Reconsidering the Mechanism to Regulate Working Conditions in the Light of Diversified and Individualised Employees and the Declining Labour Unions

Catherine Barnard
Senior Lecturer, Trinity College, Cambridge

1. General Picture of Laws and Legal Tools Regulating Terms and Conditions of Employment in the UK

1.1. Introduction

The UK has long been characterised as a system based on state abstention or collective laissez-faire. In practice this has meant that that the terms and conditions of employment have been regulated by the individual contract of employment, buttressed by collective agreement. But, as collective bargaining has declined, labour legislation has begun to fill the vacuum. These two events have not necessarily been linked. Legislation regulating workers rights dates back to the Factory Acts of the mid nineteenth century but the volume of legislation increased significantly under the Conservative government (1979-1997) which used legislation to erode the powers of trade unions and, more reluctantly, as it implemented EC obligations.

This trajectory has continued under the Labour government as it initiated a major legislative programme to give effect to its own programme laid out in the *Fairness at Work* White Paper.[1] Significantly, New Labour has not reversed much of the Conservative legislation on trade unions but it has dramatically increased the number of individual employment rights (see section two below) and, through a raft of legislation, tried to make the workplace more family friendly. At the same time the need to implement EC Directives continues unabated and this has necessitated the introduction of a large number of secondary measures and some significant reforms to the existing equality legislation.

Given the dramatic changes that have occurred in recent years, the principal pieces of labour legislation were largely consolidated into two principal statutes, the Employment Rights Act 1996 (ERA 1996) which largely concerns individual rights and TULR(C)A 1992 (Trade Union and Labour Relations (Consolidation) Act 1992 (concerning collective matters). Together these two statutes come as close as possible to our Labour Code although this is not a language with which we are familiar. There is, of course, no written constitution in the UK but European Community law and, to a certain extent the European Convention on Human Rights, is beginning to perform something of that function. However, it is the contract of employment which forms the 'cornerstone' of the employment relationship and it is to this subject that we now turn.

1.2. Contracts of Employment

In practical terms, it is the contract of employment which provides the most important source for the terms and conditions of employment. Most contracts (which can be oral or in writing) contain both express terms 'agreed by the parties' and implied terms. Evidence of these express terms is contained in the written statement of terms which must be given to all employees within two months of the start of their contract. The written statement (required by ss.1-12 ERA) does not constitute the contract itself but provides strong evidence of the actual terms. However, the statutory rules are complex.

Implied terms have played an increasingly important role in contracts of employment. In this respect we can see the extent to which the common law on the contract of employment differs radically from ordinary commercial contracts. In respect of commercial contracts, implied

[1] Cm 3968.

terms can be inferred according to the 'business efficacy' test laid down in *Moorcock*[2] and the 'officious bystander test' laid down in *Shirlaw*.[3] These tests have little relevance in the context of labour law where the courts have become increasingly willing to 'impose' duties on both employers and employees. In respect of *employees*, these duties include the duty to obey lawful and reasonable orders, the duty to cooperate with the employer, the duty to exercise reasonable care and skill and the duty of fidelity and loyalty. In respect of *employers* the duties include the general obligation to exercise care of the employee (both in respect of the employee's health and safety[4] and economically when giving a reference[5]) and a number of more specific duties, such as the duty to deal promptly with grievances[6] and the duty of disclosure.[7]

These so-called 'legal incidents' of the employment relationship are imposed on employers and employees alike. They operate, in Lord Steyn's words in *Malik*,[8] as 'default rules' which means that the parties are free to exclude or modify them. However, by far the most important of these terms is the duty, usually implied on the employer 'not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'[9] This important duty, described by Lord Nicholls as a 'portmanteau, general obligation,'[10] received strong judicial support from the House of Lords in *Malik* where the House decided that Malik was entitled to claim stigma damages from his former employer the bank, BCCI, on the grounds that the bank had breached the duty by running a 'dishonest or corrupt' business. However, in a subsequent case, *Johnson* v. *Unisys*,[11] the House of Lords refused to allow the employee to claim stigma damages for the manner of his dismissal reasoning that the term is concerned with 'preserving the *continuing* relationship which should subsist between employer and employee.'[12] For this reason, Lord Hoffman explained, 'it does not seem altogether appropriate for use in connection with the way that relationship is terminated.'

