

ORGANISATIONAL CHANGE, LABOUR FLEXIBILITY AND THE
CONTRACT OF EMPLOYMENT

ESRC Centre for Business Research, University of Cambridge
Working Paper No. 105

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September 1998

This Working Paper relates to the CBR Research Programme on Corporate
Governance, Contracts and Incentives.

Abstract

This paper reports the findings of an empirical study of the effects upon contracts of employment of organisational change at enterprise level, including the impact of trade union derecognition. The evidence is drawn from a survey of over 30 organisations which was carried out in Britain between 1995 and 1997. Where firms had withdrawn from collective bargaining, the pursuit of flexibility, in the sense of escaping from rigid job and grading structures, was widely given as one of the reasons for doing so. However, the 'individualised' employment contracts which replaced collective agreements were not arrived at through individual *bargaining*, but upon the basis of employers' standardised contract terms. These standard term contracts were, on the whole, vague about pay, and reserved considerable discretion to employers in the implementation of appraisal procedures. Terms concerning hours and job duties were, by contrast, more specific and detailed; it was common for them to formalise aspects of the exercise of managerial prerogative which had previously been contested. A further feature of these contracts was the use of 'waiver' clauses and similar devices aimed at reserving to employers the right unilaterally to alter terms governing hours and duties. Paradoxically, the removal of collective influence can be as leading in such cases to *decontractualisation*, in the sense that many employment relationships under these conditions bore little resemblance to a relational contract based on long-term cooperation. Although further evidence is needed on the longer term effects of 'individualisation' on productivity and performance, it an open question, at this point, whether the removal of collective and public regulation from the employment relationship will bring about enhanced contractual efficiency.

Acknowledgements

This paper is drawn from research carried out jointly with Willy Brown, Maria Hudson, Paul Ryan and Cliff Pratten (see Brown *et al.*, 1998) for the UK Department of Trade and Industry. The Department is not responsible for any of the views expressed.

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1. Introduction

This paper reports the findings of an empirical study of the effects upon contracts of employment of organisational change at enterprise level, including the impact of trade union derecognition. The evidence is drawn from a survey of over 30 organisations which was carried out in Britain between 1995 and 1997.¹ Around half the firms in the sample had derecognised trade unions and brought collective bargaining to an end at some point in the previous five years; most of the remaining firms had retained some kind of role for independent employee representation in the determination of pay and conditions. In virtually all cases, firms had recently undergone extensive organisational change.

Where employers had withdrawn from collective bargaining, the pursuit of flexibility, in the sense of escaping from rigid job and grading structures, was widely given as one of the reasons for doing so. However, in common with earlier studies (Evans and Hudson, 1993), it was found that the 'individualised' employment contracts which replaced collective agreements were not arrived at through individual *bargaining*, but upon the basis of employers' standardised contract terms. These standard term contracts were, on the whole, vague about pay, and reserved considerable discretion to employers in the implementation of appraisal procedures. Terms concerning hours and job duties were, by contrast, more specific and detailed; it was common for them to formalise aspects of the exercise of managerial prerogative which had previously been contested. A further feature of these contracts was the use of 'waiver' clauses and similar devices purporting to reserve to employers the right unilaterally to alter terms governing hours of work and job duties.

In the light of these findings, it may be premature to see in recent developments a revival of individual negotiation of terms and conditions of employment. On the contrary, the principal effect of the removal of collective influence from the employment relationship has been to formalise the unilateral power of management to set and vary terms and conditions of employment at will. There is little sign that this development, in itself, is leading to a greater stress on matching the individual capabilities of employees with the requirements of employers; nor does it necessarily imply a greater role for individual contracts as incentive devices for eliciting employee cooperation. In many ways, the process is better described as one of *decontractualisation*, since by widening the scope of unilateral managerial power it threatens to deprive terms and conditions of legal force or effect.

At the same time, the research reported here points to some of the limits of a policy of flexibilisation. The demise of collective influence may have enabled employers to operate free from certain rigid rules concerning grading, job duties and classifications, and to avoid the *de facto* veto through which *some* unions once obstructed reorganisations. However, it does not, of itself, solve the problem of how to elicit the cooperation of employees, particularly in the context of 'functional' flexibility which requires employees to undertake an open-ended range of job duties and responsibilities involving retraining and adaptation to new demands. From this perspective, there is a contrast between those firms which removed collective bargaining altogether and those which retained a role for independent employee representation. In many of the latter, a degree of flexibility over working hours and job duties was achieved which was at least the equivalent of what has occurred in the derecognising firms; often, unions were required to accept far-reaching contractual changes and alterations to working practices as a precondition of retaining management's support for or acquiescence in collective bargaining. What is of interest here is why, in certain organisations, management should have chosen to continue with collective bargaining when similarly situated competitors have

dispensed with it and when the legal framework would have enabled them to do the same. The continuation of union influence here suggests that independent employee representatives may play an important role in negotiating and legitimating organisational change, although the precise nature of their contribution and how it differs from more traditional forms of union involvement remain to be clarified.

The order of the paper is as follows. The next section considers briefly some competing economic and legal conceptions of the contract of employment as a mechanism of governance or incentive structure. Economic perspectives offer conflicting suggestions on the scope for individual differentiation of terms and conditions of employment. The legal framework, by contrast, has more clearly adjusted to a view that terms and conditions of employment are largely standardised; express terms of contracts of employment are largely derived from external sources, such as employer handbooks or collective agreements. Nor can the legal effect of these express terms be judged in isolation from the effect of common law implied terms and norms derived from statute, which introduce further elements of standardisation. The remaining sections examine three issues arising from the empirical survey: the role of the legal framework during the process of transition to individualised contracting in derecognising firms; the ambivalent character of the documents used by employer to implement organisational change; and the contents of the new-style agreements, with particular reference to working time flexibility, job definitions and duties, location, and the contractual mechanisms adopted for the variation of terms and conditions and working practices. The paper concludes with an assessment of how far individualised agreements can be said to perform the 'incentive' functions which economic theory ascribes to contracts as mechanisms of governance.

2. The Employment Contract as a Mechanism of Governance: Economic and Legal Conceptions

Employment law has long viewed the employment relationship in terms of an individual contract between employer and employee. Although the contractual model has been criticised as unrealistic and even archaic (most notably by Collins, 1986), it has not been undermined but has, if anything, been reinforced by the growth of modern regulation. This is largely because the legal concept of contract has been shown to be highly adaptable in adjusting to the standardisation of terms and conditions of employment through collective bargaining and social legislation (see Deakin and Morris, 1995: chapter 3). In the context of recent derecognition, then, the precise meaning of the term 'individualisation' is not immediately obvious: since employment contracts did not cease to be 'individual' when collective bargaining was introduced, they did not suddenly acquire a newly 'individual' flavour when collective bargaining was brought to an end.

