The Conceptual Integrity of Employment

Simon Honeyball

Abstract

The concept of 'employment' appears in various contexts in English law. However, the word 'employment' is defined in a variety of ways depending on which context is in point. This gives rise to the question as to whether there is a single, unified, concept of employment that is nevertheless characterised differently according to context, or whether a common term is used to cover a variety of differing concepts. The issue is an important one because the requirement or legitimacy of adopting cross-contextual, comparative, approaches is relevant to the development and interpretation of employment-related matters in several areas of law.

Introduction

This article consists of a comparative analysis of uses of the term 'employment' in English law. Its aim is not simply to draw comparisons in usage between the numerous and diverse legal areas in which the concept is of relevance, but to address some straightforward, yet fundamental and perplexing, issues concerning the cross-disciplinary usage of the term.

It might be thought that the term 'employment' in law connotes a single, unified, concept applicable across a wide range of legal contexts. On this view, for example, someone who seeks to establish that they have been unfairly dismissed (for which, in order to obtain legal redress, they must establish that they have employment status) would be identifiable as an employee also in the field of, say, anti-discrimination legislation. Given the width of varied definitions of employment in different legal contexts, this may appear a difficult position to maintain. But that is not so obvious as it would initially appear. Perhaps differing definitions should be seen as merely restricting the types of employees who are given legal protection or liabilities as the case may be. Or, perhaps more acceptably, differing definitions should perhaps be viewed as the consequence of

alternative perspectives, from varied standpoints, of a single, unified, concept. So the matter has to be addressed as to why there are differing definitions in different contexts if a unified concept of employment is utilised. One explanation could be that it is due to evolving understanding of the concept. Another is that policy considerations are the cause.

Of interest here is the approach of the courts themselves. To what extent do they seem to be of the opinion that the concept of employment is, or should be, treated in a uniform manner? This, of course, is a complex question in that it is not a matter that the judiciary is able to examine in a disinterested way, for the correct analysis is partly determined by their own approaches to the question.

An alternative view to the unified approach just described is that the word 'employment' refers to different concepts for which a single term is utilised in differing legal contexts. If this is so, then further issues arise as to why the common term is utilised. This would raise the possibility that the use of the word 'employment' is merely a type of legal shorthand denoting the subject matter of particular types of work-related legal liabilities and entitlements. It would thus nevertheless have at least some sort of underlying connective feature. Or perhaps there is some other explanation. Whatever conclusion is reached on this, the further issue is raised concerning the extent to which, if at all, different terms should be adopted in different contexts in order to delineate clearly their nature and function. This might have the, what might be thought to be beneficial, consequence of removing the temptation on the judiciary to examine concepts in particular discrete areas of law which are inappropriate in another context merely because of the adoption of a common terminology.

Whatever the answers are to these perplexities, the further consideration arises as to whether it is necessary, desirable and/or possible to alter our usage of the word in the light of the conclusions reached on these prior questions.

Let us now examine these issues in greater depth.

Current Usage

The legal contexts in which the word 'employment' is used are various in nature. Most obviously, it is used in employment law to connote those who are entitled under statute to employment protection rights such as those in unfair dismissal and redundancy law, as well as to rights to a written statement as to particulars of employment, to an itemised pay statement, not to have unauthorised deductions from wages made by the employer, guarantee payments on not being provided with work and so on.[1] It is also necessary to

[1]I am most grateful to Professor Andrew Tettenborn and John Bowers QC for reading a draft of this article.

identify those who are under the correlative liabilities.[2] The term 'employment' is used at common law to indicate the nature and extent of obligations under different types of work-contracts, for example by the incorporation of different types of implied terms.[3] In the law of tort it is used primarily in the context of establishing whether there is vicarious liability on the part of one party for the torts committed by those who work for him or her.[4] In revenue law, 'employment' denotes, for example, those who are liable to particular income tax liabilities.[5] In public law it is relevant in, for example, the context of establishing rights to natural justice.[6]

See primarily the Employment Rights Act 1996.

