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THE LEGAL
CONSTRUCTION OF
PERSONAL WORK
RELATIONS

*Mark Freedland and
Nicola Kountouris*

OXFORD MONOGRAPHS ON LABOUR LAW

The Legal Construction of Personal Work Relations

MARK FREEDLAND FBA
NICOLA KOUNTOURIS



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OXFORD MONOGRAPHS ON LABOUR LAW

General Editors: PAUL DAVIES, KEITH EWING,
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The Legal Construction of Personal Work Relations

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This series has come to represent a significant contribution to the literature of British, European, and international labour law. The series recognizes the arrival not only of a renewed interest in labour law generally, but also the need for fresh approaches to the study of labour law following a period of momentous change in the UK and Europe. The series is concerned with all aspects of labour law, including traditional subjects of study such as collective labour law and individual employment law. It also includes works that concentrate on the growing role of human rights and the combating of discrimination in employment, and others that examine the law and economics of the labour market and the impact of social security law and of national and supranational employment policies upon patterns of employment and the employment contract. Two of the contributing authors to the series, Lucy Vickers and Diamond Ashiagbor, have received awards from the Society of Legal Scholars in respect of their books.

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For Antonio and Taiga
and their families past, present, and future

Preface

The present work has two direct predecessors and one indirect one, and we regard and offer this book as an evolution from those successive works. The two directly preceding books were those of the first author of this work, Mark Freedland, namely his treatise on *The Contract of Employment* (1976), and the re-written and extended version of it, *The Personal Employment Contract* (2003). The third preceding work is that of the second author of this book, Nicola Kountouris, *The Changing Law of the Employment Relationship* (2007). The nature and objectives of this cumulative evolution are described in the Introduction and the first Part of the book itself; the main purpose of this Preface is to identify the practical and institutional arrangements which have enabled this fourth instalment of that writing project to be produced, and to acknowledge the many personal debts which we have incurred along the way.

Two particular aspects of those institutional arrangements have been crucial in providing the resources of research and writing time which have enabled this latest work to be produced. The first of these consisted in the conferring upon the first author by the Leverhulme Trust of a Major Research Fellowship from 2005–8 for the carrying out of this project. The generosity of the Trustees is acknowledged with profound appreciation and gratitude, as is the constantly supportive approach of the Director and staff of the Trust. The other crucial arrangement consisted in the agreement of the second author to participate in the project as co-author, and to contribute insights developing from his own previous and current work, without which the project could not have been brought to fruition in its present form. The second author has also greatly benefited from a generously funded AHRC Research Leave.

Both authors have many further acknowledgements to make. At the outset of the project, we had in common St John's College Oxford as an employing institution. The enlightened approach of the College towards the support of the research and the career development of its Fellows has been of enormous significance to both of us. The same can be said of our two currently respective Law Faculties, those of the University of Oxford and of University College London, as well as the second author's previous employer, the University of Reading.

Moreover, various publishing houses and their respective editors have been more than helpful to us. The publishers and editors of various journals and symposia have graciously accepted that the content of some articles and chapters submitted to them along the way would eventually be embodied in this book; we particularly acknowledge in this respect that generosity on the part of the published lecture series Current Legal Problems, the Industrial Law Journal, and, most especially, the International Labour Review in respect of the first author's article, published there in 2007, on the 'Application of labour and employment law beyond the contract of employment'. Other editors and publishers have facilitated our access to works in the course of publication or immediately

upon publication; may we single out in that respect Roger Blanpain and Michele Colucci of the International Encyclopedia for Labour Law and Industrial Relations published by Kluwer Law International, and Richard Hart of Hart Publishing for various such acts of kindness and co-operation. However, first and foremost in this part of our acknowledgements must come the Oxford University Press, as the publishers of the Industrial Law Journal and of this book itself. The commissioning and production editors who have worked with us on this book have been endlessly patient and constructive in their dealings with us, and we especially thank Gwen Booth, Alex Flach, Natasha Flemming, David Lewis, and John Louth, and in another sense Paul Davies and Keith Ewing as the other Series Editors of the Oxford Monographs on Labour Law series in which this book is published and themselves contributors to the sources of intellectual inspiration for this work.

