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**THE CONSTRUCTION OF ATYPICAL WORKING  
AND COMMUNITY LAW**

**PAUL SKIDMORE**

thesis submitted for an LL.M degree February 1993

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## Introduction

There is much talk in labour law about 'atypical workers' and 'atypical working' and yet there is little agreement on how to approach and analyse the subject. Nevertheless, in the broadest terms it can be stated that most, if not all, writers at least agree that the sort of workers to whom the label 'atypical' can be applied are (1) part-time workers, (2) those on fixed term-contracts, (3) temporary workers including casual workers and (4) those who work through a temporary employment business (in the UK context often referred to as agency workers). The European Commission estimated in 1988 that around 20% of the workforce within the European Community could be described as falling within this description of atypical working<sup>1</sup>.

The debate as to the nature and consequences of atypical working was affected and possibly confused in the 1980s by the theories of 'flexibility' regarding industrial organisation<sup>2</sup> coupled with the growth in supply-side economics. These labour market theories promoted the use of forms of working which fall into the pattern described as atypical. Against this background it might be easy to assume that atypical working is a new phenomenon. This study aims to challenge this assumption and using a model suggested by Mückenberger (1986) seeks to determine the true nature of atypical work patterns.

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<sup>1</sup> paragraph 22 of the explanatory memorandum for the atypical work Directives see n.2 below.

<sup>2</sup> see p.41 below



As Neal (1992) points out, the issue of atypical working in Europe poses a challenge to researchers, legislators and judges particularly as regards how they formulate ideas of typical and atypical. Further on, he indicates that the issue of atypical working helps to focus upon the very fundamentals of labour law, throwing open the question as to what protection labour law should offer i.e. what its purpose is. This study hopes to respond in some respects to the challenge posed by Neal and cast a critical look at how European Community labour law is developing.

Therefore this thesis proposes to firstly set up a model of atypical working. This will be done by constructing typical working from which the nature of atypical, as its antithesis, will be derived. This process will be achieved by considering the labour law of the UK and the FRG and in particular the historical and political contexts of the development of the law. This particular model of typical and atypical will then be put into the framework of other writing and theories on atypical working.

With the model firmly established, the second phase will consist of a brief analysis of the EC competence in labour and social law fields. This will pay particular reference to the constraining effects of the principle of subsidiarity and of the law on indirect discrimination. This enables the reader then to progress to the third phase of the thesis which, in the light of the first two sections, offers a critique of the Community proposals for Directives regarding atypical work. These proposals are analysed with particular emphasis being placed on what conclusions may be drawn from them as to the nature of atypical working, *as perceived by the Commission*. This is further developed by not considering the proposed atypical work Directives in



isolation, but by comparing the approach of the Commission in these proposals with their draft Directive on the posting of workers, which in an indirect manner does also address atypical working.

This legal approach it is hoped will provide a challenging perspective to the issue of atypical working by offering a mode of analysis rarely seen in the literature. In this way the writer aims to make a constructive contribution to the current debate.



## Chapter 1 - The construction of 'atypical'

It is important to set up clearly at the outset the concept of atypical that will be used later in the analysis of Community proposals and the jurisprudence of the ECJ. Atypical here will be considered as a derived state of affairs, in that it will be defined with respect to typical. This conception of atypical means that it varies according to the nature of typical: it is not a free-standing or independent concept. Rather, atypical arises because there is difference and divergence from the typical. The need for research lies in the fact that this divergence is increasing both quantitatively and qualitatively, thus challenging the ascendancy of what is commonly described as typical. The quantitative increase in atypicality may be seen in the growth of part-time employment and temporary working in Western Europe (Hakim 1989a). The qualitative increase in divergence is a longer term phenomenon which reveals itself more slowly, in that only as the level of employment rights in general improves does it become apparent that not all workers have equal access to these rights. Thus against this background we will first define typical to provide a starting point for an exploration of the atypical. No attempt will be made to ascribe a normative value to typical, it should be understood merely as a tool of legal analysis. In this way, it must be remembered that the use of the labels *typical* and *atypical* is for the convenience of developing the argument and aims to provide a point of cross-reference with other academic work.

This chapter will firstly seek to define typical working as a construction of rules of law. In analysing the rules of law in this way certain criteria will be identified which



are significant in the model of typical working. The aim is to set up a model showing typical as describing the legally privileged worker, the pattern of working which from a legal point of view offers the worker the greatest bundle of rights. To the extent that atypical is a derived state of affairs it will be described as that which diverges from typical, such that within the spectrum of working patterns with typical at one end, the extreme version of atypical will be the antithesis of this at the other end of the spectrum. Thus as typical is constructed to reveal legal privilege, it follows that in the model atypical will represent legal disadvantage within the labour market.

The criteria used in setting up the model of typical will then be placed in the context of the genesis of labour law. This consideration of the historical development of labour law in its economic and political framework (to the extent that this is necessary) will shed some light on the nature and origin of the rules which go to making up typical working. Although the main aim of this chapter is to provide a historical analysis of typical working in order to set it into its proper context, it is an essential pre-requisite to explain clearly at the outset what this study takes typical working to be and therefore this issue will be first defined so that there can be little doubt as to the concepts to be explored. Only in this way can typical working be sufficiently appraised so as to enable ultimately a clear meaning for *atypical* to be established.



### (1) Typical working

The model of typical working that is used here in a European context is derived from that developed by Mückenberger (1985) in his analysis of German law. In this model, the nature of typical working is carefully constructed through an analysis of legal rules whatever their source. Examples will be taken from both British and German law to develop a general (not system-specific) construction of typical<sup>3</sup>. Therefore we will be considering rules to be found in the general interpretation of the BGB<sup>4</sup> and the common law, in protective legislation, in collective agreements and also in the custom and practice of the enterprise.

The basic premise underlying this analysis of legal rules is that there is a conception of worker which influences the development of labour law. It has been pointed out elsewhere that the concept of worker that emerges from labour law is not necessarily identical with that which emerges from tax law or the law of tort (Bercusson casebook). However the first stage of this study is concerned with establishing the identity of the most legally protected and privileged workers with reference to their position in employment and so will restrict its scope to labour law.

Labour law is not of itself self-generating but is a reflection of the society which gives rise to it. Hence consideration will be given to the actors who shape labour law: the judges, legal draftsmen, trade union negotiators, even politicians and academics.

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<sup>3</sup> A study which draws on the experience of only two legal systems can of course only go some way towards establishing a general construction, but it is nevertheless hoped that this will overcome some of the shortcomings of a study looking only at one legal system, without any comparative perspective.

<sup>4</sup> *Bürgerliches Gesetzbuch*: German civil code of 1896



However it is not proposed to undertake a formal analysis of the discourse of the actors rather to look at the rules of labour law as a means of discovering the attitudes and conceptions of the actors. The aim is to unearth the 'worker' who figured in the actors' minds as they developed labour law. It is not expected that this will reveal a consistent image present in all minds on all occasions, but that key common characteristics may be nevertheless determined. The search is not only for common personal characteristics of the worker (age, gender, qualification) but also for the environmental characteristics of what the actors consider 'working' to be with regard to the need of legal protection. But it should not be doubted that implicitly, subconsciously there is a concept of a model worker which recurs in their minds. To (re-)construct this model it is necessary therefore to extrapolate from legal rules, treating these as a starting point, to build up the picture of typical working. This can be best achieved by extracting the criteria which determine the scope and degree of legal protection and rights attaching to an employment relationship. It is argued that these criteria will reveal the characteristics of the worker who recurringly figures in the minds of the actors. In these circumstances, the worker who best fits these criteria, exhibiting all of these different characteristics can be viewed as that constructed by law as typical working. In essence we are searching for that particular type of worker, who, howsoever the legal question is framed or the issue addressed, will always be best situated relative to other workers. It is important to note therefore that every worker who does not fulfil all of the criteria comprising typical working must be to some extent atypical. As typical is being constructed as this ideal model of working it would not be surprising if in reality a substantial proportion of workers did not fully conform to the model and therefore found themselves, within the



scheme being constructed here, as being in a pattern of employment which is atypical. The greater the number of workers that can be described as atypical, the more likely is a revaluation of the meanings and connotations of the term atypical. Such a revaluation would coincide with the aim of the author not to attach a normative function to typical working, but rather to show how historically the law itself has given it this normative role in its shaping of labour law. This will become apparent as the criteria which determine typical working and their historical development are considered. It may be noted how the same model typical worker who is the subject of labour law may also be seen emerging from social security law<sup>5</sup>, however the principal examples to be used in setting up the model will nevertheless be taken from labour law. Therefore four key criteria can be identified which help determine whether or not a pattern of working may be described as typical. These criteria relate both to personal characteristics of the worker and to the environment in which the work is carried out.

1. paid work within an establishment: this criterion effectively expresses the requirement, as is generally found in most provisions of labour law legislation relating to individual rights, that the worker subject of the law must be an employee with a contract of service<sup>6</sup>. Certain legislation on sex or race discrimination and health and safety does cast its net more widely and therefore as a matter of practice includes non-employees. Nevertheless it remains critical for a worker to establish

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<sup>5</sup> see Daly and Scheiwe (1991) for a discussion of the patriarchal model of social security law in the same two states (Britain and Germany). It is implicit in their work that social security law generally has a typical worker in mind.

