The Concept of the Employer

JEREMIAS PRASSL

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 2015

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: 2014959016

ISBN 978–0–19–873553–3

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

Introduction

The Concept of the Employer and the Personal Scope of Employment Law

The contract of employment is the central gateway to employment rights in English law.[1] Only individuals privy to that relationship are classified as employees, and can thus come within the full scope of employment protective norms. Those labouring in work arrangements outside that narrow paradigm, on the other hand, find themselves labelled as non-employee workers or independent contractors, and thus without recourse to the highest levels of protection. The question as to an individual's employment status has therefore become a crucial issue in determining the application of employment law norms.[2] In developing the concept of the employer as counterparty to the contract of employment instead of pursuing the more traditional enquiries surrounding definitions of the employee, the present work adopts an 'unfamiliar perspective, indeed initially a counterintuitive one'.[3] It argues that the received unitary concept of a single-entity employer is an increasingly salient factor in workers' falling outside the personal scope of employment law, as individuals employed in multilateral work arrangements can no longer satisfactorily identify the relevant counterparty to bear employment law obligations. A move towards a functional concept, which identifies the employer—or instead a group of employers—through the exercise of a particular set of functions (such as, for example, the provision of pay), on the other hand, represents an important step towards restoring coherence in the personal scope of labour law.

The present introduction briefly charts the conceptual problems resulting from employment law's near-exclusive focus on the classification of employees as party to a bilateral contract of employment in determining the personal scope of employment law, and suggests that the enquiry should be widened also to include

[1] In the context of employment regulation, the terms English law and United Kingdom law will be used interchangeably. See A Bradley and K Ewing, *Constitutional and Administrative Law* (15th edn Pearson 2010) 40; Trade Union and Labour Relations (Consolidation) Act 1992 (hereinafter, 'TULRCA 1992') s 301(1).

[2] The terms 'employment law' and 'labour law' are used interchangeably throughout this work.

[3] P Davies and M Freedland, 'The Complexities of the Employing Enterprise' in G Davidov and B Langile (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006) 273.

the concept of the employer. Subsequent sections then set out the central argument and overall structure of the work, and outline its scope and methodological approach. A final section sketches the broader implications of a reconceptualized definition of the employer for the scope of employment protective norms in English law.

Broadening the Enquiry

In their exploration of the 'Complexities of the Employing Enterprise', Freedland and Davies note that:

> The normal course of debate about the personal scope of employment law takes place primarily within a paradigm of bilateral . . . contracts between a worker and an employer. The problem about personal scope is perceived primarily or even solely as one of designating the appropriate category of workers to be included within the scope of legislation governing the employment relation. The primarily and traditionally appropriate category is that of dependent employees, in English law those with contracts of employment.[4]

How did employment law come to consider the employment relationship, whether in its individual or collective dimension, primarily from the perspective of the employee? The early normative focus of the discipline was of course directly related to the individual worker,[5] in the sense of rebalancing the employee's inequality of bargaining power inherent in the employment relationship.[6] What started out as the purpose of employment law, however, soon began to have an equally significant impact on the conceptual question as to which apparatus could best achieve that aim. The individual's status as an employee, self-employed contractor or later worker thus became one of, if not indeed the, key enquiry of employment law.

The present work unequivocally accepts the worker's perspective as the appropriate analytical and normative focus for employment law's fundamental concerns.[7] It does set out to question, however, the extent to which a *conceptual* focus on the worker may have come to hamper that larger enterprise by neglecting complex issues and difficult questions surrounding the concept of the employer.

