it is hard to imply one since the hirer does not pay the worker's wages. These problems were canvassed in the recent decision of *Dacas v. Brook Street Bureau (UK) Ltd*.[30] A claimant for unfair dismissal had worked for about five years under a placement provided by an employment agency as a cleaner in a hostel called West Drive run by Wandsworth Borough Council, the client of the agency. Following a complaint about alleged misconduct on the part of the claimant made by the Council, the agency told her that it would no longer be finding work for her and she ceased working at the hostel. The employment tribunal concluded that she had been employed neither by the Council nor the agency, and that accordingly she had no right to bring a claim for unfair dismissal against either party. The claimant successfully appealed to the EAT against that decision with respect to the finding that the agency was not her employer. On further appeal by the agency, the Court of Appeal allowed the appeal, holding that the employment tribunal had correctly concluded that the worker's contract with the agency could not be classified as a contract of employment because the agency was under no obligation to provide work, the applicant was under no obligation to accept work, and the agency did not exercise day-to-day control over her work. The Court of Appeal also heard argument on the issue of whether the Council was her employer instead, though since that point had not been raised in the appeal, the issue was only relevant in so far as a possible contract of employment with the Council might negative a finding of a contract of employment with the agency. A majority of the Court of Appeal (Mummery, Sedley LJJ, with Munby J dissenting) expressed the view that the employment tribunal should have considered the possibility that despite the absence of an express contract between the client (or end-user) and the worker, an implied contract of employment had arisen as a result of the conduct of the parties. Mummery LJ observed in his judgment:

> The critical point is that, although the construction of the contractual documents is important, it is not necessarily determinative of the contract of service questions, as contractual documents do not always cover all the contractual territory or exhaust all the contractual possibilities…The totality of the triangular arrangements may lead to the necessary inference of a contract between such parties, when they have not actually entered into an express contract, either written or oral, with one another…
>
> If the applicant has a contract of service in a triangular situation of this kind, it may be with (a) the end-user, the contract usually being an implied one, or (b) the employment agency, depending on the construction of the express contract between the applicant and the agency and on other admissible evidence or, though this is more problematical, (c) more than one entity exercising the functions of an employer, namely the employment agency and the end-user jointly (see M. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003) pp.42-43.)…
>
> I approach the question posed by this kind of case on the basis that the outcome, which would accord with practical reality and common sense, would be that, if it is legally and factually permissible to do so, the applicant has a contract, which is not a contract of service, with the employment agency, and that the applicant works under an implied contract, which is a contract of service, with the end-user and is therefore an employee of the end-user with a right not to be unfairly dismissed. The objective fact and degree of control over the work done by Mrs Dacas at West Drive over the years is crucial. The council in fact exercised the relevant control over her work and over her. As for mutuality of obligation, (a) the council was under an obligation to pay for the work that she did for it and she received payment in respect of such work from Brook Street, and (b) Mrs Dacas, while at West Drive was under an obligation to do what she was told and to attend punctually at stated times. As for dismissal, it was the council which was entitled to take and in fact took the iniative in bringing to an end work done by her at West Drive. But for the council's action she would have continued to work there as previously. It is true that the obligations and the power to dismiss were not contained in an express contract between Mrs Dacas

[30] [2004] EWCA Civ 217 [2004] ICR 1437 (CA).

> and the council. The fact that the obligations were contained in express contracts made between Mrs Dacas and Brook Street and between Brook Street and the council does not prevent them from being read across the triangular arrangements into an implied contract and taking effect as implied mutual obligations as between Mrs Dacas and the council.

