

Reconsidering the Notion of “Employer” in the Era of the Fissured Workplace: *Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity?*

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1. Introduction

This report explores David Weil’s concept of the ‘fissured workplace’¹ in the context of United Kingdom employment and labour law,² arguing that regulation cannot keep up with fragmenting employment relationships because our concept of the employer is still very much fixated on a unitary concept, i.e. a single entity as the employer, reminiscent of the master of old. It answers the seminar question, *viz* whether labour law responsibilities should exceed the boundary of the legal entity, with an emphatic ‘yes, but...’: it is only through the careful adoption of a functional concept of the employer that the law will be able to adapt to the increasing fissurization of workplaces whilst ensuring theoretical coherence.

In order to develop this argument, the report is structured as follows. Following this Introduction, section II sections looks at the difficulty of identifying the employer in English law, both in terms of the absence of case law directly on point, and the competing notions which emerge upon closer inspection. Section III then turns to fissured work in the United Kingdom today, looking at three specific examples (agency work, private equity groups, and crowdwork) and the potentially dramatic legal implications for the scope of employment law. Section IV turns to legislative and judicial responses, both in individual

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¹ For present purposes, the two terms will be used interchangeably. The same is true for ‘English’ and ‘UK’ law in this context: whilst there are generally considerable differences between the different legal systems found within the United Kingdom, in particular between the law of England and Wales, and the law of Scotland, large parts of Employment law are an important exception to this rule, insofar as they apply across Great Britain: Trade Union and Labour Relations (Consolidation) Act 1992 (hereinafter, ‘TULRCA’) section 301(1); A Bradley and K Ewing, *Constitutional and Administrative Law* (15th ed, Pearson 2011) 40. For an important earlier discussion on point, see W Njoya, ‘Corporate Governance and the Employment Relationship: The Fissured Workplace in Canada and the United Kingdom’ (2015-16) 37 *CLLPJ* 121.

² D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

and collective employment law, and their varying degrees of effectiveness in overcoming the problems identified. Section V then introduces the proposed future development, *viz* a functional concept of the employer; a brief Conclusion demonstrates how its adoption could restore regulatory coherence in a world of fissured employment.

Before turning to that discussion, an important preliminary remark should be made: the concept of the employer in UK (and to a lesser extent in EU) law has been the subject of my recent book, *The Concept of the Employer* (OUP 2015).³ Given present space limitations, this report can only set out a very limited summary of my broader research in this area. In order to guide the interested reader, a brief appendix identifies the relevant chapters or passages of the book on which each section draws.

2. Identifying the Employer

At first glance, there is little case law discussing the concept of the employer in the UK: this section explains how information may nonetheless be gleaned indirectly, before setting out the two competing strands of the concept of the employer which emerge upon detailed scrutiny: a unitary, and a multi-functional one.

A. Identifying the Relevant Case Law

It is a striking feature of English law that outside pockets such as triangular employment relationships, there are comparatively few decided cases on the question of the nature of the employer, as opposed to an abundance of decisions on the definition of employees, workers and dependent labour more generally. Cases disposing of questions as diverse as obtaining particulars of employment,⁴ health and safety provisions,⁵ and collective representation rights⁶ have to address the issue of the claimant's status as an initial hurdle. The definition of an individual's legal position, however, traditionally takes place in a rather circular line of enquiry, where two analytically distinct questions become intertwined: that as to the existence and definition of a contract of service and that as to the definition of its parties. On the one hand, both employee and employer could be seen as parties to a contract of service. On the other, a contract of service can only come into existence if both parties to it show the necessary features of employer and employee. Whilst puzzling in some analytical contexts, the resulting conundrum is a useful basis for present purposes: it facilitates deduction of information about the concept of the employer from pronouncements on the concept of the employee. The decisions are, after all, also on the question of the existence of a contract – and thus in turn on the nature of both, rather than merely one, of the parties to it.

B. Competing Strands of the Concept of the Employer

Viewed thus, an analysis of decided cases identifies two contradictory conceptions: a unitary conception, first, assumes that the employer must always be a single entity: the

³ J Prassl, *The Concept of the Employer* (OUP 2015): <https://global.oup.com/academic/product/the-concept-of-the-employer-9780198735533>

⁴ *Carmichael v National Power Plc* [1999] 1 WLR 2042 (HL).

⁵ *Ferguson v John Dawson Ltd* [1976] 1 WLR 1213 (CA); Construction (Working Places) Regulations 1966, SI 1966/94, reg 28(1).

⁶ *O'Kelly v Trusthouse Forte Plc* [1984] QB 90 (CA).

counterparty to the employee in the contract of employment. A multi-functional conception, on the other hand, defines the employer by reference to the exercise of various functions or roles. A particular ‘function’ of being an employer in this sense is one of the actions employers are entitled or obliged to take within the open-ended scope of the contract of employment.

(i) A Unitary Strand

With discipline and hierarchy embodied in the very idea of *the master*, to be found in the common law long before a contract of service evolved,⁷ a personified unitary concept of the employer is undoubtedly a historically accurate starting point. Two main factors can be identified as carrying over that function until today: the role of contract as key organising device of the employment relationship, and the company as a predominant legal form of the employer.

In 1967, Lord Wedderburn famously referred to contract as the ‘fundamental legal institution’ of Labour Law.⁸ Whilst Simon Deakin has successfully challenged the traditional assumption that a common law system of employment law, based on freedom of contract, predated the welfare state,⁹ the institution of the contract and its connected doctrines have nonetheless had a fundamental effect on the perception of the employment relationship in general, and the employer as work-taking counterparty to a contract of service in particular. By looking at the vast majority of personal work relationships through the contractual prism, a unitary view of the employing entity is bound to emerge: if the exchange of wage and work is characterised as a bilateral contractual relationship, emphasis shifts onto a single work-taking counterparty at the non-employee end. When used as the central category of personal work relationships, the contract of employment has a strong normative function. In substantive terms, the most significant influence of a contractual analysis in the Employment context is its inherent emphasis on *bilateral* relationships between two individual parties. The nature of the implied contract under consideration in *James* illustrates this fundamental attachment to the concept of unilateral relationships: even clearly multilateral scenarios are tackled through several bilateral contracts.¹⁰

The perception of companies as anthropomorphic individual units as a result of separate legal personality is a further factor contributing to the historical assumption that the employer must be a singular entity, substantively identical across all different domains of employment law. Despite a multitude of actors, from employees and management to a board of directors and shareholders, it has become a singular focal point for a unitary conception of the corporate entity, with powers and responsibilities perceived in anthropomorphic terms; a concept to which employment relationships then fasten. In economic theory, the conception of the firm as a singular unit is built on two factors: the firm as internalising what would otherwise be cost-inefficient market transactions between

⁷ A Merritt, ‘Control v Economic Reality: Defining the Contract of Employment’ (1982) *Australian Business Law Review* 105.

⁸ K Wedderburn, *Cases and Materials on Labour Law* (CUP 1967) 1.

⁹ S Deakin and F Wilkinson, *The Law of the Labour Market* (OUP 2005).