Over more than a century, a considerable amount of case law and scholarship has built up to develop, adapt, and refine a series of common law tests such as control, economic reality, and mutuality of obligation to 'draw a fundamental distinction between employment which is categorized as "dependent" or "subordinate" and that which is "independent" or "autonomous" '.[8] This binary divide distinguishes between individuals who work under a contract of employment or service and therefore 'come under the scope of employment protection and social

[4] Davies and Freedland, 'Complexities of the Employing Enterprise' (n 3) 273–4.
[5] K Wedderburn, *The Worker and the Law* (3rd edn Penguin 1986).
[6] P Davies and M Freedland, *Kahn-Freund's Labour and the Law* (Stevens 1983) 14, 69.
[7] For recent discussion, see M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 364 ff (The Personal Work Profile).
[8] S Deakin and G Morris, *Labour Law* (6th edn Hart 2012) 145.

security legislation' on the one hand, and those who work under a contract for services, which attracts 'fewer of the burdens or benefits of dependent status' on the other.[9]

The resulting model of employment regulation, based on the assumption of a binary—or more recently tripartite—composition of the labour market,[10] has fundamentally been challenged by economic and social developments, particularly as regards the scope and application of employment law norms in increasingly complex organizational settings. A 'tectonic shift in employment relations over the past 20 years', Fudge notes, 'has shaken the foundations of the legal architecture of the employment relationship'.[11] Examples can be drawn from a wide range of extensively analysed circumstances, from the explosive growth of so-called 'atypical' forms of work[12] to new models of business organization resulting from the vertical disintegration of enterprise.[13] A classic illustration combining both elements is the supply of workers by a temporary work agency to end-user clients. There, the definition of the employee as party to a bilateral contract of employment will usually classify the individual worker as an independent or autonomous contractor, without recourse to some of the most significant employment rights. The long-diagnosed crisis in the fundamental concepts of labour law[14] has therefore become 'if anything more serious, so far as employment contracts are concerned'.[15]

Employment law is of course not alone in its difficulty in grappling with new multilateral organizational models[16] and the resulting complex relationships across legally distinct entities.[17] Their negative impact, however, can be particularly harsh in employment law, as the individual worker may be left without recourse to even the most basic employment protection.[18] A near-exclusive focus on the concept of the employee and regulatory questions surrounding its definition has played a significant part in precipitating this crisis, by allowing a conceptual vacuum to

[9] Deakin and Morris, *Labour Law* (n 8) 145.

[10] The more recent development of additional categories such as the 'worker' concept do not fundamentally alter the binary approach, in so far as they assume similar characteristics for, and thus a high degree of homogeneity within, each category of workers. See *Byrne Bros Ltd v Baird* [2002] ICR 667 (EAT); *Redrow Homes Ltd v Wright* [2004] EWCA Civ 469, [2004] 3 All ER 98; *Jivraj v Hashawani* [2011] UKSC 40, [2011] 1 WLR 1872; though cf now *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32, [2014] 1 WLR 2047.

[11] J Fudge, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection' in G Davidov and B Langile (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006) 296.

[12] S Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 ILJ 337, 339.

[13] H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 OJLS 353, 356.

[14] K Wedderburn, R Lewis, and J Clark (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon Press 1983) vi.

[15] M Freedland, *The Personal Employment Contract* (OUP 2003) 26.

[16] G Teubner and H Collins, *Networks as Connected Contracts* (Hart 2011) 98ff.

[17] R Gilson, C Sabel, and R Scott, 'Braiding: the Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine' (2010) 110 Columbia Law Review 1377, 1389.

[18] L Benería 'Shifting the Risk: New Employment Patterns, Informalization, and Women's Work' (2001) 15 International Journal of Politics, Culture and Society 272, 348.

develop on the non-worker side of the employment relationship, filled by nothing more than a vague notion reminiscent of old concepts such as the servant's master. This impact was dramatically exacerbated by developments in the structure and organization of the modern enterprise. Just as workers have become a very heterogeneous group, so have the firms employing them: as a result of the facility with which corporate group structures can be set up and controlled and the wide availability of a labour force which can be sourced from external providers, modern work arrangements frequently involve more than one entity with control over when, where, and how work is done. As Weil concludes, '[l]ike a rock with a fracture that deepens and spreads with time, the workplace over the past three decades has fissured'.[19]

