THE CONTRACT OF EMPLOYMENT

GENERAL EDITOR
MARK FREEDLAND

OXFORD

THE CONTRACT OF EMPLOYMENT

THE CONTRACT OF EMPLOYMENT

Edited by

ALAN BOGG

Professor of Labour Law, University of Oxford

DAVID CABRELLI

Senior Lecturer in Commercial Law, University of Edinburgh

HUGH COLLINS

Vinerian Professor of English Law, University of Oxford

NICOLA COUNTOURIS

Professor of Labour Law, University College London

ACL DAVIES

Professor of Law and Public Policy, University of Oxford

SIMON DEAKIN

Professor of Law, University of Cambridge

MARK FREEDLAND (General Editor)

Emeritus Professor of Employment Law, University of Oxford

JEREMIAS PRASSL

Associate Professor of Law, University of Oxford

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2016

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2015956651

ISBN 978–0–19–878316–9

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

LIST OF AUTHORS

Einat Albin LLB (Tel Aviv), DPhil (Oxford), Lecturer and Academic Director of the Clinical Legal Education Centre, Faculty of Law, Hebrew University of Jerusalem

Lizzie Barmes BCL, MA (Oxford), Professor of Labour Law, Queen Mary University of London

Alan Bogg BCL, MA, DPhil (Oxford) **(Editor),** Professor of Labour Law, University of Oxford and Fellow of Hertford College Oxford

Douglas Brodie LLB, PhD (Edinburgh), Professor of Employment Law, University of Strathclyde

David Cabrelli LLB, DipLP (Dundee) **(Editor),** Senior Lecturer in Commercial Law, University of Edinburgh

Hugh Collins FBA, MA, BCL (Oxford), LLM (Harvard) **(Editor),** Vinerian Professor of English Law and Fellow of All Souls College Oxford

Nicola Countouris Laurea (Bari, Italy), MSc (LSE), MJur, DPhil (Oxford) **(Editor),** Professor of Labour Law, University College London

ACL Davies MA, DPhil (Oxford) **(Editor),** Professor of Law and Public Policy and Dean, Faculty of Law, University of Oxford and Fellow of Brasenose College Oxford

Simon Deakin FBA, MA, PhD (Cambridge), PhD (h.c.) (Louvain-la-Neuve) **(Editor),** Professor of Law, University of Cambridge and Fellow of Peterhouse, Cambridge

Ruth Dukes LLB (Edinburgh), LLM (Humboldt, Berlin), PhD (LSE), Senior Lecturer in Law, University of Glasgow

Sandra Fredman QC (Hon) FBA, BA (Witwatersrand), BCL, MA (Oxford), Rhodes Professor in the Laws of the British Commonwealth and the USA, University of Oxford and Fellow of Pembroke College Oxford

Mark Freedland QC (Hon) FBA, LLB (London), MA, DPhil (Oxford) **(General Editor),** Emeritus Professor of Employment Law, University of Oxford and Emeritus Research Fellow of St John's College Oxford

Judy Fudge FRS Canada, BA (McGill), MA, LLB (York), DPhil (Oxford), Professor of Law, University of Kent

Virginia Mantouvalou LLB (Athens), LLM in Human Rights (LSE), PhD (LSE), Reader in Human Rights and Labour Law and Director of Graduate Research Studies, Faculty of Laws, University College London

Louise Merrett MA, PhD (Cambridge), Senior Lecturer, University of Cambridge and Fellow of Trinity College Cambridge

Claire Mummé MA (Toronto), LLB, PhD, (Osgoode), LLM (NYU), Assistant Professor, Faculty of Law, University of Windsor

Wanjiru Njoya LLB (Nairobi), LLM (Hull), MA (Oxford), PhD (Cambridge), Assistant Professor, Faculty of Law, Queen's University, Kingston, Ontario, Canada

Jeremias Prassl MA, MSt, DPhil (Oxford), LLM (Harvard) **(Editor),** Associate Professor of Law, University of Oxford and Fellow of Magdalen College Oxford

Joellen Riley MA, LLB, PhD (Sydney), BCL (Oxford), Professor of Labour Law, The University of Sydney

Astrid Sanders BCL, BA, DPhil (Oxford), Assistant Professor of Labour Law, London School of Economics and Political Science

FOREWORD

The Rt Hon Lord Justice Underhill

This is an important and very welcome book. As the introductory chapter points out, English law continues to treat the individual contract of employment as being at the very centre of the employment relationship. Yet the developments of the last decades have raised a plethora of questions both about the characteristics of the contract itself and about its relationship with the multifarious rights created by recent legislation (both domestic and EU-derived). These developments include such crucial decisions in the substantive law as the recognition by the House of Lords in *Malik* of the "trust and confidence term"; the tortuous attempts in *Johnson v Unisys*, *Eastwood v Magnox*, and *Edwards v Chesterfield* to identify the boundary between claims for the breach of that term and claims that could only be brought under the statutory unfair dismissal regime; and the decision in *Société Générale v Geys*, finally resolving one long-standing conundrum but raising new uncertainties. However, they also include such important changes in the workplace as the increasing individualization of the employment relationship and the growing role of the 'human resources' function, with its process-driven outlook, in the management of relations between employers and employees. There is a clear need for a comprehensive analysis of the state of the law relating to the contract of employment in the light of these developments, and one which goes beyond the merely descriptive and addresses normative questions also.

It is that need which this work authoritatively fills. A team consisting of most of the leading academics in this field has come together to produce it. It would be invidious for me to single out particular names, but I would draw attention to the fact that the younger generation is as well represented as the older. It is important to appreciate that this is not simply a collection of essays on related themes. As explained in the Editors' Preface, the shape of the work, the issues to be addressed, and the methodology to be followed have been the subject of discussion and agreement by a core group over a lengthy period of careful planning. The result is a work which comes as close as is likely to be possible to a definitive treatment of the multitude of issues surrounding the modern contract of employment. It will be of immense value not only to students and academics, but also to practitioners and judges seeking principled answers to the difficult questions which repeatedly arise in this field.

