

THE CONTRACT OF
EMPLOYMENT: A STUDY IN
LEGAL EVOLUTION

S. Deakin

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ESRC Centre for Business Research, University of Cambridge
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By

Simon Deakin,
Centre for Business Research
Top Floor
Judge Institute of Management Studies Building
Trumpington Street
Cambridge
CB2 1AG

Tel: 01223 765320
e-mail: sfd20@cam.ac.uk

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Abstract

This paper reconstructs the evolutionary path of the contract of employment in English law. It demonstrates that the contract of employment is a more recent innovation than is widely thought, and that its essential features owe as much to legislation as they do to the common law of contract. The master-servant model of the nineteenth century was only displaced by the modern contract of employment as a result of twentieth century social legislation and collective bargaining. The paper discusses present-day mutations in the legal form of employment in the light of this analysis.

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1. Introduction

The aim of this paper is to reconstruct the evolutionary path of the contract of employment in English law. The period to be examined begins with the adoption of the early-modern apprenticeship and settlement laws, and ends with the emergence of the mature welfare state and collective bargaining system in the mid-twentieth century. It will be argued that not only is the contract of employment a more recent innovation than many have thought, but that its essential features owe as much to legislation as they do to the common law of contract. The widely-held belief that there was a coherent account of the employment relationship in private law prior to the growth of the social legislation of the welfare state is false, the result of viewing case-law of the eighteenth and nineteenth century through the lens of a later period.

The paper is a study in legal evolution, that is, an account of mutations in juridical form over time. The analysis of legal form, in addition to its importance for the exposition of doctrine, has much to contribute to the historical, sociological and economic understanding of the institutions of the labour market. Juridical concepts, such as the concept of the contract of employment, are cultural artefacts, tools used in the formulation and application of legal rules. As such they occupy a realm of abstract legal discourse which, in one sense, is far removed from that of the social and economic relations to which they purport to correspond. But nor are they timeless creations of legal imagination. The juridical record which has come down to us in the form of legal opinions, legislative texts and treatises can be thought of as the product of environmental pressures, a process of selection through which certain ideas and concepts have persisted while others have not. The reported cases are only a fraction of those decided in the courts, and these in turn represent a small percentage of the instances in which disputes were resolved and agreements made in the

shadow of legal rules. The recorded decisions are anything but a representative sample of the sum total of situations in which the law was applied;¹ their importance lies, rather, in the fact of their survival, and in the influence which they have thereby exercised over the development of the law. Understood in this way, the juridical record is a trace of shifts in the wider social and economic environment. It is therefore open to an interpretation which can help to explain the nature and direction of historical change in the society of which it formed a part. It further follows that an evolutionary interpretation, by locating the influence of the past in the way suggested, can throw light on doctrinal disputes and tendencies in the modern law.

In applying this method, a distinction must be drawn between the *form* and the *substance* of legal doctrine. Conceptualization, the identification of legal forms or concepts from a mass of individuated rules, is attained through ever increasing degrees of *abstraction*. Complex concepts such as ‘the contract of employment’ link together a variety of ideas (such as ‘the duty of cooperation’ or ‘wrongful dismissal’) which abstract from the particular contexts in which individual rules are conceived and applied. Legal doctrine can be thought of, then, a distinctive mode of cultural transmission which operates through the *coding* of values and beliefs into conceptual forms. Values which are coded in conceptual form thereby appear to acquire an evolutionary advantage. The substance of legal rules at any given point in time is the immediate result of litigation strategies and political process; what survives, over time, are those political values and assumptions which become embedded in the (apparently) value-free language of juridical thought. In particular, values derived initially from legislation may persist in the form of rules and precepts of judge-made law. The common law, which for this purpose we can take to include certain judge-made approaches to the interpretation of statutes, possesses a historical continuity which the statutory rules themselves, being subject to periodic revision according to changes in the political climate, are denied. However, the common law does not evolve in a vacuum; as we shall see, its path is significantly shaped by legislative developments.²

The ‘decoding’ of legal concepts has the effect of highlighting the contingent nature of implicit legal values; they can be seen to be the result of historically specific circumstances, that may no longer hold.³ But at the same time, the reshaping of the law which accompanies attempts at reform virtually never starts from a blank sheet. Concepts already available are put to new uses. This does not mean that the legal forms themselves do not change; however, they change much more slowly than shifts in the substance of the law, and in ways which reflect the previous pattern of development. Legal evolution, then, is essentially path-dependent. Conceptual adaptations are piled one on top of another, with the result that the structure of legal thought at any given point in time incorporates forms which, although in some sense superseded, nevertheless continue to shape the path of the law.⁴

Oliver Wendell Holmes’s classic account of this process of legal mutation in the first chapter of *The Common Law* remains one of the most suggestive:

A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs or needs of primitive time establish a rule or formula. In the course of centuries the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters upon a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.⁵

The recent case-law of the contract of employment is full of examples of just this effect. In the 1970s, social legislation in the area of employment protection borrowed concepts from the common law, including the contractual notion of repudiatory breach.⁶ Once placed

in a new, statutory context, this became the catalyst for the development by the courts of the employer's duty of cooperation,⁷ and was then exported back to the common law in the form of the implied term of mutual trust and confidence.⁸ The original common law concept was reshaped by its encounter with the values (and forms) of social legislation. At the same time, the inherent constraints of the common-law approach, with its traditional emphasis on contractual autonomy and the protection of managerial prerogative, could not be altogether avoided; hence the continuing obstacles which are placed in the way of using the implied duty of trust and confidence to completely reconstitute the law of dismissal.⁹

But as will be argued in this paper, these are simply the most recent examples of the interchange of forms and content between the common law and legislation in the area of employment. The contract of employment is a hybrid form which has been shaped just as decisively by now-forgotten rulings on the scope of workmen's compensation and national insurance legislation,¹⁰ as it has by common-law precedents on the mutual duties of employer and employee which are still cited as high judicial authority almost a century after they were decided.¹¹ Going back further, the role played by the eighteenth and nineteenth-century poor law and master and servant legislation in shaping the common law of employment can be discerned, along with the persistence of the service model long into the twentieth century, in large part as a result of the quasi-disciplinary jurisdiction retained by the courts under the Employers and Workmen Act 1875. While, at every stage, legislation has built on and incorporated the common law, statutes themselves have a curious half-life, continuing to influence legal development long after their formal repeal.

The intertwining of statute and the common law has wider implications for the understanding of the relationship between contract and status. One of the most powerful 'creation myths' attending current debates is the claim that the social legislation of the welfare state was imposed upon a pre-existing order of private law

whose coherence and functioning was thereby undermined.¹² The concept of freedom of contract undoubtedly occupies a prominent place in the contemporary legal imagination, just as it did in nineteenth century legal thought. It is linked to the idea of a self-organising market order, resting on an autonomous private law. From an evolutionary perspective, this claim is thrown into sharp relief by the close inter-dependence of the common law and legislation which we have just been noted. Close analysis shows that there was no period of *laissez faire*, during which the labour market was governed by the general precepts of private law. On the contrary, conceptions of status drawn in part from legislation and in part from judge-made rules which were specific to employment underpinned the rise of the modern employment relationship at every stage. While the content of these conceptions of status changed over time, and the functional relationship between legislation and the common law also shifted from one period to the next, the image of the ‘rise and fall’ (and more recent rise again)¹³ of freedom of contract in this context is highly misleading.

In developing this argument, the following sections of the paper examine the nature of employment relationships under successive paradigms of labour market regulation. The basic types are indicated in Table 1. The analysis begins with the model of guild employment which characterized parts of the urban trades as late as the early nineteenth century, and with the settlement model which prevailed in agriculture until roughly the same period. The focus then shifts to the master-servant relationship as the pivotal concept through which employment relations were conceptualized in the nineteenth century. The paper explains how influence of the master servant model reached beyond the legislation from which it initially sprang, and how this influence persisted after the last of the Master and Servant Acts was repealed. Finally, the paper analyses the emergence of the modern contract of employment from its beginnings in the classification of managerial and professional workers in the nineteenth century, and links its later development to the growth of social legislation, and in particular to the conceptions of employment

generated by workmen's compensation and social insurance legislation. The final section, in offering a concluding evaluation, also suggests ways in which the analysis presented here can aid our understanding of contemporary mutations in the contract of employment.

