

1988

Deregulation, Flexibility and Individual Labour Law in the United Kingdom

Brian Napier

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlej>



Part of the [Law Commons](#)

Recommended Citation

Napier, Brian (1988) "Deregulation, Flexibility and Individual Labour Law in the United Kingdom," *Hofstra Labor and Employment Law Journal*: Vol. 6: Iss. 1, Article 4.

Available at: <http://scholarlycommons.law.hofstra.edu/hlej/vol6/iss1/4>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

DEREGULATION, FLEXIBILITY AND INDIVIDUAL LABOUR LAW IN THE UNITED KINGDOM

*Brian Napier**

Up until now, most of the attention paid by labour lawyers to the implications of deregulation and the associated issue of labour flexibility has been concentrated on areas which fall within the scope of collective labour relations. The unions and their supporters have been vociferous in publicising their complaints to new directions the law has been taking. As examples we can cite the changed and much more restrictive legal regime now governing the organisation of industrial action taken to protect existing terms of employment; the increasingly limited powers of statutory bodies empowered to fix minimum terms and conditions of work for particular categories of workers (Wages Councils); and the general withdrawal of legislative support for collective bargaining and union security arrangements, especially in the public sector.¹ However, it is also evident that deregulation and flexibility produce problems which impact upon the individual employment relationship and the laws which regulate it. This paper, after first attempting to define the meaning of terms frequently used in the discussion, explores some of these problems together with possible future legal developments in this area.

1. DEREGULATION AND FLEXIBILITY

A preliminary point is the need to distinguish between the two

* LL. B., University of Edinburgh, Scotland; M.A., Ph.D., University of Cambridge, England; Fellow of Queens' College, Cambridge, England; Lecturer in Faculty of Law, University of Cambridge, England.

1. For a general survey of recent developments, see LORD WEDDERBURN OF CHARLTON, *THE WORKER AND THE LAW* (3rd ed. 1986), ch.1; Millward and Stevens, *Symposium. British Workplace Industrial Relations 1980-1984*, 25 *Brit. J. of Indus. Rel.* 275 (1987); McKendrick, *The Rights of Trade Union Members - Part 1 of the Employment Act 1988*, 17 *INDUS. L. J.* 141 (1988); Fredman and Morris, *The Teachers' Lesson: Collective Bargaining and the Courts*, 16 *INDUS. L.J.* 215 (1987). A possible shape for deregulated labour law in the future is sketched by Mather, *The Future Shape of Labour Legislation in The Future of Labour Law: Two Views*, *Warwick Papers in Industrial Relations*, No. 14 (1987).

concepts of deregulation and labour market flexibility, for these are often confused. Flexibility is of course, not the same as deregulation but nevertheless has close links with it. While deregulation essentially describes a negative and rather technical phenomenon, that is the absence of legislative controls on the terms of the employment relationship, labour flexibility is a much larger concept.

Labour flexibility is a characteristic of a general labour policy. In its modern guise flexibility in a labour force is usually said to be advantageous not only to employers, who have always wanted freedom to organise their workforce as they judged necessary, but also to the state, employees and prospective employees in the community at large.² Conversely, labour market inflexibility in an economy is often advanced as a principal reason for lack of international competitiveness and consequentially high levels of unemployment. A flexible work force is able to respond to market demands as they arise and adapt quickly, and is thus relatively efficient in matching available labour resources with demand. It is principally to achieve this that the government, which has already made important reductions in the scope of protective legislation is considering the repeal of statutes governing the hours of work and holiday entitlements of young people.³

But what does flexibility actually mean? It has been observed that one man's job flexibility is another's job insecurity, and this neatly makes the point that there is nothing necessarily advantageous about the concept of flexibility for those whose employment prospects are affected by it. Most analyses distinguish several differ-

2. The greater the flexibility of the labour market, the lower the economic costs of adjustment: there will be less unemployment and less loss of output. Standard microeconomic theory postulates that, in a perfectly free labour market, wages and employment adjust to rectify imbalances between supply and demand. In the real world, however, there are obstacles to adjustment. These make relevant policies that not only assist those most affected but promote the flexibility of salary structures and the adjustment of power.