Nicholas Underhill
6 March 2016

EDITORS' PREFACE

Among those pursuing the vocation, study, or practice of labour law or employment law, there is a considerable consensus, albeit sometimes a reluctant one, that the contract of employment is at the core of their subject or discipline—as much the 'cornerstone of the edifice' as when Sir Otto Kahn-Freund so characterized it in 1954, though now for rather different reasons which will emerge in the ensuing chapters of this work. In the course of 2013, a group of labour law scholars working in Oxford conceived of a new project of writing about this ever-foundational topic, and began to gather together the consortium of authors who have written and edited this work. Our subject matter has been loosely formulated as the English law of the contract of employment, by which we mean more precisely the law of the contract of employment in the law of England and Wales, but with quite frequent reference to Scots law and occasional reference to the law in Northern Ireland. This necessarily and appropriately includes some reference to European Union law and European human rights law; and some comparative reflections are included, specifically in the shape of chapters making comparison with the evolution, from common or closely related origins, of the law of the contract of employment in Australia and Canada. This should not, however, be regarded as a project of writing about 'the common law of the contract of employment' alone: much of our attention has been devoted to understanding and analysing the relationship in this particular juridical context between 'common law' and 'statute law', which we see as a central feature, one might almost say the central mystery, of the modern law of the contract of employment.

In its treatment of that subject matter, this project of work has aimed to achieve and combine two goals. On the one hand, we have sought the benefit of having many expert authors speaking in their own individual voices on topics of special interest to them within this field. On the other hand, we have tried to insist upon a sufficient comprehensiveness and coherence of treatment of those topics to endow the finished work with the character of a treatise, albeit a multi-authored one. The reconciliation of those objectives was the subject of a careful programme of work: two workshops were held in Oxford during 2014, at which the authors gathered to discuss plans for and preliminary drafts of chapters, followed during 2015 by completion of the chapters by their respective authors and a process of comment and co-ordination by a sub-group of the authors who have also acted as editors. As a result, a real sense of general responsibility for the work as a whole is shared between the editors and the authors as a group, but which we hope has not been at

the cost of the intellectual autonomy of the chapters, the author(s) of each one of which is or are respectively identified.

In the course of this project, many debts of gratitude have been incurred, both to individuals and to institutions, which are now very sincerely acknowledged. First, there are debts of gratitude for the comment upon and criticism of ideas and drafts, and the general provision of inspiration, which is crucial to the success of any such project. Normally, one would expect to find at this point a long roll of honour of those providing such comment, criticism, and inspiration. In the case of this project, the authors themselves have largely provided those crucial ingredients by way of mutual interaction; but where appropriate special thanks to external commentators are recorded at the beginning of the chapters in question. Moreover, we should like to acknowledge the friendly support of the late Sir Bob Hepple to the project especially as it was initially taking shape; and we also appreciate Sir Nicholas Underhill's generosity in agreeing to read our manuscript and write the Foreword to our book. In the closing stages of our work, significant contributions to the quality of the manuscript were made, and the apparatus of tables of cases and legislation was provided, by the team of graduate researchers who assisted in the process of technical editing—Kalina Abjadieva, Philippa Collins, Ioannis Katsaroumpas, and Cian O'Concubhair from Oxford and Claire Brown from Edinburgh. We are very grateful to them for their enthusiastic and fruitful efforts.

As to the institutional support which our project has received, we wish to thank the Law Faculties of the Universities of Oxford and Edinburgh and St John's College and Hertford College Oxford for their provision of research funding to our two workshops and to the technical editing work of our team of researchers. Oxford University Press has been an accommodating publisher, and we especially thank Natasha Flemming, Alex Flach, Elinor Shields, Franziska Bröckl, Bryony Matthews, Caroline Quinnell, Kim Harris, and Sophie Butchers for their diligent work in their various different editorial capacities. The usual burden of support for the authors and sacrifice of their leisure time has been nobly borne by their spouses, partners, and families.

Finally, our timeline—the law is stated as at the time of submission of the manuscript in October 2015, but brief reference to subsequent developments down to the date of this Preface in 2016 has been incorporated where possible. A small programme of governmental legislation concerning 'zero hours contracts', and in particular their 'exclusivity', was completed in the closing weeks of 2015 by the enactment of the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015, SI 2015/2021, which complemented the provisions of section 153 of the Small Businesses, Enterprise and Employment Act 2015 inserting new sections 27A and 27B into the Employment Rights Act 1996. This came too late for treatment in the present work; in any case, we regard this legislation as largely

irrelevant to, and unlikely to be in any way remedial of, the concerns about the rapid and unchecked growth of the practice of 'zero hours contracts' which are expressed at various points in the work, in particular in Chapters 3, 10, and 11.

Alan Bogg
David Cabrelli
Hugh Collins
Nicola Countouris
ACL Davies
Simon Deakin
Mark Freedland (General Editor)
Jeremias Prassl
Oxford, Edinburgh, London, and Cambridge
1 March 2016

CONTENTS

II. THE SPECIFIC PART—AREAS AND DOCTRINES

TABLE OF CASES

UNITED KINGDOM

COURT OF JUSTICE OF THE EUROPEAN UNION

EUROPEAN COURT OF HUMAN RIGHTS

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

UNITED NATIONS HUMAN RIGHTS COMMITTEE

INTERNATIONAL JURISDICTIONS

Australia

Canada

New Zealand

United States

TABLES OF LEGISLATION

UNITED KINGDOM STATUTES

UNITED KINGDOM STATUTORY INSTRUMENTS

EUROPEAN UNION LEGISLATION

Regulations

Directives

Other Instruments

INTERNATIONAL LEGISLATION

Australia

Canada

France

USA

TREATIES AND CONVENTIONS

European

International Labour Organization

United Nations

LIST OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
BIR	Brussels I Regulation
BIS	Department for Business, Innovation & Skills
BJIR	British Journal of Industrial Relations
CA	Court of Appeal
CDPA	Copyright, Designs and Patents Act 1988
CFREU	Charter of Fundamental Rights of the European Union
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
COEA	Contracts of Employment Act 1963
CSJPS	Civil and Social Justice Panel Survey
CSJS	Civil and Social Justice Survey
Cth	Commonwealth of Australia
CUP	Cambridge University Press
EA	Employment Act 2002
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIPR	European Intellectual Property Review
EqA	Equality Act 2010
EqPA	Equal Pay Act 1970
ERA	Employment Rights Act 1996
ET	Employment Tribunal
EU	European Union
FTER	Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
FTSE	Financial Times Stock Exchange
FWC	Fair Work Commission
HC	High Court
HL	House of Lords
HMRC	HM Revenue & Customs
HR	Human Resources
HRA	Human Rights Act 1998
HRM	Human Resource Management
HUP	Harvard University Press
IER	Institute of Employment Rights
ILJ	Industrial Law Journal
ILO	International Labour Organization
IRA	Industrial Relations Act 1971
LQR	Law Quarterly Review