In common with economic perspectives such as those of principal-agent theory, modern employment law sees the contract of employment as a mechanism for governing a series of exchanges between the parties to the employment relationship. However, this legal viewpoint also sees the express agreement as only one of a number of potential sources of contractual rights and obligations; others include collective agreements, workplace custom and practice, and employment legislation. Rules derived from these sources may take the form of express or implied contract terms, alongside the express terms of any individual agreement. The principal *juridical* significance of the contract of employment, then, is to act as a 'mechanism for expressing the impact upon the individual relationship of one or more of a number of external sources of governance or regulation' (Deakin and Morris, 1995: 211). In this way, contemporary employment law may be said to recognise the 'embeddedness' of the contract of employment within a framework of social and institutional norms, upon which the contract depends for its effective operation.

Arguments for the removal of collective and public regulation of the employment relationship tend, by contrast, to view the contract of employment as a 'free standing' expression of the parties' will; presumptively, the parties' own allocation of risk should not be upset by external interference. An economic perspective would insist that:

'the issue for the parties, properly framed, is not how to minimise employer abuse, but rather how to maximise the gain from the relationship, which in part depends on minimising the sum of employer and employee abuse. Viewed in this way the private-contracting problem is far more complex. How does each party create incentives for the proper behaviour of the other? How does each side insure against certain risks? How do both sides minimise the administrative costs of their contracting practices?' (Epstein, 1984: 957)

Critics of regulation argue that it is precisely the flexibility of the common law model of employment at will which allows the parties to achieve 'the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted, as all activities are, in conditions of technological and business change' (Epstein, 1984: 982).

Different approaches argue that there is a high degree of interdependence between contractual cooperation and the framework of rules which, in practice, governs most employment relationships. In particular, it is suggested that where workers invest in firm-specific skills, an appropriate incentive structure should incorporate a degree of protection of the employee against arbitrary treatment by management and some guarantee of continuing employment, and that this is most effectively achieved through a combination of internal governance and external regulation. A stable normative foundation to the employment relationship may be an important means for building *trust* between the parties as a basis for open-ended cooperation which goes beyond precise compliance with the contract terms (Deakin and Wilkinson, 1998).

Fox's seminal analysis of trust (1974) identifies six factors which differentiate low trust and high trust in the context of the contract of employment. These are: the extent to which workers are closely supervised; the degree to which they are expected to obey formal rules when carrying out employment-related duties; the extent to which coordination of tasks is seen as a matter for unilateral management decisions; the balance between external managerial constraints and monetary rewards, on the one hand, and self-imposed or internalised standards, on the other, in motivating workers; the extent to which sanctions are automatically imposed for breaches of rules; and the extent to which disputes are resolved unilaterally by the employer or through collectivised disputes procedures in which different group interests are represented. A low trust approach, based on managerial unilateralism, may in principle enable management to intensify the pace of work in such a way as to increase not just the share of the employer from production, but also the joint value of production. However, such an approach also gives rise to costs (or, in one sense, 'inflexibilities') which include the maintenance of a strong divergence of interests between the parties, restrictions on the flow of information between them, the need to measure the value of exchange highly precisely, and the need of both sides to exercise on a regular basis those sanctions which are available to them (dismissal or discipline on the part of the employer; strike, work to rule or 'shirking' on the part of the employee).²

The optimal employment contract of principal-agent theory would provide the employee with precisely that set of incentives (pay-offs or penalties) which aligns his or her interests with those of the employer. Rewards (or sanctions) would then be linked to performance through an incentive scheme according to the different preferences and degree of risk aversion of employees, and the costs to the employer of monitoring and verifying individual inputs to performance; according to the extent of heterogeneity, a degree of contractual differentiation by individuals would be the result. At the same time, the transaction costs of processing multiple individual bargaining arrangements and the

danger, to the employer, of 'opportunistic' bargaining or 'hold up' by individual employees, pull in the opposite direction of standardised contract terms (Williamson *et al.*, 1975). Fox's analysis, however, goes further in suggesting that in certain circumstances, individualisation may in itself undermine trust. Even if it is possible to identify individual effort and link it to outcomes, a schedule of individualised rewards and punishments may encourage precise contractual performance only at the expense of extra-contractual cooperation. This is not important if the contract can adequately anticipate the future, but it becomes more important as uncertainty increases, as in the case of tasks which require the exercise of discretion by the employee, or job specifications which require retraining or adaptation by the employee to new technology.

This is not to deny that rigid or outdated rules may be a source of distrust between the parties; the defence of such rules for their own sake, on either side, may lead to a loss of cooperation by the other, and an attempt to establish a new framework of governance. In some cases of derecognition in Britain in the 1990s, employers sought to remove union influence over job definitions and working practices which they saw as obstructive to the point of destroying the commercial value of the enterprise. Fox's analysis nevertheless suggests that the provision of a normative framework beyond the individual contract may, in different circumstances to those just described, be a valuable resource on which parties faced with contractual uncertainty and incompleteness can draw. In either case, the employment contract can only be understood by reference to the wider framework of norms and conventions which govern its formation and performance.

The view that contract and regulation are in some fundamental sense interdependent is mirrored in the practice of most contemporary systems of labour law (the US may be an exception) which supply to the employment relationship a set of standardised terms, some of which are optional in nature of default rules, and others of which are mandatory. Legal norms in turn supplement a body of formal contract

terms which are most often laid down in an external sources, such as a collective agreement or employer handbook. The scope for individual bargaining may, then, be highly limited; but this would also be true of systems which formally operate a version of employment at will, which in effect simply grants an open-ended power to the employer to set and vary the terms and conditions of employment. The employment relationship represents the paradigmatic case of a *relational* contract which rests upon a distinctive governance structure, separate from market-based exchange: in such a case,

‘the substantive relation of change to the status quo has now altered from what happens in some kind of a market external to the contract to what can be achieved through the political and social processes of the relation, internal and external. This includes internal and external dispute-resolution structures. At this point, the relation has become a minisociety with a vast array of norms centred on exchange and its immediate processes’ (Macneil, 1978: 901).

The structure of the contract of employment in British labour law reflects this adaptation of contractual concepts to the task of governing a continuing economic relation, and in so doing has departed substantially from the common law model of employment at will which still persists in some American states. Because the English courts did not accept as a *general* presumption the rule that employment could be terminated on a moment’s notice, a substantial body of case law grew up at common law concerning the circumstances under which summary dismissal was permissible. Later, the extension of collective bargaining and, in particular, of employment protection legislation led to a lengthening of notice periods for the vast majority of workers (see Deakin, 1998). Unfair dismissal legislation was introduced in the 1970s, and has come to have a substantial indirect influence on the evolution of the common law, underpinning the developing notion of contractual good faith (Brodie, 1998). The evolution of the contract of employment has therefore reached the point where it currently has a

highly articulated structure of implied and express terms, terms incorporated by reference from external sources, and 'extra contractual' impositions deriving from statute. The relationship between these different sources of norms is a dynamic one and a continual source of doctrinal tension. This can be seen as an attempt by the body of legal doctrine to adjust to what it perceives as the changing political and economic character of the employment relationship; the juridical language of 'implied terms' and 'incorporation' offers mechanisms through which these 'external' or extra-legal features of the relationship acquire a specifically legal form.