<sup>6</sup> e.g. Part V of EP(C)A 1978 granting protection against unfair dismissal to an 'employee' who is defined in s.153(1) as an individual working under a 'contract of employment' which is further defined there as being a contract of service or apprenticeship.



from the outset this characteristic of 'employee' to have any chance of invoking core employment rights. In the British system even the right not to be unfairly dismissed for being a trade union member - a fundamental right one might think and constitutionally protected in Germany (Article 9(3) of the *Grundgesetz*) - is also dependent on being classified as an employee<sup>7</sup>. Because of the nature of the tests developed by the judges for determining who is an employee (Wedderburn 1986: 111-132; Richardi 1989), a worker who is unpaid or works outside an establishment will have difficulty asserting that as a matter of law that s/he is an employee. The requirement that a worker works within an establishment should not be taken to require physical presence within a building, but expresses the need for the worker to be part of an undertaking. This requirement contributes to the difficulty experienced by homeworkers and the fake self-employed in establishing employee status. In the more extreme case of a homemaker i.e. someone who works bringing up children, managing a family home, etc. s/he would fail on both aspects of this criterion in that her/his work is unpaid and outside an establishment, thus rendering the attainment of the legal status of employee impossible. It is an arguable issue as to whether this criterion properly relates to characteristics of the worker, or perhaps the environment i.e. the matrix of circumstances in which the work is carried out. It is important to realise that these environmental characteristics are as significant as personal ones in building up the model of typical working, because they also provide a good indication of whether work is perceived as being within the scope of labour law.

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<sup>7</sup> now TULR(C)A 1992 s.152 which re-enacts the provisions of EP(C)A s.58 (repealed). The (in)famous case-law examination of this is *O'Kelly v Trusthouse Forte* [1983] ICR 728, [1984] QB 90 where the Court of Appeal held that the workers in question were not employees and hence unable to claim any unfair dismissal rights.



2. size of the undertaking: this criterion, clearly does not relate to the personal characteristics of the worker, but rather considers the specific characteristics of the employer. In this way, small firms have been exempted from various legislative requirements, thus giving greater legal protection to those working in larger firms. A striking example of this is the German law on unfair dismissal which only covers those undertakings in which there are more than 5 workers<sup>8</sup>. It was estimated in 1981 that over 2 million workers were employed in some 940,000 such undertakings and were thereby excluded from unfair dismissal protection (Schwermer 1986). Between 1980 and 1985 British unfair dismissal law required a longer qualifying period for those working in enterprises with less than 20 employees (2 years compared to the 1 year usually required)<sup>9</sup>. Whilst this distinction no longer exists - to the detriment of all workers who must now work for at least 2 years before they qualify for protection<sup>10</sup> - the law on maternity rights still contains this 'small firms exemption'. Thus employers in Britain in enterprises with 5 workers or less who do not take women back after maternity leave because this is 'not reasonably practicable'<sup>11</sup>, are not treated as having dismissed their employee<sup>12</sup>. In this way the employee is disbarred from bringing an unfair dismissal claim and is therefore remediless.

3. full-time working: this is a fundamental criterion in building up the model of typical working and is clearly demonstrated in the concept of overtime. The

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<sup>8</sup> s.23 Kündigungsschutzgesetz 1969 (KSchG).

<sup>9</sup> EP(C)A s.64A as added by EA 1980 s.8(1).

<sup>10</sup> thanks to the Unfair Dismissal (Variation of qualifying period) Order 1985: SI 1985/782.

<sup>11</sup> EP(C)A s.56A(1) as added by EA 1980 s.12

<sup>12</sup> recently agreed Maternity rights Directive will change this???



assumption is that full-time working is normal or typical in that for any additional hours worked to be treated as overtime and hence be paid at a higher rate, a worker must work more hours than the usual (full-time) working week. This is true whether working time is regulated as in the UK by collective agreement (Dickens 1992: 15) or is controlled by a legislative framework as it is in Germany: *Arbeitszeitordnung* (AZO). The usual working week is ordinarily taken to be that operating within the enterprise for all workers (e.g. 37 hours), whether collectively agreed or determined by the employer, and does not relate to the number of hours agreed to be worked by any individual worker. Thus a part-time worker will invariably receive no overtime premium for any hours worked over and above his/her contractual working hours, because s/he has nevertheless not exceeded the 'normal' working week. Furthermore specific legislation e.g. in the UK, regarding unfair dismissal<sup>13</sup> or redundancy may exclude those working less than a certain number of hours per week. The provision in the German law on sick pay which excluded those working less than 10 hours per week has recently been disapplied by the Federal Labour Court<sup>14</sup>, because of its incompatibility with EC law<sup>15</sup>. It has nevertheless also contributed to the development of typical, because of the way it has built a threshold into the system.

4. length of service within an undertaking: it is a general rule that the nature and quality of employment rights (and also pay levels) increase as a function of the length

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<sup>13</sup> The rules in EP(C)A Sch 13 determine whether a week counts towards the minimum qualifying period (currently 2 years) required. Normally the contract must specify at least 16 hours for the week to count. A week where the contractual hours to be worked are less than 8 hours can never count. There are special provisions for those with contractual hours of between 8 and 16 hours.

<sup>14</sup> [1992] NJW 1125 case 5 AZR 598/90 decision of 09.10.91; noted in (1992) 218 EIRR 26.

<sup>15</sup> the Federal Labour Court applied the ECJ decision of *Rinner-Kühn* [1989] ECR 2743 an Article 177 reference from the Oldenburg Labour Court on the same point.



of service within the undertaking (seniority rule<sup>16</sup>). This is reflected in specific legislation on e.g. unfair dismissal<sup>17</sup>, maternity rights and in the entitlement to paid holiday. It is also implicit in most redundancy selection procedures, particularly the practice of Last In First Out (LIFO)<sup>18</sup>. Thus those with fixed-term contracts or who regularly change undertaking are placed at a disadvantage, when the law rewards those who have built up long periods of service. The inferior position of those on fixed-term contracts is made particularly clear in both states. In the UK, the only possibility for contracting-out of individual employment rights relates to those on fixed-term contracts of more than 1 year as regards redundancy and 2 years as regards unfair dismissal<sup>19</sup>. This represents a serious departure from the general rule that statutory rights cannot be derogated from, except to the benefit of the employee. A similar phenomenon can be seen in Germany where the courts developed a rule which prevented fixed-term contracts with a duration of more than six months unless they could be justified according to tight criteria. This rule was swept aside by the new law on the improvement of employment opportunities<sup>20</sup> which now permits, without the need for justification, fixed-term contracts of up to 18 months duration or even 24 months in the case of new small firms<sup>21</sup>. This rule offers fixed-term contract workers less protection than that enjoyed by workers with open-ended

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<sup>16</sup> see the critique of this at p.? below.

<sup>17</sup> EP(C)A s.64(1)(a) (however by way of exception no minimum period of service is required by an employee complaining of dismissal on grounds of membership and non-membership of a trade union s.154 TULR(C)A 1992) and KSchG s.1

<sup>18</sup> approved by the EAT in *Clarke and Powell v Eley (IMI) Kynoch* [1982] IRLR 482; [1983] ICR 165 because the interests of legal certainty outweighed any discrimination which might thereby arise.

<sup>19</sup> under s.55(2)(b) EP(C)A the termination of a fixed-term contract is treated as a dismissal, a provision which is invariably circumvented by means of s.142(1), allowing contracting-out.

<sup>20</sup> *Beschäftigungsförderungsgesetz* 1985 (BeschFG).

<sup>21</sup> *ibid.* s.1(2).



contracts. The lower level of legal protection for workers employed for short periods or on a fixed-term contract leads to the conclusion that length of service is an important criterion in the model of typical working. It should be noted that these rules on continuity (length of service), relating both to the number of hours worked per week and to a minimum period of uninterrupted employment also exist in social security law. They operate to determine entitlement to social insurance benefits (unemployment benefit or sick pay) and have a similar negative effect as those thresholds in labour law, in that they arbitrarily exclude certain groups of workers.

A picture therefore builds up of the typical worker as being one who works full-time in a large enterprise with a contract of service. This worker is unlikely to change employer thus is able to acquire seniority-based rights. From whichever angle or point of view the legal position of this worker is considered, s/he is safe and secure. It could therefore be suggested that such a model worker is likely to be a man employed in industry or manufacturing, since his pattern of labour market participation fits the template which we have seen carved out of labour law. However we know that this does not represent the full reality of the labour market.

In the next section we will offer some possible historical explanations for the development of this model subject of labour law: the typical worker. The purpose of the historical perspective is to shed some light on why law came to have a *selective* function<sup>22</sup> i.e. why the law does not treat equally or even similarly the various

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<sup>22</sup> This theme regarding the selective function of law leading to exclusion or inclusion will be returned to when the EC actions in this sphere are considered, p.7 below.



workers within the labour market (Mückenberger and Deakin 1989: 198), leading to legal disadvantage for certain groups. It is hoped thereby, to show how many of the factors which contribute to the model of typical working are not recent innovations, but have been built up over the 120 or so years during which modern labour law has emerged. That this model of typical has been developed over a long time-span, implies also that atypical working as defined here is not a recent phenomenon, contrary to the *flexibility* arguments of certain labour market theorists<sup>23</sup>. Rather than asserting that atypical working is new, the 'discovery' of typical and atypical working it is argued, can be ascribed to a changing perception of workers, their rights, and the role of law in the employment nexus. This changed perception and increased role for law<sup>24</sup> has revealed the legal disadvantage experienced by certain groups of workers i.e. patterns of working to which the label *atypical* can be applied. An appreciation of how typical and atypical working emerges from legal rules is essential for any attempt to predict how further developments in the law are likely to influence the model of typical working.