MLR	Modern Law Review
MPLR	Maternity and Parental Leave etc Regulations 1999
NHS	National Health Service
NIRC	National Industrial Relations Court
NLJ	New Law Journal
NMW	National Minimum Wage
NMWA	National Minimum Wage Act 1998
NMWR	National Minimum Wage Regulations 2015
NSW	New South Wales
OJLS	Oxford Journal of Legal Studies
ONCA	Ontario Court of Appeal
OUP	Oxford University Press
PALR	Paternity and Adoption Leave Regulations 2002
PILON	payment in lieu of notice
PWD	Posted Workers Directive
Qld	Queensland
RC	Rome Convention
RIR	Rome I Regulation
RMT	National Union of Rail, Maritime and Transport Workers
SC	Supreme Court
SCC	Supreme Court of Canada
SER	standard employment relationship
SETA	Survey of Employment Tribunal Applications
SPLR	Shared Parental Leave Regulations 2014
TCR	'termination change and redundancy'
TFEU	Treaty on the Functioning of the European Union
TULRCA	Trade Union and Labour Relations (Consolidation) Act 1992
UCTA	Unfair Contract Terms Act 1977
UDHR	Universal Declaration of Human Rights
UN	United Nations
VAT	Value Added Tax
WDF	World Duty Free
WTR	Working Time Regulations 1998
YUP	Yale University Press

Part I

THE GENERAL PART—STRUCTURES AND THEMES

1

GENERAL INTRODUCTION—AIMS, RATIONALE, AND METHODOLOGY

Mark Freedland

Introduction

The aims of this book can be condensed down to a single objective, which is that of effecting a critical re-analysis of the English law of the contract of employment in the form of a multi-authored but closely co-ordinated treatise. This notion of 'critical re-analysis' is fairly akin to that of 're-statement', certainly to some versions of the idea of re-statement; but this work does not have the ambition to codify the English law of the contract of employment, and is in this respect in some contrast, for instance, with the products of the American Restatement project.[1] The notion of critical re-analysis is at once more broadly contextual, and perhaps also more underlyingly normative, than that of 're-statement'; but that does not prevent the authors of this work from aspiring to a degree of authoritativeness in the way that 're-statements' tend to do. This introductory chapter sets out and develops the programme of the team of authors for fulfilling this objective. It first seeks to identify an overall *rationale* for the work, a reason for carrying it out, which is articulated in terms of the 'problematical centrality of the contract of employment' to the theory and practice of labour law.

The chapter then seeks to develop a distinctive *methodology* for carrying out the work, one which draws upon the variety of particular interests within the law of the contract of employment which the authors bring to this work and the variety of perspectives from which they survey the subject. This methodology has three aspects, by which is meant three dimensions in which that body of law can be analysed and understood. These aspects are:

[1] For example, Restatement (Second) of Contracts (1981) and Restatement (Third) of Agency (2006).

(1) the institutional basis,
(2) a normative critique, and
(3) a doctrinal analysis.

Each of these is introduced in the succeeding sections, and, in a concluding section, it is explained how they are inter-related to each other in the course of this work.

1. The Problematical Centrality of the Contract of Employment

The centrality of the contract of employment to labour law is generally accepted as a descriptive proposition, but is much disputed, indeed often denied, as a normative proposition. This antithesis presents a foundational problem for labour law which this work seeks to address in all its aspects. The descriptive centrality of the contract of employment to English labour law is axiomatic, in the sense that labour law identifies the contract of employment as the legal paradigm for the employment relation: the contract of employment becomes almost by definition labour law's way of rendering or characterizing the employment relation. However, no sooner is that identity made than it is revealed as a highly problematical one. Does it and should it include every kind of employment relation? Moreover, for those employment relations which are within its descriptive category, which elements in those relations count and should count as terms or provisions of the legal contract? On the other hand, what provisions or regulations of labour law are, and should be, imposed upon and made part of the contract of employment? Furthermore, the contract of employment, thus descriptively located at the centre of the stage of labour law, presents three very basic normative issues or problems.

First, the contract of employment seems, as a central focus for labour law, in its nature to prioritize individual work relations over collective ones, indeed, in the view of many, individualistic values over solidaristic ones. Secondly, its contractual element seems, as a central focus for labour law, in its nature to favour arguments for 'freedom of contract', often in the guise of 'flexibility', over arguments for worker protection. Thirdly, it is often regarded, as a central focus for labour law, as perpetuating pre-modern views of employment relations as strictly hierarchical ones characterized by obligations of deference or obedience on the part of workers, and by entitlements to continuing discretionary control on the part of employers or managers.[2]

Moreover, the contract of employment, thus located at the centre of labour law, also seems to present several further issues or problems which are both normative and structural in character. First, there is a structural question of whether the

[2] P Davies and M Freedland (eds), *Kahn-Freund's Labour and the Law* (Stevens 1983) 17–18.

contract of employment represents a sufficiently or suitably comprehensive category of personal work relations to serve as the dominant paradigm for the legal regulation of those relations.[3] This issue becomes especially problematical in so far as that dominant paradigm consists not of the contract of employment in all its possible forms but more particularly of a 'standard' contract of employment.[4] Secondly, there is a further and distinct structural question of whether the law of the contract of employment, understood as basically a body of judge-made common law, sufficiently or suitably integrates a large set of norms derived from legislation on the one hand and collective agreements on the other. The latter problem seems to be receding in practical importance;[5] but the former problem seems to be gaining in practical importance.[6]

Thirdly, there is a further question, both structural and normative, as to whether the law of the contract of employment is sufficiently, or on a contrasting view excessively, distinct from the general law of contract.[7] One might ask this question of various aspects of the law of the contract of employment, perhaps especially with regard to the termination of the contract and the remedies for wrongful termination. By this path of argument, one arrives at a position in which the contract of employment and the law of the contract of employment are indeed identified as central to labour law, but in which that centrality is fraught with analytical and normative issues and problems. The essential rationale for this work is the shared view of its authors that this is an extremely important set of issues and problems which might in some measure be addressed by their concerted efforts. The remaining sections of this introductory chapter seek to establish a methodology for an inquiry which is framed by this rationale.

