

**United Kingdom National Study for the ILO**

**Workers' Protection**

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\* Corresponds to *IV - Self-employment in situations of economic or other dependency* in the project outline.

\*\* Corresponds to *III - Self-employment except cases of economic or other dependency* in the project outline.

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## I Introduction

### A The changing dynamics of employment in the UK

1.1 There is general agreement among analysts of the labour market in the United Kingdom about the dynamics of employment patterns during the 1990s. That agreement is reflected in the following official analysis of the most recent trends, from the *Labour Market Quarterly Report*<sup>1</sup> for February 1999. Those trends are summarised in that report as follows:-

The Labour Force Survey continues to record a growth in employment, and the Workforce Jobs Survey also shows a rise. The number of employees ranges in the year to September/November 1998, with faster growth in employment amongst women. By region, the largest increase in total employment was in the London region, and by industry the largest increase was in distribution, hotels, and restaurants. Full-time employment rose over the year. The Labour Force Survey showed that the number of full-time employees had risen. In the most recent quarter, total employment – measured by the Labour Force Survey – rose amongst both men and women. Over the last two years, economic activity has risen, the decline in claimant unemployment continues, and the UK continues to compare well to the rest of Europe.

All this serves to confirm the widespread belief that the rise in unemployment in the UK has been halted or even reversed, but that the shift in employment and in economic activity from the manufacturing to the service sector continues, as does the shift in the growth of employment from men to women.

1.2 However, for the purpose of the present study, the above considerations are largely background ones. Right in the foreground, on the other hand, is in the dynamic of changing working patterns, and in particular the strong tendency towards flexibilisation of working patterns or arrangements. There is extensive recent evidence of the strength of this dynamic. In the *First Findings of the 1998 Workplace Employee Relations Survey*, a whole section is devoted to workplace flexibility, and the authors are able to “add to the evidence which is normally derived from aggregate employee data by looking at the ways in which the *employers* adjust and deploy labour to meet changes in demand”<sup>2</sup>. A very useful further body of evidence is provided in a recently published report on flexible employment policies and working conditions which has been prepared by Damian Grimshaw and Kevin Ward, who use case studies of a typical employer in the private

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<sup>1</sup> The *Labour Market Quarterly Report* was originally published by the Manpower Services Commission, which has now been merged into the Department for Education and Employment; the *Report* is now listed as a “Skills and Enterprise Network Publication”.

<sup>2</sup> Mark Cully, Andrew O’Reilly, Neil Millward and others, *The 1998 Workplace Employee Relations Survey - First Findings* (Routledge, London, 1998 - a booklet summarising survey findings which are to be presented and analysed more fully in two books to be published in Autumn 1999) (“WERS”) at p.7..

servicesector and a typical employer in the private manufacturing sector to examine how such employers “have introduced a range of employment flexibility policies ... in response to a diverse range of internal and external pressures for change”<sup>3</sup>.

1.3 An equally important contribution to this discussion has been provided by a very recent advisory booklet on changing patterns of work which has been produced by ACAS, the British official Advisory, Conciliation and Arbitration Service. This publication makes an important set of links between flexibility and changes in patterns of work, and more particularly in patterns of *working time*. Thus it is said that:-

“ Patterns of working time have always been subject to change but the pace of change is now more rapid than ever. Organisations are under constant pressure to produce goods and services, of the right quality and price, and when customers want them. This pressure can often mean that new ways of working have to be found to make the best use of staff and resources.”<sup>4</sup>

The “new ways of working” which are discussed in the booklet are:- flexible working hours, flexible working weeks, flexible working years, flexible contracts, flexible places of work, and flexible working lives. So the ACAS publication is organised on the assumption that all the current important changes in patterns of work can be understood in terms of flexibility, and that most of them concern working time. This perception helps us to identify the general terms in which the problems of workers’ protection should be set.

B. The general analysis of the issues of workers’ protection.

1.4 There is a clear connection between the changing dynamics of employment in the UK, which we examined in the preceding paragraphs, and the issues of workers’ protection with which we are concerned in this report. The issues about workers’ protection are, essentially, questions about the personal scope of employment law, and about the personal status of workers in relation to employment law. The effect of the rapid changes in working patterns which we discussed above has been to cast doubt upon – we might even say to throw into confusion – the previously existing rules and assumptions for determining the personal scope of employment law, and for deciding upon the personal status of particular workers in particular work situations.

1.5 This kind of doubt or confusion is caused in the following way. As we shall see in more detail later on, the arrangements which exist for determining the personal scope of employment law, and for allocating personal status to specific work relationships, depend

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<sup>3</sup> Damian Grimshaw and Kevin Ward, *Flexible Employment Policies and Working Conditions - UK Report* (Prepared for the European Foundation for the Improvement of Living and Working Conditions (Project No. 0203), June 1999) (“FEPAWC”).

<sup>4</sup> ACAS, *Advisory booklet on Changing Patterns of Work* (London, 1999) (“ACASAB”) at p.6.

upon or assume, whether explicitly or implicitly, certain models of typical employment or work relationships. The rapidly changing working patterns which we have identified earlier alter or at least affect those models in at least two major ways. Firstly, they *intensify the use of flexibilised terms and conditions of employment* which differ from the traditional models. Secondly, they produce a *great increase in various forms of sub-contracting for employment*. The overall result is to create a radically different context from that in which the typical models evolved and became integral to the structure of workers' protection.

- 1.6 However, we need to qualify this analysis in certain ways if it is not to be misleading. Without such qualification, we might appear to be suggesting that the problem about workers' protection consisted entirely of re-constituting a perfectly balanced set of arrangement which had existed before the recent wave of flexibilisation of patterns of work. That would be far from accurate; the current period or rapid changes in patterns of work represents no more than an intensification of problems which had previously existed. Moreover, we can already see ways in which the legal system is starting to respond to the changes in employment patterns by devising new approaches to the issues of the personal scope of employment law. The task is to ensure that these responses become and remain fully adequate and functional, so that the system of workers' protection can be said to be coherent on a continuing basis.
  
- 1.7 In order to carry out this task, we need to analyse carefully the concepts of "sufficient workers' protection" and "insufficient workers' protection" which form the core of the specification for the present report. Clearly, we are using these concepts in a very special sense, since if we were using them in a general sense, they would require a political judgement of the extent to which the employment laws of the particular national system under consideration gave expression to the needs and legitimate expectations of workers within that system. We are concerned with a much more specific and technical question, namely that of whether particular kinds or groups of workers enjoy a suitable level of protection, given *the particular pattern of work which they have*, and given *the way that employment status is allocated to that pattern of work*. In other words, the question of sufficiency of workers' protection, as used in this study, means sufficiency of protection by comparison with that accorded to workers with different patterns of work and with the corresponding employment status.
  
- 1.8 The foregoing analysis thus enables us to identify the issue of "insufficient workers' protection" in terms of *discrimination against workers according to the pattern of work* which applies to them. We can surely go on from this to articulate the general principle that *workers should be protected by employment law from unjustified discrimination against them according to their pattern of work*. This means that a worker has a legitimate expectation, which should be vindicated by employment law, not to be adversely treated by comparison with a worker who has a different pattern of work unless that differentiation can be shown to be objectively proportional to the aim or purpose for which it is imposed.

1.9 Developing this concept of unjustified discrimination by pattern of work in greater detail, we can discern at least three forms of this kind of discrimination. As with most or all other legal and administrative systems, UK employment law creates and operates according to a number of general categories of workers or employment statuses – such as that of “employee under a contract of service” or of “independent contractor under a contract for services”. The first main form of discrimination by pattern of work consists of inappropriate adverse treatment *of a whole category* – as might be the case, for instance, if freedom of association rights were denied to the whole category of independent contractors for no good reason. The second main form of such discrimination consists of inappropriate adverse differentiation *within a particular category* – as might occur, for instance, where, within the general category of employee, part-timers were treated adversely compared with full-timers without justification. The main form of such discrimination consists of *mis-allocation as between categories* – as where a worker who ought to be treated as an employee is treated as an independent contract without good objective grounds for doing so.

1.10 There has been some tendency to proceed as if the problem of discrimination by pattern of employment arose entirely in the third of these forms, so that the solution to the problem could consist simply of fixing the appropriate set of categories and ensuring the appropriate allocation of workers to those categories. But because the problem takes the more complex set of forms which has been outlined above, it actually demands a more complex and less static set of solutions. In fact it will be argued in this study that the problem of workers’ protection, as defined earlier, demands a *process approach*, that is to say it requires the putting in place and maintaining of a process which will ensure that discrimination by pattern of employment is *continuingly* identified, monitored, and remedied. It will be the task of the substantive chapters of this study to work out this process approach in more detail; this will be done by examining, in relation to the main patterns of employment, the ways in which this kind of discrimination is presenting itself and therefore what needs to be done to regulate it.

## C. Methodology and Sources Used

1.11 The following methodology will be adopted in the substantive chapters. The question of the sufficiency of workers’ protection will be considered, in relation to the main types of employment status, by means of an analysis on the regulatory structure by which those statuses are created and allocated. In the course of that analysis, we shall seek to relate the regulatory structure to the actual context within which it operates, and to the perceptions of employers and of workers as to what employment status is appropriate to the pattern of work which applies in the particular case. In the United Kingdom, the sources of regulation by which employment statuses are created and allocated consist, for all practical purposes, almost entirely of employment legislation and of the decisions of employment tribunals and superior courts applying that legislation. In another sense, individual work contracts constitute a major regulatory source for this purpose; however, collective agreements do not have a particularly significant role to play in this respect.