[2] It is becoming increasingly important to identify 'employment', not to establish who are employees - the traditional concern - but who are employers. This is particularly the case because of the growing fragmentation of types of work relationships with the growth of employment agencies, personal service contracts and so on. In these cases the person for whom the employee is working is not necessarily that person's employer. See Deakin, 'The Changing Concept of the "Employer" in Labour Law', (2001) 30 ILJ 72. However, there are signs that the courts are beginning to be prepared to take a radical approach, and determine that, regardless of classical theory, an employment relationship may exist between parties between whom there is no direct express contractual nexus. In *Dacas v. Brook Street Bureau (UK) Ltd* [2004] IRLR 358 an employment agency appealed against a decision of the Employment Appeal Tribunal, overturning the employment tribunal, to the effect that the defendant was employed by the employment agency. The Court of Appeal allowed the agency's appeal on the basis that the tests of employment, such as the requirement for a necessary degree of mutuality of obligation, had not been established. There was no cross-appeal against the tribunal's decision that the end-user - the Council for whom the defendant worked - was not the defendant's employer either, and so the Court of Appeal was not in a position to find that it was. However, two of their lordships, Mummery and Sedley LJJ gave strong indications that they would have held the end-user to have been the defendant's employer, even though there was no express contractual relationship between them. The possibility existed that the contract could have been implied. In the present context it is interesting to note (for reasons which will become clear below) that not only was the identification of any employer the primary issue here, but that the Court of Appeal assumed that a finding that the defendant was not employed for the purposes of her unfair dismissal claim entailed the idea that neither the employment agency nor the Council would have been vicariously liable for any torts she may have committed i.e. that the unified approach pertained - see the judgment of Mummery LJ at para.2.

[3] So, for example, if a contract is found to be a contract of service, there will be implied terms of co-operation (*Secretary of State for Employment v. ASLEF (No.2)* [1972] ICR 19), obedience (*Ottoman Bank v. Chakarian* [1930] AC 277), confidentiality (*Faccenda Chicken v. Fowler* [1986] IRLR 69) and mutual trust and confidence (*Malik* v. *Bank of Credit and Commerce International* [1997] IRLR 462) that are not to be found implied in contracts for services. Thus the contract and the relationship are not characterised by virtue of the content of the contract, but the content of the contract is determined, at least in part, by the nature of the relationship.

[4] See e.g. *Winfield and Jolowicz on Tort*, (Sweet and Maxwell, London, 16th edn 2002 by W.V.H. Rogers) ch. 20.

[5] See e.g. Tiley, *Revenue Law,* (Hart Publishing, Oxford, 4th edn 2000) p.201f.

[6] See e.g. Wade and Forsyth, *Administrative Law*, (Oxford University Press, Oxford, 9th edn 2004) p.539f.

Arguments for the 'unified' analysis

It might be thought that the use of the word 'employment' in each of these different areas of law clearly cannot refer to the same concept (a 'unified' concept) in that the definition (or at least the method of identification) of employment may be different in each. This would seem particularly to be the case in statute law where a specified definition is laid down in each instance. Often these definitions vary, and perhaps even within the same area of law. So, for example, the definition for the purposes of unfair dismissal and redundancy protection is different from that used for sex discrimination law.[7]

However, it does not necessarily follow, although it might be the case that different definitions exist because different concepts are being defined. It is quite possible, of course, for a concept (or thing, or word) to be defined in different ways purely because of the standpoint of the person making the definition, or because of differing purposes of a definition. A car, for example, might be defined differently for the purposes of a general dictionary than for the purposes of historians of travel, insurance companies or the Inland Revenue. The difficulty with that in the present context, however, it is not merely that different wording is used in differing contexts, but that the employees who are covered by a particular definition differ in each instance. Sometimes a definition can be wider, or narrower, than others. This is strong evidence against the argument of perspective.

There would seem to be two further clear competing candidate reasons why there are different definitions in different statutes. The first is that there may have been a change in understanding of the concept. Inadequacies in previous legislation might have been identified and thus the opportunity has been taken to take remedial action. So, the definition of employment in the Sex Discrimination Act of 1975 is therefore somewhat wider than that in the Employment Rights Act 1996. However, that is not at all a convincing explanation. The definition under the 1996 Act is actually originally to be found in earlier legislation[8] pre-dating the Act of 1975, and yet it has been re-adopted. If it were thought to be inferior to the 1975 definition one would expect it to have been altered when the opportunity presented itself.

The other candidate explanation is that different definitions are used in legislation seeking to achieve different objectives because of policy considerations. For example, it might be thought that the category of those at work entitled to protection from sex discrimination is wider than those who should be entitled to protection against unfair dismissal or redundancy. This seems to be a

[7] Section 230(1) of the Employment Rights Act 1996, giving unfair dismissal and redundancy protection rights, defines an employee as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.' However, section 82(1) of the Sex Discrimination Act 1975 refers to 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour.' It is thus somewhat wider.