¹⁰ *James v London Borough of Greenwich* [2008] EWCA Civ 34, [2008] ICR 577 [5] (Mummery LJ). Despite dicta to the contrary in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 (EAT) [53], the potential of multiparty contracts is not entirely barred: *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, [2004] ICR 1437 [20], [78]; *Cable & Wireless Plc v Muscat* [2006] EWCA Civ 220, [2006] ICR 975 [41].

factors of production,¹¹ and the firm as concentrating management powers in the hands of a small group, thus taking them away from the shareholders of the company.¹²

Company law developed against this background, setting the legal boundaries of the company not at the economic remit of all those involved, but on a far narrower basis, shaped by two closely related doctrines: separate legal personality, and limited liability.¹³ The potential for abuse of the limited liability form is rarely doubted; the courts have nonetheless provided clear affirmation of the ‘right [...] inherent in our corporate law’¹⁴ to rely on the principles expounded in *Salomon* in deliberately structuring corporate groups to parcel out liability. In the employment context, Davies and Freedland have therefore suggested that limited liability applies within corporate groups

even though the managerial structure of the group (or part of it) itself ignores the division of the group into separate legal entities. [...] The fact that the business organisation of the group ignores the separate legal entities of the group companies will not enable the employee to go behind or beyond his or her employing company.¹⁵

As the following sub-section will show, however, this unitary view is rather different from the conception of the employer borne out in another context: the common law tests through which the concept of the employee as party to the contract of employment has evolved.

(ii) A Multi-Functional Strand

A ‘function’ of being an employer here is one of the various actions employers are entitled or obliged to take as part of the bundle of rights and duties falling within the scope of the open-ended contract of service. In trawling the established common law tests of employment status such as control, economic reality or mutuality of obligation for these employer functions, there are endless possible mutations of different fact scenarios, rendering categorisation purely on the basis of past decisions of limited assistance. The result of this analysis of concepts underlying different fact patterns, rather than the actual results on a case-by-case basis, is the following set of functions, with the presence or absence of individual factors becoming less relevant than the specific role they play in any given context. Individual elements can vary from situation to situation, as long as they fulfil the same function when looked at as a whole.¹⁶ Key to this concept of the employer being a *multi-functional* one is the fact that no one function mentioned above is relevant in and of itself. Rather, it is the *ensemble* of the five functions that matters: each of them covers one of the facets necessary to create, maintain and commercially exploit

¹¹ R Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386, 388. Today, centralised management exercises the entrepreneur’s role.

¹² A Berle and G Means, *The Modern Corporation and Private Property* (The Macmillan Company 1939) 119.

¹³ *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL). Though the rules for incorporation are found in statute. The Companies Act 2006, s 3(1)-(3) defines limited liability companies, and Part II of the Act sets out the incorporation process.

¹⁴ *Adams v Cape Industries Plc* [1990] Ch 433 (CA) 544 D-E.

¹⁵ P Davies and M Freedland, ‘The Employment Relationship in British Labour Law’ in C Barnard, S Deakin and G Morris (eds), *The Future of Labour Law: Liber Amicorum for Sir Bob Hepple QC* (Hart 2004) 137.

¹⁶ The ‘equipollency principle’ (Äquivalenzprinzip): L Nogler, ‘Die Typologisch-Funktionale Methode am Beispiel des Arbeitnehmerbegriffs’ (2009) 10 ZESAR 459, 463.

employment relationships, thus coming together to make up the legal concept of employing workers or acting as an employer.

The *five main functions* and their functional underpinning of the employer are:¹⁷

[1] Inception and Termination of the Contract of Employment

This category includes all powers of the employer over the very existence of its relationship with the employee, from the ‘power of selection’,¹⁸ to the right to dismiss.¹⁹

[2] Receiving Labour and its Fruits

Duties owed by the employee to the employer, specifically to provide his or her labour and the results thereof,²⁰ as well as rights incidental to it.²¹

[3] Providing Work and Pay

The employer’s obligations towards its employees, such as for example the payment of wages.²²

[4] Managing the Enterprise-Internal Market

Coordination through control over all factors of production, up to and including the power to require both how and what is to be done.²³

[5] Managing the Enterprise-External Market

Undertaking economic activity in return for potential profit,²⁴ whilst also being exposed to any losses that may result from the enterprise.²⁵

As the following section will show, in the context of fissured work, the multi-functional conceptualisation of the employer poses a direct challenge to the unitary concept, reconcilable only in a small set of paradigm cases. On the other hand, in situations where different functions may be exercised from more than one *locus* of control,²⁶ the tension quickly comes to the fore. The practical implications of this conflict are considerable, from regulatory obligations placed on unsuitable entities to a complete breakdown of employment law coverage.

3. Fissurized Work in the United Kingdom Today

The United Kingdom labour market is amongst the most flexible and deregulated in the world.²⁷ It is therefore perhaps unsurprising that fissurized work has long been an important issue in litigation and academic discussions. This section begins by focussing in

¹⁷ For earlier lists see eg M Freedland, *The Personal Employment Contract* (OUP 2003) 40.

¹⁸ *Short v J&W Henderson Ltd* 1945 SC 155 (CS).

¹⁹ *Narich Pty v Commissioner of Payroll Tax* [1984] ICR 286 (EAT) 295E.

²⁰ *WHPT Housing Association v Secretary of State for Social Services* [1981] ICR 737 (HC).

²¹ *Stevenson Jordan & Harrison v McDonnell & Evans* [1952] 1 TLR 101 (CA) 111; *Initial Services v Putterill* [1968] 1 QB 396 (CA).

²² *Cassidy v Ministry of Health* [1951] 2 KB 343 (CA) 360.

²³ *Simmons v Heath Laundry Co* [1910] 1 KB 543 (CA) (Hilbery J).

²⁴ *Ready Mixed Concrete Ltd v Minister of Pensions* [1968] 2 QB 497 (HC) 522.

²⁵ *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 (HC).

²⁶ The term *locus* of control is designed to avoid additional complexities arising out of the fact, noted *inter al* by Freedland (n 17) 45-47, that even in traditional companies without external influence management control is often exercised by more than one person amongst a group of relatively senior executives.

²⁷ Jo Swinson MP, *Employment Law 2013: Progress on reform* (BIS, March 2013) Foreword. It is interesting to note in this connection that Njoya has argued, convincingly, that there is a particularly strong link between public and private capital markets: (n 1) 133ff.

detail on perhaps the two most challenging phenomena – agency work and corporate groups, relying as a particularly stark example on those driven by financial investors such as Private Equity funds. For each of these models, the relevant subsection briefly explains the managerial motives and socio-economic background behind the relevant business models, and how they lead to a fissurization of work. Following a brief account of a currently emerging challenge – digital crowdwork – a final sub-section sets out the significant impact fissured work has had on the scope of employment law– from incomplete and incoherent coverage to a complete breakdown of protective mechanisms.