127 ORG. ECON. CO-OP & DEV. OBSERVER at 29 (1984).

New products and processes, and new competitive pressures, offer new challenges and opportunities; inevitably, they also mean that established patterns of work, hours and job demarcation may become inefficient and costly. British business has adjusted more slowly than most of our competitors. All too often change has been seriously hampered by management inaction and trade union resistance.

EMPLOYMENT, THE CHALLENGE FOR THE NATION, DEPARTMENT OF EMPLOYMENT, 1985 CMND. 9474, at 14.

3. Cf. the proposals advanced by the Institute of Directors in *A New Agenda for Business* at 11 (1987). ("[T]he key to the long-term transformation of Britain's industrial relations, and indeed of its business performance, is the treating of employees as individuals, who should contribute to and share in the success of the enterprise.").

ent aspects of flexibility. For example, in the Advisory Conciliation and Arbitration Service ("A.C.A.S.") Report for 1987,⁴ a growing emphasis on enhancing flexibility in working methods and organisation was singled out for mention in a review of recent developments in the climate of British industrial relations. This general trend was analysed under headings consisting of new working arrangements, new ways of organising working hours, changes in craft and skill divisions between workers, and changes in payment schemes so as to place more emphasis on rewarding effort and achievement on the part of individual employees.⁵ Other discussions of flexibility emphasize the need to remove regulations and standards which discourage employers from creating jobs, the need to produce "a better balance of bargaining power in industry," and the growth of "responsible trade unionism."⁶

Achieving flexibility in employment may, due to the multi-faceted nature of the concept, require many types of reform, in which the process known as deregulation is just one.⁷ Alongside deregulation (in the narrow sense of reduction of direct legislative intervention in the terms on which work is undertaken) there are several other measures which the state can take to promote flexibility. These include alteration of the rules of tax and social security systems in order to tempt workers to take lower-paid jobs, promotion of forms of work-sharing which encourage particular groups of potential workers to participate in the labour market⁸ and the provision of training opportunities to facilitate the learning of new skills. More controversially, flexibility may also be achieved if the state weakens the "industrial muscle" of unions that seek to maintain established practices which, at least in the short term, are seen as benefitting their members in employment. The recent history of industrial policy in Britain shows evidence of government-initiated movement on all these fronts.⁹

4. The Advisory, Conciliation and Arbitration Service ("A.C.A.S.") is a state-funded body with statutory responsibilities for the improvement of collective industrial relations.

5. A subsequent inquiry into such forms of flexibility see LABOUR FLEXIBILITY IN BRITAIN: THE 1987 ACAS SURVEY, A.C.A.S., OCCASIONAL PAPER 1988, No. 41.

6. For these aspects of flexibility, see generally EMPLOYMENT, THE CHALLENGE FOR THE NATION. DEPARTMENT OF EMPLOYMENT, 1985, CMND. 9474, ch. 7. See also J. Atkinson, *Flexibility or Fragmentation? The United Kingdom Labour Market in the 1980's*, 12 LAB. & Soc'y 1 at 86 (1987).

7. See generally, G. Standing, *Unemployment and Labour Market Flexibility: The United Kingdom*, International Labour Office [Geneva], at 60-61 (1986).

8. For example, women who wish to combine paid work with family responsibilities and who find full-time work unsuitable.

9. See generally Hakim, *Trends in the flexible workforce*, Employment Gazette at 549

2. DEREGULATION, FLEXIBILITY AND LEGISLATION

Deregulation can most obviously affect on individual employment law through the abolition of particular statutory controls which limit managerial discretion or, if you like, the freedom of the individual employer and employee to reach their own bargain on terms which suit each other. It is, however, an elementary error to suppose that the achievement of employment flexibility requires a decreasing incidence of statutory control over employment rights.¹⁰ Even in Britain, where the government has tended to view flexibility and deregulation as two sides of the same coin, movement towards the former has not resulted in less labour legislation. The core idea is that the employment relationship should be freed from unwarranted regulation either by the state or by bodies, principally unions, seen as representative of sectional interests within the state. While the removal of state influence may be achieved relatively simply by removal of the specific statutory provisions which have been imposed in the last two decades, the neutralising of the coercive powers of union is not so straightforward, given the legal framework within which, until recently, such organisations have operated. In part the reorganisation of collective bargaining practices, with greater emphasis being placed on decentralised bargaining, has certainly contributed to the demise of union power, especially in the public sector, and is a policy actively promoted by government.