[8] Industrial Relations Act 1971 s. 167(1).

much more attractive explanation. For example, if government ministers state that they have not decided whether particular groups of workers are employees for the purposes of particular items of employment legislation,[9] they are not uncertain as to whether it would be lexicographically correct to use the term. They are not challenged as to the meaning of the word but are uncertain on policy grounds whether to bring certain types of people within the scope of legal protection. In this way, the term 'employee' may be seen merely as a familiar shorthand word to be used in these type of situations to denote those who have the rights or liabilities in question. It is not surprising, then, that the definition is different in different contexts.

The approach of the courts to a 'unified' analysis

The approach of the courts seems, at first blush, to have been consistently one of adopting the 'unified' analysis.[10] One factor suggesting that is that the tests in employment law are also those that have been employed in tort and tax cases, for example.[11] The oldest test, which is retained as an element in later tests, was that of control. The greater the degree of control over the worker by the other party, the greater the likelihood that the relationship would be considered to be one of master and servant.[12] The leading case in the nineteenth century was *Yewens v. Noakes,*[13] a decision of the Court of Appeal concerning the issue whether or not 'habitable house duty' was payable. Bramwell LJ famously said: "A servant is a person subject to the command of his master as to the manner in which he shall do his work."[14] Most obviously, perhaps, the element of control is applicable in tort cases, especially with regard to vicarious liability when it would seem clear that the test should be whether liability should attach to someone who controlled the negligent acts of another.[15] The test was also current in employment law for a long time, and is still considered to be an important element to be considered in more sophisticated tests. So, for example, in

[9] As, for example, they are empowered to do with regard to trainees by virtue of section 26 of the Employment Act 1988. See further Honeyball, *A Guide to the Employment Act 1988* (London, Butterworths, 1988) ch. 17.

[10] Some academic writers also seem to assume that a unified approach is the more preferable - see e.g. Deakin, 'The Changing Concept of the "Employer" in Labour Law', (2001) 30 ILJ 72, at p. 72.

[11] See McKendrick 'Vicarious Liability and Independent Contractors - A Re-examination' (1990) 53 MLR 770 at p. 782-784 where the author states, in an argument that accepts the existence of the unified approach of the common law, that a contextual approach was urgently required for the purposes of the law on vicarious liability.

[12] The terms 'employee' and 'servant' are often considered to be synonyms, but Markesinis and Deakin state that this is wrong of the nineteenth century - see Markesinis and Deakin, *Tort Law*, (Clarendon Press, Oxford, 5th edn 2003) at p. 574.

[13] (1880) 6 QBD 530.

[14] Ibid., p.532.

[15] See e.g. *Mersey Docks and Harbour Board v. Coggins and Griffiths Ltd* [1947] AC 1 and *Collins v. Hertfordshire County Council* [1947] KB 598.

Montgomery v. Johnson Underwood Ltd [16] the Court of Appeal held that, in the context of an unfair dismissal claim, control together with mutuality of obligations was an irreducible minimum in establishing an employment relationship. Control also plays an important part in the multiple test, as we shall shortly see, dating from the decision of the High Court in *Ready Mixed Concrete*[17] in 1968, expressly approved recently by the House of Lords in *Carmichael v. National Power plc.*[18]

Various factors contributed to the demise of the control test as a single-factor test, although it is doubtful that the traditional reason given - that it was due to the growing technical nature of much of employment duties over which an employer could have no real control due to insufficient knowledge and expertise - is unlikely to paint the entire picture. That was true of much of the nineteenth century also. Nevertheless, it was considered to be increasingly inadequate and was replaced by a number of other judicial approaches. The so-called integration (or organisational) test was explored in the early 1950s whereby the extent to which the worker was assimilated into the business was considered to be the best determinant. This test too found its way into a variety of areas of law. It was particularly developed in the employment law case of *Stevenson Jordan and Harrison Ltd v. MacDonald and Evans*[19] when the Court of Appeal had to consider an issue of the law of breach of confidence. Denning LJ described the test in these terms:

> … under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.[20]