Given the traditional focus on defining the employee and the concomitant neglect of the concept of the employer, however, the regulatory responses to increasingly complex work relationships were once again primarily focused on the definition and position of the worker in specific subsets of the labour market.[20] The crucial problem with this approach is its assumption of a high degree of homogeneity in employment scenarios generally, and the problems faced by particular groups of employees in particular. It ignores the considerable degree of 'heterogeneity of [such] work',[21] as reflected in a growing nomenclature of "atypical" and "non-standard" work, apart from commonly used categories such as temporary, part-time and self employed work [and including terms such as] "reservist"; "on-call," and "as and when" contracts; "regular casuals"; "key-time" workers; "min-max" and "zero hours" contracts'.[22] The various categories of 'atypical' work will furthermore frequently overlap, for example where agency work incorporates a 'zero-hours contract dimension'.[23]

Even a very preliminary sketch of factual situations can therefore show that current approaches to labour market regulation will continue to fail in their attempts to grapple with the ever-increasing fragmentation or fissure of work arrangements. As long as attention remains focused on the employee category and related secondary conceptions alone, it will be very difficult to address the relevant questions at all. As Freedland and Davies have noted, there may well be a link between this limited focus on defining particular groups of employees and the increasing inefficiencies of the current situation, as technicalities arising from the

[19] D Weil, *The Fissured Workplace—Why Work Became so Bad for so Many, and What Can be Done to Improve It* (Harvard University Press 2014) 7.

[20] In domestic law, see eg the extension of anti-discrimination rights to 'contract workers': *Harrods Ltd v Remick* [1998] ICR 156 (CA). At EU level, see eg the equality duty with comparative workers: Directive (EC) 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L327/9. For contrasting examples in US law, see the Fair Labor Standards Act 1938; C Ruckelshaus, R Smith, S Leberstein, and E Cho, *Who's the Boss: Resoring Accountability for Labor Standardas in Outsourced Work* (NELP 2014) 32ff.

[21] D McCann, *Regulating Flexible Work* (OUP 2008) 102.

[22] L Dickens, 'Exploring the Atypical: Zero Hours Contracts' (1997) 26 ILJ 262, 263.

[23] J O'Connor, 'Precarious Employment and EU Employment Regulation' in G Ramia, K Farnsworth, and Z Irving, *Social Policy Review 25: Analysis and Debate in Social Policy* (OUP 2013) 238.

current approach create strong avoidance incentives:[24] employers can easily avoid the vast majority of employment law obligations by recourse to relatively low-cost strategies such as corporate reorganization or the outsourcing of labour-intensive processes.

It is true, as Deakin has argued, that '[w]ork relations which fall on the "margins" of the employment category . . . have always posed a problem of classification', even though to 'point to the recurring nature of the problem is in no way to underestimate the problems involved in solving it today'.[25] Indeed, the persistent difficulties identified warrant further enquiry, albeit in different and perhaps initially counterintuitive directions. In their already-cited work, Davies and Freedland argue that:

> some of the difficulties which attend the whole debate about the personal scope of employment can best be resolved, or at least understood, by questioning and de-constructing not, as is traditional, the concept of 'the worker' or 'the employee', but rather that of 'the employer', especially in the context of the contract of employment.[26]

It is this path which the current work hopes to pursue. It presents an enquiry into the legal concept of the employer; both as it has been historically received in the common law and as to how it could develop in future within that framework. An extensive discussion of this perspective is long overdue. As previous paragraphs have noted, numerous detailed conceptual accounts of the specific legal issues facing different types of atypical workers have been developed in recent years. This has yet to be matched by a similarly extensive body of scholarly thought on the employer side: there might be just as many variations on the other side of personal employment relationships. From a regulatory perspective, furthermore, the vast majority of measures regarding employers continue to be framed in terms of a unitary paradigm, thus often imposing liability at a single level even if key decisions in the work arrangement are taken by multiple entities. A 'deepening and reinforcement of the understanding of the employing organization may [therefore be amongst the most promising avenues to] optimise the personal scope of employment law'.[27]

Argument and Structure in Outline

The central argument put forward in this work is the idea that the current concept of the employer is riddled with internal contradictions, as a result of which employment law coverage will quickly become incoherent or incomplete in complex, multilateral settings. These problems can only be addressed by a careful

[24] M Freedland and P Davies, 'Labour Markets, Welfare and the Personal Scope of Employment Law' (1999–2000) 21 CLLPJ 231, 235, 238.