1.12 It follows from what was said about the methodology of this study in the previous paragraph, that we shall need to draw upon two kinds of documentary sources. The first kind consists of the textbooks or commentaries concerning the law on contracts for work. The second kind consists of studies or articles providing empirical information about changing work patterns, in particular about flexibilisation, and about the ways in which they relate to the legal categories and the formal employment statuses which are created or applied by or in the legislation. So far as the first kind of source is concerned, the author of the present study respectfully refers to certain works on the contract of employment of which he is the author or the editor<sup>5</sup>; but perhaps a more important source consists of the latest edition of what is now the most comprehensive and up-to-date general textbook on British labour law, that written by Simon Deakin and Gillian Morris<sup>6</sup>. For documentary sources of the second kind, reference may be made to the research studies and advisory materials cited above<sup>7</sup>, and also to a highly relevant newly published research study on the employment status of individuals in non-standard employment in<sup>8</sup>.

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<sup>5</sup> Mark Freedland, *The Contract of Employment*, (Clarendon Press, Oxford, 1976); Chapter 39 - "Employment" of *Chitty on Contracts* (27<sup>th</sup> edn, Sweet & Maxwell, London, 1999).

<sup>6</sup> Simon Deakin & Gillian Morris, *Labour Law*, (2<sup>nd</sup> edn., Butterworths, London 1998) ("D&M").

<sup>7</sup> *Supra*, paras. 1.2, 1.3..

<sup>8</sup> Brendan Burchell, Simon Deakin & Sheila Honey, *The Employment Status of Individuals in Non-Standard Employment*, Research Paper for the Department of Trade and Industry (DTI, London, August 1999) ("TESINSE").

## II Employment Relationships

### A The concept and legal definition of the contract of employment.

2.1 For all its many difficulties, our substantive analysis can begin with one clear strong statement, which is that in the British system of employment law, both so far as legislation is concerned and at the level of the jurisprudence of the courts, the archetypal protected employment status is associated with employment under a *contract of employment*, otherwise known as a contract of service. This is the legal concept which corresponds to what is described in the specification for this study as “the situation of wage-earning employment, whether subordinate or dependent, ... which is carried out within the framework of an employment relationship”. The worker who works under a contract of employment is termed an “employee” – formerly, but no longer, termed a servant.

2.2 For most of its modern history, British employment law has been constructed on the basis of a binary system of employment statuses whereby workers were classified either as employees employed under contracts of service or as *independent contractors* working under contracts for services. An elaborate body of jurisprudence has evolved to distinguish between these two types of work relationship and these two types of work contract. The authors of TESINSE take the view that there are now four common law, that is to say case-law, tests which are used to make this classification, namely those of (1) control, (2) integration, (3) economic reality, and (4) mutuality of obligation<sup>9</sup>. The working of these tests, and the inter-relationship between them, are undoubtedly complicated; considered in their totality, they represent the idea that the contract of employment is essentially characterised by some degree of subordination and continuing economic dependence on the part of the worker. In that rather obscure classificatory context, it becomes important to consider whether there are rules or doctrines which give systematic help in establishing the existence of a contract of employment.

### B. Factors facilitating the finding of a contract of employment.

2.3 Given the structure of both British employment legislation and case-law, in order for there to be factors facilitating the finding of a contract of employment, (in the words of the specification for this study “assumptions and other elements facilitating the confirmation of the existence of an employment relationship or contract”), these would have to consist of a *presumption*, imposed either by the legislation or by case-law, that a particular work relationship was to be treated as taking the form of a contract of employment unless it had been positively demonstrated that it did not take that form. Sometimes in British employment law, use is made of presumptions of a similar kind; we even find one instance,

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<sup>9</sup> TESINSE, 2.1.1 - 2.1.4.

in the context of statutory redundancy payments, where employment is presumed to be *continuous* unless the employer can demonstrate that it is not.<sup>10</sup> . However, we find no instance of a comparable statutory presumption in favour of the classification of a work relationship as a contract of employment, and the view of the author of this study is that the case-law does not create such a presumption either; or at least, if does so, it is only a presumption of a very light and easily rebutted kind. Employment tribunals and the courts proceed by balancing the totality of factual *indicia* which point towards or away from an employment relationship; the possible *indicia* against an employment relationship are very nearly as numerous and powerful as those in favour of the finding of a contract of employment<sup>11</sup>. The absence of any, or at least any significant, presumption in favour of a contract of employment makes it in principle easier for the relationship of employer and employee to be disguised in other legal forms.

C. The evolution of disguised employment relationships.

- 2.4 Let us begin this part of the discussion by defining the sense in which we shall use the terminology of “disguised employment relationships”, given that there are a number of different possibilities as to what one might mean by this. We shall use the term to identify situations in which situations or configurations of work that, properly understood, amount to employment relationships and ought therefore to be classified as taking place under contracts of employment, are in fact successfully established as taking place under some other status, such as – indeed archetypally – that of a contract for services with an independent contractor.
- 2.5 By saying “successfully”, we imply that this non-applicability of employment status has by definition been deliberately sought. This might suggest that the “disguising” of employment relationships is necessarily, or at least typically, an activity involving evasion, perhaps even deception, with regard to the regulatory controls which employment law exerts upon employment relationships. It is not in fact intended to build that pejorative implication into the definition. If we insisted upon that inference, we should distort our vision in two ways – we should both take too negative a view of the phenomena which fell within the definition; and moreover we should miss part of the problem, which may consist of activity viewed by all concerned as the perfectly legitimate exercise of freedom of contract.
- 2.6 Having defined “disguised employment relationships” in this way, we can use that definition to observe that there are two main ways in which the phenomenon, or the problem, of the disguised employment relationship presents itself. The one form is relatively superficial, the other is more deep-seated. The more superficial form consists

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<sup>10</sup> Employment Rights Act 1996 s.210(5).

<sup>11</sup> See *Chitty* paras. 39-009 – 39-024.

of *re-labelling* the work contract or contracts with some label designed to make it clear that there is not a contract of employment as such – typically by designating the worker as “self-employed”. The more deep-seated form consists of *adapting the pattern of contracting* so that it moves away from the traditional stereotype of the contract of employment (although the relationship is still to a significant extent one of subordination and/or dependence on the part of the worker). Where re-labelling occurs, it is typically accompanied by some degree of adaptation of the pattern of contracting; it must be rare for an employer to attempt simply to re-classify workers while continuing to employ them under traditional work patterns corresponding to the stereo-typical contract of employment.

2.7 This brings us to a point which is crucial to the whole of this study. In the UK, flexibilisation of work patterns has advanced so far as to create a large sector of the workforce within which disguised employment *may* be taking place – though, for reasons which will be explained, we should not regard this as a sector entirely and systematically characterised in terms of disguised employment. The authors of TESINSE have, very usefully, identified this sector and have provided some valuable empirical data about the difficulties of allocation of employment statuses within it. In fact, their survey and their analysis of its results are constructed around the notion of a sector of the workforce consisting of “workers in ‘non-standard’ forms of employment” (“WINSFOES”) whom they actually *define* as “those people not easily categorised as employees or self-employed”<sup>12</sup> – though they go on to describe that category of people as those with “‘non-standard’ working arrangements” in which they include “casual work, zero-hours contracts, homeworking, agency work, and so-called ‘borderline’ self-employment”<sup>13</sup>. Their survey produces the finding that:-

“In total, therefore, 30 per cent of all those in employment [within the sample of workers who were the subject of the survey] have an employment status that, on first inspection has elements of uncertainty and is not completely clear.”<sup>14</sup>

– which is surely a startlingly high figure, and one which presumably has increased considerably within the last decade of flexibilisation of working patterns.

2.8 Clearly, as we indicated earlier, this large group of WINSFOES may contain a significant proportion who would, or, at least, should, be classified by an employment tribunal or a court as employees with contracts of employment. One of the TESINSE findings might encourage us to estimate this as a proportion of about 12 per cent<sup>15</sup>. If and to the extent that such workers were in fact treated as *not* being employees with contracts of employment, we could indeed say that this represented a situation of disguised employment. However, as we also indicated earlier, it would be misconceived to think

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<sup>12</sup> TESINSE para. 3.1.

<sup>13</sup> TESINSE para. 3.2.1.

<sup>14</sup> TESINSE para. 4.1.2.

<sup>15</sup> TESINSE para. 4.3 – “... 12 per cent of all those with unclear status have no characteristics of being an independent contractor”.

of the whole category of WINSFOES as systemically falling under heading of disguised employment. That is because flexibilisation of working patterns has developed so far, *and has been the subject of sufficient encouragement as a matter of public and governmental policy*, that it would be unsatisfactory and inconsistent to insist upon re-imposing the classification of employee on all WINSFOES, whether in a prescriptive or a descriptive sense.

2.9 Much the more satisfactory mode of analysis is to recognise the need for an intermediate descriptive category between those of “employees with contracts of service” and “independent contractors with contracts for services”. In this study, we use the terminology of “semi-dependent workers”, and we consider the situation of those coming within that category in the following chapter. We shall find that British employment law has begun to recognise a distinct category of semi-dependent workers, and to treat them differently from workers in each of the other two categories. Our immediate concern, however, is with the sufficiency of protection for workers in employment relationships and disguised employment relationships, so we turn to considering the differentiations which are made according to patterns of work and work contracts within those groups of workers.

D. Differentiation in workers’ protection according to pattern of employment within employment relationships and disguised employment relationships.

2.10 As explained earlier, we are for the purposes of this study primarily interested in differentiations according to patterns of employment *as between* the main employment statuses, rather than *within* each of the main employment statuses. However, given that the status of employee under a contract of employment represents the archetypal fully protected status, it is important to refer to the few major differentiations which are made according to pattern of employment within that particular status, so that we can understand what “full protection” amounts to. Two such differentiations are made, both in a sense amounting to lesser protection, in certain circumstances, for temporary employees as compared with permanent employees. One relates to continuity of employment, the other to fixed-term employment. Continuity of employment is important for the purposes of various statutory entitlements<sup>16</sup>, but particularly for the rights to remedies for unfair dismissal and to statutory redundancy or severance payments, for which there are qualifying periods of respectively one year’s<sup>17</sup> and two years’<sup>18</sup> continuous employment with the employer in question or an associated employer. Where employment is for a fixed term of one year or more, an employer may validly seek the

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<sup>16</sup> See, for full details, D&M section 3.7 “Continuity of Employment and Qualifying Thresholds”.