## (2) Historical factors

In the previous section we identified four key criteria which the law uses in identifying the best protected workers in the labour market. These model workers are our typical workers because of their recurrent appearance, implicitly, in the minds of the actors who have shaped labour law. In identifying the four criteria we

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<sup>23</sup> see p.41 below.



analysed legal rules from many different sources that make up the patchwork of labour law. Essentially these sources can be classified into three different levels of regulation: (a) the contract of employment, (b) collective bargaining, (c) legislative intervention. This not to say that this represents a rigid hierarchy of sources, but that it is a convenient mode of analysis which roughly coincides with the historical sequence of events. Furthermore analysis of the legal rules at three levels is essential, because it is at the points of interaction and intersection of these three levels where atypical working is most clearly revealed. This can be shown by two examples: (1) it is through the development of the law relating to the contract of employment, that the concept of employee arises, with certain legal consequences which are then highlighted when statutory intervention, which only covers employees, is considered; (2) the failure of collective bargaining is designed to be offset by legislative intervention, however, close analysis shows that the very same workers outside collective bargaining are invariably outside the scope of legislative intervention.

To understand how the legal subject - the typical worker - emerged, it is useful to explore the discourse relating to 'status' and 'contract' which has greatly influenced the genesis of these three levels of regulation. This discourse stems from an aphorism of Sir Henry Maine when he wrote in 1861 of the transition 'from status to contract', describing the shift of the law of persons in progressive societies. This was the movement from ancient feudal systems where personal relations are determined by the institution of the family to one based on the free agreement of individuals. Thus in his view this could be demonstrated by the disappearance of the status of slave to be replaced by the contractual relation of master and servant (Maine 1963: 141). This



starting point has since been used by many to describe the changing legal construction of the employment relationship. It is particularly useful because it indicates the tenor of legal thinking in the mid-nineteenth century and therefore provides a suitable context for discussion of the emergence of the three levels of regulation which have driven labour law ineluctably towards its model of typical working.

(a) contract of employment

As we have seen from Maine, the dominant idea of the mid-nineteenth century was the concept of *contract*, by which contemporary society could be distinguished from those which preceded it. In the writings of liberal theorists such as Spencer, status and contract are always presented as opposites (Spencer 1969)<sup>25</sup>. Whereas status was a system of compulsory cooperation, a coercive rule; contract represented the system of voluntary exchange through which an individual could bargain and negotiate his/her own nexus of rights and duties in the market place. Contract was therefore preferable because it offered greater individual freedom and was held out to be the more modern state of affairs. Status and contract should be understood here for the purposes of our analysis, as terms of art, ideal types, in the Weberian sense<sup>26</sup> (Rehbinder 1968: 145). Nevertheless to the extent that status and contract are merely labels (ideal types) describing two different models of social organisation, we can

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<sup>25</sup> see further Fox (1974: 209)

<sup>26</sup> If one were instead to take the statement as describing a shift in absolute terms from pure status to pure contract the validity of Maine's proposition would seriously have to be questioned. For, no more can it be said that mediaeval society was solely regulated by the law of status than it can that late nineteenth century society was solely governed by the law of contract. It is easily demonstrable how mediaeval society knew of contract both for trade and for personal institutions such as marriage and inheritance and how status lives on in modern society under the guise of the managerial prerogative.



agree with the general proposition of Maine that there has been a move from status to contract. This change corresponds to that famously categorised by Tönnies as a movement from *Gemeinschaft* to *Gesellschaft*.

In a modern society characterised as 'contract' the question then arises as to what role contract as a legal institution came to play in regulating the employment relationship. Libertarian theory emphasising contract as a tool for self-definition, self-creation and for individual achievement can be seen as having influenced the German codification of 1896 (BGB). All contracts of service (*Dienstvertrag*), regardless of the type of service to be performed, were to be regulated by paragraph 611ff of the BGB. Despite arguments to the contrary<sup>27</sup>, as a matter of civil law the employment relationship has not been treated as being a special type of contract outside the basic ambit of civil law itself.

If one were to take a blank page and begin to devise a legal approach to the regulation of employment relationships, it would never be possible to define one which is based solely on the principles of contract. This arises because the theory of freedom of contract emphasises the equality of the partners who enter into contractual relations - two equal legal persons before the law. Yet it is this principle of equal contracting parties (however far from reality it may be) which has been repeatedly applied in the development of the law governing the employment relationship. It is suggested however that there are two contexts which have

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<sup>27</sup> especially von Gierke who tried to locate the contract of service within the law of persons, because of the personal relationship of trust and faith thereby created.



constrained the application of pure contract theory: (1) the influence of other areas of law outside the scope of contract and (2) the difficulty involved in applying legal concepts to the factual reality of inequality of power in the employment nexus. These contexts will be explored in order to discover why, despite the inappropriateness of contract law, nevertheless the contract of employment emerges as the basic conceptual tool for the legal analysis of employment.

This particular legal approach to the subject matter i.e. one based on contract, it will be seen, leaves certain employment relationships located outside the parameters of labour law because these are set by the contract of employment. Thus even the contract of employment will be shown to have a selective function, in its exclusion of certain workers (e.g. the self-employed, homeworkers, and franchisees), who therefore find themselves in principle outside the scope of labour law, unless legislation specifically provides otherwise<sup>28</sup>. This suggests that even the very foundation of labour law provides definite indications of the concept of typical working and may serve as a reminder that atypical working is not a new phenomenon.

In exploring the first context, that which aligns contract law within the network of other legal disciplines, two particular areas of law will be highlighted. Both criminal law and the law of persons although clearly revealing concepts of status, the antithesis of contract, had considerable impact on the path taken by contract law within the field of employment.

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<sup>28</sup> e.g. *Heimarbeitsgesetz* (HAG) 1951 or the creation of a concept of '*arbeitnehmerähnliche Person*': an employee-like person.



### 1) criminal law

Rules of criminal law which subjected workers to criminal sanctions for breach of contract whilst employers were not liable in this way, gave rise to an asymmetry which was a major obstacle in preventing formal equality. And yet, contract has always assumed formal equality to exist -a precondition for freedom of contract - thus appearing to ignore the criminal law which specifically created formal *inequality* between the parties. The inappropriateness of contract is therefore highlighted by its contradiction of a head-on nature with criminal law. It is further suggested that the outcome of this contradictory situation was that as contract took hold of the employment relationship, it did however adopt some of the concepts of criminal law in spite of the theoretical antithesis that this implied.

In Britain, these concepts of criminal law are illustrated by the Master and Servant laws which made it a criminal offence to leave or neglect work were regularly used, revised and updated in 1867, and were not finally repealed until 1875 (Wedderburn 1986: 141). In a similar way in many Continental systems the work-book<sup>29</sup> was used for many years to restrict workers' freedom to leave one employer to join another (Veneziani 1986: 43). These legal instruments were widely used and only gradually did they come to be seen (by the more enlightened) as an outdated and rather crude mode of controlling the masses. However the changing political context: the widening of the franchise and the rise of radical parties, led to circumstances which allowed for

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<sup>29</sup> this served a similar function to the British Master and Servant laws, since a worker was only permitted to leave an employer when s/he had certified that all obligations had been fulfilled by the worker.



a repeal of penal provisions and the slow translocation of the employment relationship to the sphere of private law.

The significance of these criminal law provisions is that their effects long survived their repeal. They had rooted the worker's duty to the employer firmly in status and not in contract. It does not lie within contract law to conceive of a situation where breach of a private law contract (of employment) could lead to criminal sanctions. On the other hand, breach of a duty arising out of status could be so punished. The criminal law had so ingrained these status notions which were so antithetical to contractual theory that it was difficult for contract to supplant them merely through a repeal of the penal provisions.

2) law of persons: with its concepts of paternalism, subordination and loyalty which blurred the distinction between the head of the family and an employer. This was essentially the framework which governed the employment of domestic servants who were subsumed within the institution of the household. Not only did the law of persons determine the feudal-type relationship between the head of household and the worker but historically it had also defined the legal capacity and to an extent the legal personality of the individual worker. Thus some individuals were disabled by the law from entering into certain legal transactions, i.e. were deprived of status in the Roman law sense that they lacked full legal personality. It was this status-creating nature of the law persons which was at the core of its inherent contradiction with contract as an ideal type. Thus the liberal constitutions and codifications of the nineteenth century supplanted this idea with the libertarian concept by which all



individuals were to have the legal capacity to enter into contractual relations. That the older status-related concepts of the law of persons lingered on in the regulation of the employment of domestic servants, may further explain the difficulty for contract in its pure theoretical form to constitute the foundation of labour law.

It is clear that the law of contract being applied to employment relationships could not exist in isolation from these other branches of the law. Their fundamental contradiction with contract theory was such that they could not be ignored or forgotten. In this context the law relating to employment was forced to acknowledge the continuing existence of status derived from other areas of law. This can be further seen when contract law is set in the context of the judicial approach to the factual inequality of power in employment relationships. Here, it seems apparent that the law recognised that employment was somehow different to other areas of life to which contract law applied. In trying to set parameters for this somewhat different brand of contract law, reference had to be made to concepts completely outside the scope of contract: those of subordination and control. It is by referring to these concepts for definitional and identification purposes, and influenced by other areas of law, that the law arrives at the contract of employment as the basis for labour law. It is this crisis of identity and definition within the law which now provides the first glimpses of typical working.

### subordination and control

These are notions which are completely at odds with the ideology of freedom of contract, where both parties are formally equal. The only element of subordination



or control should be that which the parties have expressly provided for in the contract. Nevertheless recourse has been repeatedly made to these concepts in attempting to recognise the subject of labour law. Legislators have often used terms such as worker, factory worker or employee, in setting out the subject of industrial or social legislation without ever defining them. It has been up to those interpreting the law to try to grasp what the legislator intended.