However, there have also been attempts to reduce, by legislative reform, the potential of unions to cause trouble while remaining within the law. In recent years this weakening has been achieved through the enactment of law that affects the internal structures of such bodies (e.g. by giving greater legal rights to dissenting minorities) and by increasing the vulnerability to external challenge (e.g. by removing in a wide range of circumstances, the immunities from legal liability which unions traditionally enjoyed with respect to economic loss caused by the pursuit of collective action). This restructuring of the legal framework for unions has necessitated a significant increase in the amount of regulatory legislation, as evidenced by the four major statutory reforms of labour law which have punctuated the nine years of Conservative government.¹¹

(November 1987); Deakin, *Labour Law and the Developing Employment Relationship in the United Kingdom*, 10 CAMBRIDGE J. OF ECON. 3 (1986); Connock, *Workforce Flexibility - Juggling Time and Task*, Personnel Mgmt. (P-H), at 36 (1985).

10. The fallacy that flexibility (as opposed to deregulation) means fewer rights is clearly demonstrated by Hepple, *The Crisis in EEC Labour Law*, 16 INDUS. L.J. 77, 81 (1987).

11. Employment Act, 1980; Employment Act, 1982; Trade Union Act, 1984; Employ-

3. DEREGULATION AND THE COMMON LAW

A major consequence of the removal of legislative controls is that, necessarily, the legal relations of the parties becomes more concentrated on the individual contract which binds them together. This observation does not apply only to the situation found in Britain,¹² but there are, perhaps, special reasons why such a revival of the common law in this country deserves comment. Many years ago the contract of employment was described as the "corner-stone" of British labour law by Otto Kahn-Freund, in a comment which has achieved classical status in the literature of labour law. What, one wonders, would he have made of recent developments? The crucial importance of contract, to which he drew attention, was never in doubt even in the relatively regulated period of the 1970s, though many commentators saw it then primarily as a means of eroding the protections enjoyed by workers.¹³ But how more apposite and relevant is Kahn-Freund's observation in the economic and political climate of the deregulated 1980s.^{13a} For if the controlling influence of statute is removed, there is only the common law left to provide a framework for the rights and duties which bind the parties, and this framework most naturally finds expression in the rules which govern the contract under which work is done. The evaluation of this phenomenon is highly controversial. Those who might be termed the proponents of the "New Right" ideology in labour law have welcomed this development as a reaffirmation of the superiority of the common law over legislation. This reaction is evident in writings on both sides of the Atlantic - Epstein in Chicago¹⁴ and Mather in London¹⁵ have both praised the contract of employment and the rules of the common law as well-equipped to deal with the needs of modern day employment conditions, and have emphasised the superi-

ment Act 1988, Part 1.

12. For a critique of similar developments in France, see Lyon-Caen, *La Bataille Truquee de la Flexibilite*, 12 *DROITE SOCIAL* at 801 (1985); Erbes-Seguin, *Industrial Relations, Labour Law and Employment, Elements for a Comparison*, Public Lecture, University of Warwick (May 27, 1987). See also M. Vranken, *Deregulating the Employment Relationship: Current Trends in Europe*, 7 *COMP. LAB. L.* 2, at 143 (1986).

13. For a forceful expression of this view see Lord Wedderburn, *Labour Law: From Here to Autonomy*, 16 *INDUS. L.J.* 1, 7 (1987): "Within the stockade of employment protection, the erosion of workers' rights by common law orientations in meaning and interpretation (sometimes by the very adoption in the statute itself of common law terms) is notorious."