The test was also used in tort cases, such as the decision of the Court of Appeal in the negligence case of *Cassidy v. Minister of Health*[21] as well as tax cases such as *Bank voor Handel en Scheepvaart NV v. Slatford*[22] when Lord Denning put it this way: "[employment status] depends on whether the person is part and parcel of the organisation."[23]

Later still came the economic reality test which involved the courts looking primarily at the extent to which the employee's work and personal circumstances reflected someone who was in business

[16] [2001] IRLR 269.
[17] *Ready Mixed Concrete v. (South East Ltd) v. Minister of Pensions and National Insurance* [1968] 2 QB 497.
[18] [2000] IRLR 43.
[19] [1952] 1 TLR 101. This case also gave rise to issues in copyright law.
[20] Ibid., p.111.
[21] [1951] 1 All ER 574. It was because of this case that the demise of the control test to be replaced by the integration test was predicted by Sir Otto Kahn-Freund in his casenote at (1951) 14 MLR 504. This proved to be greatly exaggerated.
[22] [1953] 1 QB 248.
[23] Ibid., p. 295.

on his own account. If that was the case then the contract was a contract for services, but if it was not then the contract was a contract of service. This was first enunciated in the High Court decision in *Market Investigations Ltd v. Minister of Social Security*[24] in 1969. This was a case deciding an issue relating to National Insurance.[25] But, again, the test was utilised in other areas of the law. In *Young and Woods Ltd v. West*,[26] for example, the Court of Appeal applied it in a case concerning unfair dismissal. It was applied in a decision on liability for compensation for injury in the Privy Council case of *Lee v. Chung and Shun Shing Construction and Engineering Co. Ltd*[27] in 1990.

More recently, the courts have not looked for any particular identifying characteristic of employment but rather have adopted a Wittgensteinian multiple approach which is more concerned with an exercise which balances factors on the one hand indicating employment and on the other those that do not.[28] This is the so-called multiple test. In *Ready Mixed Concrete*[29] this was given a three-pronged formulation. First, the employee agrees that in consideration of a wage or other remuneration he will provide his own his own work and skill for the employer. Secondly the employee expressly or impliedly agrees that he will be subject to the employer's control. Thirdly, the other provisions of the contract have to be consistent with a contract of employment. This can be broken down into a great number of relevant considerations such as the extent to which the employee provides his own tools or clothing, the extent to which he is free to do the work at a time of his own choosing, or where he chooses to do so, the manner in which it is done, the extent to which he can sub-contract, if at all, the work to other workers, whether he bears any financial risk, insurance responsibilities and so on. No one factor is determinative but each is placed on the theoretical scales which will dip one side or another. If this does not happen the description of the relationship made by the parties could be considered relevant.[30]

The *Ready Mixed* case was one to do with National Insurance liabilities. But, the important point here is that, as with the other tests, this test has also been applied in other areas of the law. So, in *Hall (Inspector of Taxes) v. Lorimer*[31] the Court of Appeal applied it in a case concerning liability for income tax. It has been applied in

[24] [1969] 2 QB 173.
[25] On a similar point see *Withers v. Flackwell Heath Football Supporters' Club* [1981] IRLR 307.
[26] [1980] IRLR 201.
[27] [1990] IRLR 236.
[28] See e.g. *Nethermere (St Neots) Ltd. v. Taverna & Gardiner* [1984] ICR 612, [1984] IRLR 240.
[29] Supra n.17.
[30] *Davis v. New England College of Arundel* [1977] ICR 6.
[31] [1994] IRLR 171.

negligence cases, such as *Lane v. Shire Roofing Co. (Oxford) Ltd*[32] as well as, of course, to employment law situations.[33]

There are also indications that the courts view the concept of employment as unified, not just because they apply the same tests in different contexts, but also because, in general, they do not allow different definitions in the same situation. Take, for example, *Massey v. Crown Life Assurance Co*.[34] where the Court of Appeal would not allow a man who had been classified as self-employed for the purposes of his status for income tax purposes to be classified as employed for the purposes of claiming unfair dismissal. In the later case of *Young and Woods Ltd v. West*[35] the Court of Appeal did allow a re-classification, but it still did not countenance different classification in each case. It felt that the Inland Revenue should re-coup the advantage the employee had received by way of the earlier mis-classification.

In *Calder v. H. Kitson Vickers Ltd*[36] Ralph Gibson LJ was clear, without argument, that the unified theory was correct. He said, referring to the issue as to whether a worker was an employee:

> … the decision does not depend upon the circumstances in which the question is raised, that is to say, for example, whether it is a claim for damages for personal injury or an issue as to the obligation to deduct National Insurance contributions.