[25] S Deakin, 'The Comparative Evolution of the Employment Relationship' in G Davidov and B Langile (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006) 104.

[26] Davies and Freedland, 'Complexities of the Employing Enterprise' (n 3) 273.

[27] Davies and Freedland, 'Complexities of the Employing Enterprise' (n 3) 293.

reconceptualization and the development of a more openly functional concept, defining the employer as:

> the entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law.

The work is loosely divided into three parts, each reflecting a particular step in that endeavour. Part I focuses on the traditional concept of the employer, and explains how it has increasingly come under pressure. A first chapter explores two potentially contradictory strands of the received common law concept: the employer has come to be characterized as both a unitary and a multi-functional concept. The resulting tension does not readily become apparent in the traditional paradigm model of single-entity employment. Chapter 2, however, sets out a range of multilateral situations where employer functions are shared across or parcelled out between multiple entities. The two specific contexts to be explored are temporary agency work, where functions are divided between an employment agency and an end-user business, and complex corporate groups, in particular the structures created by Private Equity (PE) investments, where the PE shareholders become closely involved in their portfolio companies' day-to-day decision-making.

Part II then explores the implications of the concept under pressure, in order to demonstrate the significant practical impact of the tension inherent in the current concept of the employer, and to lay the groundwork for the final part. Chapter 3 demonstrates the fragile scope of employment law coverage, beginning with the near-complete inapplicability of protective provisions in the triangular agency work context. Discussion then turns to the incomplete and incoherent coverage that results from an inability to identify the relevant employer in complex corporate structures, as illustrated in the context of employee consultation in collective redundancies and transfers of undertakings. Chapter 4 presents a comparative excursion, analysing the conceptual apparatus developed in German employment and company law in response to the prevalence of large corporate groups. Put together, these chapters provide some of the fundamental criteria against which subsequent developments can be evaluated. Any reconceptualization, first, has to avoid an assumption of excessive homogeneity and thus be capable of accommodating a differentiated view of different domains of employment law. The changes proposed, second, need to remain anchored within existing regulatory frameworks, and represent a careful overall evolution of both the unitary and functional strand of the received concept of the employer. The functional concept to be developed, finally, will have to prove resilient to fast-paced changes in legal structures and commercial operations, focusing on the exercise of specific functions over considerations of legal structures.

The third part turns to that task of reconceptualizing the employer. Building on the specific deficiencies identified in previous parts, it proposes a careful modification of the existing concept. To this end, Chapter 5 explores the multi-functional strand: it develops the very idea of a functional concept, and shows different avenues in existing law through which that approach could be implemented.

Chapter 6, finally, returns to the need for a single concept to ensure coherence across different domains of employment law. It re-examines each of the aspects of the unitary concept as set out in Chapter 1 to demonstrate how the law has developed in those respects, and sets out a subtle reconfiguration in response. A brief overall conclusion tests whether the reconceptualization has been successful, both in practical terms and by addressing the fundamental tension head-on, and returns to the broader implications of a functional concept of the employer in English employment law.

Scope and Methodology

In order to facilitate analytical clarity within the space available, two limitations of scope are necessary. The first of these is as to the range of relationships under examination: the focus of the present work will be firmly on the employing entity as a counterparty to the contract of employment in English law. This is not to suggest that the concept of the employer is analytically distinct in other personal work relations as a matter of logical necessity—in fact, many aspects are likely to be shared across all contracts personally to execute work. As the paradigm of employment relationships in the common law, the contract of service provides the most appropriate core model in embarking on an analysis of the concept of the employer.