<sup>17</sup> As very recently reduced from two years by the Employment Relations Act 1999.

<sup>18</sup> Employment Rights Act 1996 s.155.

prior agreement of an employee to waive his or her entitlements to remedies for unfair dismissal, or to statutory redundancy payments, which the employer may not validly do in relation to contracts of employment of indeterminate duration<sup>19</sup>.

- 2.11 If we turn from the question of workers' protection within employment status to the question of protection of workers in disguised employment relationships, a different picture emerges. If an employment relationship has been disguised, that means that it should take effect under a contract of employment but may in fact be treated as a semi-dependent or fully independent work relationship. We discuss more fully in the following chapters what statuses are assigned to those relationships, but it will be useful at this stage to identify the degree of loss of protection which workers experience if they are treated as falling into those categories.
- (A) Conditions of employment and remuneration. They do not have rights to remedies for unfair dismissal or to statutory redundancy payments, nor to statutory sick pay or maternity pay<sup>20</sup>. If they are treated as fully independent workers, their remuneration is not subject to protection from deduction, and they are not covered by the Working Time Regulations or by the Statutory Minimum Wage.
  - (B) Occupational health and safety. The statutory protections are mostly comparable to those which apply to workers with contracts of employment, but the implied terms of their contracts may be less protective, for example in respect of the employer's duty to protect the worker against the injurious consequences of stressful work situations, than if they were accepted as having contracts of employment.
  - (C) Social Security. The details of these differentiations are outside the scope of the present study, but essentially the Social Security system has a different regime for "self-employed workers" from that which applies to employees with contracts of employment; basically, employers have duties to pay contributions in respect of employees under contracts of employment, but not in respect of other workers<sup>21</sup>.
  - (D) Freedom of association. The statutory protections against dismissal or action short of dismissal by reason of the workers' membership of, non-membership of, or activity in, a trade union, and against dismissal during industrial action are confined to employees with contracts of employment.
  - (E) Collective bargaining. The statutory machinery for the compulsory recognition by employers of trade unions for collective bargaining where there is the necessary evidence of the required level of support by the workforce, is not applicable in respect of fully independent workers.

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<sup>19</sup> Employment Rights Act 1996 s.197.

<sup>20</sup> For details see *Chitty* 39-077, 39-079.

<sup>21</sup> For details see *Chitty* 39-127.

- (F) Access to justice. Generally speaking, fully independent workers do not have access to employment tribunals, except in respect of the various statutory controls upon *discrimination* – gender, race and disability – because the other statutory jurisdictions of employment tribunals do not apply to them.
  - (G) Maternity rights. As partly indicated earlier, the statutory maternity rights – to statutory maternity pay, to return to work after maternity leave, to time off for ante-natal care and to protection against dismissal for pregnancy, seem to be confined to employees with contracts of employment<sup>22</sup>.
- E. Machinery to ensure the application of employment legislation to disguised employment relationships.
- 2.12 At the moment, there are only two provisions of employment law in the UK which seem to offer any possibility of being used to ensure the application or more complete application of employment legislation to disguised employment relationships, and there is no reason to be confident that they are in practice being, or will in the future be, used to achieve that effect. That is to say, firstly, there is provision for employees to complain to employment tribunals of the employer’s failure to supply them with written notification of the terms of their employment<sup>23</sup>. Workers in disguised employment relationships might in theory be able to invoke that procedure to establish that they should have been notified of their terms of employment *as employees under contracts of employment*, thus confirming that they possessed that status. There is, however, no evidence that this procedure is used to any significant extent for this purpose.
- 2.13 Secondly, in the newly enacted Employment Relations Act 1999, a power has been created, which, we may expect, would normally be exercised by the Department for Trade and Industry, to make regulations to modify the definitions of the workers to which a wide range of employment legislation applies. So, for the sake of argument, regulations could be made extending the scope of unfair dismissal legislation from “employees” to a more widely defined set of workers. The new legislation does not, however, define or even indicate how this new power is meant to be used – it could in theory be used to *narrow* the personal scope of employment legislation rather than broadening it – and we simply cannot predict at this stage how the new power will be used. This leads on to a discussion of what a more satisfactory remedial process for such problems might consist of.
- F. A process to address problems of insufficient workers’ protection in disguised employment relationships.

2.14 The provisions mentioned in the foregoing paragraphs suggest the starting points for a

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<sup>22</sup> For details, see D&M section 6.6.

<sup>23</sup> Employment Rights Act 1996, ss.1 *et seq.* For details, see D&M section 4.3.

systematic *process approach* to the problems of emerging insufficiency of workers' protection in relation to changing patterns of work and employment – problems of which disguised employment relationships provide one context or example. When we suggest a process approach, we mean that the response to the problems of insufficiency of workers' protection should take the form not of a single instantaneous solution, an attempt at static re-formulation of the personal scope of employment laws, but instead the form of a dynamic process of response to or remedy for a set of issues or problems which is itself dynamic by virtue of the rapidity of flexibilisation of the labour market.

- 2.15 Such a process would consist of a set of arrangements which ensured that there was a continuing, and transparent, scrutiny both of the legislative norms by which the personal scope of employment laws are determined, and of the adjudications by which employment statuses are allocated to particular workers or groups of workers. Such a scrutiny would be designed to ensure the continuous identification of unjustifiable discrimination according to pattern of work – hence, in this instance, unjustifiable discrimination against workers because they are in disguised employment relationships. The scrutiny process would need to be such as to ensure that the powers to modify the personal scope of employment laws – which as we have seen already exist – were being exercised in an informed way, and with a declared commitment to remedy unjustifiable discrimination, and a public accountability for the discharge of that commitment. It would also be necessary to ensure that this commitment was shared by those engaged in the adjudicative process, and they too were placed in the position to take their decision on an informed basis so far as issues of insufficiency of workers' protection were concerned.

- III Semi-dependent employment – partly dependent workers beyond the contract of employment.
- A. Defining and denominating the category of semi-dependant employment beyond the contract of employment
- 3.1 In this study, the terminologies of “semi-dependent employment” and of “partly dependant workers beyond the contract of employment” are used to refer to a category of workers which can usefully be distinguished, both conceptually and in practice, from the categories of “employees with contracts of employment” and “independent contractors with contracts of services”. That is to say, we suggest that this intermediate category has a real existence in the current structure of the labour market in Britain, and that this category corresponds to the notion of “self-employment in situations of economic or other dependency” as used in the outline specification for this study. We also suggest that this practical category is quite rapidly emerging as a distinct *legal* category, though, as will be shown, this is still a matter of uncertainty and debate.
- 3.2 In fact, we should acknowledge that, so far as the United Kingdom is concerned, the relationship between the *factual* category of semi-dependent employment and a possible *legal* category of semi-dependent employment is a highly complex and dynamic one. In order to understand this better, it is useful to distinguish between and examine separately the treatment of semi-dependent employment, firstly, in practical analysis of the labour market, secondly in legal analysis of the labour market, and thirdly in employment legislation. We could say that these represent three distinct mind-sets or knowledge systems, each with its own approach to semi-dependent employment. It will be useful to look at each of these in turn.
- 3.3 If we consider first the treatment of semi-dependent employment in practical analysis – by which we mean the sort of analysis that is provided by specialists in labour market economics or human resource management – we find that such analysts are extremely interested in flexibilisation and the growth of atypical or non-standard patterns of employment, but not specially from the point of view of the impact of these changes upon the dependence, independence or employment status of the workers concerned. Thus, WERS devotes a long section<sup>24</sup> to workplace flexibility without becoming involved in issues of classification between employment and self-employment, dependence and independence. Similarly, the authors of FEPAWC have prepared an elaborate report on the impact of flexible employment policies upon employment conditions without becoming involved in those questions of classification. On the other hand, TESINSE, although based on an empirical survey of the situation and self-perceptions of workers, is actually devoted to testing the working of legal rather than practical categories, so it deserves to be thought of as being in the genre of legal analysis of the labour market, to which we now turn our attention.

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<sup>24</sup> WERS, pp. 7-9.

- 3.4 The legal analysis of developments in the labour market, and of changing working patterns brought about by flexibilisation, has, on the other hand, been centrally concerned with the issue of the impact of such changes upon the dependence, independence, and employment status of the workers involved. Thus from the mid-1980s onwards, legal commentators have been displaying a mounting concern with the way in which changing patterns and structures of employment threaten to disrupt and destabilise the basic construction of employment law around the central notion of employment under a contract of employment, and the contrast between employees and self-employed workers<sup>25</sup>. They have been steadily moving from a view that this is no more than a marginal issue of “disguised employment” or “sham self-employment” to a view that there is a large genuinely intermediate zone between employment and self-employment. It is this zone which is sometimes identified as that of “quasi-dependent labour”<sup>26</sup>, which is now tending to be styled “dependent self-employment” (in which the worker is not in a *subordinate* work relationship with an employer but is in an (economically) *dependent* relationship)<sup>27</sup>. In this study, the view is taken that this area is best identified as that of semi-dependent employment beyond the scope of the contract of employment in the exact (and traditional) sense of the latter term. For the most part, the legal analysts seem to be pressing for a re-drawing of the boundaries of the legally recognised employment relationship so that employment law would more readily extend to semi-dependent employment.
- 3.5 If we turn to the treatment of semi-dependent employment in current employment legislation, we find a strikingly complex and ambiguous counterpart of its treatment by legal analysts. These complexities are concentrated upon the use of the concept of “worker” in recent employment legislation. It seems that this concept is now being used in two quite different ways. In one usage, the concept of worker is being used simply to *override* the distinction between employees and (personal) independent contractors. In the other usage, the term “worker” is apparently being used to re-draw the boundary *between* employees and independent contractors, so that “workers” are an expanded group corresponding to the group traditionally described as employees with contracts of employment. We shall look at each of the usages of the term “worker” in turn, and also point out some difficulties which result from the two usages of the term “worker”.
- 3.6 As we have previously indicated, the first usage of the term worker has occurred in the context of legislation about various forms of discrimination in employment, where it is used to include those in “employment under a contract of service or apprenticeship or a

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<sup>25</sup> See, particularly, Bob Hepple, “Restructuring Employment Rights”, (1986) 15 *Industrial Law Journal* 69-89, Hugh Collins, “Independent Contractors and the Challenge of Vertical Disintegration to Employment Laws” (1990) 10 *Oxford Journal of Legal Studies* 353-380.