---

[3] See B Hepple, 'Restructuring Employment Rights' (1986) 15 ILJ 69; Lord Wedderburn, 'From Here to Autonomy?' (1987) 16 ILJ 1, 5–7; M Freedland, *The Personal Employment Contract* (OUP 2003); and M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2012).

[4] See A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001) 1–2; and D Marsden, 'The "Network Economy" and Models of the Employment Contract' (2004) 42 BJIR 659, 663–70; and compare also Z Adams and S Deakin, 'Institutional Solutions to Precariousness and Inequality in Labour Markets' (2014) 52 BJIR 779.

[5] O Kahn-Freund, 'Collective Agreements' (1941) 4 MLR 225, 226–7; O Kahn-Freund, 'Collective Agreements under War Legislation' (1943) 6 MLR 112, 115–16; O Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell 1954) 42 and 58; A Flanders, 'Collective Bargaining—A Theoretical Analysis' (1968) 6 BJIR 1, 6–10; and O Kahn-Freund, 'The Shifting Frontiers of the Law: Law and Custom in Labour Relations' (1969) 22 CLP 1.

[6] See B Hepple, *Rights at Work: Global, European and British Perspectives* (Sweet & Maxwell 2005) 65 and A Bogg, 'Common Law and Statute in the Law of Employment' (2015) 68 CLP (forthcoming).

[7] H Collins, 'Contractual Autonomy' in A Bogg, C Costello, ACL Davies, and J Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 45.

2. The Institutional Basis of the Law of the Contract of Employment

There already exists a quite well-developed body of critical legal discourse which exposes and explores the above-mentioned set of issues and problems. However, there would seem to be scope for a rather fuller articulation than currently exists of the institutional and procedural context within which the law of the contract of employment operates and develops. This articulation could usefully replicate, in a changed environment, and in a changed form, the kind of institutional and contextual exposition which used to take place under the disciplinary umbrella of 'industrial relations', a genre of social studies which has become greatly diminished to the point where it exercises very little influence upon the way in which exponents of the law of the contract of employment understand the factual context or practical operation of that body of law.

As a result, sight has somewhat been lost of the institutional apparatus for the formation and the conduct of those arrangements for work which labour law recognizes and identifies as 'contracts of employment'. One of the principal aims of this work will be to re-acquire some ways of capturing and analysing those realities, both at the theoretical level and at the empirical level, and to make use of the insights thus obtained to illuminate the prevailing understanding of the law of the contract of employment. There are various genres of writing which can be drawn upon for this purpose, with which the team of authors have had some significant engagement, for example those which concern institutional theory and systems theory in general,[8] and, more particularly, theories of 'relational contracts',[9] 'network contracting',[10] 'behavioural conflict in the workplace',[11] and 'workers' voice'.[12] Drawing upon such ideas, we seek to locate the technical or

[8] S Deakin, 'The Contribution of Labour Law to Economic and Human Development' in G Davidov and B Langille, *The Idea of Labour Law* (OUP 2011) 162–3.

[9] I Macneil, 'Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854; I Macneil, *The New Social Contract: An Enquiry into Modern Contractual Relations* (YUP 1980); H Collins, 'The Contract of Employment in 3D' in D Campbell, L Mulcahy, and S Wheeler (eds), *Changing Concepts of Contract* (Palgrave MacMillan 2013) 65; RC Bird, 'Employment as a Relational Contract' (2005) 8 University of Pennsylvania Journal of Labor and Employment Law 148; D Brodie, 'How Relational is the Employment Contract?' (2011) 40 ILJ 232; and Chapter 7 of the present work.

[10] G Teubner, *Networks as Connected Contracts*, edited by H Collins with an introduction (Hart 2011); and M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart 2009).

[11] L Barmes, 'Common Law Confusion and Empirical Research in Labour Law' in A Bogg, C Costello, ACL Davies, and J Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 107; and L Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (OUP 2015).

[12] A Bogg and T Novitz, 'The Purposes and Techniques of Voice' in A Bogg and T Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 3.

doctrinal law of the contract of employment in an understanding of the theory and practice of work relations which it is hoped will be seen to represent a distinctive feature of the present work.

Sixty years ago, Otto Kahn-Freund produced a piece of writing which had a comparable aim, and, in a few illuminating pages, fulfilled a comparable function; it had a truly foundational significance for the study and exposition of the law of the contract of employment.[13] Allan Flanders and Hugh Clegg, engaged upon compiling an edited volume on 'The System of Industrial Relations in Great Britain', invited Kahn-Freund to contribute a long and quite comprehensive chapter on 'The Legal Framework', and within that chapter he provided, and indeed gave considerable prominence to, a succinct but ground-breaking account of the law of the contract of employment. In so doing, he fully anticipated—in a sense provided the original inspiration for—the notion of 'the problematical centrality of the contract of employment' around which this chapter is organized.

Kahn-Freund was there engaged upon locating the law of the contract of employment within the 'system of industrial relations' as it was then constituted. He was thinking about the law of the contract of employment as a system within a system (that of labour law) within a system (that of industrial relations); and he was concerned to identify the interactions and inter-dependences between those systems. At that time, this was a very creative undertaking, indeed quite consciously in part a work of construction rather than description, to the extent that the place of the law in industrial relations was a deliberately limited one[14]—which Kahn-Freund was himself identifying as the rightful state of affairs—and the place of the law of the contract of employment within that body of law was far from well established and, moreover, was from the outset a controversial one for thinkers such as him whose focus was on collective labour relations and, above all, on collective bargaining.

If this chapter and this work seek to perform a corresponding function for current times, that involves a recognition and exploration of the fact that each of those systems or sub-systems has been crucially transformed in the intervening years, as therefore, have been those interactions and inter-dependences between them. Labour lawyers are well accustomed to thinking about the ways in which their discipline has become an intensely developed one, with policy orientations which are hotly disputed both descriptively and normatively, but which are almost universally agreed upon as being very different from those of the era of 'collective

[13] O Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell 1954) 42.