A. Specific Phenomena

Whilst both scenarios under discussion have been the subject of academic scrutiny, different labels have traditionally been applied. On the one hand, agency work can be placed in what Fudge has referred to as the ‘commercialisation’ of employment.²⁸ The Private Equity model to be discussed, on the other hand, can be placed in the context of discussions about the disintegration of the enterprise,²⁹ where ‘[t]he boundaries of the firm have proved to be quite porous, “making it difficult to know where the firm ends and where the market or another firm begins”’.³⁰ Both examples are brought together for present purposes, however, as they are stark illustrations of the fissurization of the workplace.

(i) Agency Work

A report commissioned in 2014 by the Recruitment & Employment Confederation, an industry representative body, suggested that ‘24% of the British population [have] worked as a temporary agency worker at some point in their working life’,³¹ and an international comparison published in the same year put the number at 1.13 million.³² Relative to the overall size of the labour market, the agency industry is therefore larger in the UK than anywhere else in the European Union (EU).³³ Industry figures from 2014 suggest that there are approximately 18,000 agencies operating across the UK, employing a workforce of approximately 93,360 internal staff to match agency workers with assignments.³⁴

²⁸ J Fudge, S McCrystal and K Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Oñati International Series in Law and Society, Hart 2012) 10 (footnotes omitted).

²⁹ H Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 OJLS 353.

³⁰ Fudge, McCrystal and Sankaran (n 28) 11, citing also W Powell, ‘The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise’ in P DiMaggio (ed), *The Twenty-First Century Firm: Changing Economic Organization in International Perspective* (Princeton University Press 2003) 58.

³¹ REC, Flex Appeal: Why Freelancers, Contractors and Agency Workers Choose to Work This Way (Recruitment & Employment Confederation 2014) 5.

³² F van Haasteren, A Muntz and D Pennel, *Economic Report: 2014 Edition* (CIET 2014) 15, 17.

³³ E Berkhout, C Dustmann and P Emmder, ‘Mind the Gap’ (International Database on Employment and Adaptable Labour 2007); van Haasteren, Muntz and Pennel (n 21) 19.

³⁴ F van Haasteren, A Muntz and D Pennel, *Economic Report: 2014 Edition* (CIET 2014) 29; D Winchester, ‘Thematic feature: Temporary Agency Work in the UK’ (National Report 2007; available through the EIROnline database at <www.eurofound.europa.eu> accessed 28 August 2014; J Arrowsmith, ‘Temporary Agency Work in an Enlarged European Union’ (Office for Official Publications of the European Communities, Luxembourg 2006).

When enquiring into the use of agency work,³⁵ different studies have uncovered a wide range of potential motivations, with considerable divergence between the answers offered by end-users and agencies. Users’ arguments range from numerical flexibility to meet peaks and troughs in demand to obtaining specific skills or ensuring temporary leave and maternity cover.³⁶ Markova and McKay summarise these reasons under a series of categories.³⁷ Flexibility is considered to be of prime importance, though it is not always clear to what extent this is limited to complementarity, ie the use of agency workers in situations where required staff numbers rise temporarily, or whether there is an increasing move towards substitution of permanent employees and the long-term hiring of a workforce through agencies. Cost savings are a second factor frequently identified, though a considerable number of end-users suggest that there are little, if any, overall savings. Legal factors, finally, also loom large. Some studies suggest that employers’ primary motivation is not the avoidance of employment law regulation as such, but rather the possibility of shifting liability for immigration law violations, with the agency in charge of organising work permits, checking workers’ documents and ensuring on-going compliance.³⁸ Other studies, however, have found that up to a quarter of end-user firms rely on agency labour specifically in order to avoid incurring employment law obligations.³⁹

The setup of triangular employment relationships is well-rehearsed in employment law literature. An agency, in essence, contracts with individuals to supply their labour to end-user clients. For present purposes, the key factor is the resulting shared exercise of employer functions between the day-to-day employer (the client) and the agency. Drawing on a series of recent qualitative field studies, the extremely ‘varied and variable’⁴⁰ arrangements between different *loci* of employer functions can be illustrated using two of the functions set out, above.

[1] Inception and Termination of the Contract of Employment

As regards the first function, this will usually be the primary task of the employment agency: a worker is taken on its books, and contracted out to end-users at the agency’s discretion.⁴¹ Agencies can also shortlist and select candidates on the end-user’s behalf,⁴²

³⁵ See also S McKay, ‘Employer Motivations for Using Agency Labour’ (2008) 37 ILJ 296.

³⁶ EMAR, ‘Agency Working in the UK: A Review of the Evidence’ (Employment Relations Research Series No. 93, BERR 2008) Table 1.1, drawing on survey of Recruitment Agencies in 2007, Table 4.1.

³⁷ E Markova and S McKay, ‘Agency and Migrant Workers: Literature Review’ (TUC Commission on Vulnerable Employment 2008) 19ff, drawing on L Gramm and J Schnell, ‘The Use of Flexible Staffing Arrangements in Core Production Jobs’ 2001 (54) *Industrial and Labour Relations Review* 245; K Hakansson and T Isidorsson, ‘Flexibility, Stability and Agency Work: A Comparison of the Use of Agency Work in Sweden and the UK’ in B Furaker, K Hakansson and J Karlsson, *Flexibility and Stability in Working Life* (Palgrave 2007) 123; P Allan, ‘The Contingent Workforce; Challenges and New Directions’ (2002) *American Business Review* 103.

³⁸ Markova and McKay, ‘Understanding the Operation and Management of Employment Agencies in the UK Labour Market’ (n 50) 24–25.

³⁹ Equality and Human Rights Commission, ‘Inquiry into Recruitment and Employment in the Meat and Poultry Processing Sector’ (EHRC 2010) 22.

⁴⁰ P Leighton and M Wynn, ‘Temporary agency working: is the law on the turn?’ [2008] *Company Lawyer* 7, 8.

⁴¹ E Markova and S McKay, ‘Agency and Migrant Workers: Literature Review’ (TUC Commission on Vulnerable Employment 2008) 39ff.

and be in charge of organising work permits and checking other qualifications and documents.⁴³ End-users are however also sometimes involved in the selection of individual workers, and there are reports of instances where they do so for illegal purposes, for example by specifying a particular race or nationality of the agency worker to be supplied.⁴⁴ Termination and replacement is likewise via the agency itself,⁴⁵ usually upon the end-user's request,⁴⁶ and without significant notice periods.⁴⁷ Some clients, however, may retain a direct right to dismiss the employee,⁴⁸ again with several reports of this function being exercised for inappropriate reasons, such as dismissing a female line worker.⁴⁹

[3] Providing Work and Pay

The division of this third employer function is amongst the more difficult to analyse, as it varies drastically across different scenarios. Looking first at the obligation to provide work, the agency will normally not be under any obligation to do so.⁵⁰ The situation of the end-user is less clear. While an obligation to provide work is rarely found on the facts,⁵¹ there have been decisions to the contrary, especially where the employee was deeply integrated in the end-user's undertaking, up to and including managerial control over the end-user's permanent employees.⁵² Whilst the provision of day-to-day work is therefore clearly a role of the end-user, for example in choosing the allocation of particular jobs,⁵³ such findings will be rare. In reality, workers will frequently turn up at an end-user's site in the morning only to find that on that particular day no work is available.⁵⁴

The provision of pay, on the other hand, is usually a function exercised by the agency, together with general payroll and tax services. Suggestions that an employment agency merely acts as the end-user's agent in this regard no longer seems to feature in the most recent case law.⁵⁵ While wages are nearly always paid to workers by their agency or a payroll company associated with it,⁵⁶ the question as to who actually determines the levels of remuneration yields a much more mixed response, as a recent report for ACAS shows.⁵⁷

⁴² *ibid* 20; citing C Stanworth and J Druker, 'Human resource solutions? Dimensions of Employers' Use of Temporary Agency Labour in the UK' (2006) 35 *Personnel Review* 175.