<sup>26</sup> See, for instance, D&M s.3.5.

<sup>27</sup> See, for instance, TESINSE para. 2.7.

contract personally to execute any work or labour”<sup>28</sup>. This has been treated as meaning that independent contractors will count as workers, and as such will fall within the scope of the legislation, as long as they contract to work personally rather than by providing the services of other persons.

- 3.7 As long as the term “worker” was used solely in that sense, the position was reasonably clear. However, matters have become much more complicated now that a “new wave” of recent British employment legislation<sup>29</sup> has started to use the term “worker” in an apparently different and more restricted sense. For in this second usage, there is an express exclusion, from the category of “worker”, of those working under contracts where the recipients of the work or services have the status of “a client or customer of any profession or business carried on by the individual [who is to render the work or services]”<sup>30</sup>. The latter category is clearly meant to exclude the “genuinely self-employed”, or those “in business on their own account”.
- 3.8 The use of the term “worker” in the second sense might appear to create a coherent basis for including semi-dependent workers within the scope of employment legislation. But it is very confusing to have two different statutory definitions of “worker” in contemporaneous use, and it is even more difficult to know how to fit both definitions into the traditional distinction between “employees” and “independent contractors”. So at the moment the legal classification of semi-dependent workers, dependent workers beyond the scope of the contract of employment or “dependent self-employed workers” is very complicated and controversial in the British context.

## B. Quantitative and qualitative evolution of semi-dependent employment

- 3.9 As we have now seen, most of the discussion about how to classify semi-dependent workers is essentially discussion about the *legal* categories into which they should be fitted, and that part of the discussion has become a very complex one. As a result, it has become extremely difficult to trace the quantitative and qualitative evolution of this kind of work. The main purpose of TESINSE was to assess what proportion of the workforce, and in particular what proportion of WINSFOES, now come within the definition of “workers” in the particular sense in which it is being used in the most recent employment

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<sup>28</sup> Equal Pay Act 1970 s.1(6)(a), Sex Discrimination Act 1975 s.82, Race Relations Act 1976 s.78, and similarly in Disability Discrimination Act 1996 s.68.

<sup>29</sup> This “new wave” starts with the protections against deductions from wages which were originally enacted in the Wages Act 1996 and are now contained in Part II of the Employment Rights Act 1996, and continues with the National Minimum Wage Act 1998 and the Working Time Regulations 1998, all of which define the term “worker” in this new special sense – see next footnote..

<sup>30</sup> See Employment Rights Act 1996 s.230(3).

legislation<sup>31</sup>. Most of that group of “workers” is made up of employees with contracts of employment; it is only the rest of that group who constitute the semi-dependent workers beyond the scope of the contract of employment.

3.10 TESINSE may offer some guidance as to the size of that latter group, to the extent that about 64 per cent of the workers who were surveyed appeared to be “employees” on first inspection, whereas almost 80 per cent turned out on investigation to be dependent workers ie “workers” in the sense in which it is being used in current employment legislation<sup>32</sup>. We might regard the 16 per cent margin between those two proportions as representing the likely size of the group of dependent workers beyond the contract of employment. However, it must be emphasised that the employment status of no less than 30 per cent of the workers surveyed was unclear on first inspection, which was reduced to about 12 per cent upon further investigation<sup>33</sup>, so that the margin of uncertainty between the two stages of the survey was large enough to absorb the apparent figure for the proportion of semi-dependent workers. Given that the assessment is, for the reasons we have stated, an extremely difficult one, we should probably think of this category as quite a small one, occupying no more than 5 per cent of the workforce, and possibly quite a lot less.

3.11 The same uncertainties make it difficult to give reliable indications as to the quality of semi-dependent work, and as to the trends in relation to semi-dependent work, both quantitative and qualitative. The general tendency seems to be for the proportion of semi-dependent workers to grow gradually, as a proportion of the workforce as a whole, and for the quality of semi-independent work to increase in the sense that its development seems to be concentrated on the higher echelons rather than lower echelons of the workforce. However, we should not suppose that the overall amount of semi-independent employment is growing specially rapidly, nor moving dramatically up the labour market. All this may be slightly further clarified by looking at the causes and locations of semi-independent work, to which we now turn our attention.

#### C. Causes and locations of semi-independent employment.

3.12 It would seem to be reasonably clear that the main driving force towards the formation of semi-dependent work relationships is flexibilisation imposed by employers. We can be fairly certain that most workers now in semi-dependent work relationships either were in fully dependent employment relationships in the mid-1980s or would have been if they had been in the labour market at that time, so that flexibilisation by employers is pushing some

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<sup>31</sup> See TESINSE s.1.4.

<sup>32</sup> See TESINSE Table 4.4.

<sup>33</sup> See, again, TESINSE Table 4.4, and compare TESINSE s.4.6 for further discussion of the uncertainties involved.

of their employees into semi-independent work relationships. This movement can be seen as part of – probably no more than a small part of – the more general growth of non-standard forms of employment. As such, it is on the increase, it is concentrated on service provision (such as journalism and entertainment, but many other types too) rather than upon manufacturing, and it is tending to move up the labour market towards professional and managerial employment (such as medical, educational, or accountancy work)<sup>34</sup>. However, as such it is also strongly associated with the growth in *contracting-out* and in *agency employment*<sup>35</sup>, and it may well be that many of the issues about semi-dependent employment are better understood as issues about *triangular* employment relationships, which are considered in a later chapter.

D. The main problems of insufficiency of workers' protection in relation to semi-dependent employment, and the suggested solutions.

3.13 The problems of insufficiency of workers' protection in relation to semi-dependent employment can be explained by reference back to our earlier discussion<sup>36</sup> of the corresponding problems for workers in disguised employment relationships – though the two situations are not, of course, wholly the same. The earlier discussion showed how workers in disguised employment relationships suffered some loss of protection if they were classified as workers but not as employees with contracts of employment, and that they suffered a further loss of protection if they were classified as fully independent workers. In particular, they lost protection against unfair dismissal and redundancy if they were classified as workers who did not have contracts of employment, and further lost the benefit of the National Minimum Wage and of the Working Time Regulations if they were classified as fully independent workers.

3.14 The same progressive loss of protection according to status allocation, as one moves from employee status to the status of worker beyond the scope of the contract of employment to fully independent contractor status applies in the case of semi-dependent workers. There is, however, an important difference, in principle at least, between the case of the worker in a disguised employment relationship and the worker in a semi-dependent work relationship. For whereas the worker in a disguised employment relationship can be regarded as having been *wrongly or inaccurately* classified if he or she is treated as anything less than an employee with a contract of employment, the semi-dependent worker has in principle been *correctly* classified if he or she is treated as a worker beyond the scope of the contract of employment. On the other hand, *both* groups of workers will have been wrongly classified if they are treated as fully independent contractors. It is also important to remember that the distinction between these two

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<sup>34</sup> Compare, for instance, the evidence about workplace flexibility which is provided by the WERS survey at pp 7-9.

<sup>35</sup> This is much emphasised in the section of the WERS survey cited in the previous footnote.

<sup>36</sup> See above, para. 2.11.

groups of workers is not a practice a complete one, and that in any event, as has started to become very evident, the whole system of status allocation has become very intricate, and perhaps even lacking coherence. This brings us on to the issue of suggested solutions.

- 3.15 In the specification for this study, three alternative solutions are canvassed for the problem of insufficiency of protection for “self-employment in situations of economic or other dependency”. The three suggested alternatives are to classify these workers as (a) self-employed workers, with the same status as such workers; or, (b) as subordinate workers, with the same status as such workers, or, (c) as workers in a different situation who have, or merit, their own legal treatment. It has been argued earlier that British employment more is in a deeply equivocal state as between these different alternatives. The tendency seems to be towards the third alternative, but the tendency is not established with any degree of certainty. In that situation, it would seem unrealistic to expect that a solution was going to be found in attempting to impose a simple choice between these alternative methods of classification.
- 3.16 It is again suggested, therefore, that it might in the British context be better to pursue the sort of process approach which was advocated earlier in relation to the problem of disguised employment relationships<sup>37</sup>. That is to say, the solution might consist in ensuring that there was a robust process in place to monitor the development of semi-dependent employment, and to address and control the occurrence, in employment legislation, or in adjudication about the allocation of employment status, of unjustifiable discrimination as regards this kind of work relationship. But before a general assessment can be made as to how best to ensure the success of this process approach, it is necessary to consider the parallel issues as they arise in the context of the other main work relationships or statuses which have not so far been considered, namely full self-employment and triangular work relationships.

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<sup>37</sup> See above, paras. 2.14 - 2.15.

