

OXFORD

# THE CONCEPT OF THE EMPLOYER

Jeremias Prassl



OXFORD MONOGRAPHS ON LABOUR LAW

## THE CONCEPT OF THE EMPLOYER

## OXFORD MONOGRAPHS ON LABOUR LAW

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# The Concept of the Employer

JEREMIAS PRASSL

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To my  
Mother and Father

*. . . nihil tantum repugnat ne verbis illustretur, at nihil adeo necesse  
est ante hominum oculos proponere ut certas quasdam res, quas  
esse neque demonstrari neque probari potest, quae contra eo ipso,  
quod pii diligentesque viri illas quasi ut entia tractant,  
enti nascendique facultati paululum appropinquant.*

*H.H.*



## *General Editors' Preface*

Almost exactly fifty years ago Lord Wedderburn introduced his new 'simple account of the relationship between British workers and the law' with the words, which became famous, 'Most workers want nothing more of the law than that it should leave them alone' (*The Worker and the Law*, 1965, p 9). In a very changed environment, it could now be said with equal force that most employers want nothing more of the law than that it should leave *them* alone. In its treatment of relations between workers and employers, both individual and collective, English law does not 'leave employers alone' and nor should it do so, but there are some serious shortcomings in the way that it understands and deals with the concept of the employer. This book focuses on those shortcomings and tries to suggest some ways of repairing them.

As the Series Editors, we are very pleased to include this volume in the Labour Law Monographs Series. The volume builds on the author's doctoral thesis and article writings, and we are sure that it will come to be regarded as having made an authoritative contribution to this somewhat neglected and under-theorised aspect of the law of the employment relation. Its claims to that authoritative status will, we think, be reinforced by the ways in which it explores the corporate law dimension of the concept of the employer, especially in the context of Private Equity, and also develops a comparative perspective upon the concept by means of a careful study of the notion of the *Konzern* in German law—both of those being methodologies of which Lord Wedderburn, among others, would have approved as offering crucial insights to English labour law.

Moreover, it seems to us that this highly original work is timely in a practical as well as a theoretical sense. There is a great deal of policy debate about the extension of moral and legal responsibility for exploitative employment practices 'further back up the supply chain' both nationally and internationally, and this book offers much in the way of finely textured technical argumentation to those discussions. In recent years we have been in the fortunate position of being able to commend new additions to our series on the basis that they will maintain and add to the cumulatively high standing of the previously published volumes. We confidently make that assertion with regard to this engaging and innovative new book.

PLD  
KDE  
MRF

1 December 2014





## Preface

Commenting on his series of paintings depicting faceless men in bowler hats, René Magritte (1898–1967) once noted that:

Everything we see hides another thing; we always want to see what is hidden by what we see. There is an interest in that which is hidden and which the visible does not show us. This interest can take the form of a quite intense feeling, a sort of conflict, one might say, between the visible that is hidden and the visible that is present.

The present work hopes to look behind one such visible that is nearly always present in employment law—the concept of the employee—in order to explore that which is often hidden and which the visible does not show us: the concept of the employer as counterparty to the contract of employment. It is an adaptation of my doctoral thesis, and its completion gives me the opportunity to acknowledge the help which I have had in writing not only this book but the thesis which preceded it. This, above all, is to acknowledge the intellectual example, generosity, and kindness of my *Doktorvater*, Mark Freedland, without whose wise counsel and encouragement neither project would have found fruition.

My two years of doctoral research were funded by the Arts and Humanities Research Council (Studentship *AH/I012826/1*), as well as smaller grants from the Foundation of the Swiss National Bank, the Faculty of Law, University of Oxford, and Magdalen College, Oxford. Columbia Law School, New York, and the Max Planck Institute of Comparative and International Private Law, Hamburg, kindly supported extended research visits. Officials at the European Commission (DG MARKET) provided helpful guidance and discussion of the design and impact of the AIFMD on the Private Equity industry. Tim Jenkinson at the Said Business School, Sean Rainey at Magdalen, and my former colleagues at UBS Investment Bank provided many an important lead into the world of PE; I am deeply grateful to all those fund managers, CEOs, bankers, professional advisers, and industry representatives who agreed to be interviewed, albeit on the condition of strict anonymity.