13a. See generally D. KAHN-FREUND, *LABOUR AND THE LAW* (3rd ed. 1983).

14. Epstein, *In Defense of the Contract at Will*, 51 *U. CHI. L. REV.* 947 (1984).

15. G. Mather, *The Future Shape of Labour Legislation*, *WARWICK PAPERS IN INDUS. REL.*, No. 14 (1987); see also Hanson and Mather, *Striking Out Strikes*, *INST. OF ECON. AFFAIRS*, HOBART PAPER 110 (1988).

ority of the common law over statutory regulation.

There are developments in English law which show that this re-orientation in individual labour law towards contract is already well under way. The developments are primarily concerned with what might be termed "technical law", in the sense that they depend on an appreciation of how particular rights and remedies are sought within different legal regimes. It should not be forgotten, however, that perhaps the biggest change associated with flexibility is the alteration in the composition of the working population. It is estimated that now approximately one-third of all employed persons work in "atypical" employment, be it self-employment, part-time work, or temporary work. By so doing, they have chosen to work, to a greater or lesser extent depending on particular circumstances, outside the scope of what has been termed "state-regulated employment". There is every indication that this proportion is likely to increase, as surveys show that employers intend in the future to make even greater use of temporary and sub-contracted workers.¹⁶

4. THE REGULATION OF DISMISSALS

A recent survey of job security in the United States, contrasting the approaches found there with those of several European countries, ends with the challenging question: "In the final analysis, might it not be the case that an economy providing sustained employment growth offers the most fundamental form of job security?"¹⁷ Such a view, which in a more developed form argues that the absence of generalised legal protections against dismissal has encouraged the growth of employment, is a recurring theme in current discussion of policy options for labour law. However, Francis Blanchard, the Director-General of the International Labour Office, has drawn attention to the fact that in some of the countries where job security is highly regulated, such as Austria and Sweden, current levels of unemployment are well below less regulated countries, such as the U.K.¹⁸ There can be no simple equation between legislative protec-

16. A report in the Financial Times newspaper on Nov. 2, 1986 found that, out of 450 firms production and service companies surveyed, over 40% intended to make increased use of such staff.

17. Addison, *Job Security in the United States: Law, Collective Bargaining, Policy and Practice*, 24 BRIT. J. OF INDUS. REL. 381, 412 (1986). See also Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. OF COMP. L. 310 (1985); Mordsley and Wall, *The Dismissal of Employees Under the Unfair Dismissal Law in the United Kingdom and Labor Arbitration Proceedings in the United States: the Parameters of Reasonableness and Just Cause*, 16 CORNELL INT'L L. J. 1 (1983).

18. *Employment, Labour Relations, Productivity and Quality of Working Life: The*

tion of job security and the incidence of unemployment. Nevertheless, the British government would appear to be unconvinced. In its White Paper entitled "Building Businesses . . . Not Barriers"¹⁹ the government said it was necessary to ask

why it is necessary to depart from the basic principle that terms and conditions of employment are matters to be determined by the employer, and the employees concerned (where appropriate through their representatives) in the light of their own individual circumstances. The rights of people in employment have to be balanced against the needs of those who are unemployed.²⁰

The aspect of employment security legislation which has had the highest profile is that concerning unfair dismissal, which gives to dismissed employees the right to challenge their dismissal before an industrial tribunal, effectively a specialised labour court. The industrial tribunal is chaired by a qualified lawyer who sits with two lay members having practical experience of industrial relations. These tribunals are the subject of some 34,000 applications a year in England and Wales.²¹ A successful claim of unfair dismissal leads to the award of financial compensation which the ex-employer has to pay to the worker; unlike the position which obtains under grievance arbitration in the United States, there is little prospect of reinstatement in the job from which the individual has been dismissed - this outcome is the result in less than 3% of successful cases.