The enquiry to follow will therefore be focused on the contract of employment and the parties to it. It is nonetheless important briefly to look beyond this subset, noting especially that none of the conclusions drawn should be read as a suggestion that opposite concepts apply automatically in other contracts for the personal execution of work. To the contrary, several observations apply directly to *all* personal work contracts. As regards the *unitary* perception of the employer, for example, this will be shown to be influenced by a range of factors, most of which are common to the vast majority of personal work relations—any conclusions drawn therefore extending by definition beyond the contract of service. The most prominent example here is the key role played by the contractual nature of the relationship: this framework has had a major influence, in both form and substance, in shaping the concept of the employer as unitary.[28] As nearly all work relationships have become perceived through this prism today, the unitary view of the parties to it is an essential feature of any personal work contract.

A significant proportion of the case law at the heart of the enquiry in Part I, on the other hand, has traditionally been used to draw a line between different categories of dependent labour, by determining whether the contractual relationship could be classified as one of employment.[29] Conclusions drawn from its analysis

[28] M Freedland, *The Contract of Employment* (OUP 1976).

[29] The case law on the definition of the more recent category of the worker is in that sense equally relevant, as the courts have found the distinction between workers and employees to be one of degree rather than kind: see n 10.

are therefore undoubtedly most relevant to the concept of the employer as counterparty to a contract of employment. Whether there are differences in the concepts of the employer in different forms of the employment relationship is beyond the immediate scope of this work; there is nothing however that would exclude the possibility of similar conclusions in other contexts. First, the focus on a subset of personal work relations does not suggest that it is in all regards analytically distinct from other arrangements for the personal execution of labour. Second, while the conceptualization of the contract of employment is built up in the case law through a juxtaposition of employees and those working under a contract for services or other personal work contracts, instructions on how to divide a category (such as personal work contracts) into subsets (including contracts of service and contracts for services) nonetheless reveal interesting aspects about the larger pool. It is, finally, not the practical application of the various tests that is of immediate interest but rather the inherent concepts underpinning each. Whilst the illustrations to be developed in subsequent parts of this work are carefully designed to show how a functional concept of the employer could be put into practice within existing structures, the functional approach developed could therefore equally encompass broader concepts, such as the personal employment contract or even personal work relations.[30]

A second, and similarly non-exclusive, limitation of scope arises from this focus on the contract of employment: for present purposes the collective dimension of relationships between workers and multiple employers cannot be discussed in great detail. Whilst the links between workers' collective voice and the common law in general,[31] and the contract of employment (and therefore the parties to it) in particular, have been the subject of detailed enquiry,[32] the overall domain remains heavily regulated by statutory intervention, and its impact on the concept of the employer might therefore appear somewhat limited.[33] This, however, is again not to be taken as a suggestion that the functional concept of the employer to be developed could not have an equally significant impact in that dimension of labour law, whether in the field of collective bargaining or in the course of industrial disputes. The correct identification of the employer, for example, is an important criterion when determining the lawfulness of a strike. Under what is known colloquially as the 'Golden Formula',[34] any such action will only be protected if it is done 'in contemplation or furtherance of a trade dispute'.[35] This notably means that any strike can only be directed by workers against their immediate employer[36]—a

[30] M Freedland, *The Personal Employment Contract* (OUP 2003); Freedland and Kountouris, *Legal Construction of Personal Work Relations* (n 7).

[31] M Freedland and N Kountouris, 'Common Law and Voice' in A Bogg and T Novitz, *Voices At Work—Continuity and Change in the Common Law World* (OUP 2014).

[32] D Brodie, 'Voice and the Employment Contract' in A Bogg and T Novitz, *Voices At Work—Continuity and Change in the Common Law World* (OUP 2014).

[33] With the notable exception, for present purposes, of discussion surrounding the information and consultation of employee representatives, as discussed in-depth in Chapter 3.2.

[34] Wedderburn, *The Worker and the Law* (n 1) 520; B Simpson, 'A Not So Golden Formula: In Contemplation or Furtherance of a Trade Dispute After 1982' (1983) 46 MLR 463, 476.