Guild employment

Up the early part of the nineteenth century, legal regulations were in place to protect guild employment. The distinctive feature of the guild system was the preservation of control over the form and pace of work by the 'trade', the collectivity of producers who were subject to the rules of guild membership. A master's relationship with his suppliers and customers was that of an independent contractor, while a journeyman, although paid by the day, could only be hired to work within his apprenticed trade and was protected from low wage competition by the restrictions on apprenticeship numbers and by the general controls on entry into the trade. Rules regulating competition were thereby linked to a particular conception of property rights within the enterprise. The nature of the 'artisan wage relationship' was that the journeyman 'worked with, nor for, his master, and during slack times he was likely to be kept on for as long as the master could manage'. Equally, the guild rules gave the master a 'protective independence ... [which] existed within a body of custom and law which prevented competition and encouraged solidarity between producers of the same trade'.¹⁴

Under the Statute of Artificers of 1563, only those who had served a seven-year apprenticeship in one of a number of specified trades could exercise that trade or be employed in it, on pain of a fine, and masters in those trades were required to limit numbers of apprentices to three for every one journeyman. The 1563 Act, itself the successor to earlier statutes, stood above a host of by-laws concerning apprenticeship, in many cases the expression of long-standing local, customary laws, which were made and enforced by the incorporated urban guilds. Guilds applied their rules through fines and operated the 'right of

search' to destroy 'deceitful' goods and unauthorized machinery.¹⁵ In the City of London, the Acts of Common Council gave the trade companies powers to set prices, enforce entry controls by excluding outsiders, and place upper limits on the numbers of apprentices. These by-laws were the subject of litigation and disputes between the companies and the journeymen's clubs throughout the eighteenth century.¹⁶

The apprenticeship provisions of the Statute of Artificers were repealed only in 1813, after a number of trades had mounted a vigorous campaign for their more vigorous enforcement following a long period of declining effectiveness.¹⁷ The repeal of the Act (and of related local laws around the same time) marked a fundamental change in conceptions of property rights in skills and in employment. However, this rearrangement of rights had already been largely achieved by judicial reinterpretation of the Act of 1563. The Act had effectively made capitalist forms of employment unlawful in the regulated trades. Since ownership and control of work organisation rested with those within the guild, an employer setting up in a particular trade had to have completed an apprenticeship in that trade. Nor was it possible, under the Act, for one employer to hire as workmen a number of artisans from different trades, since he would then be exercising trades in addition to his own. After initial hesitation¹⁸ the courts confirmed that qualification in one trade did *not* by itself entitle a person to exercise any of the other trades regulated by the Act.¹⁹

As a result, the artisanal form of production on which the Act was premised was fundamentally at odds with the emerging forms of factory employment that combined managerial coordination with an internal division of labour between workers of different skills and tasks. Neither of these was compatible with the legal framework of guild production. Nor was the concentration of property rights over productive assets in the hands of merchant-capitalists or external equity investors. The tensions which arose can be seen in the case of *Hobbs v. Young* as early as 1689.²⁰ Here, a merchant directly employed journeymen clothworkers in his house for a month to make materials

for export. He was successfully prosecuted for a breach of the Act. Counsel argued that:

he who cannot use a mystery himself, is prohibited to employ any other men in that trade; for if this should be allowed, then the care which has been taken to keep up mysteries, by erecting guilds or fraternities, would signify little.

The court, by a majority, agreed:

the exercise of [the trade] by journeymen and master workmen, or an overseer for hire, is not an exercise of it by them, but by him that employs them; he provided them materials and tools, and paid them wages: by law, he is esteemed the trader who is to run the loss and hazard; the whole managery was to be for his profit, and the workmen are to have no advantage but their wages.

This view was steadily undermined by later decisions, so that by the end of the eighteenth century the prohibition on wage labour in the regulated trades was little more than nominal. In *Hobbs v. Young* itself the dissenting judge commented that ‘no encouragement was ever given to prosecutions upon this Statute ... it would be for the common good if it were repealed, for no greater punishment can be to the seller than to expose goods for sale, ill wrought, for by such means he will never sell more’. The turning point was *Raynard v. Chase* in 1756,²¹ which decided that a non-apprenticed manager or investor could act as the employer by becoming the *partner* of one who was qualified in the relevant trade. This was seen as casting doubt on *Hobbs v. Young*, since it meant that an owner could employ individuals from more than one trade, as long as those employed were qualified in their respective crafts.²² Then in *Smith v. Company of Armourers* (1792)²³ the Court of King’s Bench ordered the admission to the guild of an unqualified manager of an iron foundry, on the grounds that although ‘he did not know how to manufacture the commodity by his own personal labour’, he had been employed there for seven years ‘during the greatest part of which time he conducted the whole of their extensive works, received

all the orders, gave directions to the workmen etc. ... he knew how to conduct the business as well as any master in London'.²⁴ Finally, just prior to the repeal of the Act in 1813, in *Kent v. Dormay* (1811)²⁵ Lord Ellenborough refused to convict an unqualified mill owner, alluding to:

the valuable mills at Wakefield, Leeds etc., the property of several persons of the first families in this kingdom; but who would be liable to informations, or would be required to serve regular apprenticeships as millers, if the defendant could be considered as within the meaning of the Statute.

Wage labour was developing and increasing in spite of the apprenticeship law; in *The Wealth of Nations*, Adam Smith suggested that the incomplete coverage of the Act encouraged the growth of new industries such as the metal trades in Birmingham and the Black Country which as 'new trades' lay outside the scope of regulation.²⁶ Smith's arguments were taken up by the courts, the judges contending that the 'natural reason' of the market, rather than guild controls, was the true constraint upon the manufacture of poor quality goods: '[t]he reason for making [the Act] was that bad commodities might not be spread abroad; but natural reason tells us, that if the manufacture is not good, there is no danger of its having a favourable reception in the world, or answering the tradesman's purpose'.²⁷ This was a direct echo of the claim in *The Wealth of Nations* that 'the pretence that corporations are necessary for the better government of the trade, is without any foundation. The real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers'.²⁸ Thus the courts' refusal to defend the collective property rights of the guild was accompanied by an awareness of arguments from the political economy of the time in favour of greater competition, the division of labour, and the advantages of managerial coordination. As the artisanal wage relation declined, the way was clear for alternative forms of employment to take its place.

Settlement, apprenticeship, and the yearly hiring

In agriculture and in industrial employment outside the guild system, early forms of apprenticeship and service were shaped by the poor law and in particular by judicial construction of the Settlement Acts. Settlement Act litigation arose because of disputes between parishes (local units of administration through which poor relief was organised) over responsibility for the sick, aged and unemployed. For much of the seventeenth and eighteenth centuries, the right to relief in the parish of settlement was thought of as ‘the peculiar privilege of the poor’,²⁹ that is to say, the particular *right* of the wage-dependent classes. In *The Wealth of Nations*, Adam Smith condemned the settlement laws for restricting labour mobility, the effect of confining the right to relief to particular localities.³⁰ This effect arose because a labourer or servant who became ill or unemployed was liable to be forcibly removed to his or her parish of origin. Yet within this framework, the Acts of the late seventeenth century had set out to promote labour mobility by making it possible to acquire a settlement through a number of methods in addition to birth or ownership of property, including apprenticeship and completing a yearly hiring. As a result, the yearly hiring became the most effective route to the security of an independent settlement for those with insufficient resources to rent a substantial property or insufficient income to be levied for rates, or whose parents were unable to pay for an apprenticeship. An essential feature of this early eighteenth-century conception of the yearly hiring is that it limited the potential cost of relief to the parish of settlement by requiring the master to maintain the servant ‘throughout the revolution of the respective seasons: as well as when there is work to be done as when there is not’,³¹ to keep him in board and lodging and to meet the costs of medical assistance.

The settlement laws thereby came to be an important source for the development of the legal concept of the contract of service. From a conceptual point of view, the security provided by service and apprenticeship as exceptions to the normal rules on removal was rationalized in terms of the contractual link between the parties to the

relationship. The treatise writer William Burn wrote that the normal rule, enabling the justices to make an order of removal at any time within forty days of the servant's arrival, 'would not avail; for that the justices, upon complaint of the overseers, who are no parties to the contract, cannot make void the contract between the master and servant, by which the servant is bound to continue with his master if he requires it'.³² In the event of a breach of contract by the servant the master could apply to have the contract discharged, under the Statute of Artificers; only then could the servant be removed from the parish. If, on the other hand, the master was removed, the justices had the power to order the servant to go with him not under the laws of settlement and removal but as part of their more general jurisdiction to supervise the performance of the service contract.³³

The decline of annual service dates from the 1780s. Historical studies have charted the decline and identified the role played a combination of institutional and market factors: the rising cost of poor relief, on the one hand, which discouraged employers from agreeing to yearly hirings, and on the other the intensification of cereal farming in the south-eastern counties, which reduced the need for regular, year-round employment.³⁴ The decline of annual service as a social institution was mirrored by a gradual move within the law towards a more restrictive reading of the exceptions to the power of removal, which culminated in the statutory abolition of settlement by hiring in the Poor Law Amendment Act 1834. In early cases under the Acts of the late seventeenth century, the courts had taken a flexible view on the twin statutory requirements of a hiring for a year and actual service for a year. In principle there had to be 'an entire contract for at least a complete year's service, consisting of 365 consecutive days'.³⁵ In practice the courts held that a contract to work for a year could be implied from the fact of a continuous year's service,³⁶ and disregarded breaks brought about by illness³⁷ or temporary absence with the employer's permission. Although successive hirings of less than a year were regarded from the inception of the Acts as insufficient,³⁸ a contract for a year's service with provision on either side to determine the hiring on a month's notice at the end of any quarter was held to

confer a settlement, the court commenting that ‘if this should be determined not to gain a settlement, it would overturn great numbers of settlements that subsist on such things’.³⁹