Although there is a conspicuous lack of empirical evidence to support its view that the possibility of having to waste time and money in the defending of ill-founded claims acts as a deterrent to job creation, the government has used this argument to justify reductions in the protective coverage which the legislation provides. In 1985, the qualifying period necessary before a claim could be made was increased from one to two years (in 1979 it had been six months), and the ACAS Report for 1987 has confirmed that this change has indeed had the desired effect in reducing significantly the number of complaints made. Further changes are likely, including the possibility that potential applicants may be required to make a deposit of up to £150 before being able to proceed with a claim, this sum being refundable in the event of success.

Challenge of the 1990's, Fourth European Regional Conference, Report of the Director-General, I.L.O., [Geneva], at 15 (1987).

19. 1986, CMND., No. 9794.

20. *Id.* at ¶ 7.2.

21. See generally L. Dickens, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, 1985; *Industrial Tribunals*, A Report by Justice, 1987.

Despite the impact of recent case law, which has done something to reverse the progressive downgrading of unfair dismissal protection,²² the general trend favouring the downgrading of job security legislation is unmistakable. This has had an impact on the use made of the common law, as a means of challenging on procedural and substantive grounds the decision of an employer to terminate employment. Traditionally, the rules of the common law offered little help to those who were dismissed. Although English law never accepted as fully as did the United States the doctrine of "employment at will",²³ the basic rule was that the contract of employment only protected an employee to the extent that he or she was entitled to notice before termination. Even this protection was of course lost in the event of the employee committing gross misconduct, when summary dismissal was in order. But in the majority of cases, the only recourse open to someone dismissed without notice or notice less than that to which he was entitled was an action for damages, to recover the value of the wages due during the period of notice, less any sum deductible by reason of the duty on the innocent party to mitigate his or her loss.

Under the influence of the statutory law of unfair dismissal, with its recognition of a wider concept of job security, the common law has evolved by case law in recent years to give somewhat different and more substantial protections to workers who lose their jobs. It is now clear that the contractual obligation to follow agreed procedures governing investigation may be a substantive restriction on the common law powers of the employer as given above. Such contractual procedural obligations are commonplace - most medium and large size employers have introduced them into their standard conditions of employment for their staff. In brief, the position now is that if a dismissal is in breach of these procedures - as might occur, for example, when an employee is dismissed without being given the chance to explain alleged misconduct - then the employee may expect to recover damages in respect of the lost opportunity to present his explanations.²⁴ Such a claim is independent of and additional to

22. Especially the decision of the House of Lords in *Polkey v. A.E. Dayton Services Ltd.*, [1987] Indus. Rel. L. Rep. 503, which emphasises the importance, in any assessment of the fairness of a dismissal, of whether the employer has followed proper procedures in reaching the decision to dismiss.

23. See Townshend-Smith, *Labor law in Great Britain and America: the Similarity of the Underlying Themes*, 9 GEO. MASON U. L. REV. 245, 299 (1987); Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: an Historical Analysis*, 5 COMP. LAB. L. 85 (1982).

24. *Dietman v. London Borough of Brent*, [1988] Indus. Rel. L. Rep. 299; *Gunton v.*

that which may arise when there is termination with no, or too short, notice, and may succeed even where the employee is seen as having been guilty of gross misconduct by reason of his behaviour.²⁵ The significance of this newly emphasised (if not newly created) contractual right to procedural protections becomes clearer when it is seen alongside the new remedies which have been fashioned by the common law in matters of contested dismissals. The rule that the courts will not grant specific performance of contracts which require personal service is well-established as a general rule of the common law, and in relation to employment matters has meant that employees being dismissed in breach of contract must content themselves with a claim for damages for breach of contract. The granting of an injunction to prevent a dismissal in breach of contract from going ahead has, in the past, been highly exceptional. While it still is an exceptional remedy, it will not be granted where the employer has lost faith in the ability of the employee to do the job in question.²⁶

There is a definite evolution evident in the case law of the last few years which shows a new readiness on the part of the courts to grant injunctive relief to the employee in a situation where he is in danger of being dismissed in breach of a contractual term.²⁷ The conclusion reached by Hendy & McMullen is that a realistic alternative to industrial tribunal proceedings, such as unfair dismissal, has now been developed, offering speedy and effective remedies to many employees who cannot be adequately compensated for the loss of a secure job. The interesting question is the extent to which this new development in the law can be attributed to the changes associated with deregulation and flexibility, such as the reduced efficacy of statutory protections and the weakening of unions. It seems unlikely, to say the least, that it is a coincidence that the common law protections should be developed just as statutory and other²⁸ protections

London Borough of Richmond [1980] Indus. Cas. R. 755.