- IV Self-employment, or the fully independent personal work relationship.
- A. The concept and its legal definition.
- 4.1 Much of what needs to be explained about the concept of self-employment, or the fully independent work relationship, and its legal definition, follow from what has already been said in the preceding chapters, but one very important further set of points nevertheless remains to be made before we can assess the incidence of self-employment and the issues of workers' protection which it presents. Both in practical terms and in legal terms, self-employment has at least two boundaries or interfaces with other economic and legal relationships. On the one side, as we have seen, it meets up with, or perhaps we should say that it shades into, the semi-dependent work relationship. We have examined that boundary carefully in the previous chapter, and, although it is clearly a difficult boundary to draw, we do not need to say more about it at this stage.
- 4.2 But there is another equally important boundary of self-employment which we which we have not yet explored. It is useful to envisage a spectrum of economic relationships from fully dependent employment relationships to fully commercial or business relationships. There is a point on the spectrum where we cease to think of the relationships as employment or work relationships in any sense in which employment law is even minimally involved; this is, as it were the boundary between self-employment on the one hand, and purely business or commercial relationships on the other. That is the point where, in legal terms, the provider of services ceases to be regarded as a "worker" even in the largest sense in which it is used – which, as we have seen, is in the context of the legislation about discrimination in employment.
- 4.3 This is a boundary which is important enough, but which receives little attention from legal analysts. In legal terms, it is defined by reference to the *personal* nature of the work relationship in question, since, as we have seen, the "worker" in the broadest sense is "an individual who works under a contract of employment or any other contract whereby the individual undertakes to do or perform *personally* any work or services". So self-employment, otherwise known as employment under a contract for services, or the relationship between employer and independent contractor, is the fully independent form of the *personal work relationship*.
- 4.4 There seems to be a tendency among legal analysts to assume that it is not difficult to distinguish between personal work relationships on the one hand, and non-personal or purely commercial work or business relationships on the other. If we say that a personal work relationship is one in which a human individual is providing his or her own work or performance, it would seem on the face of it easy to distinguish between such relationships and other relationships where the contractor for work was providing the services of other persons rather than his or her own services.
- 4.5 In fact, that distinction is quite difficult to draw both in theory and in practice. For quite often it is not contractually specified or in any other way made clear how far a provider of his or her own services is free to provide the services of others in addition to or in

substitution for his or her own services. The English courts have taken the view that a contract for the provision of services will not be counted as a personal work contract, so as to identify the service provider as a “worker” in the wide statutory sense, unless the “dominant purpose of the contract” is the execution of personal work or labour<sup>38</sup>. As it is quite difficult to apply that test to many relationships on the borderline between contracts for independent employment and business contracts, we have to regard the precise identification of self-employment as quite an uncertain matter. Those difficulties have been increased by flexibilisation of the labour market, as we shall see more clearly when we turn to consider the incidence of and trends in relation to self-employment in the next section.

## B. Incidence and Trends.

4.6 The WERS Survey gives some useful indications both of the importance which self-employment has attained, and of the extent to which it is associated with flexibilisation, and, finally, of how difficult it is to measure self-employment precisely because of confusion about terminology. Under the heading of “workplace flexibility”, the summary of the findings of the survey records how its authors “were able to examine the proportion of workplaces using different categories of non-standard workers, such as freelancers (13 per cent) and tutworkers (six per cent)”<sup>39</sup>. This makes overdone importance of these categories, hand away in which are used is associated leave flexible isolation. Less obvious is the imprecision of these categories; but further consideration reminds us that, although the terms “freelancers” and “tutworkers” seem apt to describe various kinds of self-employed workers, in fact these terms are not legally defined at all, and it is almost impossible to be sure how far they identify workers who are self-employed in the legal sense.

4.7 These difficulties by no means disappear even in the hands of the legal analysts themselves – indeed Simon Deakin and his co-authors, who have contributed very greatly to the development of the analysis, are the first to acknowledge these difficulties. Thus Deakin and Morris record that:-

“In the course of the first half of the 1980s, the numbers of self-employed in Britain grew substantially, from 1.9 million to 2.8 million persons. In the winter of 1997 there were reported to be over 3.3 million self-employed persons, a figure which represented just over 12% of the employed labour force. ... Sectors in which self-employed workers are concentrated are construction, distribution and catering.”<sup>40</sup>

However, the authors surround these data with warnings that it is difficult to relate them reliably to the legal categories, and that in particular these figures for the “self-employed” may actually include many workers economically dependent upon an employer.

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<sup>38</sup> See Mirror Group Newspapers Ltd v Gunning [1986] ICR 145 (Court of Appeal).

<sup>39</sup> WERS, p.8.

<sup>40</sup> D&M s.3.5.2, p.173.

- 4.8 This sense of imprecision becomes even more heightened in TESINSE, whose authors conclude that those in independent employment outside the scope of the definition of “workers” as used in section 230(3) of the Employment Rights Act 1996 and under the National Minimum Wage Act range from between 7% to 19% of the working population; and they add that:-
- “The range of numbers in each category is caused by uncertainty in knowing precisely how courts and tribunals will apply the relevant legal tests in practice.”<sup>41</sup>
- C. Application of employment law to fully independent work relationships - problems and possible solutions.
- 4.9 With regard to the fully dependent work relationship, as with regard to the disguised employment relationship, and the semi-dependent employment relationship, the problems of insufficiency of workers’ protection consist in the possibilities either of misclassification of particular workers or groups of workers, or of a more systemic failure to recognise needs for an appropriately rigorous application of employment laws to whole categories of workers. Previous chapters have addressed the issues of misclassification as between fully dependent, semi-dependent, and fully independent work relationships; in this chapter we have looked again at that set of problems with particular reference to the borderline between the new kind of “worker” status and the status of self-employment – but we have been mainly concerned to examine the outer edge of employment law where there are problems at its boundary with commercial law, and possibilities of relegation of work relationships to a realm beyond even the most inclusive aspects of employment law, those concerned with discrimination in employment of all kinds, on the basis that these work relationships are not sufficiently personal in character.
- 4.10 As in the earlier chapters, we again propose an essentially process approach to this set of problems, that is to say the putting in place of a process which can provide continuous monitoring and response to the problems as the practical context shifts. This seems particularly necessary and appropriate at a time when flexibilisation of the labour market is continually re-locating or de-stabilising the frontier between the world of employment and the world of business. The Department of Trade and Industry has just published a report about the future shape of the labour market in which it is predicted that as much as 40 per cent of the workforce will be self-employed within 15 years. That announces the development of a labour market environment in which the meaning of self-employment and the extent to which it is and should be regulated by employment law will be increasingly contested issues, requiring a responsive process to address them.
- 4.11 It should be added, by way of conclusion to this chapter and introduction to the following chapter, that some of the problems about the boundaries of “self-employment” and about the sufficiency of protection of workers in fully independent work relationships turn out,

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<sup>41</sup> TESINSE, s. 8.2, p.87.

on close examination, to be, in part at least, problems and issues about *triangular* work relationships. In particular, problems about the *personal* character of work relationships are very often associated with triangular work situations. This will be explained in the next chapter, which is concerned with triangular work relationships, and which will complete our general survey of the various types of work relationships before we turn to the case-studies of particular occupations and our general conclusions.

## V Triangular work relationships

### A. Concept and Definition

- 5.1 We come to the last of the chapters of this study in which we consider the principal types of work relationship, and how the problems of insufficiency of workers' protection present themselves, and might be addressed, in relation to each of those types. It has been left till last because, as has been indicated at earlier stages, the issues about triangular work relationships intersect with the issues about fully dependent, semi-dependent, and fully independent work relationships in various complex ways, and it was important to have as clear as possible a picture of those issues before trying to inter-relate the two sets of issues.
- 5.2 Thus far, we have been analysing work relationships on the assumption that they are essentially bilateral in character. That is to say, they exist between an employer on the one hand and a worker on the other. This seems obvious in the case of the fully dependent or semi-dependent work relationship, and seems applicable even in the case of the fully independent work relationship, in the sense that even if the worker (W) is not economically dependent upon the person for whom he works (E), there is still some kind of relationship of employment between them - the term "self-employed" is, strictly speaking, a contradiction in terms.
- 5.3 There are, however, many work relationships where there is in fact an intermediary (I) between the worker (W) and the actual user (U) of the worker's services. In such cases, the relationship becomes trilateral or triangular in the sense that continuing rights and obligations, or at least an appropriate case for recognising continuing rights and obligations, may exist between each of the three parties, that is to say, W/U, W/I, and I/U. This is often the case with so-called "agency workers", and also in situations where work is "sub-contracted" or "contracted-out" - they represent the main situations in which there may be said to be a triangular work relationship. It is, however, important to realise, firstly, that not all agency workers or workers in situations of contracting-out are in triangular work relationships, and, secondly, that, on the other hand, these are not the only forms which triangular work relationships may take.
- 5.4 Thus, as to the first of those two points, we may note that an "employment agency" may function purely and simply as a means by which an employer recruits a worker or a worker finds an employer - in such a case there is a direct W/E relationship, rather than a continuing W/I/U set of relationships - the employment agency will have dropped out of the intermediary role. Where work is contracted out, again there may or may not be a triangular work relationship - there may simply be no meaningful sense in which we can envisage the person or organisation which contracts out its work to a service provider as having the kind of multiple links both with the worker and with the service provider which are the essence of the triangular work relationship, so that the worker again simply has a bilateral W/E relationship, but this time with the service provider.
- 5.5 However, and this is the second point, if the presence of "agency work" or "contracting-

out of work” are not *sufficient* conditions in themselves to indicate the presence of a triangular work relationship, nor, on the other hand, are they *necessary* conditions. That is to say, triangular work relationships may arise outside the context of arrangements for “agency work” or for “contracting-out of work”. In particular, there seem to be various other arrangements for “lending” or “secondment” of workers, or for “franchising” of work, which in fact create or involve triangular work relationships. So it is quite hard to define the extent of triangular work relationships by reference to practical categories; this leads to the question whether they are more satisfactorily defined by legal categories.