These implied terms are of enormous importance and are now well recognised in labour law. However, if they operate merely as default rules then their importance can be undermined by some careful drafting. Yet, an (admittedly small) number of cases appear to countenance the possibility that these implied terms operate in such as way as to *override* express terms. For example, in *Johnstone* v. *Bloomsbury AHA* [1991] IRLR 118, a case which concerned a junior doctor working on average an 88 hour week (40 hours mandatory and 48 hours discretionary overtime), the Court of Appeal decided 2:1 that an employee should be able to claim damages for the losses he had suffered. Although the reasoning of all three judges differed, for our purposes the most striking judgment is that of Stuart-Smith LJ, who argued that the contract terms did not override the duty of the employer in both contract and tort to take reasonable care to ensure the employee's health and safety. However, in *Johnson* v. *Unisys* Lord Hoffman seemed to doubt that these implied terms could prevail over express terms, certainly in the context of dismissal.[13] So the position is decidedly unclear. For the present, it is possible simply to note that these implied terms are important aspects of the regulation of the employment relationship.

1.3. Collective Bargaining

Trade union membership has declined significantly since its heyday in the 1970s, although

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2 *The Moorcock* (1889) 14 PD 64.
3 *Shirlaw* v. *Southern Foundries (1926) Ltd* [1939] 2 KB 206
4 *Waltons & Morse* v. *Dorrington* [1997] IRLR 488.
5 *Spring* v. *Guardian Assurance* [1994] IRLR 516.
6 *Goold (Pearmark) Ltd* v. *McConnell* [1995] IRLR 516.
7 *Scally* v. *Southern Health and Social Services Board* [1991] IRLR 522.
8 *Malik* v. *BCCI* [1997] IRLR 462, para.53.
9 Ibid, per Lord Nicholls, para. 8.
10 Ibid, para. 13.
11 [2001] IRLR 279.
12 Per Lord Hoffman, para. 46.
13 [2001] IRLR 279, para. 46.

the figures for the last four years have remained fairly constant. Trade union membership now stands at around 7,340,000 (about 29% of all employees). Levels of collective bargaining have declined significantly in the UK and only 22% of private sector employees are now covered by collective agreement (as compared to about 73% of public sector workers).[14] However, this figure too has remained fairly constant over recent years, at about 8.7 million or 35.6% of the workforce. Collective agreements themselves are presumed not to be legally binding (s.179 TULR(C)A)[15] and, unlike Continental systems they do not have *erga omnes* effects. However they can have legal effect through individual contracts of employment provided two conditions are satisfied: first, there needs to be a bridging term (which can be express or implied, including through custom) and second, the terms themselves must be suitable for individuation (that is that they contain matters relating to the individual (eg redundancy selection procedures,[16] disciplinary and grievance procedures[17]) as opposed to collective or procedural terms.

Because collective agreements derive their legal force from the contract, this has three significant consequences. First, all employees with a bridging term in their contracts will benefit from the collective agreement, whether trade union members or not. Second, because collective agreements do not operate as a floor of rights in the UK, employers and employees can agree that the terms of the collective agreements do not apply to them. Thirdly, even if the employer breaches the collective agreement, this has no effect on the individual contracts of employment; the individual contracts themselves will need to be amended if the employer wishes to remove all effects of the collective agreement (on the question of contractual variation, see below).[18]

Collective agreements are negotiated between recognised trade unions and employers or employers' organisations. In the United Kingdom worker representation has traditionally been channelled through recognised unions (the single-channel approach), with the concept of works councils or their equivalents being largely unfamiliar. This approach to industrial relations, combined with the abstention of the state from involvement in industrial relations, have been distinguishing characteristics of British industrial relations since the nineteenth century.[19]

This picture has, however, significantly altered in the recent past, due in part to increased government intervention in industrial relations and in part to external pressure from the European Community. The pattern beginning to emerge is one of a significantly-weakened union structure combined with the development of alternative methods of worker consultation mechanisms influenced by the 'dual channel' approach found on the Continent. The developments at European Union level, while sitting awkwardly with the British model of single channel have, to a large extent, received the support of the trade union movement.