The courts also disregarded an apparent requirement of the 1697 Act that the twelve months’ service should be precisely co-terminous with the contract for the yearly hiring: Lord Parker was reported as saying, ‘if there was a service for a year, on a hiring from week to week, and then a hiring for a year, and serving for forty days, that he should adjudge that a settlement’.⁴⁰ Nor did the hiring have to be co-terminous with a year’s residence in the parish of employment. Mobility was specifically encouraged by a rule to the effect that servants and apprentices who moved with their employers from place to place gained successive hirings in each new parish simply on forty days’ residence there as long as the service continued without interruption.⁴¹

The Court of King’s Bench gradually began to take a stricter view, both through a more restrictive reading of the Acts but also through a modification of the prevailing conception of the service relationship. Rather than infer an intention to contract for a yearly hiring, in ambiguous cases the courts regarded the payment of weekly or monthly wages as evidence of a periodic hiring lasting only between payments.⁴² Similarly, task contracts were held to be insufficient to give a settlement.⁴³ The judges also cast doubt on the earlier decisions which had held that the hiring (or contract) and the service (or performance) did not need to be precisely co-terminous. The earlier construction, wrote Michael Nolan in 1825,

was given to the Statutes soon after the 8 & 9 Wm. III was passed. It was founded on a strict interpretation of their provisions, which the court would not carry beyond the letter, from an opinion that they were restrictive of the subject’s liberty, and in derogation of his common law birthright ... But judges, who have held themselves bound by the authority of this decision, have questioned its propriety. Indeed, the design of the statute seems to point to a contrary construction; and it has been stated, that the

place of settlement can be of no consequence to the pauper, since he is equally entitled to support wherever it may be.⁴⁴

The most serious limitation on settlement was the notion of the 'exceptive hiring'. The rationale for this was put in terms of the master's unqualified right of 'control' over the servant throughout the term of the contract: anything less came to be seen as incompatible with the relationship of service. In this way, the settlement laws helped to initiate the open-ended duty of obedience which later came to characterize the contract of service. Although a servant could not be made to work 'unreasonable hours of the night, and he is punished if he profanes the sabbath day ... an express stipulation in the hiring, even of these seasons, will defeat a settlement'. This was because 'a right of control and authority, at least so far as it relates to the general discipline and government of the servant, must reside in the master at all times during the continuance of the service'.⁴⁵

The distinction in practice between an 'exception' in the contract, which deprived the servant of a settlement, and a 'dispensation' in the actual service, whereby the master gave the servant a temporary leave of absence without affecting his settlement rights - seems in retrospect so slight as to be meaningless; nor was this point lost on judges at the time.⁴⁶ The contradiction is easier to understand if it is borne in mind that these two concepts developed at different times and so represent separate stages in the courts' analysis of the service relationship, with the later notion of the master's right of 'exception' being used to discredit the earlier concept of the 'dispensation'. It appears that underlying the growing use of the concept of the exceptive hiring was the increasing number of cases coming before the courts involving industrial and commercial workers whose employment patterns, based on regular hours and work schedules, lacked the open-endedness of the traditional service model.⁴⁷ Mill workers and coal miners who worked long and regular hours and who were at other times were seen to be 'at their own liberty' and hence were held to gain no settlement by way of yearly hiring.⁴⁸

Thus the rise of the exceptive hiring reflected a shift towards a more hierarchical model of employment, which emphasised both the employer's powers of discipline within the employment relationship and the economic power to use the market to discharge the worker without regard to customary understandings of hiring practice. The earlier cases which had relied on a model of service as a relationship based upon reciprocal obligations, going beyond the immediate execution of work, which the courts came to consider anachronistic for all groups of workers, and not simply those engaged in industry or commerce. Under the traditional model, the master had the power to dispense with the servant's labour, being under no duty to find work - 'he may compel his servant to work at all lawful seasons, or suffer him to remain unemployed'⁴⁹ - but this did not in any way put an end to the wider relationship between them, nor to his duty to maintain the servant through cash payments or in kind. It followed that a settlement could be gained not just by actual service but also by fictional or 'constructive' service during the periods when the relationship continued without work.⁵⁰ For this purpose the consent of both parties was deemed necessary to discharge the contract, unless in an exceptional case the master could point to 'immorality' or some similar serious breach of contract by the servant as grounds for dismissal without the prior sanction of the magistrates.⁵¹ Not even the master's bankruptcy could dissolve the contract of hiring against the servant's consent.⁵²

By contrast, the concept of the exceptive hiring was based on a clear legal recognition of the employer's power to treat the contract as dissolved prior to the completion of the customary year's service. Its application therefore marks the increasing irrelevance in the late eighteenth century of the requirement of yearly hiring in the Statute of Artificers. Conversely, the traditional concept of service gave way to one in which only the closest and most complete control of the worker by the employer was sufficient for the Acts to be satisfied: 'if the master has once parted with his control over the servant, so that neither he nor the servant retain power of compelling subsequent performance of the contract, it is dissolved and no settlement gained'.⁵³ The nineteenth-century judges were quite clear that the result of such an

approach would be to undermine settlement by hiring and confine the right to poor relief ever more narrowly. While some judges limited the notion of the exceptive hiring for this very reason,⁵⁴ others were more explicitly favourable to such an interpretation:

I should not wish to carry the idea of dispensation further than it has been already carried; which in many of the cases seems to me to have been stretched as far as ingenuity could go, upon the false idea that the servant had a right to acquire in gaining a settlement ... I am not inclined to carry the decisions further.⁵⁵

In due course Parliament followed the courts in making the law increasingly rigid, and a series of Bills proposed outright abolition of settlement by hiring before this was finally brought about by section 64 of the Poor Law Amendment Act of 1834. The immediate aim was to reduce the burden of poor relief upon parishes and making the yearly hiring once again attractive to employers by cutting the link with settlement. This was meant to address the complaint articulated by Adam Smith in *The Wealth of Nations*, namely that it was ‘more difficult for a poor man to pass the artificial boundary of a parish, than an arm of the sea, or a ridge of high mountains, natural boundaries which sometimes separate very distinctly different rates of wages in other countries’.⁵⁶ It seems more likely that immobility was caused not by any inherent quality of the laws, but by the construction placed upon them by the courts from the mid-eighteenth century onwards, which resulted in the ineffectiveness of the yearly hiring as a route to a settlement in the parish of employment. As it was, it was this judicial revision of the Settlement Acts which seeded developments within the concept of the service relationship which included the open-ended duty of obedience and the employer’s right to lay off or terminate the relationship at will without retaining the obligation to pay or otherwise ‘maintain’ the servant.

The master-servant relationship

The roots of master and servant legislation can be found in the service provisions of the Statute of Artificers of 1563, which gave the local magistrates jurisdiction to set maximum wages and to oversee the performance of the service relationship.⁵⁷ However, the disciplinary aspects of master and servant law were significantly strengthened in a series of Acts beginning in the mid-eighteenth century.⁵⁸ The first of these so-called Master and Servant Acts was enacted in 1747 on the basis that the existing laws for the regulation of servants and the payment of their wages ‘are insufficient and defective’.⁵⁹ This was a reference to the confusion surrounding the wage and service provisions of the Statute of Artificers, and in particular the question of whether they had any application to industrial workers; it was widely understood at this time that they only applied to servants in husbandry hired for a year and workers whose wages were formally rated by the justices. Thus the 1747 Act gave the justices jurisdiction to examine and rule on disputes not only between masters and servants in husbandry but also between masters and ‘artificers, handicraftmen, miners, colliers, keelmen, pitmen, glassmen, potters and other labourers employed for any certain time, or in any other manner’, whether or not any rate or assessment of wages had been made for them in that year. They had the power to order payment of wages due and to punish the servant or labourer for any ‘misdemeanour, miscarriage or ill behaviour’ by abating wages or committing him or her to the house of correction for up to a month; they could also discharge the servant from his contract. The Act of 1758 extended their jurisdiction to cover servants in husbandry hired for less than one year⁶⁰ and that of 1766 made it an offence for the servant to quit before the end of the agreed term.⁶¹ This last provision was an attempt to bring up to date the similar prohibition in section 15 of the Act of 1563. The Act of 1823 established new crimes of absconding from work and refusing to enter into work under a contract of hiring, and provided for imprisonment of workers for up to three months.⁶² Thus, while certain protective aspects of the Elizabethan labour code, in particular the apprenticeship laws,

were being abandoned in the name of free competition around this time, the disciplinary aspects of those laws were being reinforced.

Empirical accounts of the enforcement of the master and servant laws, both in England and in other common law jurisdictions, are gradually revealing the full significance of these measures in terms of their effect on patterns of labour contracting and discipline.⁶³ This perspective is complemented by a consideration of the legal-conceptual significance of the master-servant model. Two central questions which confronted the courts in the nineteenth century concerned the *scope* of the disciplinary statutes, and their implications for the *contents* of the service relationship.