[14] For a recent examination of the relationship between industrial relations and labour law, see figure 2 in BE Kaufman, 'History of the British Industrial Relations Field Reconsidered: Getting from the Webbs to the New Employment Relations Paradigm' (2014) 52 BJIR 1, 4.

laissez-faire'.[15] They are, perhaps, less well accustomed to reflecting upon some at least of the equally fundamental changes in the institutional environment of labour and employment relations which have taken place and which have transformed the role and character of the law of the contract of employment as Kahn-Freund was then portraying it.

So radical has this transformation been that it has extended to the very frame of reference itself for describing the institutional environment within which the law of the contract of employment functions: this would no longer be envisaged as that of 'the system of industrial relations', and instead one finds that the corresponding body of social and economic practice is typically identified and studied under the heading of 'human resource management'. This work is by no means the place for a general revisiting of that whole set of issues; but recognizing the epistemological turn from 'industrial relations' to 'human resource management' does assist in recognizing some of the key changes in that particular composite body of social, economic, and legal arrangements or practice which we are accustomed to think of as 'the contract of employment'.

Thus, by building upon that observation, and also upon the insights of Hugh Collins concerning the increasingly *bureaucratic* character of employment relations[16] and the increasingly '*standard-form*' character of the process of contracting for employment,[17] one can begin to construct a picture of the institutional basis of the contract of employment which is in some ways[18] dramatically different from the one which Kahn-Freund was describing. For Kahn-Freund, the legal contract of employment was above all the artificial reification, into the form of a contractual agreement between the employer and the employee, of a set of arrangements for employment which were still in 1954 essentially informal ones, especially so far as individual dealings with each worker were concerned. Even the partial formalization of those individual dealings which was imposed by employment legislation from 1963 onwards did not wholly disrupt that vision of the contract of employment, because it soon emerged from the case law that the courts accepted that the

[15] See H Collins, 'The Productive Disintegration of Labour Law' (1997) 26 ILJ 296; G Davidov and B Langille, *The Idea of Labour Law* (OUP 2011); S Deakin and F Wilkinson, 'The Evolution of Collective Laissez-Faire' (2004) 17 Historical Studies in Industrial Relations 1; P Davies and M Freedland, *Labour Legislation and Public Policy* (Clarendon Press/OUP 1993) chapters 10 and 11; and W McCarthy, 'The Rise and Fall of Collective Laissez Faire' in W McCarthy (ed), *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell 1992) 1–78.

[16] H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 ILJ 1.

[17] H Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36 ILJ 2.

[18] Though not in others; the bureaucratization of employment relations has, as Collins himself perceived, somewhat paradoxically often included the reassertion of unbridled managerial discretion, albeit now in the form of explicit rules conferring powers upon the employing enterprise to *vary the terms of the contract of employment itself*—rules which therefore in a formal sense bureaucratize the relation while in a substantive sense de-bureaucratizing it.

legislator had required the employer only to provide, *post hoc*, certain particulars of the terms of the contract of employment, rather than to embody the contract itself in documentary form.[19] This may seem a nicety, but it was one which helped to sustain a view of the contract of employment as still in essence a 'figment of the legal imagination'.[20]

That foundational idea of the legal contract of employment as a figment of the legal imagination has remained valid in so far as it identifies the falsity of any idea of the contract as one which is *individually negotiated* by any but the most advantaged of workers;[21] but it has, it is suggested, become seriously misleading in so far as it conjures up the vision of a still essentially *informal* set of arrangements of which the 'contractual' character is no more than a legal abstraction. It is quite to the contrary; many if not most employment relations are today couched in an array of documents which are self-consciously contractual and legal in character, much of the *purpose* of which is to align the work relation with employment legislation, fiscal regulation, and the social security system. Moreover, this characteristic is by no means confined to what remains of the 'standard employment relationship'. The burgeoning case law concerning casual, formerly regarded as 'atypical', employment relations provides a window upon a world of substantively loose but procedurally highly formalized and self-consciously contractual work arrangements. In certain leading cases such as *Autoclenz*,[22] the very point at issue is whether the courts can and will break through a carefully constructed formal contractual carapace of actual or virtual 'self-employment' to find a different 'reality' underneath it.

Furthermore, the institutional arrangements which sustain this new contractualism have themselves been considerably transformed into the emergent genre of 'human resource management'. The business of contracting for employment, and the implementation and termination of arrangements for employment, has been to a significant extent entrusted to specialized cadres of 'human resource managers', whose professional training and practice is quite tightly geared to the demands of employment legislation in general and discrimination legislation in particular.[23] This effect is greatly heightened by the rapid growth of employment via employment agencies and other intermediary enterprises, the very function of which is to handle the task of labour contracting and of 'human resource management' more broadly speaking; the business of those intermediary organizations is very much

[19] For a comprehensive discussion of the statutory provisions of the Contracts of Employment Act 1963, see Chapter 20, section 1A–C.

[20] Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 18.

[21] Ibid, 23–6 and 31; and see further Chapter 18, section 2.

[22] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745, [2011] ICR 1157.

[23] P Edwards, 'The Employment Relationship and the Field of Industrial Relations' in P Edwards (ed), *Industrial Relations: Theory and Practice* (2nd edn, Wiley 2009) 25–6.

that of professionalized employment contracting 'in the shadow of the law', to transpose Brian Bercusson's famous phrase.[24]

All that said, one needs to take care not to fall into the trap of in any way taking it for granted that these transformations are straightforwardly negative ones in a normative sense. There may be significant advantages in the transition from the institutional framework of industrial relations to that of human resource management; it has for instance done much to embed the drive against various kinds of discrimination and harassment in the institutional practice of employing enterprises, even if that drive is still far from its destination. Moreover, the argument which has been advanced in this section has not been intended as a normative one, but rather as one which indicates that the factual character and the institutional basis of 'the contract of employment' have been significantly transformed in recent decades—so much so that we need to begin to re-conceive our understanding of the very notion of 'the contract of employment' in the particular ways that have been indicated in the course of this section. In the next section, the focus turns to some normative implications which follow from that set of descriptive arguments. There are, however, one or two crucial descriptive steps which need to be taken before reaching that point, in particular to inquire further into the institutional basis of the law of the contract of employment.