This need for this alternative channel of worker representation was brought into sharp focus by the Commission's challenge to the UK's implementation of two Directives which required information and consultation of 'representatives of the employers provided for by the law and practice of the Member States.'[20] The UK implemented this obligation by requiring employers to consult with a recognised trade union.[21] While in the late 1970s, when the Directive was first

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[14] DTI (2002) *Trade Union Membership: an analysis of data from the Autumn 2001 Labour Force Survey*, available at http://www.dti.gov.uk/er/emar/artic_01.pdf.

[15] See also *NCB* v. *NUM* [1986] IRLR 439 and *Ford Motor Co* v. *AUEFW* [1969] 2 QB 303.

[16] *BL v. McQuilken* [1987] IRLR 245; *Anderson* v. *Pringle of Scotland* [1998] IRLR 64.

[17] *Dietman* v. *Brent LBC* [1988] IRLR 299.

[18] *Robertson* v. *British Gas* [1983] IRLR 302

[19] Clark and Winchester 'Management and Trade Unions' in *Personnel Management: Comprehensive Guide to theory and Practice in Britain*, K.Sisson (ed), Blackwell, Oxford, p.714. O.Kahn-Freund, 'Legal Framework' in A.Flanders and H.Clegg *The System of Industrial relations in Great Britain*, (Oxford: Blackwell, 1954), 43, cited in B.Simpson *The Determination of Trade Union Representativeness in the United Kingdom*, Paper presented to the ILO, October 1994, 1.

[20] Article 2(c) of Directive 77/187/EEC on transfers of undertakings) or 'worker representatives' (Article 1(b) of Directive 75/129 on collective redundancies.

[21] Section 188 TULR(C)A 1992 provided: 'An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of the union about the dismissal in accordance with this section.' Regulation 10 of the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 1981 contained a similar provision.

implemented, this may have been adequate, the decline in trade union recognition over the last twenty years highlighted the inadequate implementation of the Directive in respect of at least half the workforce. Therefore, in *Commission v. UK*[22] the Court of Justice upheld the Commission's argument that the UK had failed to implement the Directive properly by not providing a mechanism for the designation of workers' representatives in an undertaking where the employer refused to recognise a trade union.[23]

The UK's response can be found in SI 1995/2587[24] requiring an employer, from 1 March 1996, to consult with 'appropriate representatives' of any of the employees who are going to be dismissed in the case of collective redundancies and 'affected employees' in the case of transfer of undertakings. These 'appropriate representatives' of any employees are:

(a) employee representatives elected by them, or

(b) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union.'[25]

Although the 1995 'CRATUPE' Regulations gave the employer the choice of which group to consult, amendments introduced by the Labour government require employers to consult with a recognised trade union where one exists.[26] Only in the absence of a recognised trade union can an employer consult with elected worker representatives.

The 1995 CRATUPE Regulations marked the first substantial inroad into the single channel.[27] They have, however, paved the way for the implementation of other European Directives such as the Working Time Directive 93/104 (as it then was), the Parental Leave Directive 96/34 and the Fixed Term Work Directive 99/70. In respect of the implementation of each Directive, the legislature has made provision for workforce agreements which can flesh out the detail of the rights laid down by the Directive. For example, the Working Time Regulations define a workforce agreement as 'An agreement between an employer and workers employed by him or their representatives in respect of which the conditions set out in Schedule 1 are satisfied.' To be valid, a workforce agreement must:

- be in writing;
- have been circulated in draft to all workers to whom it applies together with guidance to assist their understanding of it;
- be signed, before it comes into effect, either
  - by all the representatives of the members of the workforce or group of workers; or
  - if there are 20 workers or fewer employed by a company, either by all the representatives of the workforce or by a majority of the workforce;
- have effect for no more than five years.