25. Where there is gross misconduct but also failure to follow contractually set procedures, it seems that measure of damages would be set by reference to the wages payable over the period of time it would have taken to operate the procedures properly.

26. *Ali v. London Borough of Southwark*, [1988] Indus. Rel. L. Rep. 100.

27. See generally Hendy & McMullen, *Injunctions in Contracts of Employment: the New Growth (Part 1)*, LAW SOCIETY'S GAZETTE 3568 (1987); Hendy & McMullen, *Injunctions in Contracts of Employment: the New Growth (Part 2)*, LAW SOCIETY'S GAZETTE 28 (1988); See also Powell v. London Borough of Brent, [1987] Indus. Rel. L. Rep. 55; Hughes v. London Borough of Southwark, [1988] Indus. Rel. L. Rep. 55.

28. For a while it was thought that the remedy of judicial review might provide additional protections to persons dismissed or about to be dismissed improperly in the public sector, but this possibility now seems less likely; see Ewing & Grubb, *The Emergence of a New Labour Injunction?*, 16 INDUS. L.J. 145 (1987).

are reduced. There is, however, a certain irony in the fact that one reason why the judges have been prepared to extend the substantive common law rights of employees faced with dismissal has been their awareness of improved protections made available under the statutes of the 1970's.²⁹

5. FUTURE PROSPECTS

The reformulation which deregulation brings about in the common law of individual employment relations is unlikely to be restricted to the field of contested dismissals. Deregulation and flexibility can also be expected to give rise to reinterpretations of traditional rules affecting other areas of the law.

Several problems are posed by the changed role of unions. For example, the decline in union recognition for collective bargaining purposes by employers is increasingly a phenomenon singled out for comment in the ACAS Report for 1987. The proportion of the workforce that is now unionised has fallen from 55% in 1979 to just over 40% in 1987. Even more worrisome for unions, membership is increasingly concentrated in the public sector and traditional manufacturing industries. In the areas where new jobs are being created there is little interest being expressed in union membership by the workforce. Sometimes, as an alternative to an outright rejection of unions, an employer will indicate a willingness to recognise a union for consultation, though not bargaining purposes. While this is no doubt more encouraging than complete rejection, it should be remembered that such an arrangement can produce problems in the relationship between employer and individual employee, as well as affecting collective negotiations. Recognition of a union for consultation purposes can significantly alter the legal analysis of managerial discretion. An employer is better placed to argue he has the legal right to vary unilaterally a condition of employment where this has been preceded by consultation rather than negotiation with a union.³⁰ Where this occurs a court may say that although a particular rule made by the employer may have acquired contractual status in the individual contract of employment, because it is an employer's rule, and thus a matter which falls within his right to govern, he may change or abandon it as he likes, without fear of adverse contractual consequences.

Another point is that, more and more often, where union recog-

29. See *R v. B.B.C. ex parte Lavelle*, [1983] Indus. Cas. R. 99, 111.

30. *Cadoux v. Central Regional Council*, [1986] Indus. Rel. L. Rep. 131.

nition is secured in newly established plants it is likely to be on terms which embody a "single union deal". This is especially true when newly established "greenfield" enterprises accept union recognition. Instead of recognising a variety of unions each representing different categories of workers within the enterprise (the traditional British pattern), the recognition agreement is increasingly likely to be with just one union, and on terms which makes the union pay a high price for what it receives from the employer. The typical characteristic of the "single union deals" is that there is an agreement to extend the benefits of "staff" status to all workers in exchange for the abandonment on the union side of traditional craft and skill demarcations between workgroups. Also, there may be an agreement that disputes should be settled by pendulum arbitration and not industrial action, although it is inaccurate to think that all single union deals (which are still highly controversial within the British trade union movement) necessarily require such no-strike clauses.³¹