This suggestion that there may be an implied contract of employment between the client and the worker, though plausible because of the element of personal service and control by the client, has to overcome the central difficulty that the client is not in fact under an express contractual obligation to pay the worker, but on the contrary only has an express contractual relation with the agency to pay its fees. It was for this reason that Munby J doubted that any implied contract of employment, or indeed any contract at all, could be found between the client and the worker. Despite the attractions of Mummery LJ's proposed analysis for workers, it must also be recognised that clients use the services of employment agencies both to achieve flexibility in manpower and to avoid the obligations of employment law. Thus the economic rationale of these business arrangements is precisely to enable employers to contract out of many statutory protections for their employees. The above case is the closest that the courts have so far come to constructing an implied contract of employment between the user and the worker for the purpose of securing the worker some employment rights.

6. FRANCHISING.

Under English law franchising is regarded as a commercial contract to which the normal principles of freedom of contract apply. There are no special legal rules applicable to franchising other than general contract law and general competition law. In particular, there are no special protections for franchisees who may often be regarded as the weaker party in the relationship. Franchisees will be regarded as independent businesses who need to look after their own interests, and these arrangements will normally fall outside the scope of labour law. Unlike the case of agency workers there are no special rules in the protective legislation that deem franchisees in some cases to be covered by the legislation.

Nevertheless it seems possible that in some cases the protective legislation may be applicable to franchisees. Although it is unlikely that they will be regarded as working under a contract of employment, they may perhaps be regarded as 'workers', the term that governs the scope of such protective legislation as minimum wages and maximum hours. The general definition of worker is usually stated in the following terms:

> In this Act 'worker' means 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 it is 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 undertaking carried on by the individual; . . .[31]

There is no statutory definition of the concepts of 'profession' or 'business undertaking'. With respect to the notion of 'profession', in the context of a claim brought by freelance wildlife cameramen and women under the statutory trade union recognition procedure, which applies

[31] Employment Rights Act 1996, section 230(3).

to a similar concept of 'worker',[32] it was held that although the existence of a regulatory body is probably a sufficient condition for a person to count as a 'professional', it is not necessary condition, so that other factors such as skills and academic qualifications might be sufficient to exclude a person as a professional.[33] With respect to the phrase 'business undertaking', this phrase cannot be understood simply as the common law concept of 'independent contractor', for that interpretation would deprive the concept in (b) of any meaning. The type of independent contractors to be included as 'workers' should be self-employed individuals who for the most part only enter contracts to perform work personally for a single employer, and whose degree of dependence or subordination is essentially the same as that of employees. The concept of worker has been held to include bricklayers contracted personally to perform particular jobs on building sites though clearly in the capacity of independent contractors rather than employees.[34] But a sub-postmaster who provides his own premises and can employ staff to perform the work, which is in effect a franchise operation, has been held to carrying on a business undertaking.[35] It therefore seems that only franchisees who contract to perform work personally might be included under this concept of 'worker'.

As well as this UK statutory definition of 'worker', the scope of some European Community law applies also to the concept of 'worker'. But confusingly, this EC concept of worker has its own meaning and does not defer to national interpretations of the concept. In *Allonby v Accrington and Rossendale College*,[36] the ECJ held that Article 141 of the European Treaty applied to 'workers', a concept which had a Community meaning. A worker was a person who, for a certain period of time, performs services for and under the direction of another person in return for remuneration. Thus a person who was formally classified as self-employed or an independent contractor under national law could be a 'worker' withing the EC law governing equal pay if her independence disguised the reality of a relation of subordination.

In relation to anti-discrimination laws UK law operates a different regime for the personal scope of the law, which again might include some franchisees.

> In this Act, unless the context otherwise requires 'employment' means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour . . .[37]

The requirement that the contract should be one containing an obligation to perform work, a requirement that is common to the legal definition of 'worker' above, has been interpreted to mean that the contract should be of a kind in which the employee undertakes to perform work and the employer promises to provide work. [38] In addition, the courts have imposed a further gloss on the statute, which insists that the dominant purpose of the contract should be that it is an undertaking to perform work personally. The contrast is with a contract where the undertaking is merely to ensure that the work is performed by managing the performance of the service by others. In the application to franchisees, this restriction means that unless the franchisee undertakes to perform the work in person exclusively, as opposed to employing others to help, the discrimination legislation is unlikely to apply. In *Mirror Group Newspapers* v. *Gunning*,[39] the applicant's father had held a distributorship for newspapers, which involved the purchase of newspapers in bulk, and then the resale and delivery of newspapers to about 90 retail outlets by means of employing about eight people using rented vans. The father's work involved direct supervision of the collection of the newspapers and their loading onto