⁴³ E Markova and S McKay, 'Understanding the Operation and Management of Employment Agencies in the UK Labour Market' (TUC Commission on Vulnerable Employment, London 2008) 24-25.

⁴⁴ Equality and Human Rights Commission (EHRC), 'Inquiry into Recruitment and Employment in the Meat and Poultry Processing Sector' (EHRC 2010) 8.

⁴⁵ M Aziz and others, 'Hard Work, Hidden Lives: The Full Report' (TUC Commission on Vulnerable Employment 2008) 189.

⁴⁶ Leighton and Wynn (n 40) 9.

⁴⁷ E McGaughey, 'Should Agency Workers be Treated Differently?' (LSE Working Papers 07/2010) 2.

⁴⁸ *Muschett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451, 14.

⁴⁹ EHRC (n 39) 11-12.

⁵⁰ Leighton and Wynn (n 39) 12.

⁵¹ See eg James (n 10).

⁵² *Tilson v Alstom Transport* [2010] EWCA Civ 1308, [2011] IRLR 169.

⁵³ EHRC (n 39) 10.

⁵⁴ Aziz (n 45) 14 (John's story).

⁵⁵ Though cf Munby J's dissent in *Cable & Wireless Plc v Muscat* [2006] EWCA Civ 220, [2006] ICR 975.

⁵⁶ EHRC (n 39) 16.

⁵⁷ C Forde and G Slater, 'The Role of Employment Agencies in Pay Setting' (ACAS Research Paper 05/2011) 19.

(ii) Private Equity

A second, and rather different, example of fissurized or multi-entity employer function exercise can be found in the Private Equity (‘PE’) industry. As the traditional model of dispersed shareholdings has increasingly come under pressure,⁵⁸ industry analysts have noticed a strong trend towards concentrated ownership, from block holdings to outright subsidiary ownership. Private Equity funds are a prime example of this shift towards relational, or ‘insider’,⁵⁹ systems of corporate governance. Concentrated share ownership is particularly challenging in the employment context, as it leads to multiple parties potentially exercising traditional employer functions. Once the majority, or at least a significant proportion of, voting rights are vested in a single shareholder, it will be able to exert considerable power over management.

In the mid-2000s, the UK Private Equity industry, along with the rest of Europe (and indeed the world), enjoyed extremely benign economic and regulatory conditions, leading to record investments in 2006.⁶⁰ The demise of this rapidly maturing industry has been predicted by economic and academic commentators,⁶¹ and current statistics do show a contraction of the Private Equity sector in line with the retreat of global financial markets during the recession:⁶² overall, BVCA members’ investment in the United Kingdom fell from £12bn in 2007 to £8.2bn in 2008.⁶³ Figures for total global investment of UK-based firms show an even more drastic decline, from £20bn in 2008⁶⁴ to £12.6bn in 2009.⁶⁵ By 2012, these numbers had begun to stabilise, with BVCA member investing £5.7bn and £12.2bn respectively.⁶⁶ The industry’s significance is unlikely to diminish in future: a key forward-looking measure—the amount of new funds raised—showed a significant upturn during 2012 with £5.9bn in fresh capital committed to Private Equity (and venture capital) funds.⁶⁷

The underlying economic rationale of this industry can be summarised in three main strands. The first of these rejects traditional models of firms built on managerial discretion and shareholder deference to professional managers,⁶⁸ focussing on the agency costs that

⁵⁸ H Gospel and A Pendleton, ‘Markets and Relationships: Finance, Governance, and Labour in the United Kingdom’ in H Gospel and A Pendleton (eds), *Corporate Governance and Labour Management: An International Comparison* (OUP 2005) 71.

⁵⁹ *ibid* 62.

⁶⁰ K Raade and C Dantas Machado, ‘Recent Developments in the European Private Equity Markets’ 319 European Commission Economic Papers 27.

⁶¹ eg B Cheffins and J Armour, ‘The Eclipse of Private Equity’ (2008) 33 *The Delaware Journal of Corporate Law* 1.

⁶² E Appelbaum and R Batt, *Private Equity at Work—When Wall Street Manages Main Street* (Russell Sage Foundation 2014) Ch 4 (The Effects of the Financial Crisis)

⁶³ PriceWaterhouseCoopers, ‘PE and VC Performance Measurement Survey’ (BVCA 2008) 12.

⁶⁴ PriceWaterhouseCoopers, ‘Private Equity and Venture Capital Report on Investment Activity 2008’ (BVCA 2008).

⁶⁵ BVCA, ‘February Briefing’ (2010) 26.

⁶⁶ PriceWaterhouseCoopers, ‘Private Equity and Venture Capital Report on Investment Activity 2012’ (BVCA 2013) 4.

⁶⁷ PriceWaterhouseCoopers, ‘Private Equity and Venture Capital Report on Investment Activity 2012’ (n 179) 3.

⁶⁸ A Berle and G Means, *The Modern Corporation and Private Property* (Macmillan 1939).

arise from a misalignment of owners' and managers' interests.⁶⁹ Second, a clearly defined and closely monitored obligation to service creditors⁷⁰ settles what could otherwise be a constant struggle between owners and managers over the allocation of free cash-flow;⁷¹ thus removing further inefficiencies that are said to result from the public corporation's split between ownership and control. Finally, the much more detailed and regular provision of information about the company to investors considerably reduces the price of financing operations by overcoming the 'lemons market' problem, where uncertainty about the true quality of a product impedes otherwise beneficial market transactions.⁷²

Management control is thus the unique selling point of the Private Equity industry: in order to ensure the success of their investments, General Partners must carefully work with and oversee entrepreneurs and portfolio companies.⁷³ Their PE management company thus becomes a second entity with the potential to exercise employer functions, up to and including control over the supposedly singular counterparty to the contract of employment itself.

Finding specific evidence for this division of traditional employer functions in practice is rather challenging: there is little, if any, detailed qualitative research on the actual modes of interaction between funds and their investee companies. In order to obtain the relevant information, several case studies were therefore conducted amongst London-based Private Equity funds.⁷⁴

[1] Inception and Termination of the Contract of Employment

Most PE management companies maintain rosters of executives specialising on specific management tasks, from divisional restructuring to supply chain reorganisation. If a portfolio company decides to hire employees in any of these fields, the fund will 'assist' its efforts by selecting an executive from its database, or sometimes even propose one of its own senior partners as an appropriate (temporary) manager.⁷⁵ These candidates will normally be interviewed and selected directly by the PE management company team, who are also often tasked with negotiating further particulars of employment. Other funds maintain a much smaller stock of experienced executives, but nevertheless retain the power to direct the investee company's hiring choices.⁷⁶

The right to terminate employment relationships is equally shared between both *loci* of control. Portfolio company management and investing funds can usually initiate redundancies, albeit through different processes. The former will retain the formal power to terminate most employment contracts, subject to key personnel clauses. Nonetheless, even minor terminations are usually discussed in informal phone calls between the PE

⁶⁹ A Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *The American Economic Review* 777; W Meckling and M Jensen, 'A Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal FE* 4.