2.1. Terms implied by the common law

The common law is itself a particularly important source of regulation of the employment relationship (Freedland, 1995). Implied terms of fidelity, cooperation and care are read into every contract of employment. These common law implied terms are a particularly important source (or expression) of managerial prerogative, or the employer's unilateral decision-making power. From a juridical point of view, at least, this power has never rested solely on the employer's property rights over the productive assets of the firm, as suggested by some economic theorists (Grossman and Hart, 1986). The common law provides for a residual, open-ended duty of obedience on the part of the employee. While this duty may be confined by express contract terms or by the profession or rank of the employee concerned, it can never be entirely eliminated. To that extent, the employment contract necessarily embodies implied obligations which go beyond the express agreement made by the parties.

As a result, the relationship of implied terms to express terms is often unclear in practice. Respect for the principle of freedom of contract should mean that, at common law, an express contract term necessarily prevails over one which is merely implied. If this were so, the function of implied terms would simply be to fill in gaps and to clarify the meaning of those express terms which were unclear. However, the

distinction between gap filling and clarification, on the one hand, and regulation on the other, is often non-existent in practice. Implied terms may qualify the terms of express agreements; one illustration of this is the reciprocal duty of trust and confidence.³ This term may have the effect of requiring the employer to exercise certain express contractual powers (such as the power to require the employee to work overtime,⁴ or the power to increase the rate of the employer's contributions to an occupational pension scheme⁵) in good faith, which in practice means that the interests of the employee may have to be taken into account. Certain other implied terms, such as the employer's duty to safeguard the safety and health of the employee, may prevail over contrary express terms in the event of conflict,⁶ although legal authority on this point is not completely clear.

2.2. Terms incorporated from collective agreements

Until recently, the single most important source of terms and conditions for the majority of non-managerial employees in Britain has been collective bargaining. The normative terms of collective agreements, concerning hours, wages and other terms and conditions, are regarded as incorporated into the contracts of employment of individual employees in workplaces where the relevant union or unions are recognised for the purposes of collective bargaining, or where the employer observes a multi-employer agreement of some kind. Rules deriving from workplace custom and practice may also be implied into contracts of employment, depending, in general, upon how stable and regular a particular practice has become. Whether the precise mechanism of incorporation is thought of as 'crystallised custom' (Kahn-Freund, 1983) or as an express or implied 'bridging term' (Hepple, 1981), the effect of incorporation depends upon the express and implied terms of the *contract of employment*, and not upon the collective agreement itself. In the British system, the collective agreement has no regulatory or normative force in its own right.⁷ Nor are the terms of collective agreements normally enforceable as contracts between the employers and trade unions who are party to

them.⁸ However, thanks to the common law doctrine of incorporation, collective agreements have come to play a major role in the formalisation of terms and conditions of employment at the level of the individual employment relationship.

2.3. Statutory incidents of employment

A considerable body of legislation in the fields of employment protection, health and safety and equality of treatment, applies to contracts of employment. Statutory obligations do not normally take the form of terms of contracts in the same way as terms based on express or implied agreement; rather, they operate as 'extra-contractual impositions' (Kahn-Freund, 1967). However, since their effect normally depends on the existence of a contract of employment between the parties concerned (as opposed to a contract of a different kind, such as a contract for services), they may be thought of as incidents of the employment relationship in much the same way as many contract terms are. Many of these statutory rights are, at least formally, mandatory or 'non-derogable', in the sense that the parties cannot validly contract out of them (Wedderburn, 1993). It is rarer for statutory norms to be expressed as optional 'default rules' which apply unless they are avoided by agreement.⁹

2.4. The statutory written statement

Another important influence in the formalisation of terms and conditions is the so-called statutory written statement which the employer must issue to employees with at least one month's continuous employment. The statement must be issued within two months of the start of employment and may subsequently have to be updated (or additional documents issued) as terms and conditions change. The relevant law (now contained in sections 1-12 of the Employment Rights Act 1996) dates back to the Contracts of Employment Act 1963, and a further amendment in 1993 incorporated the requirements of EC Directive 91/533 (see Clark and Hall, 1993). The written statement is

not a direct source of norms, as such; it cannot, of itself, create any obligations at the level of the contract of employment. It is, rather, a record of 'particulars of employment' which, to have contractual effect, must themselves be derived from any one or more of the usual sources (collective agreement, individual agreement, implied term, and so on). The expression 'particulars of employment' covers contract terms (including terms incorporated from an external source) as well as certain obligations derived from legislation and, in principle (although rarely in practice), particulars which have the status of works rules without being terms as such.

However, with only a few exceptions, the legislation only requires an employer to notify to the employee those matters which form part of his or her contract of employment, or which may otherwise be classified as 'particulars of employment' for this purpose. In other words, the Act does not specify that any given employment relationship *must* contain terms on, for example, hours of work, although where certain particulars have not been agreed, that fact must be stated (see Deakin and Morris, 1995: 223-231). The employer must state in writing terms derived, by incorporation or otherwise, from custom and practice or from collective agreements, because these are 'contract terms' just as much as those which may have been individually agreed. However, in a situation where there is no applicable collective agreement and where custom and practice is not certain enough to form part of the contract, it is possible that there may be very few particulars of employment which the employer has to report to the employee.

Moreover, particulars of employment may be observed in practice without necessarily being binding on the employer. The question of whether a given practice forms part of a binding contract is, in the end, a matter of construction for the court. Ineed it is only by virtue of the approach taken by the courts to the construction of contracts, and not as a matter of regulatory law, that norms relating to such matters as hours of work and a wide range of employee benefits are viewed, conventionally, as forming part of individual contracts of employment.

There is still considerable uncertainty over the contractual status, for example, of the rules of occupational pension schemes and similar arrangements, and, therefore, uncertainty over the extent to which such schemes may be altered without the agreement of employees (see Nobles, 1993).

2.5. Variation of terms

Even where the contractual effect of a given norm is not in doubt, it may be subject to *variation* in one of a number of ways. If an employer attempts to impose new terms without obtaining the employee's agreement, for example by cutting the agreed rate of pay, the employee is entitled to enforce the original contract terms, and may do so even while carrying on working, as long as he or she makes clear that this is being done under protest.¹⁰ A claim can then be brought for wages in return for work done under the contract at the rate originally agreed, although it is less likely that an employee will obtain an injunction formally restraining the employer from acting in breach of contract in the future. The same principle applies where the employer abrogates or unilaterally withdraws from a collective agreement. The termination of the collective agreement can have no bearing, in itself, on the enforceability of the normative terms at the level of the individual contract of employment, once incorporation has taken place.¹¹

However, an employer almost invariably has the option at common law of dismissing the employee and offering re-employment on new, inferior terms. This may nevertheless amount to redundancy and may also be an unfair dismissal under employment protection legislation, for which the employer would be liable to pay compensation. British courts and tribunals have, however, stopped well short of ruling that a dismissal effected in order to alter the contract terms is, for that reason alone, unfair. On the contrary, they have held that where an employer can point to economic factors which necessitate a change in the contract terms, the employer may be held to have acted reasonably in

requiring the change of terms and conditions, even if it is to the employee's disadvantage.¹²