Thus, elected workforce representatives or, in the case of a company employing fewer than 20 workers, the workers themselves can enter into a new type of agreement, a workforce agreement, which can, for example, modify or exclude the application of certain key provisions of the Regulations.

The European Community duty to consult worker representatives also applies in respect of health and safety at work[28] and, more recently, in respect of economic issues arising in transnational companies (as a result of the European Works Councils Directive 94/95/EC,[29] implemented in the UK through the TICE Regulations) and now in respect of national companies (as a result of Directive 2002/14 on national level information and consultation,[30]

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[22] Case C-383/92 [1994] ECR I-2479

[23] See generally P.Davies, 'A Challenge to Single Channel' (1994) 23 ILJ 272.

[24] The Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment) Regulations 1995.

[25] Regulation 3(1), Regulation 9(4).

[26] SI 1999/1925 CRATUPE Regs 1999.

[27] Department of Employment, *Consultation about collective redundancies and business transfers: a legislative proposal*, April 1995.

[28] See, for example, the Framework Directive 89/391/EEC.

[29] OJ 1994 L254/64 considered by C.McGlynn, 'European Works Councils: Towards Industrial Democracy' (1995) 24 ILJ 78.

[30] OJ [2002] L80/29.

which are due to be implemented in the UK through the ICE Regulations). These developments are significant for they are intended to foster a spirit of partnership between employers, workers and their representatives, both union and non-union.

1.4. Varying the Terms of the Contract

There are a number of ways in which contractual variation can take place. One possibility is by agreement with the individual employee, usually with the employer offering some consideration in return for the change. Another possibility is for the employer to take unilateral action. This may amount to a repudiatory breach of contract which the employee can accept or reject. If he accepts the breach then he will treat the contract as terminated and sue for unfair and wrongful dismissal. If, on the other hand, he rejects the breach, then he can treat the contract as ongoing and either do nothing (the more usual situation) or sue for damages.

Another alternative is for the employer to agree with the trade union to vary the terms. If this is done via collective agreement and the collective agreement forms part of the individual contract of employment then this will take effect as contractual variation (although there may also have to be some consideration if the variation is to the employees' detriment). Even if the employer does not negotiate a variation in terms with the trade union, the union's participation and agreement may be a factor taken into account when assessing the fairness of the dismissal of any employee who has not agreed to the changes in the contract.[31]

A further possibility is that no variation is necessary either because the contract contains a broad flexibility clause which will achieve the employer's purpose or because the courts are prepared to give a broad reading to the implied duty of cooperation. Therefore, in *Cresswell* v. *Board of Inland Revenue*[32] the Inland Revenue computerised its procedures. This was held to be an updated version of the tax officers' existing jobs which they were supposed to adapt to, subject to the necessary training, and not a unilateral variation of the contract. A final possibility is that certain aspects of the employment relationship are contained in works rules or a company handbook. In this context they are simply a codified form of instructions from the employer which can be altered unilaterally as part of managerial prerogative.[33]

The only area in which legislation envisages the possibility of trade unions negotiating a reduction in terms and conditions of employment is in respect of the transfer of an undertaking which involves the survival of an undertaking. This can be found in the revised directive on transfers of undertakings[34] which has not yet been implemented in the UK.

2. Significant Changes in the Contents of Labour Laws in Recent Years

2.1. Introduction

The most significant changes that have occurred to labour law in the UK in recent years have been brought about by the (New) Labour government. This was signalled by the *Fairness at Work* White Paper[35] which contained a rejection of the approach deemed to epitomise the Conservative government ('low-skill, low-wage, low-quality, low-value economy') and replaced with the aim of achieving 'high' – 'high quality, high performance, high skills, high productivity, high value.'[36] The White Paper, which was premised on the aim of achieving a 'flexible and efficient labour market'[37] contained three main elements:

- Provisions for the fair treatment of employees;
- New procedures for collective representation at work (see heading three below); and
- Policies that enhance family life while making it easier for people – both men and women – to

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[31] *Catamaran Cruises* v. *Williams* [1994] IRLR 386.
[32] [1984] IRLR 190.
[33] *Secretary of State for Employment* v. *ASLEF (No.2)* [1972] 2 QB 455.
[34] Art. 5(2)(b) of Dir. 2001/23 (OJ [2001] L82/16).
[35] Cm 3968.
[36] Para. 1.3.
[37] Para. 1.8.

go to work with less conflict between their responsibilities at home and at work.