- 5.6 It must be said that there is, in British employment law, nothing amounting to a satisfactory general definition, or even recognition, of triangular employment relationships. There are one or two minor points at which employment law touches upon them, and one major recognition of some at least of them in the laws relating to discrimination in employment. We can dispose of the minor points briefly; the major one requires more careful examination. Firstly, in the law regulating the conduct of employment agencies, which is based upon the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations<sup>42</sup>, a distinction is drawn between “employment agencies” and “employment businesses” which corresponds to the distinction drawn in an earlier paragraph<sup>43</sup> between the agency as a means of placement of workers, and the agency as a continuing party to the work relationship. Essentially, the terminology of “employment agency” is used for the former situation, while that of “employment business” is used for the latter situation; and different controls are applied to the two situations. In particular, the latter situation is subject to controls upon the hiring out of workers for profit which in a sense recognise it as a triangular work relationship<sup>44</sup>.
- 5.7 A second minor, but nevertheless interesting, legal recognition of triangular work relationships occurs in the treatment of homeworkers in recent employment legislation, notably the National Minimum Wage Act 1998<sup>45</sup>. The framers of that legislation clearly wished it to apply to homeworkers even if the homeworkers in question themselves employed assistants, therefore operating as small home-based businesses and falling outside the normal definitions of “workers”, who, as we have seen, are defined as those providing services *personally*. So it is provided that persons may qualify as “homeworkers” for this purpose when providing services from their homes “*whether personally or otherwise*”. This operates both to recognise a certain kind of triangular work relationship, and to treat the intermediary homeworker, (I), as well as the assistant

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<sup>42</sup> See, for details, D&M s.3.5.4.

<sup>43</sup> See above, para. 5.4.

<sup>44</sup> Without, however, *forbidding* that kind of activity as some other systems of employment law in Europe do - see D&M, p.179.

<sup>45</sup> See Sections 35 and 54 of that Act.

worker, (W), as being in a work relationship to which a particular aspect of employment law applies.

5.8 If the previous paragraph depicts a minor instance, in the case of homeworker, of the attaching of employment law significance to the triangular work relationship and in particular to the U/I relationship between the employer and the homeworker who employs assistants, we find a much more general recognition of triangular work relationships, and an attaching of employment law significance to the U/W relationship, in the treatment of so-called “contract workers” in the various kinds of legislation dealing with discrimination in employment. The various kinds of discrimination legislation provide as follows in relation to “contract workers”:-

“(1) This section applies to any work for any person (‘the principal’) which is available for doing by individuals (‘contract workers’) who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.

(2) It is unlawful for the principal, in relation to work to which this section applies, to discriminate against a contract worker -

(a) in the terms on which he allows him to do that work; or

(b) by not allowing him to do it or continue to do it; or

(c) in the way he affords him access to any benefits, facilities or services or by refusing or deliberately omitting to afford him access to them; or

(d) by subjecting him to any other detriment.<sup>46</sup>

5.9 The effect of these provisions is to apply the relevant aspect of employment law to the relationship between user of work and worker as if the user of work was the direct employer. This applies in favour of “contract workers” - though that term is not elsewhere used or defined in British employment law; and indeed it must be said that this terminology is not a very clear one, and may be a misleading one, wrongly understood as referring to semi-dependent or fully independent workers in purely bilateral work relationships. It is sometimes regarded as virtually synonymous with the term “agency workers”<sup>47</sup>, though the concept of contract workers would actually seem to be a wider one than that of agency workers, especially now that it has been decided that it may apply, in an appropriate factual situation, to the relationship between a franchisor and the employees of the franchisee - the factual context for the particular situation was that of employees of a retailing concession within a department store<sup>48</sup>; it is considered in greater detail in the case studies which will be found in the next chapter.

## B. Incidence and Trends.

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<sup>46</sup> Race Relations Act 1976 s.7; similar provisions are made by s.9 of the Sex Discrimination Act 1975 and s.12 of the Disability Discrimination Act 1996.

<sup>47</sup> Compare D&M s.3.5.4 at p. 179.

<sup>48</sup> See Harrods Ltd v Remick [1998] ICR 156 (CA).

- 5.10 In presenting an assessment of the incidence of, and trends in relation to, triangular employment relationships, we find ourselves in a rather similar position to that which we assumed with regard to self-employment, with the difference that the difficulties of exact estimation are, if anything, even greater. We can be confident that flexibilisation of the labour market, being strongly associated with the development of non-standard patterns of working, and in particular with the development of agency work and the contracting-out of work, is resulting in a general increase in the proportion of triangular work relationships to all work relationships. However, exact specification of the extent of this is extremely difficult.
- 5.11 Thus, an indication of the growth in contracting out of work, and of its tendency to transform bilateral work relationships into triangular ones, is provided by the following extract from the findings of the WERS Survey:-
- “If the extent of contracting-out has been on the increase, it may have led to a reduction in direct employment within workplaces. We asked managers in workplaces which had contracted-out services whether contractors were doing work which five years previously would have been undertaken by direct employees of the workplace, and a third said this was the case. Moreover, among those workplaces, one-third were using contractors of whom at least some were former employees of the workplace. Thus, by this route 11 per cent of workplaces have transferred some employees to a different employer over the past five years.”<sup>49</sup>
- 5.12 Other indications of the large extent and growth of triangular employment are also to be found. Thus, it appears that between 1990 and 1996 the numbers employed on agency work doubled to reach a figure of around 200,000 individuals<sup>50</sup>. Thus again, it appears that of the 3.2 million members of the labour force reported by the Labour Force Survey as being self-employed in Winter 1997/98, 835,000 are recorded as having employees,<sup>51</sup> thus suggesting that they may be intermediaries in triangular work relationships.
- 5.13 However, there are various reasons for doubting how much these figures tell us about the extent and growth rate in triangular employment relationships. The notion of “contracting-out” is far from precise, and it is not at all clear how systematically it results in the formation of triangular work relationships. The same is true of the notion of “agency work”, especially given the ambiguity which we have seen to exist as between employment agencies as intermediaries for recruiting and as intermediary continuing employers. Then again, as is emphasised by TESINSE, the concept of “self-employment” which is used in the Labour Force Survey is itself imprecise, if only because, as is stated

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<sup>49</sup> WERS, at pp. 7-8.

<sup>50</sup> D&M at p.179, referring to Frances Sly and Darren Stillwell, “Temporary Workers in Great Britain” (1990) *Labour Market Trends* 347-354.

<sup>51</sup> See TESINSE, 3.2.2., Table 3:1.

there:-

“It is difficult to estimate the size of other groups, such as borderline self-employed, sub-contractors and people working in partnerships, since accurate data are not available.”<sup>52</sup>

It follows that the category of “self-employed with employees”, which we have identified as a possible or likely location for triangular work relationships, is itself a contested one.

## C. Problems and Possible Solutions

- 5.14 With regard to triangular employment relationships, even more obviously than with regard to the various bilateral work relationships we have considered, the imprecision of the factual data and categories, as identified in the foregoing paragraphs, contributes to and forms part of the set of problems about insufficiency of workers’ protection in such relationships. For those problems are themselves to a very significant extent issues about the legal *recognition* of triangular work relationships - we could say that the legal *recognition of these relationships* and the legal *response to these relationships* are so closely bound up with each other as very often to amount to one and the same thing. So the more that the factual data and categories are uncertain and contestable, the more that the process of legal recognition of them, and therefore response to them, are going to be unsystematic and unresolved. The present situation in British employment law could be characterised in those terms, though no doubt it is not the only system of employment law in which such problems arise with regard to triangular employment relationships.
- 5.15 To particularise this situation more fully, we should consider firstly the issues and problems concerning the workers (W) in triangular employment relationships, and then secondly the issues and problems concerning the intermediaries (I) in such relationships. So far as the workers (W) are concerned, there seem to be two main kinds of issues and problems arising out of triangular work relationships, each in a different sense amounting to a kind of failure to recognise a triangular work relationship as such. So far as intermediaries (I), there is one main kind of issue or problem arising out of triangular work relationships, which is different from those arising in relation to the workers (W); it amounts to a failure to recognise that in a triangular work relationship, the intermediary (I) may himself or herself be in the situation of a worker, or in a worker-like situation, so that it is appropriate that employment law is to some extent applicable, whether directly or by analogy.
- 5.16 Thus, to begin by concentrating on the situation of workers (W) in triangular work relationships, there is, firstly, some risk that, because of the triangular nature of the work relationship, and because of the way that the functions of the employer in bilateral work relationships are, in triangular work relationships *distributed between* the user (U) and the intermediary (I), the worker may wrongly fail to be recognised as a dependent or semi-dependent worker, may be treated as a fully independent worker, or even as a person in

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<sup>52</sup> *Ibid.*, at p.23.

a special kind of work relationship not recognised by employment law, and so may experience an insufficiency of workers' protection. There is a special risk that the tests for recognising the existence of a contract of employment may operate in this way, so that triangular work relationships may thus be disguised employment relationships, whether between W and U, or between W and I.