My examiners, Paul Davies and Simon Deakin, subjected the completed thesis to extensive scrutiny and provided many helpful suggestions for the further development of its enquiries in a stimulating viva and many conversations since. Anne Davies's comments at earlier stages were equally important in shaping and refining its arguments. Eli Ball, Hugh Collins, Joshua Getzler, Gregor Hogan, Franck Lirzin, and Ben Spagnolo commented extensively on the draft manuscript for the present book, and saved me from many an infelicity. I have attempted to state the law as of 1 October 2014; the responsibility for all remaining errors is, of course, entirely mine.

It would not have been possible to complete this work without the support, comments and criticisms of my teachers, colleagues, and friends. I am grateful,

in particular, to George Adams, Einat Albin, John Armour, Diamond Ashiagbor, Sue Ashtiany, Dan Awrey, Roderick Bagshaw, Lizzie Barmes, Catherine Barnard, Ulf Bernitz, Michal Bobek, Leon Brittan, Nicola Countouris, Paul Linton Cowie, Richard Ekins, Judy Fudge, Rob George, Sir Roy Goode, Tamás Gyulavári, Angus Johnston, Jeff King, Dorota Leczykiewicz, Sylvaine Laulom, Antonio Lo Faro, Piera Loi, Amy Ludlow, Antoine Lyon-Caen, Luke Mason, Sonia McKay, Hans Peter Meister, Sandy Meredith, Jenny Payne, Amir Paz-Fuchs, Francis Reynolds, Christopher Roeder, Roger Smith, Jane Stapleton, Alain Supiot, Stefan Vogenauer, and Steve Weatherill. As regards comparative matters, I am in the debt of Paula Aschauer, Leopold Bauer, Reinhard Bork, Horst Call, Martin Flohr, Andreas von Goldbeck, Klaus Hopt, Elisabeth Kohlbacher, Laurenz Liedermann, Robert Rebhahn, Martin Voelker, Bernd Waas, Christine Windbichler, and Reinhard Zimmermann for guiding my first steps in German law. In the United States, I benefitted greatly from discussions with Mark Barenberg, Jack Coffee, Cindy Estlund, Ron Gilson, Lynn Rhinehart, and Katherine Stone. Cathy Ruckelshaus and her colleagues at NELP kindly invited me on several occasions to present my ideas to policy makers and practitioners in Washington, DC.

I am grateful to the series editors of the *Oxford Monographs on Labour Law* and my anonymous reviewers for agreeing to publish this work, as well as Alex Flach, Natasha Flemming, and their team at OUP for help at each stage of the publishing process. Thomson Reuters and Hart Publishing, an imprint of Bloomsbury Publishing plc, kindly granted permission to draw on material first published in the *Law Quarterly Review* ('The Notion of the Employer' (2013) 129 LQR 380) and in *The Autonomy of Labour Law* (Hart 2015), a collection edited with A Bogg, C Costello, and A Davies.

I submit this manuscript ten years to the day after I first came up to Oxford. Writing on the eve of becoming an Official Fellow of Magdalen College, I am deeply aware of how tremendously lucky I have been to have the love and support of my entire family, as well as enjoying terrific institutional support and personal guidance throughout the years. In addition to those already mentioned, special thanks are due to Geoffrey Tindyebwa at the Lester B Pearson United World College of the Pacific for introducing me to the joys of writing. As a student in Oxford, I greatly benefited from the teaching and guidance of Liz Fisher, Lucia Zedner, Eloise Scotford, and Simon Douglas at Corpus and Katharine Grevling, my graduate advisor at Magdalen. Gráinne de Búrca, Ben Sachs, and Cass Sunstein supervised my early research efforts at Harvard. Peter Mirfield and Rob George led me through my first teaching steps whilst a Stipendiary Lecturer at Jesus College, and during my subsequent years as a Supernumerary Fellow of St John's, I could not have had better pupil masters than Paul Craig and Simon Whittaker.