2.2. New Rights for Individuals

As far as new rights for individuals are concerned, some are derived entirely British-grown, others are based on European Community Law. In the first group are firstly, the National Minimum Wage Act 1998 laying down for the first time in the history of British industrial relations a minimum wage for all workers over 18;[38] and the Public Interest Disclosure Act 1998 protecting whistleblowers. In the second group are regulations concerning working time, part-time work and fixed term Work.

Significant changes have also been made to existing legislation, notably concerning unfair dismissal. As a result of the *Fairness at Work* White paper, the government:

- Reduced the service requirement prior to claiming unfair dismissal from two years to one. This was justified on the grounds that employees would be less inhibited about changing jobs and thereby losing protection, which should help to promote a more flexible labour market and persuade employers to introduce good employment practices which should 'encourage a more committed and productive workforce';[39]
- Abolished the possibility that those employed on fixed term contracts could waive their rights to claim unfair dismissal;
- Increased significantly the ceiling on the compensatory award from £12,000 to £50,000 (having originally proposed to abolish the statutory cap altogether). All limits were also index-linked.

The government has also been concerned about the volume of cases going to industrial tribunals. As a result, it has placed much emphasis on encouraging dispute resolution in the workplace by introducing – in the Employment Act 2002 – statutory grievance and disciplinary procedures which must be complied with by both employers and employees, as well as encouraging alternative sources of dispute resolution, notably through arbitration under the Employment Rights (Dispute Resolution) Act 1998. It is anticipated that this will have the effect of reducing cases before the employment tribunals by between 34,000 and 37,000.

The other major area in which the government has introduced some significant legislation is in respect of family friendly policies. The approach to family friendly issues is multi-faceted: there is a policy strand (a National Childcare Strategy to encourage businesses to provide access to good quality childcare for their employees); a financial strand (the Working families tax Credit giving financial support to working families) and, most importantly for our purposes, some important legislation. Some of the legislation has been introduced to serve other objectives but is harnessed to support the family friendly strategy (eg the national minimum wage, the Working Time Directive and the Part-time Work Directive) but legislation is specifically intended to address work-life balance issues, notably:

- Improved (and simplified) maternity (and adoption) rights – women are now entitled to 6 months ordinary maternity leave (OML), and a further six months additional (but unpaid) maternity leave (AML);[40]
- Parental leave (a total of thirteen weeks but no more than four weeks p.a during the first five years of the child's life) and time off for force majeure. Neither of these rights is paid. Both derive from EC Law; [41]
- Two weeks paternity leave paid at sick rate levels;[42]
- The right to request flexible working.[43]

More generally, and outside the direct rubric of family friendly policies, has been the

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[38] This is designed to encourage competitiveness 'by encouraging firms to compete on quality rather than simply on labour costs and price' (para. 3.2.)
[39] Para. 3. 9.
[40] SI 1999/3312 The Maternity and Parental Leave Regulations 1999.
[41] SI 1999/3312 The Maternity and Parental Leave Regulations 1999.
[42] SI 2002/2788 The Paternity and Adoption Leave Regulations 2002.
[43] Eg SI 2002/3236 The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002.

significant expansion of equality legislation introduced under the impetus of European Community law. In particular, new regulations have been adopted to ensure equal treatment on the grounds of sexual orientation[44] and religion or belief.[45] There have also been some significant amendments to the existing legislation on sex, race and disability discrimination.