Although the Master and Servant Acts enumerated long lists of the trades to which they applied, the courts inferred⁶⁴ that they should apply to all ‘servants’ and ‘labourers’, but not to higher status ‘employees’ such as managers, agents and clerks. The latter were deemed to be excluded by implication from the wording of the Statute and also by being associated with the separate concept of the ‘office-holder’.⁶⁵ This selective effect was clarified by the Act of 1867, which explicitly stated it was only to apply to the classes of servants and labourers.⁶⁶ The test adopted at this time for distinguishing between servants and independent contractors based on the criterion of ‘exclusive service’. Thus it was held that ‘the statute ... applies only to cases of contracts to serve. There may indeed be a service, not for any specific time or wages, but to be within the Act there must be a contract for service by the party exclusively’.⁶⁷ This apparently excluded the task contract and the casual hiring from the scope of the legislation.⁶⁸ After the abolition of settlement by hiring in 1834, the test of exclusive service was applied rather more flexibly, with the courts no longer persisting with the artificial requirement that the servant should be at the employer’s disposal at all hours of the day and night.⁶⁹ Instead, it was held to be enough to show that the parties had undertaken mutual obligations to serve and to provide work, respectively, for a defined period. In particular, the presence in the contract of long notice periods was used as evidence of the necessary mutuality of obligation.⁷⁰ This

interpretation had the effect of bringing within the scope of the legislation groups of skilled artisans with a tradition of independence and a large degree of market power.⁷¹ In this way, long periods of hire were frequently used in the early nineteenth century to bind artisans and skilled workers to the enterprise through the threat of imprisonment for quitting without notice.

The master servant model had wider repercussions for the courts' construction of the service relationship, above all by reinforcing the open-ended duty of obedience while further minimising the employer's duty to provide either work or income. In some cases, courts read into contracts of service employers' obligations to provide work and to maintain the relationship in being through depressions in trade, as the necessary complements to provisions for extended notice or duration. Without such terms, a worker's agreement to serve the employer exclusively for a period of years would be void as being in restraint of trade. The contract might provide for payment on the basis of piece rates or time rates. In an agreement for exclusive service for twelve months with payment on piece rates and provision for three months' notice on either side, the court found a 'necessary implication that the employer shall find reasonable work and pay for the articles manufactured ... The necessity of giving notice clearly shows that there is some obligation on the part of the employer. What is that? To find reasonable employment according to the state of the trade. That is not a unilateral agreement, but a mutual agreement with something to be done on both sides'.⁷²

These cases look like decisions in which the courts respected what we might now call the 'reciprocal' and 'relational' aspects of the service relationship. However, in other decisions, the higher courts denied employees' claim for wages based on the employers' contractual obligation to provide work. The employer was found to have an implied right to lay off without wages, even in the case of an annual pit bond binding the workers to a year's exclusive service.⁷³ In this sense, long-service agreements effectively benefited only the employer; the worker was bound without having the protection of security of income or

employment. The principal purpose of finding mutuality was not to provide for a right to work or wages, but essentially to trigger the disciplinary provisions of the Act against the worker, or to form the basis for an action by the employer against another employer for enticing away the servant. This can be seen from the way in which the courts' construction of the contract of service differed according to the statutory context which was being considered. Hence butty workers, subcontractors in coal mining, were excluded from the coverage of the protective Truck Acts on the grounds that they were independent workers,⁷⁴ while being simultaneously subject to the Master and Servant Acts as servants.

These cases suggest that the courts at this time had no consistent conception of the contract of employment as a legal institution governing the reciprocal obligations of industrial workers and their employers. Instead, the classification of work relationships was determined above all by the different species of regulatory legislation which operated on the service relationship.

Servants who quit without notice or in the middle of a pay period normally forfeited all wages due under the contract, even for work actually completed. This was the result of a common-law rule apparently dating from the end of the eighteenth century, to the effect that an employee who quit voluntarily or who was discharged for good cause in mid-contract had no claim for wages for the part of the work which he or she actually completed.⁷⁵ Why the rule against the recovery of wages in long-term contracts should have been tightened in this way at the end of the eighteenth century has been the subject of debate among legal historians. Morton Horwitz has attributed it to the growing influence of the 'will theory' of contract in place of traditional notions underpinning the right to compensation for work done and benefits transferred to the employer, while John Barton has suggested that, on the contrary, the common law rule was of long standing.⁷⁶

The difficulty with Horwitz's interpretation, at least in the English context, is that, as we have just seen, the courts did not consistently see

the contents of the service relationship in contractual terms. This casts doubt on the relevance to the service relationship of the general theories of contractual obligation which were circulating at this time and which Horwitz characterizes as ‘will theory’. A better explanation (at least in the English context) is to be found in the more specific influence of the master-and-servant model in reinforcing the employer’s control over the payment of wages, and the decline of the model of reciprocal rights and obligations which was associated with the institution of the yearly hiring.

The weakness in Barton’s analysis is his failure to locate the common-law cases in the context of this legislation. Contrary to his suggestion, the settlement cases of the eighteenth century indicate that in a fixed-term hiring the employer only had the right to terminate the contract prematurely in exceptional circumstances, and that in the absence of gross misconduct by the employee the contract was regarded as continuing for the agreed term.⁷⁷ Moreover, this line of reasoning was also taken up in the common law of the service relationship; it was on this basis that courts took the view that, in the event of a wrongful dismissal, the employee could sue for the contractual wages under the fiction of ‘constructive service’.⁷⁸

It was only after the repeal of settlement by hiring in 1834, that the fiction of constructive service was abandoned.⁷⁹ A servant who was wrongfully dismissed after the abolition of the doctrine was in theory entitled to bring a claim for damages for breach of contract, based on the employer’s failure to employ him for the period agreed.⁸⁰ However, this was unlikely to succeed in practice as the courts began to apply the principle of ‘entire obligations’ to require the servant to complete the agreed service in full before being entitled to any payment. They also ruled that the servant could no longer sue in quantum meruit for work done as an alternative to a contract action.⁸¹ These common law developments paralleled the magistrates’ statutory power to discharge the servant from the contract and ‘abate’ or reduce his or her wages for breaches of discipline. These statutory powers were interpreted as overriding any contractual right to wages, to the extent that a servant

convicted under the Act would forfeit wages due as earned and his employer would be released from any obligation to pay for work actually done.⁸² It would appear, then, that the statutory context – the repeal of settlement by hiring, on the one hand, and the enactment of the magistrates’ wide-ranging powers to abate wages for breaches of discipline, on the other – propelled the common law in the direction of a strict rule against recovery in either contract or quantum meruit.

The abolition of settlement by hiring also brought to an end the long-standing presumption that service was for a fixed term of a year. Although there was nominally still a presumption that servants in husbandry were hired for the year, this was easily rebutted by evidence of a common intention or practice to the contrary. In industrial employment and domestic service contracts were normally regarded as terminable by notice on either side, by reference to the payment period agreed by the parties; the employer did not then need to give a reason for dismissal.⁸³ At the same time the courts implied a number of wide-ranging duties into contracts of service, with the sanction of summary dismissal in the event of breach. Servants were required to obey all lawful orders on pain of summary dismissal; for industrial and agricultural workers a single act of disobedience or of negligence would be enough to entitle the employer to dismiss.⁸⁴

The employment relationship after 1875: the influence of the Employers and Workmen Act and its displacement by collective bargaining.

In common with other jurisdictions, Britain repealed its master and servant legislation in the second half of the nineteenth century. The turning point came in 1875 at the same time as a number of criminal sanctions against strikes and other aspects of labour organisation were also removed.⁸⁵ However, the legacy of master and servant was the assimilation by the common law of a hierarchical, disciplinary model of service. The persistence of this model owed much to the Employers and Workmen Act 1875, which replaced the Master and Servant Act 1867 as the principal statute regulating the service relationship. The history

of this significant measure has until recently been almost completely neglected.⁸⁶ Under its provisions, the powers of magistrates and of the County Courts were not confined to the simple enforcement of civil law obligations arising out of the contract of employment. The Act conferred additional powers in effect to supervise the terms of the contract and the manner of its performance by the worker.⁸⁷ Section 3(1) of the Act gave these courts the powers to adjust and set off against each other the separate claims of the parties, enabling the employee's claim in debt for wages due as earned to be reduced or possibly cancelled out altogether by an employer's counter-claim for damages for breach of contract, which the courts would readily award against an absconding or negligent employee. Under section 3(2) the courts had extensive powers to dissolve contracts of service at their discretion and apportion wages or damages between the parties. In *Keates v. Lewis Merthyr Consolidated Collieries Ltd.* Lord Robson said of section 3(2):

This is a very unusual power, and shows that the county court judge or magistrate is being entrusted with a jurisdiction and discretion outside the limits of ordinary litigation. It opens a wide field of inquiry beyond the particular claim which one of the parties has brought before him.⁸⁸

Lord Atkinson considered that:

the statute of 1875 was passed, as set forth on the face of it,⁸⁹ to enlarge the powers of the county courts, not to leave them as they were. And it has enlarged them in a most remarkable way. The court may now, under [section 3] give relief which not only was never claimed by either of the parties litigant, but which is directly in conflict with the relief claimed, and setting at naught the rights they respectively insist upon.⁹⁰

Hence in *Keates* the House of Lords applied the 'remarkable' power of section 3 to enable the court to order (and thereby effectively to ratify) abatement of the employees' wages upon a finding that was liable to

the employer for breach of contract, an abatement which would otherwise have been contrary to the Truck Acts.⁹¹

Under section 3(3) of the Act the court had the power to order specific performance against an employee who was in breach of contract, a right not available under the general law of contract either at the time or since. The employee could be made to give security for the unperformed portion of his contract, whereupon the court could then ‘order performance of the contract accordingly, in place either of the whole of the damages which would otherwise have been awarded, or some part of such damages’. Technically the consent of the employee was needed, but there would often be little or no choice in accepting this as a means of meeting the debt to the employer. In the last resort the court could commit the employee to prison for forty days for failure to pay a sum due, using powers under the Debtors Act 1869.⁹² This was a measure designed to facilitate the enforcement of small debts, below £50; in the case of *larger* sums only, the debtor could present a petition in bankruptcy in order to obtain his release.