2.6. Managerial prerogative and flexibility beyond contract

The multiplicity of sources means that in practice, there is considerable uncertainty over the point at which the contract ends and 'managerial prerogative', or the employer's unilateral decision-making power, begins. Works rules, for example, may be binding on the employees not because they form part of their contracts, but because they are (from a legal perspective) the expression of the employer's implied, open-ended power to direct the way in which the work is to be carried out.¹³ Where rules of the workplace are classified as part of this 'managerial prerogative', they can be changed at will by the employer. Where, by contrast, a rule, practice or custom becomes crystallised or incorporated as a term of the contract, then as we have seen it cannot be altered except by mutual agreement. Daily and weekly hours of work and starting and finishing times are normally construed as terms of the contract, but the provisions of a school timetable, detailing particular lessons would be taken by particular teachers, have been held to be works rules which the employer could alter without the need for prior agreement from each employee.¹⁴ The identification and construction of contract terms thereby has a direct bearing on the degree of flexibility which the employer can require, legally, of the employee.

To sum up the argument so far, then, it has been suggested that, in practice, the performance of the individual employment relationship is made possible by conventions and norms of various kinds which serve a number of purposes related to coordination of the parties' behaviour and expectations and the diversification of risk. The legal system has adjusted the juridical model of contract to these normative influences in various ways, principally by reference to the techniques of implication and incorporation of terms. This means that it is fundamentally misleading to think of the terms of the employment relationship being negotiated by the parties to it in a 'state of nature' or normative void.

This is not to say that bargaining, or (to put it less formally) mutual adjustment, does not go on, simply that it does so within a framework of norms which channel the parties' behaviour. With the removal of collective bargaining, we would not necessarily expect to see more scope, in practice, for individual bargaining, but rather a new prominence for alternative sources of governance, including managerial prerogative. We now turn to an examination of the empirical evidence to see what the practical results of decollectivisation have been.

3. The Transition from Collective Bargaining to 'Individualised' Contracts

The legal framework in Britain in the early and mid-1990s placed few obstacles in the path of derecognition at the level of collective labour relations. Collective agreements are conclusively presumed *not* to be legally binding as contracts between the parties to them (that is, the relevant employer or employer's association, and trade union), unless they contain a written statement to the effect that they are.¹⁵ There have been very few cases of 'contracting-in' to legal enforceability. One consequence of non-enforceability is that a trade union cannot normally bring an action for damages or for an injunction against an employer which unilaterally repudiates a collective agreement (conversely, a trade union cannot be sued under the collective agreement if it acts in breach of a 'procedure' clause, such as a no-strike agreement).

At the level of the individual employment relationship, the situation is more complex. As we have noted, the normative terms of the collective agreement, once they are incorporated into the individual contract of employment, have contractual effect and cannot be varied unilaterally by either side. This means that each employee must give his or her agreement to the changes made to their terms and conditions of employment. Agreement cannot normally be inferred from conduct alone, in particular if the employee makes it clear that he or she is carrying on working under protest.

3.1. Achieving a variation of contract terms

Individual variation was achieved in most of the case-study firms by mailing to each affected employee a variant of a standard form contract which they were invited to sign and return to the employer as an indication of their agreement to the new terms. It was common for individual agreements to be accompanied by materials seeking to explain the company's reasons for offering individual contracts and providing further information concerning the change. Inducements were offered to employees accepting individualised contracts while at the same time there were attempts to reassure them that most other terms, in particular those relating to pensions and other employment benefits, would not be affected.

In one case, accompanying documents stated that the purpose of individual contracts was 'introduce a system whereby the individual merit and contribution of an employee may be recognised and rewarded'. Those agreeing to the new terms would receive at the same time 'a substantial increase in wages' and free health care. Employees were also told that although the right to trade union representation over pay and conditions would be lost under individualised arrangements, 'your conditions of employment will... differ only in limited respects from those which you have at present'.

In another case, at the same time as contracts were individualised, a new facilities company was set up to employ staff in what had previously been the metering and billing sections of a privatised utility. Employees were offered the choice of transferring to the new organisation either under their existing terms and conditions or under the new personalised arrangements. Those who did not wish to transfer at all were told that opportunities would be sought to redeploy them in the parent company, but that if these could not be found, they would be offered redundancy on the normal severance terms. Those who were willing to accept employment in the new company but who did not wish to accept an individualised contract were told that their existing

terms and conditions would apply, but that they would not receive the 'enhanced' terms which were part of the individual package. These enhanced terms included a basic 5% pay increase and the possibility of further performance-related bonuses.

Those accepting the new terms received assurances that their accrued rights to pensions and other employment benefits would not be affected by the change. They were also informed that their basic pay, while subject in future to annual reviews by the company, would not be reviewed downwards. The company also took steps to settle a grievance of part-time workers who had initially been told that they would not qualify for the full 5% 'signing-on' increase which was paid to other staff.

One rather blunt method of achieving variation is the dismissal of the existing workforce coupled with the offer of new terms, or their replacement by a new workforce.¹⁶ Although numerous employers in the present survey had undertaken large-scale redundancies at around the same time as individual contracts were being introduced, there is only limited evidence that the purpose of these dismissals was to push through individualisation in the sense of revoking one set of terms and offering another. It was more usual for organisations to make substantial cuts in the workforce in any case, as part of a process of adjusting to more intensively competitive market conditions. This is not to say that recent redundancies played no role in persuading remaining employees to accept new terms when they were offered. In the docks industry, the ending of the National Dock Labour Scheme in 1989 was the prelude to a number of developments which included large-scale dismissals, casualisation and derecognition. When individualised contracts were offered, those declining to accept them were not threatened with dismissal and re-employment as such, but their position was not made comfortable: employees were informed that in future all vacancies for the relevant grades would be filled on the basis of the new, individualised terms and that if they wished to accept redundancy,

enhanced rates of compensation which were then on offer would shortly be withdrawn.¹⁷

3.2. Inducements for individualised contracts

A potential constraint on the practice of offering inducements to employees to accept individualised contracts throughout the period which we are examining was the law relating to anti-trade union discrimination by employers. Attempts by employers to provide differential benefits to members in particular unions, or to non-unionists, may infringe the principle that no 'action short of dismissal' should be taken to penalise either membership or non-membership. Specifically, it was (and is) unlawful for an employer to take action short of dismissal against an individual for certain union-related purposes, including 'preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so'.¹⁸ Legislation also provides that it is automatically unfair to dismiss an employee on the grounds of his or her membership or non-membership of an independent trade union, or on the grounds of their taking part in the activities of such a union at an appropriate time.¹⁹