In that latter respect there are many other colleagues to whom our indebtedness is intense for being in various senses the interlocutors and 'critical friends' for our work as it took shape. It is all too likely that the list which follows, long though it is, nevertheless omits some who might have a real claim to be included in it, to whom we apologise; but we wish to name Harry Arthurs, Diamond Ashiagbor, Sue Ashtiany, Lizzie Barnes, Catherine Barnard, Alan Bogg, Alexandra Braun, Douglas Brodie, Giuseppe Casale, Hugh Collins, Sean Cooney, Guy Davidov, Anne Davies, Simon Deakin, Ruth Dukes, Muriel Fabre-Magnan, Matthew Finkin, Sandra Fredman, Judy Fudge, Mario Giovanni Garofalo, François Gaudu, Juan Gorelli-Hernández, Rachel Horton, Guus Heerma van Voss, Bob Hepple, John Howe, Jean-Claude Javillier, Claire Kilpatrick, Robert Knecht, Brian Langille, Julia Lopez, Virginia Mantouvalou, Christopher McCrudden, Luca Nogler, Wanjiru Njoya, Antonio Ojeda Avilés, Jeremias Prassl, Robert Rebhahn, Joellen Riley, Silvana Sciarra, Spiros Simitis, Vanessa Sims (whom we specially thank for the opportunity to consult her Doctoral thesis on 'Good Faith in English and German Contract Law'), Katherine Stone, Alain Supiot, Bruno Veneziani, Evert Verhulp, Lucy Vickers, Christophe Vigneau, Aurora Vimercati, Nicholas Vrousalis, Bernd Waas, Manfred Weiss, and Simon Whittaker. Although these colleagues could between them lay claim to have inspired many of the ideas to be found in this work, they bear no responsibility for its shortcomings. Still less do our families, in particular Geraldine and Isobel, who have had to sacrifice a good deal of our time and attention to this project of research and writing.

We have sought to bring our work up to date to January 2011 but have included some subsequent developments where appropriate. There is one such development which occurred too late for treatment in this work but is of real significance to some of the central arguments of our work, namely the decision of the UK Supreme Court in *Jivraj v Hashwani* [2011] UKSC 40. Arrangements have been made for the publication of an article in the Industrial Law Journal early in 2012 in which we will seek to relate that decision to the arguments advanced in this work.

MARK FREEDLAND
NICOLA KOUNTOURIS

Oxford and London
31 July 2011

General Editors' Preface

We write this preface on the day that regulations come into force in Great Britain to enhance the rights of temporary agency workers. These controversial regulations – introduced to implement an equally contentious EU Directive – do not, however, address the central question which has vexed English courts and tribunals for some time, this being the legal status of such workers, which will remain to be contested.

The position of agency workers in the United Kingdom is but one of many problems of modern labour law, with its competing demands of the worker for job security and those of the employer for greater flexibility. As such, however, it raises fundamental questions about the purpose, scope, and content of what the authors of this volume encourage us to think of as ‘the law of the personal work relationship’, questions being asked with growing urgency in a fast-moving global economy.

As editors, we are particularly pleased to introduce this volume to the ‘Oxford Monographs on Labour Law’ series. The volume builds on the highly acclaimed writings of both authors, and the productive result of this collaboration is work of profound scholarship. In addressing key problems of modern labour law, their study is greatly enriched by its fresh theoretical insights, its comparative methodology, and its infusion by the jurisprudence and literature of other European systems.

More than that, however, the authors provide a fundamental re-analysis of the legal foundations of modern labour law, and in doing so invite law-makers and theorists to reconsider ‘the ways in which personal work relations might be legally constructed more rigorously and comprehensively than they at present are’ (p. 76). The book thus offers a most rewarding basis for a reconsideration of the legal construction of personal work relations, at a time when it is sorely needed.

But not only do the authors invite us to think about ‘the law of personal work relations’: in this rich, profound, and challenging study, they also offer nothing less than a re-conceptualisation of labour law itself. A persuasive new framework is offered as a normative basis for the discipline, focussing upon ‘a set of positive claims which workers have to certain kinds of qualities of treatment’ (p. 371), these being dignity, capability, and stability at work, all expounded with characteristic lucidity.

In introducing this volume we do so confident in the belief that it will not only be widely admired, but also that it will add greatly to the reputation of the series. This is a quite exceptional book, which sets high standards for labour law scholarship. Just as importantly, it will have long-term implications: not only for how we think about the discipline of labour law, but also for addressing labour law problems in the future, with consequences for all workers.

PLD
KDE

1 October 2011

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