In the Employment Appeal Tribunal (EAT) case of *Hilton International Hotels (UK) Ltd. v. Protopapa,*[37] the employee claimed that she was constructively dismissed by her employer because her employment was in fact terminated by her superior who had no authority to do so. Knox J stated that the EAT saw no reason to draw the line in any other place than that applied by the general law of vicarious liability of the employer, even though this was in the context of a statutory claim for unfair dismissal in circumstances where vicarious liability would never be an issue.

However, sometimes the courts are prepared to accept different classifications in the same situation. For example, in *Hewlett Packard Ltd v. O'Murphy*[38] the EAT held that, even though a claimant had been characterised as an employee for tax purposes, it was right not to classify him as such for unfair dismissal purposes. Nevertheless, it did not consider, nor does it seem it was invited to consider, the implications of differing characterisations of one status in different areas of law. In *Airfix Footwear Ltd. v. Cope*[39] the EAT held

[32] [1995] IRLR 493.
[33] For recent examples of many see *Express and Echo Publications Ltd v. Tanton* [1999] IRLR 367 and the House of Lords' decision in *Carmichael v. National Power plc* [2000] IRLR 43.
[34] [1978] 2 All ER 576, [1978] 1 WLR 676.
[35] [1980] IRLR 201.
[36] [1988] ICR 232 at p.254.
[37] [1990] IRLR 316.
[38] [2002] IRLR 4.
[39] [1978] ICR 1210.

that someone was an employee for the purposes of unfair dismissal protection even though he was treated as an independent contractor for tax purposes. Likewise, in *Wardell v. Kent County Council*[40] the Court of Appeal stated that a person could be a servant for the purposes of the Workmen's Compensation Act 1925 even though they were not for the purposes of the law of negligence.[41] A similar decision was reached by the Court of Appeal again in *Denham v. Midland Employers Mutual Assurance Ltd.*[42]

Difficulties with the 'unified' analysis

There are certainly difficulties associated with the unified approach, not least on the grounds of public policy. Some writers have suggested that the reason why the control test came to be seen as unsatisfactory as the single determinant of employment status was that many relationships the courts wanted to recognise as such simply did not have the necessary degree of control. Modified analyses, attempting to retain the pivotal role of control - such as the idea that, even if there were not actual control of the worker in his or her tasks, the residual capacity of the other party to exert that control if he or she so desired was enough - did not work either. Some employers clearly did not have this expertise. It was not that they chose not to exercise it. The element of control was missing. It is thus thought by these writers that the move to other tests was brought about by changing social factors together with changing ways in which work was done, and the evolving nature of that work. As Markesinis and Deakin put it:

> The control test was more appropriate to the social conditions of an earlier age ….. As specialist skills of employees increased, the unskilled employer was less and less able to control their work….. The increasing subtlety of the employment relationship makes the control test, however modified, inadequate. [43]

---

[40] [1938] 2 KB 768.

[41] Greer LJ (dissenting) made the different but related point that it is possible to be a servant for some of the tasks involved in a position whilst being an independent contractor for others. So, a nurse in performing nursing duties was not, he thought, a servant, but whilst performing administrative duties, she was. (See too *Hillyer v Governors of St. Bartholomew's Hospital* [1909] 2 KB 820.) Whilst the majority disagreed with Greer LJ on the facts, they did not question the logic of his argument. The court does not appear to have given any thought to the daunting complications this gave rise to regarding the employee's tax status. See too Goodhart, (1938) 54 LQR 553 and Grunfeld, (1954) 17 MLR 547.

[42] [1955] 2 QB 437.

[43] *Ibid.* Furthermore, as Markesinis and Deakin also point out, the move to a test that requires an examination of the issue, not as to whether there *is* control**,** but if there is a *right* to so control, presupposes that the relationship has already been characterised as an employment relationship - see Markesinis and Deakin, *Tort Law*, (Clarendon Press, Oxford, 5th edn 2003) at p. 574.