However, the law was clarified in a direction which was favourable to the strategies of derecognising employers as a result of the *Wilson and Palmer*²⁰ litigation of 1992-95. Both cases arose out of the derecognition of trade unions in, respectively, the newspaper industry and the docks, and the subsequent introduction of 'individualised' contracts of employment. As part of these arrangements, employees who agreed to give up the protection of the terms previously negotiated under collective bargaining were given increments or bonuses denied to those who refused individualised terms. In neither case was the employee concerned formally required to give up his union membership as a condition of retaining employment. However, it was argued that the *effect* of offering increments to those employees with individual contracts was to discourage union membership and to penalise those (in practice, union members) who opposed the

individualisation of terms and conditions. This argument was accepted by the Court of Appeal. This prompted the then Conservative government to introduce a clause at a late stage during the passage of the Trade Union and Employment Rights Act 1993 (now section 148(3) of the Trade Union and Labour Relations (Consolidation) Act 1992), in effect carving out an ad-hoc exception to the principle of non-discrimination in order to enable employers to continue to offer incentives in return for agreement to individualised contracts.²¹

However, when the cases reached the House of Lords the Court of Appeal's judgment was reversed: it was concluded, firstly, that the individual rights to trade union membership and participation in trade union activities were not infringed as long as the employee retained the bare right to membership; secondly, that clear evidence of an anti-union intent on the part of the employer was required, and had been lacking in these two cases; and, thirdly (and most controversially), that in order for the legislation to bite, it was necessary for the individual claimant to be the victim of some action which deprived him or her of a benefit which they had previously enjoyed - it was not enough for them merely to be denied a benefit which was extended to others. As it turned out, then, the 'section 148(3) exception' introduced by the 1993 Act was unnecessary, although it still stands.

The *Wilson and Palmer* judgment could be seen as affirming the practice of a two-tier system, with sharp differentials between those on the 'old' and 'new' terms and conditions, which had developed in organisations undergoing individualisation. However, the adoption of this strategy by particular organisations cannot in most cases be directly attributed to the *Wilson and Palmer* judgment, since many of them preceded the House of Lords' ruling by several years; the *Wilson and Palmer* judgment and section 148(3) confirmed but did not initiate these practices of employers.

3.3. The treatment of employees refusing the new terms

Although detailed information on the numbers of those refusing to accept individualised terms was not made available to us by most respondents, some developments were clear. Particularly in the media industries, relatively high turnover meant that, after only a few years, only a small minority of staff had had experience of the period when collective bargaining was in force. Most of the employees who had opposed individualisation had subsequently left the organisation. By contrast, there were organisations in which many employees, who supported collective bargaining in principle, nevertheless accepted new-style contracts. This was done for a number of reasons, including concern over security of employment or promotion prospects, or to take advantage of the benefits being made available by the employer. This was sometimes the case even with former shop stewards and lay officials. In a number of organisations, management reported that trade union membership remained relatively high (often in excess of 50%) notwithstanding that many of the employees concerned had gone over to individual contracts.

4. Bargaining, Contract Form, and the Statutory Written Statement

We now turn to a closer consideration of the form and content of contracts of employment following organisational change. The 'individualised agreements' closely followed the model of the statutory written statement required by legislation. This finding suggests that their principal function from the employer's point of view was informative rather than normative; in other words, they were intended principally to *inform* employees of the rules laid down by the employer for the employment in question. By contrast, the documents played virtually no role in terms of providing a framework for *individual bargaining* between employer and employee.

4.1. Take it or leave it

Our empirical research confirms the finding of Evans and Hudson (1993) to the effect that 'individualisation' is a misnomer, *if* it is taken to imply the establishment of individual contractual agreements in place of collective agreements. Prior to 'individualisation', the individual and collective agreements existed together, in a relationship governed, in legal terms, by the individual contract. In the vast majority of cases, when a collective agreement was abandoned or terminated and new terms validly agreed between the individual employee and the employer, the collective agreement was simply replaced by the employer's standardised terms and conditions as the principal source of norms governing the individual contract.

Derecognition was not a prelude to individual negotiations. In most cases, the employees affected were invited to sign the document which they received from the employer and to return to it an indication of their agreement to the new terms. This was done more or less on a take it or leave it basis. At one of the organisations studied, a number of employees, when told that personal or individualised contracts were being introduced, went along to management with a view to making agreements which suited their personal and/or domestic circumstances, 'apparently thinking it was Christmas' in the words of a personnel manager; they were swiftly disillusioned.

4.2. Form and effect of documents: contract or statement?

It is also less than clear that the documents issued by employers were intended to have a normative effect. As we have seen, employment law in the UK draws a clear distinction between the contract of employment (whose function is *normative*, in the sense of creating mutually binding rights and obligations) and the written statement (whose function is essentially *declaratory* or *informative*, in the sense of recording in writing the relevant particulars of employment). However, empirical research dating from the 1970s suggests that, in practice, this

distinction is blurred (Leighton and Dumville, 1977; see also, Leighton and O'Donnell, 1995). Our more more recent study confirms that this remains the case: individualised agreements tend to be hybridised documents which purport to be contractual at the same time as meeting the employer's statutory obligation to provide the employee with the written statement of particulars.

In most organisations, the most common practice was for a written offer of employment to be issued together with a document containing the principal terms and conditions of employment, and for either or both documents to make reference to other materials containing disciplinary and grievance procedures, details of employment benefits, and other matters. In some cases, the material was spread over several separate documents and was quite bulky. It was most likely that the main document described itself as a 'statement of terms and conditions of employment', but some were headed 'contract of employment', while in others both 'contract' and 'statement' appeared on the same document. The employee would normally be invited to sign and return to the employer a form signifying his or her contractual assent to the terms and conditions; less frequently, he or she was required to sign and return a form indicating that they had received a written statement of particulars for the purposes of employment protection legislation. Some documents made explicit their apparent dual function as contract and statement, as in the following heading:

[XXX] Group. Statement of Main Terms and Conditions. This document outlines the main terms of employment, which apply to you as a member of the [XXX] Group within [ABC Ltd.] It meets the requirements of the Employment Protection (Consolidation) Act 1978 as amended.

In another case, a document was headed: 'Employment offer and statement of personal terms and conditions'; in another, the heading read 'Contract of Employment between [DEF plc] and [the employee]' but went on, 'These are the terms of your employment including the

particulars of employment required by the Employment Rights Act 1996’.

Even where a document described itself as a contract, it was unusual for it to make much use of technical legal language. One highly technical document was intended for senior managers. The general practice was to issue documents whose contents could be understood without any legal knowledge. In that respect, they resembled written statements of the kind which would have been in common use in the period prior to individualisation, when collective agreements were in force.

The resemblance between individualised contracts and written statements was reinforced by the contents of the documents issued by employers. Many of them conformed closely to the minimum requirements for written statements under the Act, in the sense of itemising those matters which must normally be listed by virtue of the legislation.²² As allowed by the Act, disciplinary procedures were mostly contained in separate documents. Few agreements made reference to matters going beyond the requirements of the Act. Where additional material was included, it most often took the form of confidentiality agreements or ‘restrictive covenants’ restraining the employee from undertaking similar work for a period after the employment ended; or reference was made to certain additional employment benefits (such as company cars). Only few documents made reference to the provision by the employer of training, as in the following extract:

It is company policy to encourage its staff to improve their professional, technical and educational standards thereby increasing the ability of the Company to achieve its business objectives more effectively, and efficiently and to develop employee’s individual abilities to the fullest extent. To this end the Company provides opportunities for you to follow approved courses relevant to the development of your career, both internal

and external, give consideration to study and examination leave, and reimburse course fees subject to successful completion of the course.