The implications such developments in collective labour relations will have for individual rights have yet to be considered in the courts. To what extent will the employer's implied right under the contract of employment to issue instructions and commands about how work is to be done and organised be affected by collective agreements which explicitly embrace flexibility? How will the implied duty of the employers to maintain trust and confidence within the employment relationship, a doctrine which has been extensively developed in recent years under the influence of unfair dismissal law, be changed when relevant collective agreements state the need "to promote mutual trust and cooperation between the Company, its employees and the Union; to recognise that all employees, at whatever level, have a valued part to play in the success of the Company; to seek actively the contributions of all employees in furtherance of these goals."?³²

These are just some of the many questions linked with deregulation and flexibility which the courts will have to deal with in the years to come. It may be that, faced with the growing *de facto* popularity of atypical employment, the courts will take a more relaxed view about the nature of classifying employment relationships, and allow greater autonomy of choice to the parties than has tradition-

31 See Kennedy, *Single Status as the Key to Flexibility*, Personnel Mgmt. (P-H), at 51 (1988); Lewis, *Strike-free Deals in the U.K.*, Financial Times, May 4, 1980.

32. This example comes from an agreement between Nissan and the Amalgamated Engineering Union. See P. Wickens, "The Road to Nissan", at 76, 1987.

ally been permitted.³³ The result of such a change of emphasis will be to permit greater freedom to the parties to decide whether or not their employment relationship will be subject to the rules of regulated labour law. Broadly speaking, only employees (i.e. persons employed under a contract of service) fall within the ambit of the mainstream statutory employment rights. This possibility raises, in turn, a further interesting question. Since it is a tenet of British labour law that it is not possible to exclude by contractual agreement the impact of these statutory rights,³⁴ why should it be acceptable that the same result be brought about by allowing the parties freedom to choose the legal nature of their work relationship?

Another area where the move away from state regulation is already a cause for concern is health and safety. Although the discussion of policy options by government always addresses to the need to maintain proper standards of health and safety, the fact remains that the 1980s have seen fewer resources devoted to the Health and Safety Executive, the branch of the civil service which has responsibility for enforcing legislative standards and implementing safety policies. As the number of factory inspectors has fallen, the accident rate has risen.³⁵ One recent survey sees changing employment practices, together with the hostile economic environment, as responsible for undermining assumptions about the respective responsibilities of employers and employees in safety matters.³⁶

The victory of the Conservative party in the election of 1987 gave the government a clear mandate to continue the radical economic and social policies which it pioneered in the first half of the 1980s. In the field of labour law and industrial relations, this means more deregulation and more attempts to achieve labour flexibility. There is no sign that any significant change in policy is likely, indeed, the evidence displayed in recently issued policy discussion papers suggests the contrary. In the autumn of 1988 the much publicised opposition of Mrs. Thatcher to further moves towards European integration was pivoted on opposition to the introduction of "bureaucratic" controls on business emanating from the European Commission. The continuing development of such policies will pose a

33. See the interesting discussion of the relevance of choice of self-employed status in *Calder v. H. Kitson Vickers & Son (Engineers) Ltd.*, [1988] Indus. Cas. R. 232.

34. *Employment Protection (Consolidation)*, 1978, § 140.

35. Jones, *Safety Standards: Casualisation's Biggest Casualty*, *The Listener*, Dec. 11, 1987.

36. Barrett and James, *Safe Systems: Past, Present - and Future?*, 17 Indus. L.J. 26, 40 (1988).

range of questions for labour lawyers to answer in the next few years. In the circumstances, a conference which has the title "Labour law after deregulation" might be said to be somewhat premature. It may be, to quote the words of a famous American, that "you ain't seen nothing yet," and the policies of social change which include deregulation have plenty more surprises in store for labour lawyers, and others concerned with the business of industrial relations.