However, this is not an entirely satisfactory analysis. What makes the control test increasingly inapplicable, at least for a unified concept of employment, is that it is not based upon sound policy grounds when taken away from the area of vicarious liability and utilised elsewhere. To extend vicarious liability to A (an employer) where B (an employee) does a negligent act would seem to be justified if there is a sufficient degree of control by A over B, at least while B does the act over which A has control. In effect, the person really committing the tort is the employer. The employee to all intents and purposes is the tool, or the medium, by which the negligent act is brought about. As Lord Chelmsford L.C. put it in *Bartonshill Coal Co. v. McGuire*:[44]

> … every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act.

On the other hand, it is not at all clear why the element of control should be considered to be important in determining whether there should be statutory liability for the manner in which a working relationship is brought to an end, or for acts which are, for example, sexually discriminatory. Different policy considerations surely there come into play and a contextual approach seems necessarily more appropriate.

It is the control test where, perhaps most clearly, it can be seen that the courts have never in fact been primarily concerned with seeking a definition of employment that is based on lexicographical considerations. Even in the nineteenth century it would seem that, far from discovering that control was the determining factor in the characterisation of the employment relationship, its place was secured more because of the desire of Victorian judges to re-assert the master's right to control his servant.[45] The element of control was thus injected into the relationship, not determinative of it.

Atiyah felt able to state in 1967, in an argument that supports the unified thesis, that Parliament approaches legislation in a manner consistent with it. He sought to illustrate that by showing that the phrase 'contract of service' appeared in legislation, as it not infrequently did, without definition. He said: "it is a reasonable assumption that it intends to attract the existing body of law on the subject",[46] that is to say, the whole body of case law on the matter, whatever the context. However, even if that were true then, it would not appear to be true today. It is still the case that Parliament continues to use the phrase 'contract of service' without further definition, such as in section 2 of the Employment Act 2002 concerning rights to statutory paternity pay and statutory adoption pay. However, the phrase generally tends to appear within a

[44] (1858) 3 Macq. 300 at p. 306.
[45] See Wedderburn, Lewis and Clark, *Labour Law and Industrial Relations* (Clarendon Press, Oxford, 1983) at p. 147.
[46] Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, London, 1967) p. 32.

definition of employment, and these are quite varied. So, to take some recent examples, in section 42(5) of the Sexual Offences Act 2003, 'employment' means any employment, whether paid or unpaid and whether under a *contract of service* or apprenticeship, under a contract for services, or otherwise than under a contract. This can be contrasted with section 4 of the Income Tax (Earnings and Pensions) Act 2003, which states that 'employment' includes:

(a) any employment under a *contract of service*,
(b) any employment under a contract of apprenticeship, and
(c) any employment in the service of the Crown.

Note that this is not, unlike others, an exclusive definition. Compare this with section 42(2) of the Criminal Justice and Court Services Act 2000 on provisions relating to the protection of children where 'employment' means paid employment, whether under a *contract of service* or apprenticeship or under a contract for services. So, even if 'contract of service' is generally undefined in modern statutes, it generally appears within a definition of the concept of employment that is defined in a wide variety of ways.[47]

Atiyah was conscious of the two views examined here as to the meaning of 'employment', but nevertheless continued to prefer the unified approach. He said the purposive approach "has the merit of emphasising that legal concepts are tools to be used intelligently for the purpose in hand and not to be applied blindly to a variety of uses".[48] However, he argued that where the law does recognise fundamental legal concepts it seems pointless not to use them. They at least provide "valuable sign posts."[49] But this surely begs the question. It is only if the field in question is unified that this would be the case. There is also the danger with this view of falling into the trap when dealing with concepts of allowing definitions to determine solutions to problems instead of definitions following on from purposive analysis.[50]

Deakin puts forward an argument that creates difficulties for those advocating a unified approach. He states that the prevailing attitude towards statutory interpretation regards reasoning by analogy from one statutory context to another as illegitimate, and he gives examples of this.[51] If that were true it would be a significant

[47] For other recent examples, see Criminal Justice Act 2003, Sch. 3 Part 2; Enterprise Act 2002, ss. 128 and 234; Social Security Fraud Act 2001, s.15; Health and Social Care Act 2001, Sch. 1 Pt. 3; Financial Services and Markets Act 2000, s.59; Transport Act 2000, s.182; Protection of Children Act 1999, s.12; National Minimum Wage Act 1998, s.54.
[48] Supra, n.46.
[49] Ibid.
[50] As H.L.A. Hart famously wrote: "though theory is to be welcomed, the growth of theory on the back of definition is not." (See Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford, 1983) 21 at p.25.
[51] Deakin, 'The Changing Concept of the "Employer" in Labour Law', (2001) 30 ILJ 72 at p. 79.