Still fewer agreements expressed the provision of training as an obligation of the employer, as in the case of document which stated: 'the Company undertakes to provide the necessary opportunities and facilities to ensure that all members of staff are in possession of the knowledge, skills and experience necessary to perform their jobs to a satisfactory standard'. On the whole, very few documents went beyond the minimum requirements of the legislation relating to the statutory written statement.

5. Incentives, Flexibility and Variation of Terms

A principal advantage of individualisation, which was cited to us by numerous respondents, was increased flexibility. A common management view was that under collective bargaining, organisations had operated under rigid pay and grading structures, and had been required to submit changes in working practices to the relevant trade union or to joint committees of unions and management for their approval. Derecognition and the removal of collective bargaining enabled management to end unions' rights of consultation (or veto) over job changes. In this section we consider how the issues of incentives and flexibility were approached by the individualised agreements which replaced collective bargaining.

5.1. Pay

A key development in many organisations was the use of individual appraisal systems in place of the annual pay round; individual performance-related pay was especially prevalent in firms which had derecognised completely. However, it is notable that there was, on the whole, little formalisation of systems of individual appraisal. It was normal to make only a brief reference to the employee's basic salary

and to an annual appraisal round in the offer letter and/or the document containing terms and conditions: 'It is Company policy to conduct an annual performance review for each member of staff during June of each year'; 'salaries are normally reviewed annually'.

In short, individualisation did not lead to any greater specificity of contractual rules governing pay. Rather, it was common for employers to reserve to themselves substantial discretion to set individual pay by reference to open-ended appraisal procedures.

5.2. Flexibility clauses

In contrast to the absence of detailed contractual terms on pay, most individualised agreements dealt explicitly and in detail with issues of flexibility and variation of terms. The formal contractual documentation was used by employers as an expression of flexibility in various ways. Clauses were expressed in such a way as to reserve to the employer a unilateral right to vary the required contractual performance. This was regularly done for such matters as job duties and location, the employer reserving the right to change the employee's duties or place of work. Broad flexibility clauses of the following kind were common:

During your employment with the Company, you will be required to cooperate in the development of new working arrangements as necessary, including participating in training in order to improve both individual skills and the profitability of the company. This will include being flexible in regard to the duties undertaken and mobile within the Company's establishment in which you are employed.

More bluntly, one agreement stated:

The Company may make reasonable changes to the terms and conditions of your employment. Such changes will be confirmed in writing.

Terms and conditions governing hours of work were also subject to flexibilisation. In one case a 'normal' working week of 37.5 hours was qualified by the statement, 'In addition, you will be required to undertake shift work as and when required'. In another, management reserved the right to insist on overtime work 'in order to meet prevailing needs such as deadlines, delivery dates, etc.'. In a further case, basic hours only were set by the contract itself, leaving starting and finishing times to the discretion of line managers:

Operational hours are the hours during which your function offers a service to its customers. Individuals will agree their own pattern of working within those hours, to suit their personal circumstances and the requirements of the business. Actual working hours remain 37 hours per week... Actual normal working hours will be determined by agreement with your manager in order to ensure cover throughout operational hours.

There were numerous other examples of contractual documents stipulating that employees were expected to work additional hours according to the company's needs, without entitlement to overtime pay. While the loss of overtime payments reflects, to a certain extent, the move to single salaried status, these agreements also involve an erosion of the expectation of a normal or basic working week for both white-collar and blue-collar workers. To that extent, they go beyond the previous practice of many employers of requiring overtime working in times of need.

In one case, annualisation of hours was introduced following the withdrawal of collective bargaining. Annualisation was not confined to non-union environments; however, it was less usual to see a provision of the kind contained in the employment handbook of this organisation,

according to which the employer could unilaterally move the employee from one type of contractual arrangement to another, simply by giving three months' notice.

5.3. No-legal-effect clauses

A further feature of individualised agreements was the use of clauses aimed at denying legal effect to certain terms and conditions, again providing the employer with an implied right of unilateral variation. In one organisation, the individualised contract stated that 'the company reserves the right to change the bonus scheme from time to time'. In another, works rules contained in a company handbook were described as 'not contractual terms and conditions of employment', but simply 'brought to your attention to comply with the law and to make you aware of the Company's policy and practice in these areas'. The matters concerned included disciplinary procedures, rules relating to health and safety, and grievance procedures. Even though the legal effect of a clause of this kind, which is akin in many ways to an exclusion clause in a standard-form consumer contract, is unclear, it is significant that the employer should in this way seek to deny normative effect to terms which are normally classed as contractual. Again, this confirms that the role of the documents was seen by employers as principally informational.

5.4. Entire understanding clauses

A further device used in a number of agreements was an 'entire understanding' clause, designed to ensure that, as far as possible, the document issued by the employer was an exhaustive statement of the parties' contractual rights and obligations:

- Except as otherwise expressly provided by its terms and for any detailed rules (not being inconsistent with the express terms hereof) from time to time laid down by the Company, this Contract represents the entire understanding, and supersedes any

previous agreement, between the parties in relation to your employment by the Company.

This cuts both ways: extraneous sources, in particular collective agreements, are excluded, while at the same time the contract's own stipulations with regard to flexibility and the variability of terms are cemented into place. The intention is that the employee can have no greater rights than the agreement itself allows. Although a clause of this kind cannot make the agreement completely watertight, since the effects of certain implied terms and of statutory impositions are unavoidable, it would normally be impracticable for employees to test its limits through legal action.

5.5. Formalised flexibility?

The effect of these various clauses may be thought of in terms of a *formalised flexibility*: the terms of the agreement themselves are used to define the limits of the employee's contractual entitlements and, conversely, the extent of management's powers to change the basis upon which work is to be carried out. In the sense that employment law has always recognised an area of unilateral managerial prerogative beyond the contract terms, this may not, from a strictly juridical point of view, represent a major innovation. However, the law has also recognised that contractual terms and conditions can impose limits on managerial power, for the employee's protection. Very wide flexibility clauses, and clauses seeking to deny legal effect to certain terms and conditions, signify an attempt to roll back that protection.

Contract formality was also used to limit the defensive effects of informal custom and practice at workplace level. Wide flexibility clauses, which assert management's rights to define the employee's duties, undercut expectations of the employees based on custom and practice. Individualisation also provided the employer with the opportunity to state more precisely certain obligations of the employees which were previously governed by informal norms:

Cranedriviers, when required by Management, will work in wet and other adverse weather conditions commensurate with safe working practices... There will be no predetermined manning levels and the allocation of Cranedriviers to tasks will be at the sole discretion of Management... Cranedriviers will be required to handle difficult, dusty and dirty cargoes...