Thus far, some key transformations in the organizational institutions by and within which contracts of employment are made and implemented have been identified, and it has been argued that those transformations affect and indeed alter the very nature of contracts of employment. The extent of those transformations, however, would be seriously understated if they were envisaged simply in terms of a transition from the organizational structures of 'industrial relations' to those of 'human resource management'. This might suggest that the institutions of 'human resource management' had become the very seat and location of power in which contracts of employment are made and carried out. In fact, the agencies of 'human resource management' are themselves very often no more than the executants of organizational employment strategies which have been formulated elsewhere in the structures of employing enterprises[25] often themselves situated in networks of enterprises;[26] and account has to be taken of structural changes in those enterprises and networks in order fully to understand the present reality of the institutional basis of the law of the contract of employment.

[24] B Bercusson, 'The Dynamic of European Labour Law After Maastricht' (1994) 23 ILJ 1, 20 and B Bercusson, *European Labour Law* (Butterworths 1996) 541.

[25] MR Allen and PM Wright, 'Strategic Management and HRM' in P Boxall, J Purcell, and PM Wright (eds), *The Oxford Handbook of Human Resource Management* (OUP 2008) 88.

[26] See J Prassl, *The Concept of the Employer* (OUP 2015) 36–42 on the sharing and parcelling out of employer functions between or amongst two or more legal entities; and Chapter 16 of the present work.

There is a further such point, which is a more abstract or theoretical one. In this section it has been argued that the turn to 'human resource management' has tended to transform the making of a contract of employment into a more formalized and documented practice than it previously was, and in that sense the contract of employment has become a more concrete institution. At the same time, it is important to remember that this is still primarily a legal conception, and a legal construction of practical transactions which do not necessarily or clearly identify themselves as contracts of employment. The legal construction of the contract of employment is a process into which there are many inputs from diverse sources, centrally prominent among which is a very highly complex body of employment legislation. By means of this set of arguments, one arrives at a position in which 'the contract of employment' is identified as an evolving legal institution within a changing social and economic institutional setting. This is a starting point from which to consider how best to formulate an appropriate normative critique of the law of the contract of employment; but first it will be useful to develop somewhat further, in certain particular dimensions, that notion of the contract of employment as an evolving legal institution within a changing social and economic institutional setting.

3. The Contract of Employment between Agreement and Regulation

The suggestion which is advanced in this section, by way of further development of the idea of the contract of employment as an evolving legal institution within a changing social and economic institutional setting, concerns the sense in which and the extent to which the employment relation can satisfactorily be identified as a contractual one.[27] This is a question which has always been a central conundrum for labour law theorists, especially as it has many ideological implications or overtones; it has often been formulated in terms of the dichotomy between 'status' and 'contract';[28] it essentially concerns the set of issues about how far the norms of the employment relation are open to be determined by the parties themselves or, on the other hand, are pre-determined by legislation or collective bargaining or are

[27] See B Hepple, 'Restructuring Employment Rights' (1986) 15 ILJ 69; Lord Wedderburn, 'From Here to Autonomy?' (1987) 16 ILJ 1, 5–7; and Freedland, *The Personal Employment Contract* (n 3).

[28] See RH Graveson, 'The Movement from Status to Contract' (1941) 4 MLR 261, 270; O Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30 MLR 635, 635–42; M Freedland, 'Status and Contract in the Law of Public Employment' (1991) 20 ILJ 72; M Freedland and N Kountouris, 'Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe' (2008) 37 ILJ 49, 57–9; and *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, [2011] QB 323 [19]–[20] (Sedley LJ).

derived from other external sources. In this section, it is argued that, rather than chasing down a line between 'status' and 'contract', we should think of the contract of employment as existing in a mixed domain of voluntarily agreed arrangements and imposed norms. It is that idea which is expressed by the heading of 'the contract of employment between agreement and regulation'.

That idea will be developed in the following way. It will be suggested that the location of the contract of employment between agreement and regulation is an extremely complex and subtle one, perhaps more so than has hitherto been recognized. It will also be suggested that it is useful to carry out an institutional or organizational analysis of the ways in which these interactions between 'agreement' and 'regulation' take place within employing enterprises or organizations however large or small. At the heart of that analysis is the idea that the functioning of work enterprises or 'employers' is organized and controlled by the *activity of management*. That activity of management includes the creation and conduct of employment relations, and therefore the formulation and application of the norms which govern those relations, and hence, in legal terms, the making, implementation, and termination of contracts of employment. It is argued that by focusing on the particular and quite rapidly changing ways in which this 'activity of management' is interposed between agreement and regulation, we can better understand the real nature and working of the contract of employment.

This argument, about the interposition of the activity of management between agreement and regulation, is advanced at two different levels: first, at a general level on which it applies across various different legal and social systems at different times, and secondly, at a particular level on which it applies to the legal and social system under consideration in this work and at the present time. The argument at the general level is that the proposing and administering of contracts of employment can usefully be thought about as an activity of management undertaken by the 'employer' or working enterprise, and that the contribution of that activity is to situate the contract of employment 'between agreement and regulation' in various material senses. It is appropriate to enlarge somewhat upon those general propositions.

At the core of this general argument is the idea that contracts of employment are typically *proposed to workers by employers* or working enterprises, and then once made are *administered by employers* or working enterprises. Contracts of employment are typically proposed to workers by employers or working enterprises in a double sense: first that it is typically the employer or working enterprise which offers to engage the worker rather than the worker who initiates the engagement, and secondly that it is typically the employer or working enterprise which proposes the terms of that engagement rather than its being the role of the worker to do so. Moreover, it is then typically the employer or working enterprise which provides the documentation for the engagement, which proposes or organizes subsequent elaborations or modifications of the terms of engagement, which lays down rules of

work, and in those senses and more generally administers the contract of employment as part of its managerial activity.[29] In short, it is generally the employer or working enterprise which proposes and manages the contract of employment rather than its being the worker who does so. The worker is generally confronted at the outset with a proposal for a contract of employment more or less on a 'take it or leave it' basis, subject to the possibility of some negotiation about some terms and conditions;[30] and may be similarly confronted on the same basis with variations or elaborations or renewals of the contract of employment in the course of the employment relation.

All this might seem to be too obvious to be worth stating, at least at that level of generality. However, important arguments follow on from that generalization. It is through this process of proposing and administration of contracts of employment that employers or working enterprises respond to the various kinds of external controls and constraints which may be imposed upon the employment relations in question, most obviously and importantly those of legislation and collective bargaining. It is this process which locates and characterizes contracts of employment as generally lying 'between agreement and regulation'. The contract of employment generally speaking lives in the normative space which is opened up by the worker's initial engagement and bounded by external regulation; it is a space which is largely occupied and controlled by the activity of management.