It is interesting to note the historical confusion and uncertainty in German law on this subject. Originally the concept of contract of employment (*Arbeitsvertrag*) was a wide generic term used to describe all contracts of service and contracts for services. Thus an employee (*Arbeitnehmer*) was merely the party to this generic contract of employment who actually carried out the work. This broad approach was modified when it became necessary to identify the subject of social legislation, who was described as being an employee having the characteristics of a blue-collar worker (*Arbeiter*). When social protection was extended to white-collar workers (*Angestellten*), the term employee came to mean both white-collar and blue-collar workers. Thus subtly the genesis of the concept of employee had achieved the exclusion of the self-employed who in this sense were neither blue nor white-collar workers (Richardi 1989: §§147-9). Furthermore in looking at the whole corpus of law governing employment including that located outside the scope of specific legislation, i.e. in England the common law and in Germany that derived from the BGB, the difficulty that arises is knowing whether we are dealing with the law relating to contracts of employment or the law relating to employees. Theoretically we should be of course dealing with the law relating to contracts of employment, because this is contract law



(the law of obligations) and not the law of persons. However the easiest way to discern whether any particular contract is a contract of employment is to look at whether the one party exhibits the characteristics of an employee. This is particularly the case because the courts have repeatedly stated in both the UK and Germany that they will look to the substance and not the form of the relationship. Hence neither a clause stating "this is not a contract of employment" nor the treatment of a worker for tax and social security purposes as self-employed necessarily precludes the existence of a contract of employment<sup>30</sup>. But even objectively to define an employee is a very complex if not impossible task:

"Most courts now appear to use this elephant test for the employee - an animal too difficult to define but easy to recognise when you see it." (Wedderburn 1986: 116)<sup>31</sup>.

Any attempt to define an employee however crude has come to rely on notions of subordination and control because the courts in both systems have developed tests related to the degree of *personal* dependency of the worker<sup>32</sup>. Important factors in determining whether a worker is an employee (i.e. satisfying the first criteria of the model: paid work within an enterprise) are the degree of integration into an enterprise, the distribution of risk, and the organisational control of the enterprise. In choosing these characteristics the law has unmistakably the image of a worker in a factory in mind.

The fact that the law reveals this image of a factory worker may not be unconnected with the dominance and success of the logic of Taylorism, a method of industrial organisation which promoted large-scale factory production. This logic took the principle of the division of labour to its extreme, holding that all aspects of the

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<sup>30</sup> see case 5 AZR 298/73 reported at (1974) 25 BAGE 505 (German law) and *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497 (English law).

<sup>31</sup> referring to *Methodist Conference v Parfitt* [1984] ICR 176 (CA), at 183H where Dillon LJ states that whilst the courts cannot determine whether or not someone is an employee, they are repeatedly able to recognise an employee if they see one.

<sup>32</sup> the German courts have refused to adopt a test of *economic* dependency.



organisation of work could be determined scientifically by measuring workers' performance under different conditions. Those methods which had been scientifically 'proven' to be most successful were then applied to the production process. As a consequence, any scope of discretion was removed from those performing low level tasks, which thereby became standardised and homogenised. At the same time workers performing such tasks were increasingly subjected to rigorous regimes of control and supervision, (those elements seized upon by the courts in identifying an employee). It is suggested that the concept of employee which emerged was therefore reinforced by one of the most important techniques of industrial organisation as developed in the early part of the twentieth century: the theory and practice of Taylorism. The characteristics of a Taylorist production-line worker were easily identifiable as those which the courts used in identifying an employee. It is possible that the dominance of this and similar techniques of industrial organisation stifled the development of alternative tests other than subordination and control for identifying an employee. Thus it is more difficult, following the influence of Taylorism, to argue against and contradict the historically established tests of subordination and control. And yet despite the demise of Taylorism the law does not adapt as quickly and so workers even today who are less able to fulfil the requirements of subordination and control run the risk of not being classified as an employee and therefore will fail to benefit from the protective regime of labour law. These workers are not excluded because they are in any less need of protection, but because the law was not able to come up with a test capable of including them.

The paradox therefore emerges that the law because it cannot find a single overarching definition for a dependent employee instead is forced to fall back on aspects of subordination and control, the very features which are the antithesis of freedom of contract. The historic remnants of the law of persons and criminal law, combined with a notion of subordination and control mutate the institution of contract when applied to the employment nexus to such an extent that it is barely recognisable. And yet such is the insistence of the courts on the institution of contract, despite its inability to deal with the inequality of the employment relationship, that Kahn-Freund is forced to conclude that the contract of employment is the cornerstone



of labour law (Kahn-Freund 1954: 45). In this way contract and contractual doctrines then become the framework for legal analysis of employment. These historical explanations analysing how the law came to have restricted the group of workers to which the label employee applies, do not reveal any convincing logic for the perpetuation of the system. The nature of the employment relationship it has been seen, sits so uneasily within the nexus of contract, that a reappraisal of the issue which builds on a completely different foundation must always be conceivable: Community law offers the opportunity to perform such a reappraisal.

#### (b) collective bargaining

The previous section has shown how the development of the contract of employment contributed to the genesis of typical working, owing to the superior position of a worker to whom the label 'employee' can be applied. In this next section we will observe how this is compounded and exaggerated by the historical development of the theory and practice of collective bargaining.

It is useful to recall how the theory of collective bargaining holds that it serves to counteract the inequality of bargaining power between capital and labour. In the discourse of status and contract, collective bargaining in the traditional pluralist<sup>33</sup> model represents the realisation of a politically created status whereby labour can (collectively) bargain on equal terms with capital thus compensating for the inadequacies of contract<sup>34</sup>. The practical consequence of collective bargaining from a worker's point of view is that it permits a greater degree of autonomy in the regulation of his/her working life than would otherwise ever be possible for the majority of workers<sup>35</sup>. This mainstream view of industrial relations shared by

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<sup>33</sup> *pluralist* as practised in the UK indicates that management and unions work together but with divergent i.e. plural aims in mind (see further Clegg (1975)).

<sup>34</sup> it must be recognised that collective bargaining in Continental European states is founded on a different theoretical basis - corporatism. However here it is the consequences of collective bargaining structures that are in issue.

<sup>35</sup> contrast the opposite view of Browne-Wilkinson J in *Powley v ACAS* [1978] ICR 123 at 135G where he described the statutory procedure for promoting collective bargaining through the intervention of ACAS (s.11 EPA 1975 - now repealed) as the "compulsory acquisition of an individual's right to regulate his working life"; a right which is "not to be lost... except in strict accordance with the statutory procedure".



Kahn-Freund<sup>36</sup> and Wedderburn (amongst others) has come in for increasing criticism as Western societies have undergone economic transformation in the 1970s and 1980s, but should not be wholly discounted when it seems that the social dialogue at the level of the European Community encouraged by Delors is draws on aspects of both the pluralist and corporatist traditions.

These opening remarks which sketch out some of the fundamental axes of industrial relations theory, immediately reveal a blind spot in the theory: namely the non-universal nature of collective bargaining. It may seem to be stating the obvious, but it is by no means clear in the theoretical literature, that the realisation has been made that not all workers are covered by collective agreements or are able to engage in collective bargaining. Collective bargaining presupposes firstly the existence of trade unions: it is a requirement of the general German law on collective agreements (*Tarifvertragsgesetz*)<sup>37</sup> that one of the parties be a trade union<sup>38</sup>; the same requirement can likewise be found in the British statute<sup>39</sup>. Not only is the existence of trade unions presupposed, but secondly a certain level of membership is required for collective bargaining, so that collectively the union has a sufficient degree of industrial strength. These two presuppositions are highlighted by Clegg as the central thrust of pluralist theory:

"For the pluralist, collective bargaining is the right way of handling industrial relations. But collective bargaining cannot take place without unions and unions cannot exist without members."<sup>40</sup> (Clegg 1975: 314).

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<sup>36</sup> see the comments of Davies and Freedland regarding Kahn-Freund's attitude to collective bargaining in their introduction to the third edition of his book (Davies and Freedland 1983: 2).

<sup>37</sup> hereafter TVG.

<sup>38</sup> s.2(1) TVG.

<sup>39</sup> s.178(1) TULR(C)A 1992 defines a collective agreement.

<sup>40</sup> this requirement for trade unions and therefore union membership in order for collective bargaining to take place, would also be a requirement of corporatist theory.



Even in a highly unionised state such as the UK the density of trade union membership has never exceeded 60%<sup>41</sup>, and is now in decline after a century of gradual increase, such that nearly two-thirds of workers are not trade union members. Such statistics challenge the generality of the direct application of collective bargaining. Whilst it is of course true that terms of collective agreements may apply to non-union members within the same establishment,<sup>42</sup> it is nevertheless the case, that the greater the number of non-union members in an establishment or industry, the greater the likelihood that no collective agreement will exist. In the long-term, falling levels of trade union membership will threaten the very existence of collective bargaining. Furthermore the existence of trade unions with reasonable membership levels does not of itself guarantee that collective bargaining will take place. No amount of industrial strength can force an employer or employers' federation to enter into a collective agreement; not even a statutory duty to bargain in good faith as in the US National Labor Relations Act can ensure that meaningful collective agreements are entered into. Returning therefore to the parameters of the theoretical discourse and the question emerges as to how the theory accommodates all those workers who do not achieve this new politically-created status which collective bargaining implies. If collective bargaining creates a compensatory status for the worker in response to the inequality of the employment nexus, preventing anomie and the disintegration of society which Durkheim predicted, then why have those outside the scope of collective bargaining not reacted against their inability to regulate their working lives which collective bargaining might otherwise permit? It would seem that theory simply ignores those workers who are outside the scope of collective bargaining. This failure to account for such workers is seated in the fundamental assumption that is made regarding the universal nature of collective bargaining; an assumption which goes a long way towards explaining the development of the concept of typical working. Two issues arise here regarding typical working, firstly the normative role

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<sup>41</sup> figures for the density of union membership indicate that this is currently 38% in the UK, compared with peak of around 50% in 1979 (Bird, Stevens and Yates 1991); whereas in Germany the density of union membership reached a peak in 1981 at around 40% (Weiss 1986).