⁷⁰ M Jensen, 'The Eclipse of the Public Corporation' (1989) 67 *HBR* 61, 64; 1997 revision 18.

⁷¹ J Gilligan and M Wright, *Private Equity Demystified: An Explanatory Guide* (2nd edn ICAEW Corporate Finance Faculty 2010) 84.

⁷² G Akerlof, 'The Market for "Lemons": Qualitative Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488.

⁷³ P Gompers and J Lerner, *The Venture Capital Cycle* (MIT Press 2004) 70.

⁷⁴ Fieldwork approved by the Oxford University Social Sciences and Humanities Inter-Divisional Research Ethics Committee (IDREC) on January 20, 2010: SSD/CUREC1/10-285.

⁷⁵ Telephone Interview with Senior PE Operations Executive (15 February 2010).

⁷⁶ Interview with PE Business Development Partner (London 19 February 2010).

operations team and the company’s Chief Executive Officer (CEO) or Head of Human Resources.⁷⁷ If analysts within the Private Equity management company have identified potential redundancies, the next steps will depend on the fund’s investment strategy: while some firms only initiate ‘general conceptual discussions’ with management,⁷⁸ others will provide detailed instructions on where and how changes to the workforce are to take place.⁷⁹

[4] Managing the Enterprise-Internal Market

Control over the enterprise-internal market is not shared in the sense expounded, for example, in the first function. Rather, the same sets of functions are in fact exercised at different levels in the PE context: the investing fund will traditionally focus on business plans and development, leaving more detailed execution to the company’s executives.

In nearly all investment agreements there is a clear list that sets out which strategic matters can only be initiated and in some cases even executed by the PE firm. This will cover decisions on senior management, group structures and financing, from repayment priorities to additional loans.⁸⁰ Whilst strategic change is often addressed at formal board meetings there are other, more opaque, methods of communication between the two *loci* of control: the investors can, for example, request mere attendance rights at board meetings, with the minutes clearly reflecting that all decisions were made by the executive directors alone. In other scenarios, particularly when it comes to reductions in employment levels, information is conveyed as informally as possible, from telephone calls to lunch conversations.⁸¹ Other funds take an even more active approach to managing the enterprise-internal market. The employment of operating partners as senior management has already been discussed; another frequently used technique is a direct secondment of junior analysts at all levels of the target company,⁸² for example as chief of staff to key executives, in order to get ‘very close to the operations’ and deliver the strategic changes decided by the fund.⁸³

(iii) The Rise of Crowdwork

A final phenomenon which should be mentioned briefly is crowdwork,⁸⁴ a still-emerging model of employment relationships also known as crowdsourcing of labour or crowd employment. Crowdwork refers to the digital organization of the outsourcing of tasks to a large pool of workers. The work (ranging from transportation services and cleaning to digital transcription or programming tasks) is referred to in a variety of ways, including ‘gigs’, ‘rides’, or ‘tasks’, and is offered to a large number of people (the ‘crowd’) by means of an internet-based ‘crowdsourcing platform’.⁸⁵ This organisational model

⁷⁷ Interview with former Investee Company CEO (Oxford 23 February 2010).

⁷⁸ Telephone Interview with Senior PE Operations Executive (15 February 2010).

⁷⁹ Interview with PE Partner (London 10 March 2010).

⁸⁰ Interview with PE Partner (London 10 March 2010).

⁸¹ Interview with PE Partner (London 10 March 2010).

⁸² Interview with PE fund General Counsel (London 11 March 2010).

⁸³ Telephone Interview with Senior PE Operations Executive (15 February 2010)

⁸⁴ See further J Prassl and M Risak, ‘Rethinking The Legal Analysis Of Crowdwork: Platforms As Employers?’ (2016) CLLPJ (forthcoming).

⁸⁵ For the best -known, Amazon’s Mechanical Turk (www.mturk.com) see Strube, ‘Vom Outsourcing zum Crowdsourcing’, in Cristiane Benner (ed), *Crowdwork – zurück in die Zukunft* (Bund Verlag 2014) 75 ff.

forms part of a larger set of processes known as ‘crowdsourcing’;⁸⁶ with customers (or indeed employers) referred to as ‘crowdsourcers’. The resulting contractual relationships are manifold and complex: whilst the work is usually managed through an intermediary (the crowdsourcing platform), some will insist on direct contractual relationships between crowdsourcer clients and crowdworkers, whereas others will opt for tripartite contractual structures, akin to traditional models of agency work and labour outsourcing.⁸⁷

Just as the two previous arrangements, crowdwork thus brings the contradictions inherent in the concept of the employing entity to the fore: the assumption that only a single entity, the counterparty to the contract of employment, can exercise employer functions is incongruent with their continuous joint exercise by two *loci* of control in the contexts surveyed. It is to the tension’s practical implications for employment law coverage to which a second sub-section now turns.

B. Implications for the Scope of Employment Law Coverage

The tension characterising the concept of the employer makes employment law coverage fragile in multi-entity employment scenarios: it becomes unclear, incoherent, and open to easy manipulation. This is because the identification of the employer is driven by two conflicting strands with the potential to point in different directions. In multilateral employment relationships, the multi-functional aspect of the concept instinctively points towards the identification of several relevant entities, whereas various elements identified as parts of the unitary strand in chapter one insist on a single entity conceptualisation. As a direct consequence of the concept’s underlying tension, no employer may be identified in the temporary agency work scenario; in the Private Equity scenario identification is limited to a small subset, which may frequently be an inappropriate counterparty, or only one of several relevant entities.

(i) Break-Down of Employment Law Coverage

The joint exercise of employer functions is a clear illustration of the ‘profound difficulties’ posed by complex triangular or multilateral employment relationships:⁸⁸ it challenges the very existence of a contract of employment, thus leaving individual workers without recourse to the majority of domestic employment protective legislation. The complete breakdown of employment law coverage is a consequence of ‘contractual arrangements that split, on the one hand, day-to-day control of work processes and, on the other hand, day-to-day securing and paying of people to work, [thus] *prima facie* prevent[ing] those working from being legally classified as anyone’s “employees”’.⁸⁹

⁸⁶ A term derived from a combination of the words “outsourcing” and “crowd”, and was used by Jeff Howe for the first time, cf. Jeff Howe, ‘The Rise of Crowdsourcing’ (*Wired Mag*, 14 June 2006).