impediment. However, perhaps he overstates his case. For example, in the decision of the House of Lords in *Carter v. Bradbeer*[52] in 1975 Lord Diplock said:

> The ratio decidendi of a judgment as to the meaning of particular words or combination of words used in a particular statutory provision can have no more than a persuasive influence on a court which is called on to interpret the same words or combination of words appearing in some other statutory provision."[53]

So it is clear that, although the practice is not required, it is by no means viewed as 'illegitimate'.[54] Indeed, if the statutes are on the same subject matter (*in pari materia)* the approach of the courts is that the same meaning will usually be given, with exceptions being made in cases, for example, where a prior interpretation is obviously erroneous, as in the Court of Appeal's decision in *Royal Crown Derby Porcelain Co. Ltd. v. Raymond Russell.*[55] Cross states that what amounts to an 'obligation' exists on the judge to consider other statutes *in pari materia*.[56] Even in cases where statutes are not *in pari materia* Cross shows that reasoning by analogy is by no means illegitimate. He states:

> In a statutory area, reasoning by analogy within the statutory 'code' is perfectly acceptable by application of the general rule permitting the use of other statutes on the same subject as a guide to interpretation.[57]

A good example of this is *R v. Arthur*[58] in 1968 when the words 'any person' in section 18 of the Offences Against the Person Act 1861 were given the same meaning, contrary to the initial inclination of the court, as those same words in section 2 of the Malicious Damage Act 1861.[59]

As Lord Diplock pointed out in *Carter*[60] the undoubted move towards a greater degree of purposive interpretation by the courts[61]

---

[52] [1975] 3 All ER 158.
[53] At p. 161.
[54] See further, Manchester, Salter, Moodie and Lynch, *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation* (Sweet and Maxwell, London, 2nd edn 2000) at p.49.
[55] [1949] 2 KB 417.
[56] Cross, *Statutory Interpretation* (Butterworths, London, 3rd edn 1995 by Bell and Engle) at p. 151-2. This contains a useful analysis of the circumstances in which statutes will be considered to be *in pari materia* - see p.150f.
[57] Ibid., p. 44. See further *Pioneer Aggregates (UK) Ltd v. Secretary of State for the Environment* [1984] 2 All ER 358.
[58] [1968] 1 QB 810.
[59] See further Bankowski and MacCormick in MacCormick and Summers (eds) *Interpreting Statutes* (Dartmouth, Aldershot, 1991) at p. 369.
[60] Supra n. 52, at p.161.
[61] Of course, there is nothing new in purposive approaches in interpreting statutes which goes back at least as far as 1584 - see *Heydon's Case* 3 Co. Rep. Fa; 76 ER

will mean that similar words in different statutes will result only in a persuasive argument at most that they should be interpreted similarly. Different contexts will mean the potential at least for identical words to be given different interpretations. However, it is not always necessary in the context of a purposive approach for the interpretations to be different in that such an approach recognises that even identical concepts may be treated differently in different contexts. It is not dependent on varied definitions but on a varied application in different situations.

Deakin states, however, that the reluctance of the courts to reason by way of analogy from statute to the common law is now decreasing, and that is facilitative of a unified analysis of employment.[62] It is certainly true that there has not been a unified approach with the regard to the conceptual relationship between statute and the common law historically. Statute tends to provide additional, alternative, remedies and conceptual frameworks to the common law. It does not, on the whole, attempt to amend the common law. Even on those occasions when it strays into common law territory, it does so very tentatively. So, for example, the Equal Pay Act 1970 seeks to remedy the deficiencies of the common law that does not require equal treatment between the sexes in the terms and conditions of employment. It does so by stating that, where a contract does not already contain one, an equality clause shall be deemed to be included.[63] And yet the remedy is not in contract at all but is a stand-alone statutory claim under the Act with the consequence that, for example, normal contract limitation periods do not apply. Also, the case was brought in an industrial tribunal even when it did not have jurisdiction to hear contract claims.[64]

However, I have argued elsewhere that there are many examples where the courts, in interpreting employment legislation, have found it difficult to abandon their common law roots and have injected common law ideas into statutory claims.[65] I referred to what I considered to be a particularly striking illustration of this in the case of *Western Excavating (ECC) Ltd. v. Sharp*.[66] This was a case concerning the definition of 'constructive dismissal' in section 95(1)(c) of the Employment Rights Act for the purposes of claiming unfair dismissal. Deakin was later to use the same case in point.[67] This

637.638. See Miers and Page *Legislation* (Sweet and Maxwell, London, 2nd edn. 1990) p. 170f.

[62] See particularly Deakin, 'Private Law, Economic Rationality and the Regulatory State' in *The Classification of Obligations* (ed. Birks, Clarendon Press, Oxford, 1997) p. 283.