Beyond the library, many friends were there with me throughout the research years: Sebastian Butschek, Ben Gardner, Hannah Glover, Ben Jones, Liz Lindesay, Aidan Reay, and Johannes Terwitte always lent a kind ear. Joe Abdalla, Clare Bucknell, Anna Cairns, Hannah Davison, James Hillis, Jess Howley, Kate Mitchell, Marius Ostrowski, the Rev'd Michael Piret, Olivia Reilly, Jaani

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Last, but by no means least, two Hertford labour lawyers deserve special mention: Alan Bogg and Ben Ogden. I first studied labour law primarily on the basis that tutorials were going to be given by Alan, and was richly rewarded: not only by some of the very best teaching I have ever experienced, but also insofar as the very idea for my thesis, and thus this book, was first conceived on a Tuesday evening walk home from Alan's lecture on *The Composition of the Workforce*. A further attraction in taking labour law was the opportunity to share those weekly discussions with Ben, whose sharp intellect and cheeky grin I had come deeply to admire during our Erasmus adventures on the Continent. The joy and elation of putting the finishing touches to my doctoral thesis were overshadowed by the news of Ben's tragic death in September 2012, shortly after his qualification into A&O's employment law team. He is missed every day.

J.F.B.B.P.

Michaelmas Day 2014  
Magdalen College, Oxford



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## *Table of Abbreviations*

AG	<i>Aktiengesellschaft</i>
AIF	Alternative Investment Fund
AIFM Directive	Directive (EU) 61/2011 of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L174/1
AIV	Alternative Investment Vehicle
AktG 1965	<i>Aktiengesetz 1965</i>
ARD	Acquired Rights Directive (Council Directive (EC) 23/2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16)
ASPV	Acquisition Special Purpose Vehicle
AÜG 2003	<i>Arbeitnehmerüberlassungsgesetz 2003</i>
BAG	<i>Bundesarbeitsgericht</i>
BetrVG 1972	<i>Betriebsverfassungsgesetz 1972</i>
BGB	<i>Bürgerliches Gesetzbuch</i>
BGH	<i>Bundesgerichtshof</i>
BVCA	British Venture Capital and Private Equity Association
BVG	<i>Bundesverfassungsgericht</i>
CA	Court of Appeal
CEO	Chief Executive Officer
CJEU	Court of Justice of the European Union
Collective Redundancies Directive	Council Directive (EC) 59/1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16
DDA 1995	Disability Discrimination Act 1995
DrittelBG 2004	<i>Drittelbeteiligungsgesetz 2004</i>
EASI	Employment Agencies Standards Inspectorate
EAT	Employment Appeals Tribunal
EBITDA	Earnings Before Interest, Taxes, Depreciation, and Amortization
ECSR	European Committee on Social Rights
EHRC	Equality and Human Rights Commission
ERA 1996	Employment Rights Act 1996
ET	Employment Tribunal
EU	European Union

EVCA	European Private Equity and Venture Capital Association
GLA	Gangmasters Licensing Authority
GmbHG 1892	<i>Gesetz betreffend die Gesellschaften mit beschränkter Haftung 1892</i>
GP	General Partner
HC	High Court
HR	Human Resources
HSWA 1974	Health and Safety at Work Act 1974
ICFC	Industrial and Commercial Finance Corporation
IDREC	Inter-Divisional Research Ethics Committee
ILO	International Labour Organization
KSchG 1969	<i>Kündigungsschutzgesetz 1969</i>
Information and Consultation Directive	Directive (EC) 14/2002 of the Council and the European Parliament of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29
KWC	<i>Konzern Works Council</i>
LBO	Leveraged Buy-Out
LP	Limited Partner
MBI	Management Buy-In
MBO	Management Buy-Out
MitbestG 1976	<i>Mitbestimmungsgesetz 1976</i>
MontanMitbestG 1951	<i>Montanmitbestimmungsgesetz 1951</i>
P2P	Public to Private
PE	Private Equity
RRA 1976	Race Relations Act 1976
SDA 1975	Sex Discrimination Act 1975
SER	Standard Employment Relationship
SPV	Special Purpose Vehicle
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union
TUC	Trades Union Congress
TULRCA 1992	Trade Union and Labour Relations (Consolidation) Act 1992
TUPE 2006	Transfer of Undertakings (Protection of Employment) Regulations 2006
UKSC	United Kingdom Supreme Court

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