[32] Trade Union and Labour Relations (Consolidation) Act 1992 section 296(1).
[33] *R v Central Arbitration Committee* [2003] EWHC 1375 Admin [2003] IRLR 460 (QB).
[34] *Redrow Homes (Yorkshire) Ltd v Wright* [2004] EWCA Civ 469, [2004] IRLR 720 (CA)
[35] *Commissioners of Inland Revenue v. Post Office Ltd* [2003] IRLR 199 (EAT).
[36] Case C-256/01 Allonby v Accrington and Rossendale College [2004] ICR 1328 (ECJ).
[37] Sex Discrimination Act 1975, section 82(1)
[38] *Mingely v. Pennock and Ivory (trading as Amber Cars)* [2004] EWCA Civ 328, [2004] ICR 727 (CA)
[39] [1986] ICR 145 (CA).

the vans. On her father's retirement, the applicant applied for the distributorship, where she had been employed by her father, but the defendant refused the application and instead gave the work to two other businesses in the area. The applicant brought a claim for sex discrimination. A preliminary question was whether the legislation applied to the distributorship agreement. Reversing the industrial tribunal and the EAT, the Court of Appeal found that the distributorship did not satisfy the requirement of a contract personally to execute work.

7 COLLECTIVE ACTION AND COLLECTIVE BARGAINING IN A CONTEXT OF PRODUCTIVE DECENTRALIZATION.

In general trade unions are hostile to productive decentralization. The effect of outsourcing is perceived to be the removal of the outsourced workers from the bargaining unit and the coverage of existing collective agreements, usually to the disadvantage of both the outsourced workers and indirectly to the retained workers, whose bargaining position may thereby be diminished. In addition, trade unions often experience difficulty in organising and obtaining recognition from the contractors to whom the work has been outsourced. Although in theory the transfer of undertakings regulations might apply in many instances of outsourcing to protect the transferred workers' rights under the governing collective agreement, in practice it seems that the contractor will often either ignore this legal requirement or shortly after the transfer initiate a process of derecognition and abandonment of collective bargaining.

UK law does not provide for a statutory recognition procedure at the level of a group of companies in addition to the local level of the bargaining unit. However, UK law does comply with the two European directives regarding consultation and information for European multi-national enterprises and in large firms.

Trade unions have traditionally been organised by reference to a trade or profession rather than employment by a particular company. Employers sometimes bargain for and succeed in insisting that only one union be regarded as the representative of the workforce in its business. It is possible, however, by agreement between the parties, for a group of trade unions to agree to negotiate jointly with an employer or a group of companies. Such arrangements are likely to take place in the case of proposals for major business restructuring rather than annual pay negotiations.

Industrial action or strikes is closely regulated in the UK. As well as balloting requirements, there are restrictions on the legality of strikes with respect to subject matter and secondary action.[40] Given that in a group of companies, or in the case of outsourcing, the employers represented by the separate companies in the group or the external contractors will be regarded in law as separate entities, industrial action aimed at the group or the external contractor is likely to be regarded as unlawful industrial action as secondary action. Secondary action is defined as inducing the employees of an employer who is not a party to the dispute to breach their contracts of employment. Thus strikes which spread out from the immediate employer in the dispute to the group of companies as a whole are likely to be regarded as involving a tort, which can be subject to a labour injunction or a claim for damages against the union.[41]

[40] Trade Union and Labour Relations (Consolidation) Act 1992, ss 222-225.
[41] *Dimbleby & Sons Ltd v NUJ* [1984] ICR 386, HL.