[63] Equal Pay Act 1970, section 1(1).

[64] This has now changed by virtue of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994 (SI 1994/1623) and the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 (SI 1994/1624).

[65] See Honeyball, 'Employment Law and the Primacy of Contract', (1989) 18 ILJ 97.

[66] [1978] IRLR 27.

[67] See 'Private Law, Economic Rationality and the Regulatory State' in *The Classification of Obligations* (ed. Birks, Clarendon Press, Oxford, 1997) 283 at p.297.

states that the employee will be taken to have been dismissed if he resigns in circumstances such that he is entitled to do so by reason of the employer's conduct. Entitlement here was originally thought to arise where the employer had acted unreasonably - this is, after all, in the context of a statutory claim that seeks to provide remedies where the common law does not for the unfairness of a dismissal. However, the Court of Appeal held that this was not correct. The test to apply was whether the employer had committed a repudiatory breach of contract. The common law had crept in through the back door.

However, perhaps this is after all not so striking as it first appears, for several reasons. First, the scheme of the unfair dismissal claim is such that the issue of reasonableness has its part to play in that stage of the proceedings where the fairness or unfairness of the dismissal is examined. To introduce the concept of reasonableness at the earlier point when determining whether there has been a dismissal at all may make the later issue redundant and at best may cause confusion. Secondly, the legislation is not so divorced from the common law as it might appear. For example, the unfair dismissal remedy does not apply where an employee is dismissed from his or her employment, but upon the termination of a contract of employment, and one employment may consist of a number of contractual periods. Furthermore, it should be remembered, employment under the legislation is still defined in terms of the existence of contractual relationships.

Conclusion

The picture is thus a confusing one. Whilst the unified approach does seem to be the one favoured by the judiciary and the legislature, consistency is lacking. Furthermore, whether the unified or multiple approach is adopted, it is not clear that this is as a result of a fully-reasoned working out of the considerations involved, or whether it is a consequence of more fortuitous factors. Neither is it certain that it is the approach that should be adopted.

Although there are clear difficulties associated with the unified approach, as we have seen, to move to a multiple approach, perhaps policy-focussed, would in any event not be straightforward. There would be a price that it might not be possible or desirable to pay. To take just one example a multiple approach would probably best be served by an attendant change in nomenclature, particularly in legislation, in order to make clear that different concepts were in point. It would seem that much of the confusion has arisen in this area because, if different concepts are in issue, the same term has been used to apply to them. If different terms were to be adopted this result would largely be avoided. But the consequence of that in turn would be that the law would appear more technical to those to whom it applies, and more divorced from reality. Relative familiarity for the lay person with 'employment', 'contracts of employment', 'contracts

of service' and so on mean that the law is more accessible than it would be were neologisms to abound, as would probably be required. Neither, purely on a practical and political level, is such a change likely to be brought about. We can discard it as a serious possibility.

However, there is one improvement that could be made which, though modest and limited in scope, would I suggest be a move in the right direction. Matters are made unnecessarily confused at present because the limited terminology that is used is employed in a definitionally cross-referencing manner that is unhelpful. To define an employee as one who works under a contract of employment, for example, is not only generally unenlightening but opens up the definitional approaches that have been adopted in other areas with regard to those phrases.[68] Be it good or bad, this invites a unified approach. On the other hand, if an approach were to be adopted that sought to identify the concept without reference to other concepts in law, this would, I suggest, be both more enlightening and less of a temptation to stray into areas that have not been fully worked through. Definitions of the type that define an employee as one who undertakes to perform work for another personally would be an example, and already exist in some areas.[69] But this would merely be a beginning. What is fundamentally required is a thorough understanding of the theoretical complexities involved in the definition of concepts which is not substantially evident at the moment.

[68] As with the heavy case law on section 230(1) of the Employment Rights Act 1996.
[69] See e.g. part of the definition in section 82(1) of the Sex Discrimination Act 1975.