⁸⁷ Cf. Aniket Kittur et al., ‘The Future of Crowd Work’, paper presented at 16th ACM Conference on Computer Supported Cooperative Work <www.lri.fr/~mbl/ENS/CSCW/2012/papers/Kittur-CSCW13.pdf> accessed 13 January 2016; Jan Marco Leimeister, Shkodran Zogaj and Ivo Blohm, ‘Crowdwork – digitale Wertschöpfung in der Wolke’, in Walter Brenner and Thomas Hess (eds), *Wirtschaftsinformatik in Wissenschaft und Praxis* (Springer Verlag 2014) 51 - 64.

⁸⁸ Freedland (n 17) 36ff.

⁸⁹ L Barmes, ‘Learning from Case Law Accounts of Marginalised Working’ in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oñati International Series in Law and Society, Hart 2012) 308.

neither the relationship with the agency nor with the end-user is characterized as one of employment.

As regards the former, it is unlikely ‘that many agency contracts will turn out to be contracts of employment [even if] the possibility should not be overlooked’.⁹⁰ Instead, while a contract with the agency will be found, it will usually be characterised as one of service. In *Wickens*,⁹¹ for example, it was held that the claimant could not bring an unfair dismissal claim, as temporary agency workers were not engaged under contracts of employment, and that the relevant business size threshold had therefore not been met. Despite exceptions on the facts of specific cases⁹² or in the practice of individual agencies that explicitly ‘employ’ their temporary workers,⁹³ temporary workers thus fall outside the protective scope of a contract of employment with their agency.

The situation as against end-users is similar, if not even more difficult. There is generally no direct contractual arrangement in place between the parties, although factual exceptions are again possible.⁹⁴ A potential solution on the basis of implied contracts of employment proved to be rather short-lived. In *Dacas v Brook Street Bureau*,⁹⁵ a Court of Appeal led by Mummery LJ picked up earlier foundations in cases such as *Franks v Reuters*⁹⁶ and developed the use of implied contracts in triangular work scenarios. Upon a review of the existing case law on employment relations in triangular setups,⁹⁷ it was made clear that the threshold for implication was a high one: as the council’s exercise of employer functions over Ms James could be explained by the parties’ ‘respective contracts with the employment agency, [...] it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties.’⁹⁸ As a result, it is increasingly unlikely that a contract of employment would readily be implied between an agency worker and the end-user of the agency’s services.

(ii) Incomplete and Incoherent Coverage

Even where there is a contract of employment between an individual worker and his or her immediate employer, however, the tension inherent in the concept of the employer may lead to incomplete or incoherent employment law coverage – most notably in the context of complex corporate setups, including PE firms, where internal management structures dividing up employer functions are liable to render employment law obligations nominal. A recent example can be found in the context of employers’ duty to consult with employee representatives in the case of collective redundancies, derived from the

⁹⁰ HMRC, *Employment Status Manual*, ESM2002, <www.hmrc.gov.uk/manuals/esmmanual/ESM2002.htm> 1 September 2012.

⁹¹ *Wickens v Champion Employment* [1984] ICR 365 (EAT).

⁹² *McMeechan v Secretary of State for Employment* [1996] EWCA Civ 1166, [1997] IRLR 353.

⁹³ C Forde and G Slater, ‘The Role of Employment Agencies in Pay Setting’ (ACAS Research Paper 05/2011) 14; K Ward, ‘Making Manchester “Flexible”: Competition and Change in the Temporary Staffing Industry’ (2005) 36 *Geoforum* 223.

⁹⁴ *Dacas* (n 10): contract with client; *Motorola Ltd v Davidson* [2001] IRLR 4 (EAT): very high level of end-user control, including training and sanctions; worker is employee.

⁹⁵ (n 10).

⁹⁶ *Franks v Reuters* [2003] EWCA Civ 417, [2003] ICR 1166.

⁹⁷ *James* (n 10) [46] - [52]. Agency worker cases at the tribunal stage had been stayed in anticipation of the decision.

⁹⁸ *ibid* [42].

(European Union's) Collective Redundancies Directive 98/59/EC.⁹⁹ Where more than 20 employees are to be made redundant at an establishment within a period of 90 days, the employer has to commence negotiations, with a view to reaching agreement, on ways of avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals.¹⁰⁰

The issue of external influence is clearly addressed in the Directive's preamble, where the Community institutions note that

it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of whether the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer.¹⁰¹

In practice, however, this is not the case. In *Fujitsu Siemens*,¹⁰² management control over manufacturing plants in Kilo, Finland and various locations in Germany was exercised by a Dutch Holding company. The executive team of the parent entity had resolved to propose the disengagement from the local plant to its board; the latter supported the proposal on 14 December 1999. Local management in Kilo consulted with employee representatives from 20 December to 31 January 2000, before ceasing activity on February 1 and terminating the employment of 350 workers from February 8 onwards. The trade unions representing the claimants alleged that these steps meant that Fujitsu Siemens had failed to comply with the Directive's obligations, as the real decisions had been taken by entities other than the undertaking's management, and prior to consultation with employee representatives.

In the resulting litigation, several questions were referred to the ECJ, including whether consultation needed to be finalised before the parent took general commercial or strategic specific decisions that might lead to redundancies, or only before the need for dismissals was certain. In following AG Mengozzi's line of reasoning,¹⁰³ the Court affirmed that the Directive's obligations were squarely based on the 'employer, in other words a natural or legal person who stands in an employment relationship with the workers who may be made redundant'. An undertaking, even if capable of controlling the employer through binding decisions, did not have that status.¹⁰⁴ The Directive was not to restrict the commercial freedom of corporate groups to choose their organisations' management structures, and none of its provisions could be interpreted as imposing any obligations on the controller.¹⁰⁵

In situations of employer functions split across multiple corporations, this reasoning leads to an inability to identify the appropriate employing entity or combination of entities subject to the relevant obligations. In the context of redundancy consultations, such wrong identification places obligations on parties other than those who are contemplating

⁹⁹ Council Directive (EC) 59/1998 of 20 July 1998 on the approximation of the laws of the Member States relating to Collective Redundancies [1998] OJ L 225/16.

¹⁰⁰ Implemented in the United Kingdom by the Trade Union and Labour Relations (Consolidation) Act 1992, Part IV, Chapter II: Procedure, s. 188-198.

¹⁰¹ Collective Redundancies Directive (n 68) [11].

¹⁰² Case C-44/2008 *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy* [2009] ECR I-8163 (ECJ), AG[50].

¹⁰³ *ibid* AG[35].

¹⁰⁴ *ibid* [57] et seq.

¹⁰⁵ *ibid* [59], [68].

dismissals and will eventually take the relevant decisions. If consultative obligations are placed on an investee company alone, for example, the scope of consultation would become vastly under-inclusive in the Private Equity context: it is at, or more precisely in the run-up to, the decision-making stage that consultation will be at its most effective, by making a broad range of information available to the decision maker. The PE analyst team preparing the redundancy decision will frequently not have access to information beyond the company’s financial and strategic data. Its decision may therefore be inefficient, both in terms of its impact on employees and the financial performance of the fund, as there was no obligation to consult with worker representatives, who ‘would be presented with a *fait accompli*, and the provision would be deprived of any practical effect.’¹⁰⁶

4. Legislative and Judicial Responses

In broad terms, English law’s response to fissurized work has already been seen in the final sub-section immediately above: employee-protective norms have failed to address many of the challenges arising from the fragmentation of employment across multiple entities. This should not be taken as a suggestion, however, that there are no measures in place to protect workers by going beyond the boundary of the legal entity. The following section sets out a series of examples from individual employment law, both at statute as well as the Common Law, before looking at the collective dimension.