[35] TULRCA 1992, s 219(1). [36] TULRCA 1992, s 244(1).

provision which the courts have continuously interpreted in a narrow fashion clearly reminiscent of the received unitary concept of the employer.[37]

This potential significance of the concept of the employer is also evident in the European Court of Human Rights' recent scrutiny of the United Kingdom's ban on secondary action,[38] where the Strasbourg Court explicitly referred to the fact that the narrow single-entity focus embodied in current legislation:

> could make it easy for employers to exploit the law to their advantage through resort to various legal stratagems, such as de-localising work-centres, outsourcing work to other companies and adopting complex corporate structures in order to transfer work to separate legal entities or to hive off companies . . . [as a result of which] trade unions could find themselves severely hampered in the performance of their legitimate, normal activities in protecting their members' interests.[39]

This, together with an earlier citation of the European Committee on Social Rights (ECSR)'s concern that English law could prevent 'a union from taking action against the *de facto* employer if this was not the immediate employer',[40] provides a stark reminder that the focus of subsequent parts on the individual dimension of labour should not be taken as a suggestion that the concept of the employer could not be an equally important question in the discipline's collective dimension.

A final preliminary point to be addressed is the change in methodology to be deployed at different points of the work. As Harlow, building on Dicey, has noted, the:

> possible weakness [of traditional common law methods of reasoning and analysis] as applied to the growth of institutions is that it may induce men to think so much of the way in which an institution has come to be what it is, that they cease to consider with sufficient care what it is that an institution has [—and here the verbs 'should' and 'could' must be added—] become.[41]

The structure of this work is designed to overcome this weakness, echoed in Roben's observation that the 'greatest obstacle [to the changes proposed] will be not so much the intrinsic complexities of the subject as the fact that many of the arrangements under review are long established',[42] by consciously moving through the three steps implicit in Harlow's analysis and looking at what the institution or concept of the employer is at the moment ('has become'), what it *could* be and in the light thereof what it *should* be. Parts I and II operate within

[37] *Dimbleby v NUJ* [1984] IRLR 161; *UCL NHS Trust v UNISON* [1999] IRLR 31 (CA).

[38] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (Application No 31045/10) [2014] IRLR 467; for convincing criticism see A Bogg and K Ewing, 'The Implications of the *RMT* Case' (2014) 43 ILJ 221, 235ff.

[39] *RMT v UK* (n 38) [98]. [40] *RMT v UK* (n 38) [37].

[41] A Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885) Preface to the First Edition vii, as cited by C Harlow, 'Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14 OJLS 419, 426.

[42] A Robens, *Report of the Committee on Health and Safety at Work*, Cmnd 5043 (London 1972) 3 [41]: 'In the words of Bagehot (*Physics and Politics*) "one of the greatest pains to human nature is the pain of a new idea".'

the realm of positive law, applying a descriptive-analytical framework to tease out the *is*. They identify the underlying tension between two distinct strands of reasoning in the received common law concept, and demonstrate its implications across a wide range of potential factual scenarios. Part II simultaneously serves as a starting point for the analysis of what the concept *could* be, by looking at a range of potential solutions. The chapters of Part III continue with this analytical-descriptive approach, insofar as they draw on existing techniques and emphasize the feasibility of different models within current frameworks. At the same time, they mark a break with the previous chapters' limitations, turning to an openly normative approach to suggest that the concept of the employer *should* become a more overtly functional one, by proposing specific reforms to each of the two strands identified at the outset.

This shift from the analytical-descriptive to the normative in Part III is not a radical one, however. In eschewing a complete departure from the descriptive, the *should* carefully builds on the *could*: the functional approach advocated will go no further than necessary to resolve existing tensions, and remains as close as possible to the existing framework to address the fundamental challenge posed by complex work arrangements on its own terms, seeking 'to apply established legal principles to [multilateral organizational settings], and then gradually to adapt these principles'.[43]

A particularly important illustration of this approach can be found in the very concept of the employer to be analysed: Part II demonstrates the difficulties arising from the received unitary concept of the employer,[44] where the employer has come to be defined as a single entity, substantively identical in all circumstances and domains of employment law and beyond. Whether the issue at stake relates to unfair dismissal, collective redundancy consultation, or vicarious liability, the only employer identified will be a singular entity, privy to the contract of employment. Part III, on the other hand, advocates the abandonment of this narrow unitary approach in favour of a functional concept of the employer, which identifies the party or indeed parties, exercising the relevant employer functions as regulated in each particular domain or subset of employment law: the actual payment of wages (or a duty so to do), for example, will determine which entity will come under the obligation to ensure that national minimum wage levels have been met.