5.6. Flexibility in firms retaining collective bargaining

Importantly, the types of clauses just considered were not confined to the individualising firms. The following clause was contained in a collective agreement concluded in the mid-1990s, which replaced an earlier agreement between the same parties:

‘[The plant] needs to be a highly successful long term component of [the company’s operation]. Achievement of this goal will require continuous improvement and change. It will require the development of a working environment that fosters the involvement and commitment of all employees... As an essential element of continuous improvement new plant, equipment, methods and manning arrangements will be introduced, commissioned and operated without restriction. The individual flexibility of employees only be limited by safety, competency and training.

Many of the firms retaining collective bargaining made use of contractual devices aimed at formalising flexible working arrangements. Agreements included clauses reserving to the employer the right to change working hours to fulfill operational needs, and to vary job duties. Hence the preservation of collective bargaining did not prevent the achievement of a high degree of working time flexibility. In one case, a highly-detailed, written contract of employment stipulated that employees should make themselves available for work on certain days, without the employer being under an obligation to find work for them on those days. In another case, the relevant collective agreement

provided that the employer had the right to set overtime hours by giving notice in the middle of the shift then being worked. However, this was subject to a strictly-applied upper limit on the amount of overtime which could be required of any individual employee. This provision in the collective agreement was regarded by the company as a highly valuable source of flexibility; at the same time, it is significant that both procedural and substantive constraints on the employer's power to demand overtime were recognised in the collective agreement.

Moreover, in firms where collective bargaining had been retained, contractual documentation issued to the individual employees continued to make specific reference to the relevant collective agreement or agreements. In part this was because a reference of this kind is required by the legislation relating to the issuing of the statutory written statement.²³ However, in other cases it is clear that the collective agreement was regarded as a source of flexibility. In some cases, collective provisions made allowance for the possibility that the union might, in the future, engage in bargaining which led to a diminution in the level of protection offered to employees:

The Company recognises the [Union] as having sole Bargaining rights for you under this Contract of Employment. [The Union] is your agent and is empowered to negotiate variations to your terms and conditions of employment (*including diminution of terms and conditions*) on your behalf...The instrument through which the Company and [Union] establish all your terms and conditions of employment is the Collective Agreement...This Collective Agreement is hereby expressly and specifically incorporated into your Contract of Employment...If the Collective Agreement... is at any time replaced by a subsequent Collective Agreement between the Company and the [Union] your terms and conditions of employment shall be determined under that subsequent Agreement. [emphasis added]

The ubiquity of flexibility clauses across unionised and non-unionised firms has a number of implications. On the one hand, it seems that unions saw agreement over flexibility as the necessary price to pay in order to retain collective bargaining when it was otherwise under threat. At the same time, employers saw the preservation of collective bargaining as part of a strategy for maintaining the cooperation of the workforce. Either way, it is clear that, for many firms, a policy of pursuing flexible working arrangements was completely compatible with the maintenance of a role for collective, independent employee representation.

At the same time, some firms retaining collective bargaining appear to have done so out of a recognition that there were limits to how far the process of 'individualisation' could be pursued without undermining the process of organisational change itself. In one such firm, a manufacturing company, a personnel manager remarked in the course of the interview that individual contracts were not really relevant for the vast majority of workers; 'all that is individual is the salary' - employees' pay rises were set through an appraisal system - 'but that's done within a framework', based around movement within a small number of occupational grades. Individualisation in the sense of making a deal with each individual workers was seen as incompatible not just with the maintenance of a role for the trade union (which the company accepted), but also with the goal of achieving a common purpose among the workforce- 'one team, one purpose - you can't treat each individual worker as a bargaining unit'.

6. Conclusion

The recent process of 'individualisation' of employment contracts in Britain reveals a number of paradoxes. In terms of incentives operating through the linking of pay to individual performance, contractual agreements have played little or no role. The individualised 'contracts' (or statements) issued by employers tended simply to note the existence of periodic arrangements for appraisal and assessment, without, in most

cases, providing a more detailed account of how these procedures were intended to work in the setting of pay.

A clearer innovation was the use of individualised contracts to reinforce and, in a curious way, to formalise areas of managerial discretion; here, individualisation can be seen in terms of the formalisation of those aspects of custom and practice which favoured management. Wide flexibility clauses for job duties, location and working time signified a reassertion of managerial control over the organisation and pace of work in firms where union influence had been minimised, as did terms spelling out more clearly certain duties of employees which were previously the subject to the need for joint agreement or even to a union veto.

At the same time, there has also been an attempted *decontractualisation* of certain terms and conditions, which are subject to broad waiver clauses which purport to deny them binding legal effect. As we saw, documents attempted to make certain employment benefits, bonus schemes and also disciplinary and grievance procedures, discretionary from the employer's point of view. Although the legal effect of these provisions, which are akin to exclusion or exemption clauses, is unclear, their legal standing cannot easily be established either way, and so they may in practice operate to limit the degree to which employees can rely upon the stability of terms and conditions of employment.

The use of such terms is a further indication that in many cases, the individualised contracts or agreements issued to employees were not meant by employers to have *normative* effect. Many so-called contracts strongly resemble, or overlap with, the statutory written statements, whose purpose is primarily *informative*. For these reasons, these new-style contracts are not so much mechanisms of economic governance, as instruments of unilateral managerial control.

These developments in employment relations practice might at first sight seem at odds with the growing body of case-law in Britain which has imposed duties of good faith on the employer and which has also widened the scope of the reciprocal duty of contractual cooperation (Brodie, 1998). But on reflection, these developments are not so surprising. As collective bargaining has gone into retreat, the residual role of the common law has expanded, encouraged through a process of cross-fertilisation from the law of unfair dismissal. Regulation has been displaced, rather than removed entirely. This is not to suggest that judicial intervention is likely to be the equivalent in strength or effect to collective bargaining, either as a guarantor of employee protection, or as a restraint on employer power. However, it indicates that, as in the United States, the decollectivisation of the employment relationship is likely to lead to a growing role for both legislative and judicial regulation of managerial power. Such regulation can be extremely costly for individual employers, as well as unpredictable in its effects; the high damages awards made by US courts in the occasional employment contract case may soon be replicated on a wider scale in the UK if Parliament accepts the proposal in the *Fairness at Work* White Paper²⁴ for the removal of the statutory limit on unfair dismissal compensation.

There are other reasons for thinking that the future of the employment relationship does not lie in complete 'individualisation'. Many enterprises have retained collective bargaining while implementing far-reaching forms of functional flexibility. Others have set clear limits to the process of contractual differentiation. This suggests that competitive strategy is not simply a question of decollectivisation and deregulation. The next step in research on employment contracts will be to identify more precisely the contribution of independent employee representation to the competitive survival and success of organisations, as part of the wider research agenda examining the links between employment regulation and the performance of economic systems.