A. Individual Employment Law

Potential solutions to the problems arising from fragmented work in the individual domain can be found both at statute and common law. In preparation for discussion in the following section, it is important to note at the outset that whilst the models to be discussed all embody a functional approach to defining the employer at least to some extent, we cannot (yet) think of it as a coherent concept. The idea of looking to existing material for inspiration as to how a functional reconceptualisation might operate in practice, on the other hand, is not new. In 1990, Collins examined a range of piecemeal statutory interventions in search of a functional approach;¹⁰⁷ Fudge similarly found existing techniques in a number of statutory devices, notably those lifting corporate veils and ignoring privity for specific purposes in particular contexts,¹⁰⁸ as did Davies and Freedland.¹⁰⁹

(i) Statutory Avenues

A first statutory model can be found in the enforcement model of the National Minimum Wage Act 1998, section 34 of which is designed to ensure the protection of ‘agency workers who are not otherwise “workers”’. Sub-section two provides that:

¹⁰ Case C-188/03 *Junk v Kühnel* [2005] ECR I-885 AG[60].

¹⁰⁷ H Collins, ‘Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration’ (1990) 53 MLR 731, 738ff.

¹⁰⁸ J Fudge, ‘The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection’ in G Davidov and B Langile (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing, Oxford 2006) 305.

¹⁰⁹ P Davies and M Freedland, ‘The Complexities of the Employing Enterprise’ in G Davidov and B Langile (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006).

... where this section applies, the other provisions of this Act shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and—

- (a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or
- (b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work.

A tiered, functional approach is clearly visible in this provision: whoever is responsible for the exercise of the relevant employer function (providing pay), is under the primary obligation pursuant to subsection (2)(a). In the absence of clear responsibility, subsection 2(b) places responsibility on whichever entity actually effected the payments. It is furthermore not the only example of such regulation: a substantially identical approach applies in the working time provisions.¹¹⁰

A second potential solution can be found the Health and Safety at Work Act 1974. This Act imposes a wide range of general duties on 'every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'.¹¹¹ Furthermore (and crucially for present purposes), employers are to 'conduct [their] undertaking[s] in such a way as to ensure, so far as is reasonably practicable, that persons not in [their] employment who may be affected thereby are not thereby exposed to risks to their health or safety.'¹¹² On the one hand, this approach evidently still differentiates between employees defined in a narrow sense as working under a contract of employment,¹¹³ thus reinforcing formalistic distinctions. On the other, it also includes within its scope all those 'doing work', a category defined to include the self-employed.¹¹⁴ For present purposes, the provisions can however be treated as identical: as Howes suggests, the sections impose the same kind of 'basic duty ... upon the defendant company to make sure that their business (undertaking) is operated (conducted) in such a way that employees and other people are not exposed to risk.'¹¹⁵

(ii) Common Law Developments

Judicial interpretation of the common law has similarly attempted to develop a number of interpretative responses to protect workers in multi-layered contractual relationships, albeit with varying degrees of success. Traces of a functional approach can be found, for example, in contract law, notably in the idea of implied contracts as already discussed in section 3.B.(i), above. After the Court of Appeal's ruling in *James*,¹¹⁶ however, leading commentators were quick to pronounce 'the end of the road for the implied

¹¹⁰ Working Time Regulations 1998, SI 1998/1833, reg 36.

¹¹¹ Health and Safety at Work Act 1974 (HSWA), s 2(1).

¹¹² HSWA 1974, s 3(1).

¹¹³ HSWA 1974, s 53.

¹¹⁴ HSWA 1974, s 52.

¹¹⁵ V Howes, 'Commentary: Duties and Liabilities under the Health and Safety at Work Act 1974: A Step Forward?' (2009) 38 ILJ 306, 307; citing *R v Gateway Foodmarkets Ltd* [1997] IRLR 189 (CA) and *R v British Steel* [1995] IRLR 310 (CA).

¹¹⁶ *James* (n 10).

contract’ as a device to protect workers in multilateral employment scenarios.¹¹⁷ Upon closer inspection, however, it is suggested that the *Aramis* enquiry could also be understood as a functional one,¹¹⁸ in so far as it looks at the reality of the parties’ actions, rather than the formal structure of their relationships.

Another avenue is the possibility of dual or joint and several liability in a multi-employer context, as discussed in *Viasystems v Thermal Transfer*.¹¹⁹ There, the claimant had contracted for the installation of air conditioning in his factory; the work was done by a range of sub-contractors. When a negligent fitter’s mate of one such subcontractor caused a flooding of the premises while under the supervision of another sub-contractor’s employee, the question as to the identity of his employer or employers arose for the purposes of vicarious liability. The Court of Appeal was clearly aware that it was operating in novel territory; after a detailed survey of the authorities it found that traditional arguments in favour of single-entity liability were primarily based on unchallenged assumptions.¹²⁰ It therefore went explicitly on to embrace a functional approach, giving ‘precedence to function over form’,¹²¹ in order to avoid ‘an artificial choice required by an inflexible rule of law’.¹²² On the facts, it was found that the relationships yielded dual control, ie that both the second and third subcontractors had exercised regulated employer functions.¹²³ Responsibility (in the sense of vicarious liability) fell in line with that: both employers were found to be liable for half the damage caused.

B. Collective Labour Law

The concept of the employer can have an equally significant impact in that dimension of labour law, whether in the field of collective bargaining or in the course of industrial disputes. The correct identification of the employer, for example, is an important criterion when determining the lawfulness of a strike. Under what is known colloquially as the ‘Golden Formula’,¹²⁴ any such action will only be protected if it is done ‘in contemplation or furtherance of a trade dispute’.¹²⁵ This notably means that any strike can only be directed by workers against their immediate employer¹²⁶ – a provision which the courts have continuously interpreted in a narrow fashion clearly reminiscent of the received unitary concept of the employer.¹²⁷

¹¹⁷ E Brown, ‘Protecting Agency Workers: Implied Contract or Legislation?’ (2008) 37 ILJ 178. M Wynn and P Leighton, ‘Agency Workers, Employment Rights and the Ebb and Flow of Freedom of Contract’ (2009) 72 MLR 91.

¹¹⁸ *The Aramis* [1989] 1 Lloyd’s Rep 213 (CA).

¹¹⁹ *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510.

¹²⁰ *Viasystems* (n 119) [76] (Rix LJ); [12], [46] (May LJ).

¹²¹ *Viasystems* (n 119) [55]; cf also the references to function and purpose of the doctrine more broadly, eg [77]; R Stevens, ‘A Servant of Two Masters’ (2006) 122 LQR 201.

¹²² *Viasystems* (n 119) [19].

¹²³ *Viasystems* (n 119) [79]–[80]. Rix LJ is somewhat more sceptical whether control is the only criterion, considering also the possibility of ‘practical and structural considerations’.