At first glance, this change suggests a rather radical departure from the existing concept, as different and sometimes even multiple entities could be designated as employers. Upon closer inspection, however, abandoning the unitary concept does

[43] D Marsden, '"The Network Economy" and Models of the Employment Contract' (2004) 42 BJIR 659, 671.

[44] The present use of the word 'unitary' is not the only one seen in the literature. In Deakin's work on the evolution of the contract of employment, for example, 'unitary' denotes the single status that has emerged for all employees, distinct from that of independent contractors. See eg S Deakin, 'The Evolution of the Contract of Employment, 1900 to 1950—the Influence of the Welfare State' in N Whiteside and R Salais (eds), *Governance, Industry and Labour Markets in Britain and France—The Modernising State in the Mid-Twentieth Century* (Routledge 1998) 225.

not simultaneously imply that English law has to abandon its reliance on a single underlying concept of the employer. That overall framework, deeply ingrained in statutory provisions and the common law, is easily maintained throughout the proposed development away from a unitary and towards a functional concept of the employer. Indeed, as Chapter 6 explains in detail, the very existence of a single definition of the employer can be maintained only by adopting a functional concept, thus ensuring conceptual unity irrespective of factual complexity.

Restoring the Scope of Employment Law

In concluding this introduction, the final question to be raised is that as to the broader implications of a reconceptualized definition of the employer for the scope of employment protective norms in English law. The preceding discussion has already suggested that the work's focus on the concept of the employer is less of a rejection of existing frameworks rather than an attempt to view the perennial problem of personal scope from a different perspective.

As a result, the development of a functional concept of the employer does not represent a rejection of the concept of the employee or even of the contract of employment as key regulatory tools in employment law. The contract conundrum identified in Chapter 1 notes that the definition of an individual's employment status traditionally takes place in a rather circular line of enquiry, where two analytically distinct questions become intertwined: that as to the existence and definition of a contract of service and that as to the definition of its parties. On the one hand, both employee and employer could be seen as parties to a contract of service. On the other, a contract of service can only come into existence if both parties to it show the necessary features of employer and employee. Whilst puzzling in some analytical contexts, the resulting conundrum suggests that, for present purposes, the concept of the employer is closely tied in with both the identification of the employee and the contract of employment.

The functional concept of the employer proposed will therefore be designed to fit into the larger edifice of the contract of employment: Part III extensively analyses a series of different avenues through which it could be put into operation with surprisingly few changes in existing legal structures. The practical impact of the functional concept, on the other hand, could herald significant change from the status quo. English law's rigid adherence to a unitary concept of the employer has meant that the personal scope of protective norms has become vastly under-inclusive. As Weil explains, '[l]aws that protect workers have not kept pace with the new boundaries of the fissured workplace. [For example, legislator's] commitment to providing safety and health and decent conditions at the workplace has not changed. But relentless subcontracting can blur responsibility for safety and put workers in harm's way'.[45]

[45] Weil, *The Fissured Workplace* (n 19) 9.

The key practical implication of the present work is a reversal of that very phenomenon: a functional concept of the employer restores coherence to the personal scope question in multilateral work arrangements. By ascribing responsibility to whichever entity—or combination of entities—exercising the relevant employer function, liability can no longer be blurred by complex organizational structures; laws that protect workers can yet again keep pace with the new boundaries of the workplace. 'Here', as Davies and Freedland suggest, 'is where the future may lie for the personal scope debate.'[46]

[46] Davies and Freedland, 'Complexities of the Employing Enterprise' (n 3) 293.