Notes

1. See Brown *et al.*, 1998, for a full account of the research project and its findings. The Appendix to this paper contains a brief description of the sample of firms in the survey.
2. Epstein (1984: 974) suggests that '[t]he institutional stability of employment contracts at will can now be explained in part by their legal fragility. The right to fire is exercised only infrequently because the threat of firing is effective'. This fails to deal with the point that the threat may lose credibility in practice (whatever the legal situation) if it is rarely exercised.
3. See *Malik v. BCCI* [1997] IRLR 462, HL.
4. *Johnstone v. Bloomsbury AHA* [1992] 2 QB 333, CA (Browne-Wilkinson VC).
5. *Imperial Tobacco Pension Fund Ltd. v. Imperial Tobacco Ltd.* [1991] IRLR 66 (Browne-Wilkinson VC).
6. *Johnstone v. Bloomsbury AHA* [1992] 2 QB 333, CA (Stuart-Smith LJ).
7. The situation is different in most, although not all, mainland European systems: see Wedderburn, 1992.
8. Trade Union and Labour Relations (Consolidation) Act 1992, s..
9. Default rules of this kind are rare in the context of UK legislation, but one example is provided by the right of the parties to a fixed-term employment contract to avoid the application of rules relating to unfair dismissal and redundancy as long as certain procedural requirements are met and a fixed term of a certain length is guaranteed: Employment Rights Act 1996, s. 197

(although, in practice, it is doubtful if the legislation succeeds in its aim of providing a quid pro quo for the employee: see *BBC v. Kelly-Phillips* [1998] IRLR 294). Another technique is to allow derogations from labour standards on condition that they are negotiated by the collective representatives of the workforce, as envisaged by certain provisions of the EC Working Time Directive (Directive 93/104).

10. *Burdett-Coutts v. Hertfordshire CC* [1984] IRLR 91 (QBD).
11. *Robertson v. British Gas Corp.* [1983] ICR 351.
12. For discussion, see Deakin and Morris, 1995: 247-249, and for a recent illustration (arising in the context of an action for professional negligence on the part of a solicitor) *Ports of Sheerness Ltd. and Medway Ports Ltd. v. Brachers* [[1997] IRLR 214.
13. *R. v. Secretary of State for Employment, ex parte Aslef (No. 2)* [1972] 2 QB 455, CA.
14. *Sim v. Rotherham MBC* [1987] Ch. 216 (Scott J.).
15. Trade Union and Labour Relations (Consolidation) Act 1992, s. 179.
16. See *Ports of Sheerness Ltd. and Medway Ports Ltd. v. Brachers* [1997] IRLR 214.
17. The ending of enhanced rates was provided for in the legislation by which the National Dock Labour Scheme was brought to an end.
18. Trade Union and Labour Relations (Consolidation) Act 1992, s. 146.

19. Ibid., s. 152.
20. *Associated Newspapers Ltd. v. Wilson, Associated British Ports v. Palmer* [1995] IRLR 258.
21. More precisely, section 148(3) requires the tribunal to disregard evidence of anti-union intent in a case where there is also evidence that the 'employer's purpose was to further a change in his relationship with all or any class of his employees', unless the tribunal considers that the employer's action 'was such as no reasonable employer would take having regard to [this purpose]'.
22. These fall into a number of categories under Employment Rights Act 1996, sections 1-4; see Deakin and Morris, 1995: 224-226.
23. Employment Rights Act 1996, s. 1(4)(j).
24. Cm 3898, 1998.

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APPENDIX

Appendix

The focus of the empirical study on which the present paper was based was the recent growth of 'individualised' employment contracts in Britain, against the background of the declining influence of collective bargaining and increasing competitive pressures on organisations in both the private and public sectors. The study's objectives were to examine employers' motives for individualising contracts, to analyse the meaning of individualisation in both substantive and procedural terms, to identify its legal significance, and to evaluate its costs and benefits. 32 organisations were studied, using case-study techniques including face to face interviews with senior managers. The majority of organisations had recently taken steps to individualise employment contracts by removing collective bargaining; a smaller number had never engaged in collective bargaining. A third group, selected to match the main group by industry, had retained collective bargaining at plant and/or company level.

The sample was weighted towards larger organisations with substantial personnel and human resource operations. 7 organisations employed 10,000 or more individuals; 15 employed between 1,000 and 9,999; 8 employed between 250 and 999; and 3 employed fewer than 250. The sectors covered included the privatised utilities, engineering, port transport, printing and publishing, newspapers, paper manufacturing, television broadcasting, retailing, process manufacturing, information technology and finance, and public services.

For most organisations it was possible to obtain contractual documents and other materials issued to employees, including employer handbooks and (where relevant) collective agreements. The sections which follow are based on a qualitative analysis of these materials, supplemented by interviews where appropriate.

The following Table lists the organisations (as anonymised) which took part in the study. For further details see Brown *et al.*, 1998.

Table: The Case Studies

CODENAME	INDUSTRY	T.U. STATUS	SIZE
<i>Privatised Ut's</i>			
FaciliCo	mixed utilities	Almost full d/r	Large
UtiliCo	mixed utilities	Mgt d/r only	Large
WaterCo	water	Mgt d/r only	Large
ElecCo	electricity	Mgt d/r only	Large
<i>Engineering</i>			
ArmsCo	engineering	Almost full d/r	Large
AirCo	engineering	Mgt d/r only	Large
ToolCo	engineering	Never recog'd	Medium
CarCo	engineering	Full recog'n	Large
<i>Port transport</i>			
PortCo	docks	Full d/r	Large
DockCo	docks	Full recog'n	Medium
QuayCo	docks	Full recog'n	Large
<i>Print & pub'g</i>			
PressCo	publishing	Full d/r	Large
DataCo	publishing	Mgt d/r only	Large
DistribCo	distribution	Mgt d/r only	Medium
<i>Newspapers</i>			
ProvnewsCo	newspapers	Full d/r	Large
LocalnewsCo	newspapers	Full recog'n	Medium
<i>Paper</i>			
BoxCo	packaging	Never recog'd	Small
PackCo	packaging	Full recog'n	Small
<i>Television</i>			
TVCo	television	Almost full d/r	Medium
ViewCo	television	Full recog'n	Medium

CODENAME	INDUSTRY	T.U. STATUS	SIZE
<i>Retail</i>			
RetailCo	retail	Almost full d/r	V. Large
StoreCo	retail	Mgt d/r only	V. Large
<i>Process M'fg</i>			
ProcessCo	chemicals	Part full d/r	Medium
MetalCo	metals	Full recog'n	V. Large
PlastiCo	chemicals	Never recog'd	Medium
<i>IT & Finance</i>			
FinanceCo	finance	Mgt d/r only	V. Large
CommCo	telecomms	Full d/r	V. Large
CyberCo	telecomms	Mgt d/r only	V. Large
SoftCo	software	Full d/r	Small
<i>Public service</i>			
UnivCo	university	Mgt d/r only	Large
HealthCo	ambulance	Full d/r	Medium
AgencyCo	govt agency	Full recog'n	V. Large

Small = <250; Medium = 250 - 999; Large = 1000 - 9999; V. Large = >10,000
d/r = derecognition

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