<sup>42</sup> thanks to a bridging term in the contract of employment in English law as in *NCB v Galley* [1958] 1 All ER 91; the position in Germany is more complicated, with collective normative regulations always applying to non-union members within the same enterprise (s.3(2) TVG), whereas individual normative regulations do not necessarily have to be applied to non-union members: it is not unconstitutional to exclude such workers from the benefit of the agreement (Wiedemann and Stumpf 1977).



given by the state to collective bargaining and secondly how there is an overlap between those left outside collective bargaining with those failing to acquire statutory individual employment rights. This second issue is discussed more fully when statutory intervention is considered (p.39). The first issue is however revealed when it is examined how it is the case that many of those found to be outside collective bargaining have nevertheless been given access by law to the product or a close substitute of the product of collective bargaining.

The history of collective bargaining shows however that many social theorists originally conceived of trade unions as likely to be a short-lived phenomenon and could never have imagined pluralist doctrine emerging. In the UK, Place, a nineteenth century employer encouraged the removal of legal restrictions on combinations which made them per se illegal with the intention that workers would soon realise the folly of such organisation and recognise the fundamental harmony of their interests with those of their employers. This logic was later adopted by the social theorist John Stuart Mill whose work was instrumental in influencing politicians of the day such that Bismarck was eventually brought onto the side of those who advocated the lifting of the ban on combinations in Germany (Jacobs 1986). Nevertheless trade union organisation and collective bargaining as a matter of reality became a conduit for the improvement of workers terms and conditions of employment. It is because of this practical role attached to it, that collective bargaining becomes important for the development of typical working, as the state begins to attribute a normative function to it as a strand of its social policy. It can be said that in both Britain and Germany the state recognised at an early stage the significance of collective bargaining, although the effectiveness of the measures is open to dispute. Arguably, the most important facet of collective bargaining is that it lays down minimum standards for remuneration, hours of work, etc. This is implicitly acknowledged in Germany by the Collective Agreements Decree of 1918 and in Britain by the introduction of Fair Wages Resolutions in 1891<sup>43</sup> and of Wages Councils by Winston Churchill in the 1909 Trade Boards Act (Wedderburn 1986: 347-354). These two

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<sup>43</sup> for a history of Fair Wages Resolutions see Bercusson (1978).



British institutions were designed as tools to reach, as regards questions of pay, those parts that collective bargaining could not reach. Fair Wages Resolutions represented an early attempt to use the technique of contract compliance whereby government contractors were required to pay 'fair' wages, whilst Wages Councils sought to impose a minimum wage in certain industrial sectors with the aim of "fostering organisation" (i.e. promoting collective bargaining). It can be argued that if the state had not considered collective bargaining to be important, it would not have tried to support the system in this way. However these institutions were of course no substitute for collective bargaining as regards issues other than pay and were seen by many as something of a last resort in the fight against low pay. The Collective Agreements Decree on the other hand used a different technique. It provided for the possibility of mandatorily extending collective agreements to cover workers in enterprises which were not party to the collective agreement<sup>44</sup>. This illustrates the same point, that the state felt collective agreements of sufficient importance that they should be extended to other workers, i.e. to reach the workers that collective bargaining cannot reach. The normative nature of this regulation is quite clear: the normal (typical) worker is engaged in the collective bargaining process, therefore because of the significance of the results of this process, a complementary regime is set up for some of those outside the scope of collective bargaining.

A second dimension to this problem emerges when it is recalled that collective agreements, particularly those of a multi-employer nature (e.g. sectoral, regional, national) only provide for minimum standards. Hence that which is extended to the workers outside collective bargaining may often fail to represent the true level of wages within the industry. Whilst as a matter of law in Germany<sup>45</sup> an employer cannot employ the worker on any *less* favourable terms than provided for in the collective agreement, the reality is that many employers engage workers on terms better than the collective agreement. Hence the collective agreement represents a base-line for individual or plant-level negotiation. The outcome of such negotiation,

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<sup>44</sup> reproduced in the current law in s.5 of the TVG

<sup>45</sup> TVG s.4(3) provides that an employer can only derogate from a collective agreement to the benefit of an employee (the so-called *Günstigkeitsprinzip*) which re-enacts the principle as included in the 1918 Decree s.1(1).



if any takes place at all, depends on the degree of the worker's individual or collective bargaining strength. It follows therefore that even those workers for whom the collective agreements are extended or who benefited from the institutions of Fair Wages Resolutions or Wages Councils<sup>46</sup> are nevertheless at a disadvantage to other workers because of their lack of bargaining strength.

Great faith has been placed upon collective bargaining by policymakers and academics - and whilst it has improved the lot of many, on the other hand it has marginalised large groups of workers who have been excluded from it, or systematically disadvantaged by it. State intervention to remedy the exclusion of certain groups has been on a *selective* basis: collective agreements are not extended to all workers in Germany, nor did Wages Councils ever exist for every sector in the UK. The selective function of the law is again apparent. More insidious is the selectivity present within the structure of collective bargaining. Trade unions have acquiesced in the differentiated (worse) treatment of part-timers<sup>47</sup>, have negotiated agreements restricting the use of temporary workers<sup>48</sup>, so as to protect existing workers and have developed the redundancy rule of last in first out (LIFO) which discriminates against workers with fewer years service within the enterprise. Thus a policy encouraging collective bargaining has a two-fold drawback: it leaves by the wayside those not strong enough to organise and secondly fuels a system which is in itself selective. In this way the model of typical working is further refined towards a small group of well-protected workers. When the framework of statutory individual employment rights is superimposed on this model, the emergence of the typical worker becomes even more startling.

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<sup>46</sup> the Fair Wages Resolution was rescinded in 1982 (see H.C. Deb., Cols. 499-568, 16.12.82) and the operation of Wages Councils was severely restricted by Part II 1986 WA which removed from the statute books the possibility of creating any new Wages Councils furthermore the government in its Trade Union Reform and Employment Bill 1993 has introduced a clause (s.28) to abolish Wages Councils completely, hence it is appropriate to refer now to these institutions in their historical context.

<sup>47</sup> such agreements as have now successfully been challenged in *Kowalska v Freie- und Hansestadt Hamburg* see n.120 below.

<sup>48</sup> e.g. agreement restricting use of temporary workers to 15% of total workforce negotiated at Massey Ferguson (IRS 1990).



## (c) statutory intervention

In the previous two sections the selective nature of legal institutions - the contract of employment and collective bargaining structures - has been shown to have contributed to the development of the typology of the typical worker. These institutions are treated as the foundation onto which statutory individual employment rights are built. In this section we seek to explore two facets of statutory intervention which are critical to developing the model of the typical worker. Firstly we consider the conceptual difficulty for statutory intervention to offer protection to those outside the parameters of the employee definition<sup>49</sup>. This will show how the legislator is channelled into creating a system with an automatically selective function and that only on occasions does s/he reach out to a class of subjects wider than that of employees. Secondly we try to explore the rationale, if any, and the historical factors for imposing thresholds in the statutory provisions which exclude many workers and thereby strengthen the position of the typical worker. A paradox may be seen to emerge that those who are in the greatest need of statutory protection, because they are not covered by collective bargaining, are the ones whom the statutes regularly conspire to exclude through the setting of thresholds.

The basic presumption which underlies the statutory creation of individual employment rights is that these form part of the complex of labour law, that is, the law relating to employees. This can be clearly seen from the law of unfair dismissal, one of the major planks in individual employment law in both the UK and Germany, which restricts itself to covering employees. Thus the scope of the British statute includes all those employed under a contract of service<sup>50</sup> or a contract of apprenticeship - though the importance of including apprentices should not be overstated, because the number of young people with a contract of apprenticeship is minimal: 40,000 in 1985 (Wedderburn 1986: 505), and rapidly decreasing. Similarly

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<sup>49</sup> in that invariably the first stage of determining whether a worker (full- or part-time) falls within the scope of legislation is to ascertain whether s/he is an employee.

<sup>50</sup> it is important to explain here a terminological difference: whilst in English law any person engaged under a contract of service is an employee, the same does not hold true in German law, where the class of employees is a subset of all those workers engaged under a contract of service.



the German statute offers protection to employees, with dismissal protection for apprentices (*Auszubildende*) - a much larger class than in the UK - being regulated by a separate statute<sup>51</sup>.

There is no explicit rationale or explanation for restricting the statutes to *employees*, it is perhaps merely as a matter of historical convenience that such parameters are set. Nevertheless the state has at times recognised the shortcomings of the term employee and has tried to get round this by casting the net of statutory protection somewhat wider. It could even be said that such statutes represent an attempt to counteract the development of the typical worker. Nevertheless the difficulties involved are immense, such is the normative effect of contractual doctrine whereby lawyers are trained to conceive of problems in contractual terms. Thus the tendency is to reformulate statutory innovations in contractual concepts<sup>52</sup>, as Honeyball puts it, "the courts continue to look through contractual eyes at statutory remedies" (Honeyball 1989: 106). In these circumstances it is a demanding task to formulate any clause (such that lawyers and courts will not misinterpret it) which includes workers who are not employees without losing clarity such that legal certainty is endangered, or alternatively leaving the definition so wide such that many true self-employed are included which would make a nonsense of the statute. The root of the problem would seem to lie with the definition of employee that the courts have developed as a basic building block of labour law.

In Germany the legislator has tried to go beyond the confines of the term *employee* by writing into the law the concept of an *employee-like person* (*arbeitnehmerähnliche Person*) in three individual statutes, the law constituting the labour court system<sup>53</sup>, the federal law on paid holiday<sup>54</sup>, and the law on collective agreements (TVG). The definition in the first two statutes speaks of the expression employee including for

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<sup>51</sup> *Berufsbildungsgesetz* (BBiG) - the law on occupational training.