3. Significant Changes to the Collective Labour Relations Laws and Collective Bargaining Patterns

As we have seen, the other area in which there have been major changes is in respect of collective labour relations. We see this in part in the shift – largely influenced by EC Law – from the single to the dual channel approach to worker consultation. But the *Fairness at Work* envisaged one major policy initiative, which was wholly domestic in origin, but intended to buttress the power of trade unions – the statutory recognition procedure. Under this rather lengthy procedure, which places much emphasis on voluntary agreement, employers are required to recognise a trade union for the purposes of negotiations about pay, hours and holidays, where, in the case of a ballot at a particular bargaining unit, the majority of those voting favoured recognition and that majority represented more than 40% of those entitled to vote.[46]

In other areas the government, consistent with its policy of giving greater rights to individuals, has strengthened collective rights through increased individual rights. It has therefore made provision for those employees who are dismissed for taking part in official industrial action to have a claim for unfair dismissal; it has abolished the so-called *Wilson and Palmer* rule which allowed for some discrimination against those involved in trade union activities, made provision for (but not yet brought into force) rules against blacklisting[47] and introduced the right for employees to be accompanied by a fellow employee or trade union representative of their choice during grievance and disciplinary procedures.[48] However, this focus on increased individual protection for collective rights has been the subject of some criticism by the European Court of Human Rights in *Wilson and Palmer*[49] and is currently being considered by the government in its review of the Employment Relations Act 1999 and in the new Employment Relations Bill.

Yet, these developments came at a price. The *Fairness at Work* White paper emphasised the government's commitment to 'maintaining the key elements of the employment legislation of the 1980s' in particular laws on picketing, on ballots before industrial action and for increasing democratic accountability in trade unions.[50]

4. To What Extent Should Labour Laws Intervene in the Labour Market?

Recent statements from the Labour government demonstrate New Labour's ambiguous attitude concerning the relationship between employment regulation and economic efficiency. For example, the White Paper on *Enterprise Skills and Innovation: Opportunity for all in a world of change*[51] (Cm 5052) published in February 2001 communicated a positive role for employment regulation. On 'rights at work' the White Paper stated:

> The UK's regulatory framework must keep up with the evolving workplace. The Government's role is to facilitate adaptation to these new conditions on fair terms. Rights at work are not the same as red tape. Minimum regulatory standards encourage

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[44] SI 2003/1661 The Employment Equality (Sexual Orientation) Regulations 2003.
[45] SI 2003/1660 The Employment Equality (Religion or Belief) Regulations 2003.
[46] The procedure can now be found in Schedule A1 TULR(C)A 1992.
[47] S.3 ERelA 1999.
[48] S.10 ERelA 1999.
[49] *Wilson and NUJ* v. *UK* [2002] IRLR 568 noted by K.Ewing. 'The Implications of *Wilson and Palmer*' (2003) 32 ILJ 1.
[50] Para. 2.15.
[51] Cm 5052, para. 5.21

> partnership in the workplace, promote social inclusion, and give employees confidence. Employers also benefit. Reputable firms are protected from unfair competition. Workers are more motivated if allowed to balance their work and private lives. Staff turnover and absenteeism are reduced.

This view reflects the approach in the *Fairness at Work* White paper that employment rights are seen as inputs into growth rather than drains upon it. The key principle is that 'fairness at work and competitiveness go hand in hand, and that one must reinforce the other.'[52] In contrast, the White Paper on *Our Competitive Future – Building the Knowledge Driven Economy*[53] published in December 1998 shortly after *Fairness at Work* communicated a very different message about the role of regulation:

> The Government is determined to avoid introducing new regulations which will impose unwarranted costs on British business. And we are reviewing the need for those existing regulations which seem incompatible with a flexible, innovative and entrepreneurial economy.

This ambiguity is not unique to the UK and is reflected in a number of documents at EU level too. Yet, despite the protestations, it is clear that there is a now a substantial (and at times complex) body of rules regulating both individual and collective employment relations.

[52] Para. 1.11.
[53] Cm 4176, para. 1.14.