The power which the employer had had under section 9 of the Master and Servant Act 1867, of making a deduction from wages for breach of contract even if no civil claim for damages would have arisen – in effect, a power to issue a disciplinary fine – did not formally survive into the Employers and Workmen Act. Despite this, damages awards made by the courts under the 1875 Act tended to be in the nature of fines, for the reason that no attempt was usually made to quantify any precise loss flowing to the employer from breach. Again, this was a clear exception to the approach normally followed in the law of contract. Courts routinely awarded damages up to the £10 limit imposed by statute, or awarded some other sum not obviously related to any loss.⁹³ Defendants also had to pay costs. These powers of the courts, as with the earlier Master and Servant Acts, only applied to contracts of ‘workmen’ - labourers, artisans or servants; higher status employees were not within the magistrates’ jurisdiction.

Section 11 of the Employers and Workmen Act attempted to prohibit forfeiture of wages in a case where the employer could not show actual damage. In common with much of the protective legislation of the time, this provision only applied to women and young workers falling under the Factory Acts, and was defeated in the same way as the courts undermined the Truck Acts - that is, by the argument that there could not be any forfeiture from wages which, under the terms of the contract, had never been properly earned.⁹⁴ The result was reversed only when the courts construed these contracts not as periodic contracts to which the principle of 'entire obligations' applied, but as indeterminate hirings.⁹⁵

This was part of the growing tendency to construe employment contracts as indeterminate in duration. However, unlike in the United States, where the same movement was accompanied by the entrenchment of the presumption of employment at will (that is to say, employment which could be terminated on very short or minimal notice without the need to show good cause), notice periods varied according to the status of the worker or employee in question. 'Higher status' workers such as clerical and managerial employees benefited from long notice periods which provided them with a degree of income security.⁹⁶ It was in these relation to these workers, who were outside the scope of disciplinary employment legislation, that the principles associated today with the contract of employment began to emerge, in particular the action for wrongful dismissal for termination by the employer in breach of a clause providing for notice.⁹⁷

By contrast, most industrial workers during the period after 1875 were employed on contracts with short notice periods, possibly of no more than a day or even an hour. At first sight this indicates a high degree of insecurity, but, again, the contractual position must be understood by reference to the wider regulatory and legislative context. In the case of industrial employment, short notice periods were often contracted for explicitly as part of collective bargaining, since they neutralised the effects of the Employers and Workmen Act. F. W. Tillyard noted in 1928 that the restrictive provisions of the Act were

‘practically a dead letter’, principally because ‘contracts of service are determinable more and more by short notice, so that powers to rescind and powers to enforce performance for unexpired periods of service are in practice rarely if ever wanted’.⁹⁸ The Act continued to be used as a weapon of discipline in the mining industry, and cases arising from its use reached the higher courts as late as the 1940s;⁹⁹ however, in most industries it appears to have played a gradually decreasing role with the expansion of collective bargaining.¹⁰⁰ Individual sanctions against the employee, enforced by law and resting on formal subordination, gave way to collective procedures resting more on a formal ‘equality’ between the parties:

the inferior status of the worker has disappeared. This is absolutely true as regards the administration of the law, but it is also largely true of other means of settling disputes. On Boards of Conciliation, on Trade Boards, on Courts of Referees, and on other bodies dealing with trade interests, working men and employers meet on an equality.¹⁰¹

Underlying this ‘equality’ was, in the final analysis, the growing collective economic power of the trade union. The shortening of notice periods was useful to unions as it meant that strikes would rarely, if ever, involve a breach of contract; short strike notice could be given within the terms of the individual contract, so relieving the strike organisers from tortious liability.¹⁰² As a result, the contract of employment remained under-developed as an instrument for regulating the mutual rights and obligations of the individual parties; many for trade unions, it was an instrument of discipline, to be neutralized where possible.

The role of labour classifications in early social legislation

The gradual emergence of the ‘unitary’ contract of employment, the model of the employment relationship describing all forms of wage-dependent labour, is most clearly visible in the first half of the twentieth century not in the law relating to the contractual rights and obligations

of the parties, for the reasons just noted, but in the use made of the concepts of ‘service’ and (increasingly) of ‘employment’ in the social legislation of the early welfare state.

The central concept here was the ‘control’ test.¹⁰³ Kahn-Freund¹⁰⁴ suggested that the control test developed in the context of the common law principle of the employer’s vicarious liability for torts of a servant acting in the course of employment. It is certainly true that, in the post-1945 period, this was one of the contexts in which the test was applied. However, the nineteenth-century authorities cited for ‘control’ were not concerned with the issue of tortious liability. One of the most widely cited cases, *Yewens v. Noakes*,¹⁰⁵ concerned the definition of a live-in servant under tax legislation. Nor did this case turn on the distinction between ‘employees’ and the ‘self-employed’, or even between ‘servants’ and ‘independent contractors’. Central to the decision was the refusal of the court to believe that a salaried clerk earning a substantial salary could be a ‘servant’, since, according to the court, such a person was more clearly akin to ‘the manager of a bank, a foreman with high wages, persons in the position almost of gentlemen’.

Yewens v. Noakes was not concerned with the modern distinction between employment and self-employment at all, but with the nineteenth-century, status-based, divide between ‘servants’ and labourers in manual employment, on the one hand, and higher-level occupations and managerial and clerical work, on the other. The distinction between manual and non-manual work, which was central to the operation of the master-servant law, was carried over into early social legislation, in particular legislation concerning workmen’s compensation and social insurance. It was in this context that the ‘control’ test was established in a series of early twentieth-century decisions.¹⁰⁶

Why did twentieth-century courts light upon obscure cases such as *Yewens v. Noakes* as authoritative guidance to the classification of employment relationships? The answer would not be problematic if the control test had already become well established in tort law or in the

interpretation of labour statutes, but as we have seen, this does not appear to have been the case. A more convincing explanation is that rediscovery and adaptation of the control test was a doctrinal innovation which was introduced at the same time as the courts were being called on to define the boundaries of regulatory legislation of a novel type. The element of compulsion in social legislation went strongly against the grain of prevailing common law values. This is clear from the judgments of the Court of Appeal in *Simpson v. Ebbw Vale*, a decision on the interpretation of the term ‘workman’ in workmen’s compensation legislation:

It presupposes a position of dependence; it treats the class of workmen as being in a sense ‘inopes consilii’ [sc. incapable of judgement], and the Legislature does for them what they cannot do for themselves: it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves. In no sense can such a principle extend to those who are earning good salaries.¹⁰⁷

As a result, the courts regularly held that professional and managerial workers were outside the scope of these new laws.¹⁰⁸

The control test, as applied by twentieth century courts, was also linked to disputes about employer’s liability in the context of the widespread practice of internal contracting. The contract system of hiring labour through an intermediary was still the predominant form of industrial organisation in road building, construction, shipbuilding, mining and quarrying, and iron and steel.¹⁰⁹ This meant that there might be no contractual nexus between workmen hired by the butty worker or foreman, and the ultimate owners of the site, plant or materials on which they worked. The control test had the effect of classifying foremen as independent contractors, given their responsibility for hiring their own gangs;¹¹⁰ while the gang workers or labourers themselves had no claim against the ultimate users of their labour since the latter did not ‘control’ the performance of their work.¹¹¹ Piecework payments were also treated by the courts as strong

evidence of independent contractor status, notwithstanding clear statutory signals that this was not to be the case.¹¹² Share fishermen - inshore trawlermen who were paid on a proportion of the profits from individual voyages - were found to be outside the social insurance legislation.¹¹³ Thus the adoption of the control test enabled employers to avoid responsibility for the social risks of illness, injury and unemployment which it had been the aim of social legislation to impose, at least in part, upon them.