<sup>52</sup> e.g. the concept of constructive dismissal created by EP(C)A s.55(2)(c), reformulated by Lord Denning in *Western Excavating v Sharp* by Lord Denning [1978] ICR 221.

<sup>53</sup> *Arbeitsgerichtsgesetz* (ArbGG).

<sup>54</sup> *Bundesurlaubgesetz* (BUrIG).



the purposes of the statute all other persons who because of their economic dependence are considered employee-like<sup>55</sup>. The provision of the TVG (s.12a) is more comprehensive and by combining this definition with that from the other statutes, it is possible to discern that the essential criteria of an employee-like person are:

- 1) needs social protection
- 2) personally undertakes to perform a service or services for a person on whom s/he is economically dependent
- 3) carries out this work generally without the help of any of his/her own employees (Rost 1989).

These statutory initiatives reflect the insistence of the courts not to extend the definition of an employee from someone who is *personally* dependent on another (i.e. under the management and control) to include someone who is *economically* dependent on another<sup>56</sup>. The courts have repeatedly held that such an economically dependent worker, but who lacks the essential quality of being personally dependent can at the most be employee-like, but never an employee. It is not unsurprising therefore that in terms of *substantive* protection - as regards individual rights - the case-law has not been generous to those who are not employees: so despite being included in the law on paid holiday (BUrIG), the "employer" of an employee-like person does not have to respect her/his wishes as to when s/he wants to take paid holiday because of the lack of personal dependency. As regards dismissal protection, the courts have recognised that employee-like persons are in need of some form of social protection, but this has been developed through minimum notice periods and ensuring that general rules relating to termination of contracts are adhered to. It would not be wrong to compare this protection built up by case law as equivalent to that offered by the common law action of wrongful dismissal.

There have been attempts in British employment law to go beyond the concept of the employee, notably in the Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA). In these statutes discrimination in employment is prohibited, where the definition of employment is extended from its meaning in EP(C)A to include

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<sup>55</sup> s.5(1) ArbGG and s.2 BUrIG; author's own translation.

<sup>56</sup> note Deakin (1986) who advocates the adoption of a test of economic dependency in British law.



employment under a contract personally to execute any work or labour<sup>57</sup>. The purpose of this legislation is essentially to promote equality of opportunity in the labour market and the economy as a whole (O'Donovan and Szyszczak 1988) and therefore has a much wider ambit than legislation specifically creating employment rights. As part of such a broad initiative it would have seemed incongruous to have restricted the scope of the protection solely to employees. Nevertheless this legislation was discovered to have lacunae<sup>58</sup>, because despite sections in the Acts which related to training, young people on government sponsored training schemes were found not to be included within the scope of them<sup>59</sup>. A more recent attempt to develop a wide-embracing definition is to be found in the Wages Act 1986 - an Act designed to clarify the rights of employers to make deductions from wages<sup>60</sup> and which removes the statutory right of certain workers to be paid in cash. Here the definition of a worker is tortuously extended to include someone who works under

"any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual." (WA s.8(2))

But it is suggested that even this definition would not necessarily include some of those who are in the greatest need of this statutory protection: homeworkers, because of the requirement that the contract has to be to perform work *personally*, whereas generally a homeworker is free to delegate her/his tasks and does not undertake to personally carry out the work. However it is not a marginal issue as to whether homeworkers are included within the scope of statutory protection, since there are hundreds of thousands of workers involved who are working for very low pay in poor conditions. In Germany specific legislation relating to homeworkers dates from as early as 1911 (as regards health and safety) and was updated to include issues of pay and terms and conditions in 1923 as a consequence of the wartime situation

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<sup>57</sup> SDA s.82(1), RRA s.78.

<sup>58</sup> which the government hopes it has filled through s.7 EA 89, which amends the SDA and RRA.

<sup>59</sup> see *Daley v Allied Suppliers* [1983] IRLR 14; and on government 'training' schemes in general see Freedland (1983).

<sup>60</sup> these are now lawful to the extent that they are contractually authorised (WA s.1) compared to the regime under the Truck Acts where they had to be 'fair and reasonable'.



where homeworkers had been engaged in military production (Maus and Schmidt 1977: 24). This statutory framework has been further revised and updated since World War II, most recently in 1974. Though the law on homeworking<sup>61</sup> does offer a certain degree of protection to homeworkers, it is not comparable with that enjoyed by employees and demonstrates that homeworkers are conceived of as being a class apart from mainstream labour law. In the UK the many attempts to create a special statutory regime for homeworkers have failed, most recently the Homeworkers (Protection) Bill 1979<sup>62</sup>, which sought to grant *employee* status to homeworkers. The earlier proposals to legislate for homeworkers arose out of the concern for the 'sweated trades' - the worst excesses of capitalist exploitation - (Ramm 1986: 87; Ewing 1982: 96), this however gave rise instead to the Trade Boards Act and Wages Councils<sup>63</sup>. Thus homeworkers in the UK have had to rely on the lottery of the legal process whenever they have tried to assert individual employment rights. As such they have on occasions been successful where tribunals have identified them as employees<sup>64</sup>, however this will not always be the case because the Court of Appeal has asserted that it is a question of fact as to whether an individual is an employee or not<sup>65</sup> and so each case will turn on its own specific circumstances. The marginalisation of homeworkers in this way serves only further to illustrate the dominance of the typical worker model. It is interesting to remember that the failed 1979 Bill would have counteracted this trend towards the emergence of the typical worker because it would have given the label *employee* to homeworkers<sup>66</sup> and thus extended the scope of this class.

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<sup>61</sup> *Heimarbeitsgesetz* (HAG).

<sup>62</sup> for a comprehensive survey of homeworking in the 1980s see Allen and Wolkowitz (1988).

<sup>63</sup> see p.28 above.

<sup>64</sup> *Nethermere (St. Neots) Ltd v Taverna* [1984] ICR 612, [1984] IRLR 240 and *Airfix v Cope* [1978] ICR 1210.

<sup>65</sup> *O'Kelly v Trusthouse Forte* supra n.7; on this issue see further Pitt (1985).

<sup>66</sup> Homeworker (Protection) Bill 1979. (HC Bills 1978/9 no.25). A *homeworker* was defined in s.1 of the Bill and would have been included in the unfair dismissal protection through s.2(8) which would have amended EP(C)A to include in the s.153(1) definition of a contract of employment " a contract for the execution of work by a homeworker", furthermore s.4 of the Bill laid down special rules which would have helped homeworkers establish continuity of employment.



The statutory intervention considered so far contributes to the development of the typical worker model because of its reliance on the contractual concept of employee. As has been suggested, it would seem that the shortcomings of this have at times been recognised by the legislator, but the limited efforts to counteract this have achieved only a measured degree of success because of the reluctance of the courts reshape labour law in a way that places less emphasis on the contractual nature of the worker's relationship (i.e. whether the label *employee* applies or not). In contrast, the statutory intervention next to be considered, explicitly and deliberately excludes certain groups of workers through the setting of thresholds.

One of the oldest thresholds in German law is that excluding workers in small firms from statutory dismissal protection<sup>67</sup>. The explanatory document relating to the first law on dismissal protection (1951) under the new post-war constitution<sup>68</sup>, reveals that the legislator introduced the threshold because a similar one had existed in Weimar Germany under the 1920 law on works councils (*Betriebsrätegesetz*). Under the 1920 Act both works councils and dismissal protection operated only in firms with more than 20 workers. The need for a minimum threshold (in terms of firm size) as regards a works council is quite obvious, such a council could not feasibly function in an undertaking with only six or seven workers. Therefore for such a period of time as the two issues (works councils and dismissal protection) remained linked - the works council was an integral part of the dismissal protection procedure - the threshold in dismissal protection can be explained. However when the two issues were separated after the war<sup>69</sup>, the existence of the threshold per se was not questioned, merely the debate was as to the level at which the threshold should be situated. Thus the small firm exemption slipped into the law and has remained ever since. It is difficult to deduce what might be the present rationale (other than inertia) for retaining the rule, though one explanation offered is that the relationship between employer and employee in such small firms is more complicated because of the high

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<sup>67</sup> see p.10 above.

<sup>68</sup> BT-Drucksache 1/2090, p.12.

<sup>69</sup> *ibid.* where it is clearly stated as regards s.2 of the new law, that dismissal protection is not dependent on the existence of the works council.



degree of economic interdependence and that therefore the law should not interfere. The small firms exemptions in individual employment law in Britain<sup>70</sup> were unashamedly introduced as supply-side economic measures which it was hoped would encourage job creation<sup>71</sup>. The government in 1979 claimed that it had been elected with a mandate to

"amend such laws as the Employment Protection Act where they damage smaller businesses and actually prevent the creation of jobs."(Department of Employment 1979).

However their own evidence and that of the independent Policy Studies Institute (Daniel and Stilgoe 1978) did not demonstrate that either unfair dismissal or maternity rights inhibited job creation, particularly in small firms. The conclusion was rather that the job creation equation was influenced by many varied factors amongst which employment protection and maternity rights remained insignificant. Nevertheless it was simply stated, as if it were obvious, that employers were reluctant to create jobs because of the existence of employment protection and maternity rights and hence these rights were abrogated as regards employees in small firms (Pitt 1980). Whether the legislator ever stopped to consider the individual employee in the small firm can be doubted, all the same, employees in small firms were at a stroke disadvantaged thus adding the extra facet of working in large firm to the model of typical working.

Two other types of threshold remain to be considered those rules which require a minimum number of hours service per week and a minimum period of continuous service to *qualify* for employment rights. The rules as to a minimum number of hours stem from an old conception that a worker who does not work on a full-time basis is 'uncommitted' to the enterprise (Deakin 1986: 239). It was perceived that those who were working part-time (of whom the overwhelming majority have always been women) were merely supplementing an existing family wage, with the implication that this work was somehow peripheral and unimportant and hence the worker

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<sup>70</sup> *supra* text accompanying notes 9-11.