- 5.17 Secondly, so far as the situation of workers (W) in triangular work relationships is concerned, there is a further risk that, although recognised as in a fully dependent or semi-dependent relationship with the intermediary (I), they may not be recognised as having any work relationship, forming the basis for the application of employment law, with the user of their services (U). It is this problem which it has been sought to address, as we have seen, in the context of discrimination law, by treating the worker W as a "contract worker" employed by I but also "working for" U so that the law about discrimination in employment applies as between U and W. However, as we have seen, there is doubt about the extent to which workers in triangular employment relationships will be accepted as "contract workers", and in any event that concept is not used except in the context of discrimination law.
- 5.18 If we turn to the problems and issues concerning the relationship between the intermediary (I) and the user (U) of the worker (W)'s services, we find that the problem now is that the intermediary (I) is, because of the existence of the triangular work relationship, viewed as an employer rather than as a worker, and treated as not requiring any protection as a worker when that may be inappropriate. That was the outcome, for example, of cases such as Mirror Newspaper Group Ltd v Gunning<sup>53</sup>, where the applicant for the position of newspaper wholesaler is treated as outside the protection of the sex discrimination legislation because the work for which she applied was not required to be done entirely by her personally; she could have applied others to do that work, so was treated as an intermediary employer, herself outside the protection accorded to workers in "employment" even in the widest sense of that term.
- 5.19 This brings us to the question of possible solutions. All three of the types of problem discussed here would seem appropriate to be addressed by the process approach in terms of unjustified discrimination on the basis of pattern of work, which has been advanced earlier with regard to the problems of bilateral work relationships. In fact we could say that such an approach is even more necessary with regard to triangular employment relationships than it is with regard to bilateral work relationships. That is for two reasons. The first reason is that, as we have seen, the *classifying* of triangular work relationships is a matter of even greater difficulty than is the classifying of bilateral work relationships. Hence an approach to the problems of insufficiency of workers' protection in triangular work relationships in terms of static categories is that much less likely to be successful than a process approach which can monitor and respond to unjustified discrimination on a continuing basis.

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<sup>53</sup> [1986] ICR 145 (CA) - see above, para. 0.00.

5.20 The second reason for preferring the process approach to problems of insufficiency of workers' protection in triangular work relationships is that, as we have seen at various points, the issues which arise with regard to triangular work relationships intersect in complex ways with the issues which arise with regard to bilateral work relationships. Again this is a reason to think that an approach in terms of static categorisation is less likely to be successful than a process approach which can look beyond the intricacies of the intersection between triangular and bilateral relationships and consider directly and in a functional way the basic questions of unjustifiable discrimination. This will perhaps be made even clearer by the case-studies of these issues as they arise in the context of some particular occupations, which we undertake in the following chapter before moving on to our general conclusions to the study as a whole.

## VI Case Studies

### A. Introduction

6.1 This chapter consists of a series of case studies of two kinds. Firstly, we consider the cases of workers in a set of particular *occupations* which generally seem to present interesting issues of sufficiency of workers' protection, and lend themselves to international comparisons in this respect. The occupations, as selected in the specification for this study, are those of construction worker, truck or lorry driver, and salesperson in a department store. Secondly, we consider the cases of workers in a set of particular *work patterns*, which are in each case more specific than the general categories of fully dependent, semi-dependent and fully independent work relationships considered in the preceding chapters, and which it is helpful to try to relate to those general categories. The work patterns are those of temporary agency workers, casual workers, freelance workers, homeworkers, and zero-hours contract workers.

6.2 The case studies take the following form. Where there are significant empirical data available about any of the occupations or work patterns which have not previously been presented, those data are described and evaluated. However, that is not the main function or methodology of the case studies. Instead, the case studies are designed to give a picture of the issues which the courts are called upon to adjudicate, and the approach which they take to that adjudicatory task, in relation to the chosen occupations or work patterns. So each of the case-studies is focussed upon one or two leading judicial decisions, the aim being to select the most recent important decisions in order to give as current as possible a picture, both of the actual incidence of issues of sufficiency of workers' protection, and of the actual judicial approaches to those issues.

### B. Construction workers.

6.3 The construction industry has been and continues to be a prime location for the development and use of various forms of contracting-out of work to sub-contractors, including the practice known as "labour-only sub-contracting" whereby construction workers are either hired as if they were fully independent self-employed workers, or hired through intermediary contractors who are themselves often construction workers operating as very small employing firms or companies. Thus there is quite a high incidence both of disguised employment and of triangular work relationships presenting problems of insufficiency of protection for workers. In recent years, this has been systematically addressed by the legislature as a problem of evasion of income tax<sup>54</sup>, but has not been systematically addressed as a problem of evasion of employment laws.

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<sup>54</sup> See Income and Corporation Taxes Act 1988, Pt XIII, Chap. IV - see further, *Chitty*, para. 39-025.

6.4 The British courts have taken an approach to this set of issues which is on the whole protective of workers. This is well demonstrated by a case in which the highest British court, normally constituted as the Judicial Committee of the House of Lords, was in fact operating as the Judicial Committee of the Privy Council and hearing a case on appeal from Hong Kong. The facts of the case arose in Hong Kong, and it was the law of Hong Kong which applied, but the facts could easily have arisen in the UK, and the case was decided as if on English law. This case, that of Lee Ting Sang v Chung Chi-Keung<sup>55</sup>, concerned a mason working for a sub-contractor on a construction site who was injured and had a claim for compensation against either the main contractor or the sub-contractor if he could show that he was employed by either of them rather than being a self-employed independent contractor. The Hong Kong courts had held that he was an independent contractor, but the Privy Council held that English common law standards should be applied, that he was to be treated as an independent contractor only if he was performing services *as a person in business on his own account*, and that such a finding was or would be so contrary to the facts as established in this case that he should, as a matter of law, be held to be an employee under a contract of service with the sub-contractor (although he sometimes worked for other sub-contractors). So, within a triangular work relationship, the worker (W) was recognised as a fully dependent employee of the intermediary (I).

6.5 It is significant that this protective approach was taken in the context of an issue about the liability of the employer for injury sustained by the worker. A similar approach was taken by the Court of Appeal in 1995 in the case of Lane v Shire Roofing Company (Oxford) Ltd<sup>56</sup>. Mr Lane was a builder who had his own firm. He initially solicited for work through advertisements and was engaged directly by clients. However, when he was unable to obtain work in that way, he worked for other contractors, and was injured while doing a job for such a contractor for a fee fixed for that job as a whole. The issue was whether he was an employee, and he was held to be so, despite the fact that he was remunerated on a task basis, and had his own firm, which seemed to suggest that he was an independent contractor.

C. Truck or lorry drivers.

6.6 Like construction work, this has been an occupation in which many employers have sought to place their workers in the position of fully independent workers, thus raising significant issues of insufficiency of workers' protection. The courts have not been conspicuously ready to address those issues as vigorously as they have done in some other areas. Thus, a key decision of the 1960s about the classification of workers for social security purposes, Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance<sup>57</sup> concerned the driver of a concrete mixing lorry whose employers had converted him into

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<sup>55</sup> [1990] ICR 409.

<sup>56</sup> [1995] IRLR 493.

<sup>57</sup> [1968] 2 Queen's Bench 497.

an ostensibly fully independent worker by making a contract for him to buy the lorry which he operated on hire purchase from a finance company associated with the employing company, and for him to maintain, repair, and insure the lorry. The issue was whether he was an employee or self-employed. The judge, MacKenna J, articulated a famously inclusive definition of the features which would confirm the existence of a contract of employment, but nevertheless, rather surprisingly, upheld the finding that this worker was self-employed, despite the facts that the worker was obliged to wear the company's uniform and obey the company's rules, and that he was prohibited from operating as a carrier of goods except under contract with the company.

- 6.7 One might say that this decision was taken a long time ago, and not in the context of employment protection legislation, and so expect that the courts would take a different approach today and in an employment law case, but a similar approach nevertheless seems to have been taken in the very recent case of Express and Echo Publications Ltd v Tanton<sup>58</sup>, which concerned the question whether a lorry driver was an employee under a contract of employment so as to come within the scope, if necessary, of redundancy payments and unfair dismissal legislation. As in the earlier case, the worker had been given a contract by his employers which was clearly designed to present him as a self-employed independent contractor. The Court of Appeal took the view that the worker was indeed in the position of an independent contractor rather than an employee, despite many indications that his work was carried out under the close control of the employer. In this case, even more than in the previous case, the decisive factor in favour of self-employment rather than employment was seen as being the fact that the driver did not have to perform all the work personally, in that he could employ a substitute to do his work if, for example, he was unable to work by reason of illness. It is notable that this is being allowed to enable employment relationships to be disguised, even though the worker may be completely economically dependent upon the employer, and even subject to the close control of the employer in all aspects of the way the work is carried out.

D. Salesperson in department store

- 6.8 Many salespersons in department stores are now employed not by the proprietors of the stores, but rather by the holders of concessions for the sale of particular products such as clothes, perfumes, or other fancy goods. As was indicated earlier, one of the most significant examples of legislation directly addressing an issue of insufficiency of workers' protection consists of the treatment of "contract workers" in the various kinds of employment discrimination legislation. These provisions are intended to ensure that employment discrimination legislation will apply to the relationship between the user (U) of the services of workers (W) supplied under contract by intermediary employment businesses (I). In Harrods Ltd v Remick<sup>59</sup>, the Court of Appeal held that salespersons

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<sup>58</sup> [1999] ICR 693.

<sup>59</sup> [1998] ICR 156.

employed by or seeking to be employed by the holders of various franchises for the sale of goods such as pens, cosmetics and flowers within Harrods department store counted as “contract workers” vis-a-vis Harrods so that they could complain of race discrimination by Harrods in refusing or withdrawing the approval which the franchisees were required to have from Harrods for employing or continuing to employ particular workers. This involved the conclusions both that the workers concerned were engaged in “work for” Harrods (though not directly employed by Harrods), and that they were “supplied under a contract made with” Harrods. Although those conditions were held to have been met on the particular facts, it may well be that those conditions would often not be held to be met because the proprietor of the department store would not be sufficiently closely contractually involved in the employment of sales persons by concession-holders.

- 6.9 It is also important to consider whether, if the salespersons were themselves also the holders of concessions, operating their concessions partly by their own personal work and partly by employing assistants, they would enjoy the protection of employment legislation as workers, even in the most extended sense of that term. There is no case-law directly on that point, but there is some case-law on the position of sub-postmasters which indicates that salespersons in that situation might fall outside the protection even of employment discrimination legislation although that is the most widely inclusive kind of employment legislation. Sub-postmasters (a term which refers both to males and females engaged in the occupation in question) are those who are appointed to run very small post offices, typically attached to shops in villages or towns. They are responsible for the running of their post office, but may operate it either personally or by employing assistants - thus being in much the same position as some concessionaires in department stores. In Sheehan v Post Office Counters Ltd<sup>60</sup>, it was recently held that a sub-postmaster did not have a “contract personally to do any work” so as to bring him within the protection of the legislation relating to disability discrimination in employment. The extent of issues and problems of this kind may become clearer if we turn from considering some specific occupations to considering some specific types of work arrangement or work patterns.