Although this conceptual space lies within the plain sight of labour lawyers, they may have given insufficient attention to what goes on within it, and could therefore usefully refocus upon it. There have been certain theoretical and even ideological factors which might explain some neglectfulness in this area. On the one hand, proponents of collective bargaining[31] and of worker-protective employment legislation[32] have been concerned to emphasize and seek to maximize the efficacy of those constraints upon unbridled managerial prerogative. On the other hand, neo-liberals have for their part largely concentrated upon the stifling effects of those constraints upon freedom of contract in the employment sphere.[33] That

[29] H Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36 ILJ 2.

[30] See H Collins, *Employment Law* (2nd edn, OUP 2010) 6–8; H Collins, *Regulating Contracts* (Oxford 1999) 228–36; F Kessler 'Contracts of Adhesion—Some Thoughts About Freedom of Contract' (1943) 43 Columbia Law Review 629; and Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 23–6 and 31.

[31] Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 69–70.

[32] G Morris, 'The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms' in L Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart 2012) 7–21.

[33] B Kaufman, 'Labour Law and Employment Regulation: Institutional and Neoclassical Perspectives' in K Dau-Schmidt, S Harris, and O Lobel (eds), *Labor and Employment Law and Economics* (Edward Elgar 2009) 3–14; R Posner, 'Some Economics of Labor Law' (1984) 51 University of Chicago Law Review 988–1004; and compare, from a different perspective, S Deakin, 'The Law and Economics of Employment Protection Legislation' in C Estlund and M Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar 2012) 330.

having been said, some credit should be given to relational contract theorists for having been interested in this conceptual space, as also in a rather different way are some labour market economists; very important insights into the process of management of contracts of employment are offered from both of those perspectives. However, we might usefully proceed further along a path of analysis of this area of management of employment contracts 'between agreement and regulation'.

At this point, the argument turns from the general level to a more specific one. The management of employment contracts between agreement and regulation is a very context-specific process; the styles and approaches of employment contract management seem to vary widely, and to be highly contingent upon the regulatory context and prevailing attitudes at the time and in the place in question. The significance of these contingent factors is apt to be underestimated both in the making of the law of the contract of employment and in theorizing about it. Trying to avoid that error, and therefore emphasizing the contingent and probably ephemeral character of the observations which are being put forward, we can nevertheless make some suggestions about the evolving characteristics of employment contract management in the UK at the present time. These are counterpoised against some frequently made generalizations which can be regarded as suspect ones.

It is suggested that the makers and theorists of the law of the contract of employment have inherited, and still generally maintain, a core understanding of that contract in which it is identified as, at bottom, in Kahn-Freund's famous words, 'a figment of the legal imagination'.[34] That celebrated characterization makes several very important points, some of which are more universal than others. One point which it makes and which is of nearly universal application is that contracts of employment only rarely consist of the fully and freely negotiated bargain which represents the ideal form of the general private law of contract. However, it is suggested that the 'figment' characterization also carries a further set of messages which is a much more contingent one, namely that the contract of employment is an essentially artificial legal construct imposed by lawyers upon a reality of employment relations in which employers and workers enter into work arrangements without self-consciously making legal contracts and without consciously orienting themselves to an environment of legal regulation. In the language of systems theory, the 'figment' characterization identifies a disjunction, a lack of contact, between the legal discourse of the contract of employment, and the factual discourse of employment relations; these were seen as two systems which were not talking to each other and were not meaningfully related to each other.

[34] Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 18.

This was an important and valid observation when Kahn-Freund made it. However, it does not satisfactorily describe the current relationship between the 'legal' contract of employment and the practice of contracting for employment in the UK. It is not just that legislation has imposed a requirement upon employers to give written particulars of the main terms and conditions of contracts of employment. It is rather that a widespread specialization and professionalization of the process of management of contracts of employment has brought about a state of affairs in which employment relations are now often, indeed almost typically, conceived and conducted in self-consciously legal contractual forms, closely and consciously adjusted to an environment of legal regulation. This assertion will be substantiated in more detail, and then some of its normative implications for the law of the contract of employment will be considered.

First, reference is made to a widespread specialization and professionalization of the process of management of contracts of employment. There is quite a general institutional transformation of employers or work enterprises in this respect. It is readily observable in those organizations which maintain a specific unit of 'human resource management' or which outsource that specific function to a specialist human resource management enterprise, the latter having become a very widespread practice. Moreover, the whole vast phenomenon of outsourcing of employment relations themselves to intermediary enterprises—employment agencies and labour sub-contractors of every kind—can and should be understood in this way.[35] It should also be noted that, in those extended senses, the specialization and professionalization of the process of management of contracts of employment often (though far from universally) extends even to very small work enterprises and personal employers, since they are increasingly offered, and disposed to accept, many forms of specialized and professionalized advice and intermediation in or for the carrying out of that function.

It is suggested, furthermore, that the specialization and professionalization of the process of management of contracts of employment is fast becoming a pervasive feature of the conduct of work enterprises in a yet more extended sense. It goes beyond the entrusting of that process and that function to specialists and professionals inside or outside the work enterprise; it also tends to transform the whole business of management of work enterprises large and small as a matter of style and approach. Several linked assertions are advanced by way of enlargement of that argument. First, a general trend towards the intensified contractualization of employment relations can be observed, as the mechanical disciplines of the

[35] See H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 OJLS 353; Freedland, *The Personal Employment Contract* (n 3) 22; and S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 314.

Fordist assembly line[36] are often replaced not, as might have been predicted, by more open-textured employment relations but rather by ever-closer contractual or sub-contractual specification of those relations through various forms of target-setting, 'bench-marking', appraisal, time apportionment,[37] and 'performance management'.[38]

Secondly, it is suggested that this intensified contractualization of employment relations should be seen as part and parcel of an increasingly legally conscious style of and approach to the management of employment relations. Labour lawyers are well accustomed to recognizing this in the form of an enhanced managerial awareness of legal risks arising from the conduct of employment relations, and a corresponding impulse consciously to respond to and 'manage' those risks by anticipating and providing for those risks in various contractual forms. However, a strong trend towards various kinds of legally conscious or legally designed contractualism in the management of employment relations can also be observed, which goes beyond the functions of straightforward regulatory compliance or legal risk management in the generally accepted sense.