<sup>71</sup> for an account of the piecemeal approach and inconsistencies in the legislation see Smith (1985); note that following the ECJ decision in *Commission v UK* case 165/82 [1983] ECR 3431, the government did remove the small firms exemption to the SDA 1975 by means of the 1986 SDA s.1.



might give up at any moment. This may once have been an accepted way of thinking, but it is suggested that this argument is now wholly anachronistic<sup>72</sup>. Nevertheless it is true that the fewer hours that are worked each week, or month, the more difficult it is to assert a 'mutuality of obligation' or the need for social protection. This arises due to the fact that the fewer hours that are worked, the more ad hoc and intermittent the employment relationship will appear thus making it look as if there is no continuing obligation on the part of the employer to provide work or on the part of the worker to offer themselves for work. However as Wank (1985: 3) puts it, when personal dependency (expressed through concepts of subordination and control) is the overriding characteristic for identifying an employee, this can be equally demonstrated with a task which is exercised one hour per week as with one which is exercised 48 hours per week - an argument supported by the Federal Labour Court. In this way in Germany all those who enjoy the label *employee* regardless of how many hours per week they work may have dismissal protection<sup>73</sup>, similarly all women who are employees enjoy maternity rights. A further possible explanation of the threshold in British law is that employment rights have always been conceptualised as a (non-wage) cost to the employer. In this way it is argued that below a certain number of hours per week, the costs of employment protection outweigh the benefit of the part-time work and that to extend coverage to all workers would inhibit job creation. Both Hakim (1989) and Disney and Szyzszak (1989) - in reply to Hakim - conclude that there is no evidence to suggest that fewer jobs would be created if employment protection had a wider scope. Nevertheless this argument enjoys political support and may well explain the existence of the hours threshold.

The history of minimum qualifying periods for employment protection (chiefly unfair dismissal) has been somewhat chequered. When the concept of unfair dismissal was introduced in Britain<sup>74</sup>, there was complete uncertainty as to what the volume of cases to be brought before the tribunal would be. In these circumstances a 2 year

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<sup>72</sup> support for this proposition can be found in the case-law of the ECJ where the argument that part-time workers are less committed has consistently been rejected as a justification for indirect discrimination; see further p.60 below.

<sup>73</sup> but not if they work in an establishment with less than five employees, *supra* text accompanying notes 67-?

<sup>74</sup> as part of the Industrial Relations Act (IRA) 1971; this Act represented a fundamental change of policy in the regulation of labour relations in the UK ...



qualifying period was introduced for 'administrative reasons' (Weekes et al. 1975: 26); but the intention of the government was not that only long servers should have protection<sup>75</sup>. In light of the early experience, the qualifying period was reduced to 1 year in TULRA 1974 and then to 6 months in March 1975. This qualifying period of six months conveniently came to represent the trial or probationary period as does the six month qualifying period in the German law<sup>76</sup>. In the 1978 Policy Studies Institute survey most personnel managers agreed that 6 months was a sufficient time-period to appraise the performance of a new worker (Daniel and Stilgoe 1978). One would assume that in a small firm it would very quickly become apparent whether a new worker was suitable or not and that despite such firms not always having a personnel officer that they could also easily comply with this six month threshold. Nevertheless the qualifying threshold was once again raised to 1 year in October 1979 and then to 2 years in 1986 because of the 'burdens of employment protection law' which 'can make employers reluctant to take workers on'<sup>77</sup>. Thus conceptually the qualifying period no longer could be seen as representing a trial period but rather a period of up to 2 years during which the employer can dismiss the worker with impunity.

Survey evidence in the UK has repeatedly shown that applicants for unfair dismissal are more likely to be from enterprises which do not recognise trade unions for collective bargaining purposes (Stevens 1988; Dickens et al 1985). Furthermore not only are small firms more likely in relative terms to dismiss workers but also the more likely it is that workers from these firms will initiate proceedings for unfair dismissal, often because of a lack grievance procedures within the firm. This indicates the importance of statutory protection especially for workers who are outside the scope of collective bargaining. It is difficult to estimate how many workers would like to avail themselves of statutory rights to maternity leave or to claim unfair dismissal but are unable to because they lack the necessary service requirements. Nevertheless

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<sup>75</sup> consultative document on the Industrial Relations Bill para. 53; noted in Weekes (1975: 26).

<sup>76</sup> KSchG s.1

<sup>77</sup> para 7.19 white paper *Employment: the challenge for the nation* Cmnd 9474.



data collected from the Labour Force Survey suggests that at any one time around 30% of all employees have less than two years service, whereas 80% of all dismissals take place within two years of joining an enterprise. Thus it may be concluded that the two year qualifying threshold seriously restricts the effectiveness of the law in terms of protecting workers against dismissal, particularly when the number of those outside collective bargaining is increasing. It can be seen therefore that both collective bargaining and the statutory intervention are failing an increasing number of workers.

It cannot be doubted that statutory intervention, particularly with its use of thresholds serves a selective function, improving the position of certain workers at the expense of others<sup>78</sup>. We have seen that it is not only statutory intervention, but also the structures of collective bargaining and the very foundation of labour law: the contract of employment which too contribute to the emergence of a well-protected worker, a worker whom we describe as typical. The historical analysis has set the typical worker within the context of the development of labour law over the last hundred and fifty years. This exploration of the rationale and circumstances of the genesis of the legal rules and structures which lead us to be able to identify the typical worker will help in the analysis of the atypical. To discover that the development of thresholds may be due to historical accident or anachronistic modes of thinking helps focus the question as to why they should remain. By exploring the evolution of the concept of employee and the parameters this sets for labour law, the difficulty involved in extending the scope of legislation beyond the employee becomes apparent. Furthermore an appreciation of the strengths and weaknesses of collective bargaining serves to remind us that the development of patterns of typical working is as much due to trade unions as it is to management or the legislator. Bearing some of these issues in mind, we are now in a better position to evaluate the Community proposals for atypical working.

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<sup>78</sup> the improvement of certain workers' rights is expressed as being at the expense of others in the sense that whilst in absolute terms their position is unchanged, in relative terms those excluded are worse off in that they no longer have the same rights as other workers.



### (3) atypical work and labour market models

The model we have developed here defines atypical work as a function of typical working. Atypicality is a measure of the divergence from the 'typical'. It is not asserted that there is a cleavage or cross-over point between typical and atypical, rather that the greater a pattern of working diverges from typical the more atypical it becomes. Significantly the model does not rely on any concept of *flexibility* to define or analyse the notion of atypical work. However the debate over atypical work is for many authors so closely linked with that of labour market restructuring and flexibility, that it seems appropriate briefly to consider here some of the issues.

One of the most influential models developed in recent years is that of Atkinson (1985) who established the core/periphery model. This model is important for our work because of the way it has been seized upon by the European Commission in its analysis of trends in industrial organisation in the EC (Hakim 1989b: 170). In this model of labour market organisation, core workers are held to be a privileged, stable group of '*relevantly skilled*' workers who are essential to the enterprise (Atkinson 1985: 28). On the other hand peripheral workers are less important to the enterprise and have fewer firm-specific skills. In this model the enterprise demands different types of flexibility from the different groups of workers. Of course as has often been pointed out flexibility for the employer may result in a decrease in autonomy for the worker (Huws et al. 1989; McGregor and Sproull 1991), especially when paid work thus begins to impinge upon the private sphere. From *core* workers flexibility is required in that they have to be multi-skilled, able to perform differing tasks according to the changing needs of the enterprise. A second and complementary method of responding to changing product market conditions is through numerical flexibility. In this way an enterprise may use a *peripheral* group of workers often low-skilled and in practice low-paid who represent a buffer between the core workers and the unemployed. A further strategy of firms according to the model is the concept of distancing i.e. contracting-out work, hiring the services of self-employed persons, in this way shifting the burden of risk away from the enterprise. It is often critically suggested that this model of 'flexibility' does in fact represent at



enterprise-level the entrenchment of a segmented (dual) labour market. This would suggest that workers in primary jobs were at the core and in secondary jobs at the periphery<sup>79</sup>. In the discourse of status and contract discussed earlier, it is argued by Streeck (1988) that the segmentation effect of the flexibilisation strategy moves the secondary workers even closer towards a pure contractual relationship, whereas the primary workers of whom so much is expected tend towards a diffuse status relationship.

For our purposes it is not necessary to discuss the many shortcomings of the Atkinson model<sup>80</sup>, but sufficient to point out its interaction with the model of atypical working which we are seeking to explore. For it would be wrong to assume that this group of peripheral or secondary workers is coterminous with the notion of atypical being developed in our model. Many workers in retailing who might be classified as peripheral may well in this model exhibit characteristics of typical working, in that they are full-time workers with open-ended contracts of employment within the scope of collective bargaining. On the other hand many university academics and skilled public sector workers in the UK who would be classified as core workers are often engaged on fixed-term contracts, a feature which in this model immediately puts them outside the historically constructed pattern of typical working. In our model the label *atypical* represents workers who are legally disadvantaged in the labour market because of the institutions of contract, collective bargaining and statute and has nothing to say as regards the relative merit of the tasks carried out or of the skills of the workers involved. Thus our definition clearly is at odds with commentators who assert that

"the mere fact that a person works in an 'atypical' context does not necessarily mean that he is especially disadvantaged or is in particular need of protection, whether socially, economically or legally." (Neal 1992: 116).

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<sup>79</sup> for the limits of this approach which equates core with primary and periphery with secondary see McGregor and Sproull (1991: 2).

<sup>80</sup> highlighted especially by Pollert (1987; 1988).