The 'unitary' model of the contract of employment which came to extend to all categories of wage-earners, including salaried and clerical workers, was only clearly adopted when further reforms were enacted to social legislation, in particular the extension of social insurance which took place in the National Insurance Act 1946.¹¹⁴ A major aspect of the Beveridge Report was the abolition of distinctions between different categories of employees: henceforth, all wage or salary earners, regardless of their annual income or of their professional status, would come under the same contributory classification.¹¹⁵ Accordingly, the 1946 Act established two principal classes of contributors: Class I covered 'employed earners', defined as 'any persons gainfully occupied in employment ... being employed under a contract of service', and Class II covered those employed on their own account.¹¹⁶ The latter paid a lower rate of contribution and were excluded from the unemployment insurance part of the scheme. In this way the fundamental division between *employees* and the *self-employed* was established. The same distinction was adopted for the purposes of income taxation¹¹⁷ and, in due course, under the employment protection legislation which was introduced first in the early 1960s.¹¹⁸ The ending of the old divide between manual and non-manual workers was epitomized by the merging of the concepts of the contract of *service* and of *employment*: for statutory purposes, these were now synonymous with each other.¹¹⁹

It was in the context of this new situation that the courts abandoned the old distinction between low status and high status employees when seeking to identify the contract of service.¹²⁰ The control test

itself came to be regarded as excessively artificial, and gave way to the tests of 'integration' and 'business reality'. These stressed economic as opposed to personal subordination as the basis of the contract of employment. The test of the worker's 'integration' into an organisation was used to explain how professionals such as doctors and journalists could be classified as employees notwithstanding the high degree of autonomy they enjoyed in their work.¹²¹ 'Economic reality' had the effect of extending protection to casual workers and outworkers who were dependent on the business of another, as opposed to being entrepreneurs with a business and employees of their own.¹²² By these means, a more inclusive notion of the employment relationship came to be established for the purposes of determining the scope of employers' liabilities in respect of personal injuries, employment protection and social insurance.

Conclusion: reassessing the evolution of the contract of employment

The contract of employment has been aptly called 'a remarkable social and economic institution, as important as the invention of limited liability for companies'.¹²³ Kahn-Freund's description of the contract of employment as the 'cornerstone'¹²⁴ of the modern labour law system captured precisely its dual nature: on the one hand, it underpinned the common law of 'managerial prerogative' through the open-ended duty of obedience, while simultaneously supporting the edifice of social legislation aimed at providing the individual with protection against the economic risks. It is possible to see here, too, the wider function of the employment relationship as the bridge between the modern business enterprise and the welfare state.

The reconstruction of the juridical evolution of the contract of employment makes it possible to see more clearly the multiple functions of regulation and classification which this concept serves, but also how its capacity to do is shaped and, in some ways, constrained by its evolutionary path. What is above all clear is that the contract of employment is a relatively recent juridical innovation,

which assumed its modern form only at the mid-point of the twentieth century. Prior to that time, there was no coherent ‘alphabet’¹²⁵ of concepts which united the different forms of wage labour in a systematic way. Rather, there were multiple conceptual classifications - servant, independent contractor, casual workers, workman, and office holder - each of which has left its trace in the notion of the employee that we know today. The cumulative nature of this evolutionary process is clear from the way in which conceptual innovations built on earlier juridical forms. This is particularly significant in the case of the contract of service, which in the nineteenth century was the main category for industrial and agricultural workers who were subject to the master-servant regime. The survival of the service model and its assimilation into the modern contract of employment accounts for many of the doctrinal tensions of contemporary labour law. It is unclear, for example, how the open-ended duty of obedience fits together with the notion of ‘mutual trust and confidence’ which represents the latest stage in the application to the contract of employment of a ‘relational’ contractual logic.¹²⁶ Nor can the limitations placed on the action for wrongful dismissal by *Addis v. Gramophone Co. Ltd.*¹²⁷ in the early years of the twentieth century be easily reconciled with the recognition, a century later, of the multiple interests, financial, reputational and psychological, which the employee has in the employment relationship. The recent House of Lords decision in *Johnson v. Unisys Ltd.*¹²⁸ indicates that today’s judges are prepared, in principle, to extend the common law of wrongful termination of employment in a way which would encompass some of these wider interests; but that, for the time being at least, they are unwilling to do so in a way which would extend common law protection beyond that provided by unfair dismissal legislation. Whether, in the longer run, unfair dismissal proves to be a serious obstacle to the development of the common law of employment remains to be seen. It is possible to see in the majority judgments in *Johnson v. Unisys Ltd.* the vestiges of a hierarchical conception of employment which entered the common law via the disciplinary labour legislation of an earlier period, and which is now barely able to resist the application of modern contractual logic.

If *Johnson v. Unisys Ltd.* represents one particular aspect of contract of employment's recent evolution, statutory innovations on the issue of labour classifications constitute another. Here, the idea of the 'binary divide' between employment and self-employment, on which modern social legislation rests,¹²⁹ seems to be called into question by the extension of certain protective rights (such as the right to receive the minimum wage and to be protected by working time limits) to 'workers', a statutory category which includes both employees and certain self-employed workers.¹³⁰ The introduction of the 'worker' is a further illustration of the cumulative nature of conceptual evolution. The idea has certain statutory antecedents in factory and wages council legislation and in the law relating to industrial action. At the same time, it could be said to mark a significant innovation or mutation, in the sense of adapting these existing (and rather marginal) forms to the present task of extending basic labour protections to so-called precarious or casual forms of employment. The 'worker' concept also significantly alters the underlying notion of the employment relationship within the schema of labour classifications. It does so by replacing a test of personal subordination or dependence - the test of control, or, to refer to a more recent version of the same idea, 'mutuality of obligation' - with a test based on the 'economic dependence' of the worker on the enterprise. Again, it is not yet possible to discern all the implications for labour law of this conceptual shift. It does, nevertheless, indicate the continuing vitality of the concept of the contract of employment, and its capacity for adaptation in rapidly changing environment.

Notes

- ¹ 'It is worth noting that the cases that appear in the Law Reports are highly unrepresentative, in many ways, and especially as guides to enforcement, although important for an understanding of both judicial thinking and political conflict': Hay, 2000: 232.
- ² The links between 'coding', abstraction and cultural transmission are explored in a growing literature on cultural evolution which has many suggestive insights to make with regard to law; see generally Dennett, 1995 : ch. 12; and on law, Teubner, 1993: ch. 4; Balkin, 1998: chs. 1-4.
- ³ See generally Atleson, 1983.
- ⁴ On the path dependent and 'bricolage'-like nature of legal evolution, see Balkin, 1998: ch. 2.
- ⁵ Holmes, [1881] 1968: 8.
- ⁶ This was used in the definition of 'constructive dismissal' which is now contained in the Employment Rights Act 1996, s. 95(1)(c). The relevance of the common law concept of repudiatory breach in this context was confirmed by the Court of Appeal in *Western Excavating (ECC) Ltd. v. Sharp* [1978] QB 761.
- ⁷ See Hepple and O'Higgins, 1981: 135.
- ⁸ Brodie, 1996.
- ⁹ These received a new twist in *Johnson v. Unisys Ltd.* [2001] IRLR 279, in which the House of Lords used the presence of statutory limitations on the right to claim *unfair* dismissal to justify restricting the common law of *wrongful* dismissal.

- 10 See *Simmons v. Heath Laundry* [1910] 1 KB 543 and *Scottish Insurance Commissioners v. Edinburgh Royal Infirmary* 1913 SC, discussed further below.
- 11 *Addis v Gramophone Co. Ltd.* [1909] AC 488, held to be correctly decided in *Johnson v. Unisys Ltd.* [2001] IRLR 279.
- 12 See, e.g. Epstein, 1983: 1357, suggesting that in the nineteenth century the ‘area of labor relations was governed by a set of rules that spanned the law of property, contract, tort and procedure’.
- 13 See e.g. Atiyah, 1979; Buckley, 1999.
- 14 Small, 1987: 55.
- 15 Leeson, 1979: 67.
- 16 Dobson, 1980: ch. 4.
- 17 Prothero, 1979.
- 18 *Re. Statute of 5 Eliz., Apprentices* (1591) 4 Leon 9.
- 19 The case law is discussed by Lord Mansfield CJ in *Raynard v. Chase* (1756) 1 Burr. 6; in that case Mansfield argued that the old construction no longer represented the law.
- 20 1 Show KB 267.
- 21 1 Burr. 6.
- 22 See *Coward v. Maberly* (1809) 2 Camp 127, where it was held that a coachmaker could directly employ a blacksmith to manufacture coach wheels; per Lord Ellenborough CJ:

‘blacksmith’s work may be required in building a bridge; but the builder who employs a journeyman properly qualified to do that work, is not himself to be considered as carrying on the trade of a blacksmith’.

23 Peake 199.

24 It followed that ‘serving an apprenticeship’ was reduced to time serving, as anyone who worked for seven years without interruption as master, servant or apprentice could now qualify under the Act: Chitty, 1812: 127. Earlier cases taking a similar view under the Statute of Apprentices include *R. v. Moor and Dibloe* (1674) 3 Keble 400 and *French v. Adams* (1763) 2 Wils 168.