¹²⁴ Wedderburn, *The Worker and the Law* (3rd edn, Penguin 1986) 520; B Simpson, ‘A Not So Golden Formula: In Contemplation or Furtherance of a Trade Dispute After 1982’ (1983) 46 MLR 463, 476.

¹²⁵ TULRCA s 219(1).

¹²⁶ TULRCA s 244(1).

¹²⁷ *Dimbleby v NUJ* [1984] IRLR 161; *UCL NHS Trust v UNISON* [1999] IRLR 31.

This approach to the concept of the employer was discussed in the European Court of Human Rights' recent scrutiny of the United Kingdom's ban on secondary action,¹²⁸ where the Strasbourg Court explicitly referred to the fact that the narrow single-entity focus embodied in current legislation

could make it easy for employers to exploit the law to their advantage through resort to various legal stratagems, such as de-localising work-centres, outsourcing work to other companies and adopting complex corporate structures in order to transfer work to separate legal entities or to hive off companies ... [as a result of which] trade unions could find themselves severely hampered in the performance of their legitimate, normal activities in protecting their members' interests.¹²⁹

This, together with an earlier citation of the European Committee on Social Rights's concern that English law could prevent 'a union from taking action against the *de facto* employer if this was not the immediate employer',¹³⁰ provides a stark reminder that the concept of the employer continues to raise equally difficult question in the collective dimension.

5. Evaluation and Future Prospects

As I have argued in *The Concept of the Employer*, in order to restore congruence to the application of employment law norms, that very concept must be reconceptualised as a more openly functional one. This section briefly sketches the contours of such a concept.

A. Towards a Functional Concept of the Employer

Our conceptualisation of the concept of the employer needs to move from the current rigidly formalistic approach to a flexible, *functional* concept. In more concrete terms, the following working definition is offered in order to draw together a range of specific aspects to be discussed, below. It is suggested that employer should come to mean

the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law.

The account of functionalism proposed for purposes of identifying and defining the employer builds on the sociological concept of functional typologies, relying on the exercise of particular functions to determine the status of potential counterparties. A full exploration of the relevant sociological literature is beyond the scope of this article; the focus will instead be on Luca Nogler's writing in a very closely related area, applying different typological models to the determination of employee status.¹³¹

The key idea of this *functional approach* is to focus on the specific role different elements play in the relevant context, instead of looking at the mere absence or presence of

¹²⁸ *National Union of Rail, Maritime and Transport Workers v United Kingdom* (Application No 31045/10) [2014] IRLR 467; for convincing criticism see A Bogg and K Ewing, 'The Implications of the *RMT* Case' (2014) 43 ILJ 221, 235ff.

¹²⁹ *RMT v UK* (n 128) [98].

¹³⁰ *RMT v UK* (n 128) [37].

¹³¹ Nogler (n 16). The following paragraphs draw extensively on this article and related work.

predetermined factors.¹³² The presence of a contract of employment (or other contract) can thus be an important indicator in particular fields (for example the obligation to pay wages), but it is by no means the only one. To adopt Nogler’s language to the present proposal, a functional concept of the employer is one where the employing entity or entities are defined not via the absence or presence of a particular factor, but via the exercise of specific functions.¹³³ This exercise of specific functions extends to include a decisive role in their exercise, in order to take account of the judicial recognition in existing cases that as regards employer functions the right to play a decisive role in a particular function is as relevant as the actual exercise thereof.

The working definition suggests that the concept of the employer should be understood as the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law. There are several steps in putting this abstract conceptualisation into practice. First is the recognition that for each employee, a functional approach to different models of inter-entity relationships will lead to an *array* of potential employing entities, from which one or several may emerge as employers. Being within this array of potential counterparties does not automatically bring any specific set of employment law obligations with it, even less so responsibility for the full domain of labour regulation. It is only as a consequence of the exercise of a particular regulated function that employer responsibilities are triggered; limited, however, to the relevant domain or domains.

The array of those with a decisive role in management, particularly as regards the exercise of employer functions, will vary depending on the context in which the employing enterprises are organised. In triangular employment relationships, for example, it includes both agency and end-user, despite their difference in organisational integration or economic interest alignment. In a Private Equity setting, both the ‘immediate’ employer (ie the portfolio company) and the PE management company will find themselves within the array. It may also extend further, including for example a franchisor with very tight control over the operations of a particular franchisee.¹³⁴ Under the traditional approach, privity (or at most a specific statutory extension) would select the employer from this array of entities potentially able to exercise employer functions. In the reconceptualised concept of the employer this role is replaced by the exercise of various functions. As a result, different employers may bear (or share) a range of obligations, depending always on their specific roles.

6. Conclusion: Restoring Coherence in a Fissured World

In conclusion, at least three observations should be made on the basis of the foregoing examples of a reconceptualised concept of the employer in action: first, that employment law obligations may be spread across multiple legal entities. This is the core of the reconceptualisation’s challenge to received concepts of the employer as a single entity. Second, as the functions of the employer can be subdivided into distinct groups, the employer is no longer exclusively defined as an entity exercising a single and simple

¹³² *ibid* pt 3.

¹³³ *ibid* 463.

¹³⁴ D Weil, ‘Fissured Employment’ (Presentation given at the 2011 ISA Meetings, Pittsburgh, PA, May 2011).

function comprising all elements identified: exercising a particular subset of employer functions may suffice to trigger responsibility in that regard. Which of the functions are relevant depends on the particular area of legal regulation: the third implication of the functional approach proposed is that the attribution of responsibility will differ across distinct domains within employment law.

At first glance, it might be thought that a fundamental reconceptualisation of the concept of the employer would require significant innovation in both statutory design and the courts' adjudication. As section 4 has demonstrated, however, that is not necessarily the case. Indeed, it is hoped that there is relatively little, if any, need for radical innovation or departure from existing frameworks to achieve the functional outcome proposed. Many if not all of the required techniques can already be found in various pockets of case law, driven by seeds of the functional approach just described. Depending on fact patterns and the purpose of the relevant area of employment legislation, a combination of techniques already found in the law of the contract of employment and the many statutory extensions to it could be developed to give employment law scope functional flexibility in complex multilateral or fissured employment scenarios.

Appendix: Further Reading in *The Concept of the Employer*

<u>Elements of this Report:</u>	<u>Corresponding Passages:</u>
2: Identifying the Employer	
(i) A Unitary Strand	Chapter 1, section 1
(ii) A Multi-Functional Strand	Chapter 1, section 2
3. Fissurized Work in the United Kingdom Today	
(i) Agency Work	Chapter 2, section 1
(ii) Private Equity	Chapter 2, section 2
B. Implications for the Scope of Employment Law Coverage	
(i) Break-Down of Employment Law Coverage	Chapter 3, section 1
(ii) Incomplete and Incoherent Coverage	Chapter 3, section 2
4. Legislative and Judicial Responses	
(i) Statutory Avenues	Chapter 5, section 2B
(ii) Common Law Developments	Chapter 5, section 2A
5. Evaluation and Future Prospects	
A. Towards a Functional Concept of the Employer	Chapter 5, section 1