E. Freelance workers.

- 6.10 Flexibilisation of the labour market has accelerated the development of a pattern of working, referred to in earlier chapters, known as “freelance” working. The freelance worker typically performs work of the kind which is often carried out by fully dependent workers, but does so under very short-term work contracts, often for a multiplicity of employers. Many workers engaged in the various aspects of the making of films and programmes for television have become freelance workers, and their situation was considered in the important case of Hall (Inspector of Taxes) v Lorimer<sup>61</sup>. As the name of the case indicates, the decision concerned the status of the worker for income tax

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<sup>60</sup> [1999] ICR 734.

<sup>61</sup> [1994] ICR 218.

purposes; a freelance vision mixer doing work under short-term contracts for a number of television production companies claimed self-employed status, which was more favourable to him for taxation purposes than the status of employee which the tax authorities attributed to him. It was held that he was a self-employed worker, particularly in view of the fact that he customarily worked on single-day assignments for 20 or more production companies.

- 6.11 Although it might be difficult for the courts to reach any other conclusion even in the context of employment protection legislation, it is appropriate to draw attention to this as an area of possible problems of insufficiency of workers' protection, because it creates many situations in which workers are fully subordinated to employers while carrying out their work, and where they cannot satisfactorily be said to be in business on their own account, yet lack the status and employment rights of dependent workers.

F. Agency temporary workers.

- 6.12 In an earlier chapter, we considered agency workers in general terms as one of the categories of workers in triangular employment relationships. It is useful now to look at the treatment in the case-law of the main type of agency workers, namely those working as *temporary* workers for an employment agency, in the sense that they have a continuing relationship with an employment agency under which they are sent to work for short periods for employer clients of the employment agency. Such workers are often known as "temps" and are said to be engaged in "temping". This has for a long time been a major form of employment for secretarial workers; it is tending to be used, in a situation of flexibilisation of the labour market, as a pattern of employment in a widening range of occupations, including professional ones. Issues arise as to whether agency temporary workers have work relationships with the employment agency as intermediary (I) or with the employer clients of the agency as the actual users of their services (U), and in either case whether those relationships are to be classified as fully dependent, semi-dependent, or fully independent ones.

- 6.13 These issues were considered relatively recently by the Court of Appeal in the case of McMeechan v Secretary of State for Employment<sup>62</sup> where the question was whether the applicant was an "employee" of an employment agency which had become insolvent, so that he could reclaim from the Department of Employment the wages due to him for his latest work assignment. The applicant worked for the employment agency on a series of temporary assignments under conditions of service which specified that he would provide his services to the agency as a self-employed worker and not under a contract of service. He was paid a weekly wage by the agency, subject to deductions for national insurance and income tax. The agency could instruct the applicant to end an assignment with a client at any time, and could dismiss him summarily for improper conduct. The worker was held to be an "employee" of the agency, not on the basis that he had a continuing contract of

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<sup>62</sup> [1997] ICR 549.

employment with the agency, but rather on the basis that each work assignment for a client of the agency was capable of resulting in a distinct contract of employment with the agency. This could be viewed as a significant instance of the courts over-riding the disguising of an employment relationship as one of self-employment - a disguise which it is often difficult for the courts to penetrate in the context of triangular work relationships, more especially when the actual work assignments are on a strictly temporary basis.

G. Casual as required or zero hours contract workers.

- 6.14 We conclude this set of case-studies of patterns of working by considering a pattern of work which has been the subject of a significant emergence or re-emergence in recent years as the result of flexibilisation of the labour market. This is an extreme form of casualisation of employment under which the workers are described as “casual as required” or “zero hours contract” workers. These are arrangements where people agree to be available for work as and when required but no particular number of hours or times of work are specified. In 1998, there were said to be approximately 200,000 individuals employed on zero hours contracts<sup>63</sup>. These arrangements present very significant possibilities that workers who are fully subordinated to employers and economically dependent upon them, may be treated as not having employee status in relation to those employers.
- 6.15 Working arrangements of this kind have recently been considered by the courts in two important cases which had divergent outcomes. The case of Clark v Oxfordshire Health Authority<sup>64</sup> concerned the question whether a nurse working for an area health authority in a “nurse bank” was an employee so as to bring her within the scope of employment legislation regarding unfair dismissal or redundancy. The “nurse bank” was an arrangement whereby nurses were maintained on a list of nursing staff who could be called upon to work as and when the need arose, but who had no regular hours of work. It was held that, in order for these workers to be regarded as employees, there would have to be a “global” or continuing contract of employment which could be regarded as remaining in being between periods of actual working; and the view was taken that there was no such contract.
- 6.16 The other recent case of this kind was that of Carmichael v National Power Plc<sup>65</sup>, which concerned tour guides who were employed to take parties of visitors on tours of power stations, on a “casual as required” basis whereby, as in the previous case, they were offered work as and when it arose. The issue was, again, whether such workers were employees with contracts of employment so that came within the scope of the employment protection

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<sup>63</sup> See D&M, s.3.4, p.167, referring to the Department of Trade and Industry White Paper, *Fairness at Work*, Cm 3968, 1998, at para. 3.14.

<sup>64</sup> [1998] IRLR 125.

<sup>65</sup> [1998] ICR 1167.

legislation applying to fully dependent workers. On this occasion, it was held that they were employees; the basis for that finding was that the apparent complete lack of reciprocal obligation between employer and worker to offer or to accept any minimum amount of work, was in fact qualified by an obligation on the part of the employer to share out any available work in a reasonable way between the “casual as required” tour guides, and by a corresponding obligation on the part of the worker to accept work offered when given reasonable notice to do so.

- 6.17 The various patterns of work which have been considered in these case-studies have demonstrated how rapidly the evolution of the labour market is presenting the courts with very difficult issues of classification and status allocation, with the result that it is very hard to be certain about the employment status which will be allocated to a given flexible work pattern. This observation provides an appropriate link to the general conclusions of this study, which are stated in the following chapter.

## VII Conclusions.

### A Issues and problems - the British situation.

7.1 It has emerged clearly from a survey of the different kinds of work relationship, and from case-studies grouped according to occupations and to forms of work arrangement, that the flexibilisation of the labour market in the United Kingdom has aggravated and accelerated the growth of a significant set of issues and problems about the sufficiency of workers' protection. These issues and problems are concerned with the way in which the application or personal scope of employment laws is conditional upon the employment status which is accorded to the worker, and the way in which the different employment statuses are allocated according to the juridical analysis of practical work relationships and contracts for work.

7.2 Thus, we have identified a number of respects in which there is scope for fully dependent employment relationships to be disguised in practical forms which result in the allocation, to the workers in those relationships, of an employment status which results in their being incompletely within the protection of employment law. More broadly still, we have identified some areas where the personal scope of some aspects of employment law may be said to be lagging behind a general tendency for employment relationships to evolve towards entrepreneurial forms where the need for workers' protection generally seems less obvious than it did in an era when industrial mass production provided the dominant stereotype for employment relationships.

7.3 We found that the legislature, particularly since the election of the present government in 1997, has been responsive to these issues and problems, for example in the way that the personal scope of the National Minimum Wage provisions and of the Working Time Regulations have been specified. We also found that the courts, in their adjudications about the allocation of employment statuses, have on the whole been sensitive to issues of sufficiency of workers' protection, and concerned to ensure a functional and purposive application of the various different kinds of employment laws. However, both as far as legalisation and adjudication were concerned, we found reason to doubt whether the responses to the demands of a rapidly changing labour market were as systematic as might be thought appropriate to a fully modern or modernised employment law system.

### B Suggested solutions, and the role of the ILO.

7.4 We have at the various different stages of this study canvassed ideas for addressing issues and problems about the sufficiency of workers' protection by means of what we have styled a process approach. By this we mean that we suggest that it is important to ensure that there is in place a vigorous and transparent process for the continuous monitoring of the personal scope of employment laws, both at the legislative and adjudicatory levels. The purpose of that monitoring would be to identify and draw attention to, and indeed

ensure remedial action with regard to, unjustifiable discrimination in the application of employment laws according to patterns and structures of work relationships. We have sought to demonstrate that a process approach of this kind might be expected to be more successful in tackling problems of insufficiency of workers' protection than the relatively static approach which consists in trying to arrive, at any one moment, at a completely adequate set of classifications of work arrangements and allocation of employment statuses – an endeavour which is unlikely to be successful in the context of labour market behaviour which is at times opportunistic and continually dynamic.

- 7.5 Finally, we suggest that the process approach is one in which the ILO might have a highly significant role in at least two respects. Firstly, we suggest that it might be more practicable for the ILO to call upon its participating states to engage in a monitoring and remedial process against unjustifiable discrimination by pattern of work, than to try to impose a single system of classification of work relationships and of allocation of employment statuses. Secondly, we suggest that the process approach, and in particular its monitoring function, would be crucially dependent for its success upon the availability of comparative information about the incidence and impact of changes in labour market patterns and work arrangements as between different national labour markets, and about the responses of different national employment law systems to the problems and issues of employment status allocation which occur as a result of those changes. The ILO could play a leading role in assembling and communicating that comparative information, and indeed might even seek to ensure that the national monitoring process took the form of a continuing dialogue between national systems and the ILO itself, perhaps through the medium of an annual reporting requirement. This national study is concluded by an expression of hope that this might be a constructive suggestion for further development of thinking about this very pressing set of issues and problems.

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