25 Kingston Assizes, August 14, 1811; reported in Chitty, 1812: 122.

26 Smith, 1776: 150.

27. In *Smith v. Company of Armourers* (1792) Peake 199, 201.

28 Smith, 1776: 161.

29 See Snell, 1985: 73.

30 *An Inquiry into the Nature and Causes of the Wealth of Nations*, at p. 176.

31 Blackstone, [1765] 1979: 413.

32 Burn, 1764: 51; and on apprenticeship, see *ibid.*, p. 37.

33 *Ibid.*, pp. 51-52.

34 Hobsbawm and Rudé, 1973: ch. 2; Snell, 1985: ch. 2.

- 35 Nolan, 1825: 343.
- 36 *R v. Cowhoneybourn* (1808) 10 East 88.
- 37 *R v. Islip* (1720) 1 Str. 423.
- 38 *Dunsford v. Ridgwick* (1711) 2 Salk. 535.
- 39 *Atherton v. Barton* (1743) 2 Str. 1142.
- 40 *Brightwell v. Westhallam* (1714) Foley 143.
- 41 Burn, 1764: 38; *Silverton v. Ashton* (1714) Foley 188; *R. v. Whitechapel* (1725) Foley 146; *St. Peter's in Oxford v. Chipping Wycombe* (1722) Foley 200; *Bishop's Hatfield v. St. Peters in St. Albans* (1715) Foley 197; *St. Peters in Oxford v. Fawley* (1722) Foley 194.
- 42 *R. v. Newton Toney* (1788) 2 Term. Rep. 453; *R. v. Mitcham* (1810) 12 East 351; *R. v. Droitwich* (1814) 3 M. & S. 243, although cases went both ways, since in other decisions the courts construed indefinite hirings as hirings for a year: *R. v. Birdbrooke* (1791) 4 Term. Rep. 245; *R. v. Hampreston* (1793) 5 Term. Rep. 205; *R. v. St. Andrew in Pershore* (1828) 8 B. & C. 679. Burn, 1764: 54, argued that a lawful hiring of a servant was by definition a hiring for a year under s. 3 of the Statute of Artificers: ‘in general, the law never looks upon any person as a servant, who is hired for less term than one whole year; otherwise they come under the denomination of labourers. Now being lawfully hired, can mean nothing else but being hired according to law. And being hired according to law, is being hired for one whole year, and not otherwise’. But by the end of the eighteenth century the Act of 1563 was less significant in practice than it had been as a means of regulating hiring.

- 43 *R. v. Woodhurst* (1818) 1 B. & Ald. 325.
- 44 Nolan, 1825: 446, referring to *R. v. Aynhoe* (1727) 2 Ld. Raym. 1521. The eighteenth century case law allowing minor hirings to be connected to a yearly hiring as long as service was continuous throughout was regarded as suspect by the time of *R. v. Denham* (1813) 1 M. & S. 221.
- 45 *R. v. Wrington* Burr. S.C. 280, per Foster J.; *R. v. Thistleton* (1795) 6 Term. Rep. 185
- 46 See the judgment of Ashhurst J. in *R. v. Sulgrave* (1788) 2 Term. Rep. 376
- 47 Napier, 1979: 65-70, 120-121; Cranston, 1985: 45.
- 48 *R. v. Macclesfield* (1758) Burr SC 458; *R. v. Buckland Derham* Burr SC 694; *R. v. Kingswinford* (1791) 4 Term. Rep. 219; *R. v. North Tibley* (1792) 5 Term. Rep. 21.
- 49 Nolan, 1825: 386.
- 50 *Ibid.*: 385.
- 51 *Ibid.*: 437.
- 52 *R. v. St. Andrews in Holborn* (1788) 2 Term. Rep. 267.
- 53 *R. v. Thistleton* (1795) 6 Term Rep. 185.
- 54 *R. v. Byker* (1823) 2 B. & C. 120; *R. v. St. John Devizes* (1829) 2 B. & C. 896.
- 55 *R. v. King's Pyon* (1803) 4 East 351.

- ⁵⁶ 1776: 169.
- ⁵⁷ 5 Eliz. c. 4, ss. 5-14; see above.
- ⁵⁸ Historical studies suggest that the enforcement of the Acts was also intensified at this time; see Hay, 2000.
- ⁵⁹ 20 Geo. II c. 19, preamble.
- ⁶⁰ 31 Geo. II c. 11, s. 3.
- ⁶¹ 6 Geo. III c. 25, s. 4. This was an attempt to impose a general restraint of the kind previously enacted around this time for particular trades, including the journeyman shoemakers (9 Geo. I c. 27, s. 4, 1722), woollen manufacturers and framework knitters (12 Geo. I c. 34 s. 2, 1725), glove and shoe manufacturers (13 Geo. II c. 8, s. 8). The 1766 Act was stated to apply to any ‘artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person contracting for any time or times whatsoever’.
- ⁶² 4 Geo. IV c. 34, ss. 3, 4 and 5.
- ⁶³ The classic study is by Simon, 1956. More recent studies include Woods, 1982; Tomlins, 1993; Craven and Hay, 1994; Hay, 2000; Steinfeld, 2001.
- ⁶⁴ *Lowther v. Earl of Radnor* (1806) 8 East 113.
- ⁶⁵ Napier, 1979: 596.
- ⁶⁶ Master and Servant Act 1867, s. 3.
- ⁶⁷ Parke J in *Lancaster v. Greaves* (1829) 9 B. & C. 627, 631-2.

- ⁶⁸ *Hardy v. Ryle* (1829) 9 B & C 603 (outworkers); *ex parte Johnson* (1840) 7 Dowl PC 825 (calico printer).
- ⁶⁹ As in *R. v. St. John Devizes* (1829) 9 B & C 896.
- ⁷⁰ See *ex parte Gordon* (1856) 1 Jur (NS) 683; *Lawrence v. Todd* (1863) 14 CB (NS) 554; *Whittle v. Frankland* (1862) 2 B & S 549; *R. v. Welch* (1853) 2 E & B 356.
- ⁷¹ See, for example, *Hartley v. Cummings* (1846) 2 Car & K 453 (skilled glass workers); *Pilkington v. Scott* (1846) 16 M & W 657 (glass blower); *Lawrence v. Todd* (above, iron workers employing their own assistants); *re Baily* (1854) 3 E & B 607 ('butty' workers, labour sub-contractors, in the coal industry).
- ⁷² *R. v. Welch*, per Lord Campbell, above; see also *Pilkington v. Scott*, above.
- ⁷³ *Williamson v. Taylor* (1843) 5 QB 175.
- ⁷⁴ *Sleeman v. Barrett* (1863) 2 H & C 934, where the court explicitly rejected a suggestion (made in *Bowers v. Lovekin* (1856) 6 E & B 584) that the Truck Acts of the early nineteenth century and the Master and Servant Acts should be interpreted so as to be consistent with one another.
- ⁷⁵ *Spain v. Arnott* (1817) 2 Stark 256; *Turner v. Robinson* (1833) 5 B & A 789; *Ridgway v. Hungerford Market Co.* (1835) 3 A & E 171; *Saunders v. Whittle* (1876) 33 LT 816.
- ⁷⁶ Horwitz, 1978: 186-88; Barton, 1988.
- ⁷⁷ See above.

- 78 Nolan, 1825: 485 et seq.; *Gandell v. Pontigny* (1816) 4 Camp 375.
- 79 *Smith v. Hayward* (1837) 7 A & E 544.
- 80 *Ibid.*
- 81 See the *Ridgway* and *Turner* cases, cited above.
- 82 *Lilley v. Elwin* (1848) 11 QB 742; *R. v. Biggins* (1862) 5 LT 605.
- 83 Smith, 1860: 47.
- 84 *Read v. Dinsmore* (1840) 9 C & P 588; *Turner v. Mason* (1845) 14 M & W 112; Smith, 1860: ch. 2, noted that ‘the servant is bound to obey all lawful orders of his master, and to be honest, and diligent, in his master’s business’, and gave the following four bases for dismissal: wilful disobedience of a lawful order; gross moral misconduct, pecuniary or otherwise; habitual negligence, or conduct calculated to damage the employer’s business; and incompetence or disability. See Cornish and Clark, 1989: 294.
- 85 By the Conspiracy and Protection of Property Act 1875. On the political background to the labour legislation of the 1870s, see J. Spain, 1991.
- 86 For a recent empirical study of the operation of the Act, which contains evidence on the degree to which it was used by workers against employers as well as vice versa, see Steinmetz, 2000.
- 87 Section 3 confirmed and extended the jurisdiction of the County Courts, and section 4 applied to Magistrates’ Courts all the powers of the County Courts over employment disputes, except that the Magistrates’ Courts could not deal with any claim

greater than £10, nor could they order damages, nor security, in excess of this amount.

88 [1911] AC 641, 646.