That is to say, those concerned with the management of employment relations by and within work enterprises, and the various professionals and enterprises who advise them and intermediate for them, have become well tuned to a legal regulatory environment which is a complex and exacting one but one which provides extensive scope for manoeuvre by means of the choice, adaptation, and adjustment of the legal forms of contracting for employment. Thus one finds that there is a generally heightened consciousness of the ways in which choices of legal forms of contract intermesh with commercial or general organizational decisions and strategies concerning the employment of workers. Obvious manifestations of this tendency are to be found in the making of legally conscious choices between employment and self-employment[39] and between direct employment and indirect employment via intermediary agencies,[40] but I suggest that these are no more than major instances of a larger trend towards a kind of generalized managerial arbitrage between all kinds and combinations of forms of contract of employment or other

[36] Supiot has defined 'Fordism' as 'a large industrial business engaging in mass production based on a narrow specialization of jobs and competencies and pyramidal management (hierarchical structure of labour, separation between product design and manufacture)': Supiot, *Beyond Employment* (n 4) 1.

[37] See H Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 ILJ 17.

[38] See GP Latham, LM Sulsky, and H MacDonald, 'Performance Management' in P Boxall, J Purcell, and PM Wright (eds), *The Oxford Handbook of Human Resource Management* (OUP 2008) 364–77.

[39] See Collins, *Employment Law* (n 30) 36–42; and P Davies and M Freedland, *Labour Law: Text and Materials* (2nd edn, Weidenfeld and Nicholson 1984) 81.

[40] See Freedland, *The Personal Employment Contract* (n 3) 33–5; and Prassl, *The Concept of the Employer* (n 26) 42–54.

personal work contracts.[41] The emergence and growing prominence of various forms of 'zero-hours contract' is a key case in point.[42]

That set of observations brings the argument about 'the contract of employment between agreement and regulation' to a point at which one can think about its normative implications. It is suggested that the tendencies which have been identified serve to bring about a particular and slightly unexpected kind of precarization of employment contracts, namely a highly managed and formalized, and legally conscious kind. It has long been accepted that there has been a strong trend in the UK towards the precarization of employment relations and employment contracts; that is to say, that various relatively precarious forms of employment contract and relation, especially those of part-time work, fixed-term work, temporary agency work, and 'zero-hours' or 'on-call' work, have become so widespread that they can no longer be regarded as 'marginal' or 'atypical' in any statistical sense.[43] However, there has, at least in the past, been a tendency to locate that growth of precarious work predominantly in the *informal* sector of the labour economy, associating it quite strongly with phenomena of relative *anomie* in the forms of very low or negligible compliance with various kinds of legal regulation—employment law, tax and social security law, immigration law, health and safety law, human rights law, and so on.

It would now seem that, although there is still no doubt a highly significant presence and problem of employment relations which are both informal and precarious, the picture which was previously entertained of precarious work may have considerably under-represented the growing presence of the kind of employment relations which are highly managed in a contractually formalized and legally conscious way, as depicted in the foregoing set of arguments—but which are nevertheless unmistakably and deliberately set up and administered in the mode of precarity. Indeed, one could go so far as to suggest that this trend towards legally formalized but substantively precarious employment contracting has leapt over the firebreaks which used to be interposed between the 'standard' and the 'marginal' sectors of the labour economy, largely dissolving any meaningful qualitative division between the two sectors. On both sides of that original divide, employment relations tend to be managed into contractual forms which are increasingly discrete rather than relational ones, as employers or work enterprises predictably

[41] See Freedland, *The Personal Employment Contract* (n 3) 12–57 for an analysis of the legal challenges these processes present.

[42] See A Adams, M Freedland, and J Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimating Precarity?', Oxford Legal Studies Research Paper No 11/2015, available from SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507693 (accessed 14 August 2015).

[43] D Weil, *The Fissured Workplace* (HUP 2014); S Fredman, 'Precarious Norms for Precarious Workers' in J Fudge and R Owens (eds), *Precarious Work, Women and the New Economy* (Hart 2006) 177; and N Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' (2013) 34 Comparative Labor Law & Policy Journal 21.

take advantage of radically reduced constraints from collective bargaining, and as arbitrage between contractual, and indeed highly contractualized, forms of employment becomes a more and more legally and conventionally accepted pattern or style of management.

This set of observations might lead on to some further normative reflections about the development and the exposition of the law of the contract of employment, at least by throwing into sharp relief some features of the institutional context which have perhaps hitherto been understated. The arguments presented in this section could be seen as confirming the need for a certain kind of judicial activism along the path opened up by the *Autoclenz*[44] jurisprudence but which needs to be more clearly rationalized and further extended.[45] These arguments also point up the dangers of a growing legislative enthusiasm for the negotiability of employment rights, of which employee shareholder legislation is such an extreme example.[46] But even more is it to be hoped that the suggestions advanced in this section might influence the ways in which the tasks of exposition and theorizing the law of the contract of employment are to be conceived. Rather than on the one hand thinking of the law of the contract of employment as an abstract body of common law, or at the other extreme thinking of it as having become simply part of the technical apparatus of a larger body of primarily legislative employment or labour law, this might now be regarded as the body of law which tempers and moderates the processes of contractual management of employment relations in which employers or work enterprises are engaged, often in a highly legally articulate and intelligent way. It is that normative task or notion which it has been sought to capture in the idea of (the law of) the contract of employment between agreement and regulation.

4. A Normative Reconstruction of the Law of the Contract of Employment

The argument thus far has served to identify the contract of employment as a legally constructed institution embodying the arrangements for employment of a worker to which the law of the contract of employment assigns legal validity and a set of legal effects; and we have also considered the way in which contracts of employment are made and implemented in an elaborate institutional setting, the

[44] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745, [2011] ICR 1157.

[45] Since the judgment of the Supreme Court in *Autoclenz* was handed down, there have been some reported decisions where it has been applied to treat the terms of a written contract as a 'sham', e.g. see *Suhail v Herts Urgent Care* [2012] All ER (D) 334 (Nov), (2013) 130 BMLR 27 (EAT).

[46] Employment Rights Act, (ERA) s 205A introduced by the Growth and Infrastructure Act 2013, s 31(1), on which, see J Prassl, 'Employee Shareholder "Status": Dismantling the Contract of Employment' (2013) 42 ILJ 307.