89 This was a reference to the phrase in section 3 of the Act which referred to the County Court being granted powers ‘in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such... *in addition to any jurisdiction it might have exercised if this Act had not been passed*’ (emphasis added).

90 [1911] AC 641, 643.

91 The Truck Acts would have outlawed this practice thanks to the earlier House of Lords decision in *Williams v. North’s Navigation Collieries* [1906] AC 136, which is discussed below. *Williams* was not cited in *Keates*.

92 On the disciplinary role of the 1875 Act, see also Cornish and Clark, 1989: 320.

93 In *Bowes & Partners v. Press* [1894] 1 QB 602 the court rejected an argument for awarding only nominal damages to the employer in a case where the employee’s breach of contract did not clearly lead to any loss; see also *Ayling v. London & India Docks Committee* (1893) 9 TLR 409; Freedland, 1976: 138-139.

94 *Gregson v. Watson* (1876) 34 LT 143.

95 Most importantly in *Warburton v. Heyworth* ((1880) 6 QBD 1 and *Parkin v. South Hetton Coal Co.* (1907) 98 LT 162. Under the rather complex contractual logic applied by the courts, this meant that the employee had a pro rata claim in debt for service rendered or work performed in respect of particular periods of the

employment in question (such as an hour, day or month) and hence would not be penalised for early quitting in breach of contract unless this caused loss to the employer.

⁹⁶ See Jacoby, 1982.

⁹⁷ A particularly important decision in the synthesis of the modern wrongful dismissal action was *Emmens v. Elderton* (1853) 13 CB 495, a case which concerned a company solicitor; see Freedland, 1976: 22; later cases include *Turner v. Goldsmith* [1891] 1 QB 544; *re. Rubel, Bronze and Metal Co.* [1918] 1 KB 315; and *Healy v. S.A. Rubastic* [1917] 1 KB 946.

⁹⁸ Tillyard, 1928: 328-329.

⁹⁹ See *Nokes v. Doncaster Amalgamated Collieries* [1940] AC 1014. *Nokes* later came to have pivotal importance in the law relating to transfers of undertakings. The decision of the House of Lords, ruling against automatic novation of the contract of employment in the event of a business transfer on grounds related to the adverse implications of this for the personal liberty of the worker (see in particular the speech of Lord Atkin), is much more readily understandable when the statutory background to the case is borne in mind. See also *Dorman, Long & Co. Ltd. v. Carroll* (1945) 173 LT 141.

¹⁰⁰ The Act had a curious end. The powers to order specific performance and to order security in return for performance were repealed by the Industrial Relations Act 1971, Sch. 9. The remaining parts of the Act were repealed by the Statute Law (Repeals) Act 1973, Sch. 1.

¹⁰¹ Tillyard, 1928: 17-18.

¹⁰² The idea that a strike necessarily involves a breach of contract,

on the grounds that an individual taking part in a strike or other industrial action thereby commits a breach of the implied duty of cooperation, was only applied later: see *Secretary of State for Employment v. Aslef (No. 2)* [1972] 2 QB 455.

¹⁰³ See Deakin 1998, for a more detailed account of the argument in this section, and Howe and Mitchell, 1999, for a consideration of how far it also applies to Australian labour law.

¹⁰⁴ Kahn-Freund, 1966: 512-513.

¹⁰⁵ (1880) 6 QBD 530.

¹⁰⁶ *Simmons v. Heath Laundry* [1910] 1 KB 543; *Scottish Insurance Commissioners v. Edinburgh Royal Infirmary* 1913 SC 751; *Hill v Beckett* [1915] 1 KB 578; *Underwood v. Perry* [1923] WC & I Rep. 63.

¹⁰⁷ [1905] 1 KB 453, 458 (Collins MR).

¹⁰⁸ See, respectively, *Waites v. Franco-British Exhibition* (1909) 25 TLR 441; *Bagnall v. Levinstein* [1907] 1 KB 531; *Dow v. McNeil* [1925] WC & I Rep. 32 (although not followed *Wardell v. Kent County Council* [1938] 2 KB 769); *re South Dublin Union Officers* [1913] WC&I Rep. 245.

¹⁰⁹ On the internal contracting system generally, see Pollard, 1968; Littler, 1986: ch. 6; Biernacki, 1995: ch. 2; Cappelli, 2000.

¹¹⁰ The courts reached opposing outcomes in different cases. Butty workers and foremen were found to be within the protection of the Workmen's Compensation Acts in *Evans v. Penwelt Dinas Silica Brick Co.* (1901) 18 TLR 58 and *Paterson v. Lockhart* (1905) 42 SLR 755, but outside them in *Simmons v. Faulds* (1901) 17 TLR 352, *Hayden v. Dick* (1902) 40 SLR 95 and

- Vanplew v. Parkgate Iron & Steel Co.* [1903] 1 KB 851.
- 111 *Crowley v. Limerick County Council* [1923] 2 Ir. R. 178; *Littlejohn v. Brown & Co. Ltd.* 1909 SC 87; although cf. *M'Ready v. Dunlop* (1900) 37 SLR 779; *Doharty v. Boyd* 1909 SC 87.
- 112 Workmen's Compensation Act 1906, s. 13; National Insurance Act 1911, Sch. 1, Part I, para. (a).
- 113 *Scottish Insurance Commissioners v. M'Naughton* 1914 SC 826.
- 114 There are some antecedents in the law relating to industrial action: see the Industrial Courts Act 1919, discussed by Kahn-Freund, 1966.
- 115 *Social Insurance and Allied Services* Cmd. 6404, November 1942, at para. 314.
- 116 NIA 1946, s. 1(2).
- 117 The modern division between self-employment and employment in tax law emerged gradually during the inter-war period and finally crystallised with the introduction of the Pay-As-You-Earn system of automatic deductions of tax from the earnings of employees by the Income Tax (Employments) Act 1943.
- 118 The first such statute was the Contracts of Employment Act 1963; the relevant provision is now contained in the Employment Rights Act 1996, s. 230(1).
- 119 See, in the context of social insurance, *Vandyk v. Minister of Pensions and National Insurance* [1955] 1 QB 29.

- 120 See, in particular, *Stevenson, Jordan & Harrison v. McDonald & Evans* [1952] 1 TLR 101.
- 121 *Cassidy v. Minister of Health* [1951] 2 KB 343; *Roe v. Minister of Health* [1954] 2 QB 66; *Beloff v. Pressdram Ltd.* [1973] 2 All ER 241.
- 122 *Market Investigations Ltd. v. Minister for Social Security* [1969] 2 QB 173; *Lee Ting Sang v. Chung Chi-Keung* [1990] ICR 409. This is not to say that problems over the classification of workers ceased; far from it. The ‘economic reality’ and ‘integration’ tests were eclipsed by the more restrictive ‘mutuality of obligation’ test from the late 1970s and early 1980s onwards, and some growing categories of employment, in particular agency labour, escaped many of the norms of employment protection altogether. Some of these problems have been addressed in the ‘fairness at work’ legislation of the Labour government elected in 1997. See Deakin, 2001.
- 123 Marsden, 1999: 20.
- 124 Kahn-Freund, 1967.
- 125 This phrase is also Kahn-Freund’s (Kahn-Freund, 1966).
- 126 For discussion of the meaning of Ian Macneil’s concept of a ‘relational’ contract in the context of employment, see Deakin, 2001b, and for judicial recognition of this relational character of the contract of employment, see the judgment of Lord Steyn in *Johnson v. Unisys Ltd.* [2001] IRLR 279, 283.
- 127 [1909] AC 488.
- 128 [2001] IRLR 279.

¹²⁹ On this, see Freedland, 1995.

¹³⁰ On the ‘worker’ concept, see Davies and Freedland, 2000; Deakin, 2001a. For an account of the statutory contexts in which the concept is used and of the case-law interpreting the concept, see Deakin and Morris, 2001: ch. 3.5.2.

TABLE

Table 1**Legal classifications of work relationships from the eighteenth century to the mid-twentieth century**

Period to 1800	
Servant	Worker (typically unmarried) engaged in service under a yearly hiring, entitled to payment in cash or in kind whether or not there was work during the period of the hiring, and with a right to a poor law settlement after the hiring ended.
Labourer	Daily or casual manual worker in agriculture or the unregulated trades.
Master, journeyman, apprentice	Worker in trades protected by guild regulation.
Period from 1800 to 1875	
Servant	Manual worker in industry or agriculture under the disciplinary regime of the master and servant legislation, with little security or wages or employment.
Employee	Clerical, managerial or professional worker outside the master-servant regime, with a degree of contractual income and employment security.
Independent contractor	Independent artisan outside the scope of master and servant legislation.
Period from 1875 to 1950	
Workman	Manual worker subject to the semi-disciplinary provisions of the Employers and Workmen Act 1875, increasingly protected as the period went on by collective bargaining, workmen's compensation and social insurance legislation.
Employee	At the beginning of the period, a non-manual worker with managerial or professional status; by the end of the period, a wage or salary-dependent worker, either manual or non-manual.
Self-employed	Independent worker not employed under a contract of employment.

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