Where our model of atypical working does come up against the notion of flexibility is at the point where it meets the rhetoric of deregulation<sup>81</sup>. The logic of the return to the neo-classical market order achieved through deregulation implies the encouragement of atypical working. In Germany deregulation brought about the introduction of the 1985 BeschFG, originally limited in temporal scope to 5 years but already extended until 1995. This provided for a relaxation of the rules on the use of fixed-term contracts and on the lending of workers from one enterprise to another. These changes in a state where legal regulation of the labour market has been traditionally tight provided much impetus for research and discussion of the issues of flexibility and deregulation<sup>82</sup> and led the government to commission a detailed analysis of the immediate consequences of the legislation (Büchtemann 1989). In the UK the forces of deregulation led to the raising of thresholds for employment protection rights (notably unfair dismissal). In both states the creation of small firms has been encouraged. All these measures sanction and foster both explicitly and implicitly the creation of jobs which we categorise as atypical because of their disadvantaged position in the labour market. This is in essence the link between flexibility/deregulation and atypical work.

The continuing drive towards deregulation and the removal of legal protection from certain workers will, irrespective of the survival of the Atkinson model, ensure the persistence at national level of work patterns which we can describe as *atypical*. It is intended to use this construction of atypical as a derived function of typical to consider the Commission's perception of atypical work (Chapter 3). However it is necessary firstly to sketch out the major axes of Community labour law in their political context (Chapter 2), so as to provide a framework for the application of our model to the Community approach.

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<sup>81</sup> rhetoric implying that law only has a prohibiting function. For a consideration of the co-ordinating and enabling function of law see Schmid (1986); Mückenberger and Deakin (1989).

<sup>82</sup> see papers from the *Wissenschaftszentrum Berlin* by Wotschack (1987) and Poppe-Bahr (1987).



## Chapter 2 - The EC dimension

The previous chapter has set up a concept of atypical working which is derived from a construction of typical. The analysis draws on the experiences of two national legal systems, the UK and the FRG, and therefore does not claim to take into account all the nuances and variations in patterns of atypical working which are to be found in the member states of the European Community.

However the factors identified earlier<sup>83</sup> in constructing *typical* dealing with length of service in an establishment, degree of attachment to an establishment, etc. do operate in other national legal systems (outside the scope of this study) within the Community as can be inferred from the work of the European Foundation in Dublin (Kravaritou-Manitakis 1988). The divergence between Member States seems to relate most to the *manner* in which patterns of atypical working appear, such that whilst in many northern Member States the incidence of part-time working (as a form of atypical work) is relatively high, it is a much rarer phenomenon in Mediterranean Member States. On the other hand Member States such as Portugal and Spain where part-time work is rare have a high incidence of those working on fixed-term contracts (Kravaritou 1988: 25). Therefore atypical working is an issue which can legitimately be addressed and considered at the level of the European Community and there is evidence that the Commission has been actively engaged in evaluating the issue for several years now<sup>84</sup>.

This chapter proposes to look at the Community's competence to legislate as regards the issue of atypical working and to highlight some of the practical constraints on Community intervention. In the light of our definition of atypical as representing workers legally disadvantaged in the labour market, particular emphasis will be placed on the competences of the Community to create employment rights. The aim of this analysis is to provide a perspective from which recent Community proposals

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<sup>83</sup> p.8 above.



regarding employment rights can be evaluated as to the extent to which they diminish or augment legal disadvantage in the labour market and therefore their likely effect on the phenomenon of atypical working.

### (1) Competence of the EC

Unlike any nation state, the Community only has power to legislate to the extent that this has been explicitly or implicitly provided for in the Treaty as interpreted by the ECJ (Birk 1992; Vogel-Polsky 1991: 99). The extent to which an implicit power to legislate in matters of labour law could be derived from the Treaty was considered by the ECJ in *Germany v Commission*<sup>85</sup> (Article 173 proceedings). It was held that where a Treaty Article conferred a specific task on the Commission, it followed that this 'necessarily and *per se* conferred on the Commission the powers indispensable to carry out the task'<sup>86</sup>, otherwise the Article would be rendered meaningless. Thus the Community may have powers and competences over and above those which a simple reading of the Treaty might reveal. Therefore we will consider not only those Articles of the Treaty which are primarily concerned with employment rights, but also, in the light of the history of Community social policy, those Articles which also are capable of forming the basis for Community legislation with regard to employment rights. This appraisal of Community competences will be taken in two stages: firstly the initial power of the Community to act with regard to employment rights based on the original Treaty of Rome and secondly the position after the introduction of the Single European Act (SEA), which set the Community on track for the Single Market of 1993. At the time of writing there is still a great deal of uncertainty as to whether the agreement concluded by the EC Heads of Government at Maastricht in December 1991 will be implemented, nor is it clear how the two protocols related to social policy<sup>87</sup> will operate, if at all, and therefore the detailed analysis that follows will not attempt to consider social policy competences with

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<sup>85</sup> cases 281, 283-285 and 287/85 [1988] 1 CMLR 11.

<sup>86</sup> at para [28] of the judgment.



regard to employment rights in the event that the Treaty is amended as envisaged in the Maastricht agreement<sup>88</sup>. Nevertheless it is appropriate to mention the fact that in the negotiation of the Maastricht accord, social policy represented a major area of difficulty for the heads of government, in that the UK had repeatedly voiced reservations about expanding Community social policy. In the light of this, the amendments to the Treaty in social policy were 'watered down'<sup>89</sup> in an attempt to persuade the British to go forward with the rest of the Community. What the British rejected includes the new competence for the Community to adopt Directives by qualified majority voting on working conditions and regarding the information and consultation of workers (Article 118(2)). Additionally the Community is given the competence to adopt by unanimity Directives relating to the social security and social protection of workers, and their protection following the termination of their employment contract (Article 118(3)). Also of significance is the role given (in rather vague terms) to the two sides of industry to develop Community policy in the area of labour and social law (Articles 118a and 118b). When the existing competence of the Community, to which all 12 Member States are agreed, is examined, it will become apparent to what extent the social chapter agreed at Maastricht does represent a step forward and how it strengthens the hand of the Commission to make proposals in the future regarding employment rights which will doubtless have an impact on atypical working.

### I - Before the Single European Act

Prior to the introduction of the SEA it can be argued that the Community did not have any specific primary competence to legislate in the field of employment rights, but that employment rights were nevertheless created through the law on free movement and through use of the general provisions on approximation of laws and the residual 'catch-all' provision of Article 235.

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<sup>88</sup> but see Barnard (1992) and Fitzpatrick (1992).

<sup>89</sup> compare the Luxembourg draft of the chapter on social policy (EUROPE document 1709/1710 of 03.05.91) with the Dutch draft (EUROPE document 1733/1734 of 03.10.91) and with the final version as agreed by 11 Member States (EUROPE document 1750/1751 of 13.12.91) and note the influence of the joint proposals of ETUC and UNICE of 31.10.91 (reported in EUROPE no. 5603 of 06.11.91 at p.12).



(a) social policy Articles 117 and 118 - Article 117 sets out the aims of the Member States as regards social policy, to improve working conditions and the standard of living for workers. Thus improved employment rights are within the scope of the Member States' aims, but the provisions for achieving this according to Article 117 are of an indirect nature. It suggests that the options for progress in social policy are i) as a spillover from economic policy (the functioning of the common market), ii) the use of other Treaty Articles and iii) the approximation of laws and administrative provisions. Article 117 of itself therefore does not grant any competence to the Community to develop employment rights. The limited power given to the Commission to specifically act on social policy matters is set out in Article 118 which restricts its role to one of 'promoting close co-operation between the Member States'. However this power was construed as including some necessary legislative competence, albeit limited<sup>90</sup>. Even if these social policy Articles are read in conjunction with Article 5 which imposes a duty on the Member States to abstain from measures likely to jeopardise the Treaty, it is difficult to construct a specific competence for the Community to act to improve employment rights.

(b) equal pay (Article 119) - This Article unlike the others to be considered here does not grant the Community competence, but is in many senses stronger, in that it enshrines the rule of equal pay for men and women in Community law. Importantly for individuals, this Treaty Article was held to be directly effective in *Defrenne v SABENA (No 2)*<sup>91</sup>, albeit with only prospective effect. Thus the right to equal pay can now be invoked by any Community national. The equality code of 5 Directives

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<sup>90</sup> *Germany v Commission* n.85 above.

<sup>91</sup> case 43/75 [1976] ECR 455; [1976] 2 CMLR 98.



(Docksey 1991: 259) developed by the Community has been substantially based on the solid foundation of Article 119 which unambiguously puts equality on the Community agenda<sup>92</sup>. As will be seen below<sup>93</sup>, the legislation and case-law on equality is an important flank to Community social policy, arguably even one of its most successful fields, and has a significant bearing on all new employment legislation.

(c) spillover from Articles on free movement (Articles 48 - 66) - the right to free movement for workers is laid down unambiguously in Article 48 and Article 49 is of an imperative nature commanding the Commission to take action to achieve this right of free movement. Indirectly employment rights can also be addressed under these economic provisions, but in the light of the law on reverse discrimination (Pickup 1986), only as regards workers who exercise their right of free movement. Taken together with Article 7 preventing discrimination on grounds of nationality, this economic measure has prevented the nationality of a worker from becoming an identifying criterion in the model of atypical working. The provisions on the right to establishment (Articles 52-58) and the freedom to provide services (Articles 59-66) particularly to the extent that they permit and regulate the establishment of temporary employment businesses also have an indirect effect on employment rights. However the provisions on free movement are not conceived of as instruments of social policy and legislation adopted pursuant thereto does not have a social objective but is designed to achieve the economic goal of the common market. This ties in closely with Article 2 of the Treaty which sets out clearly the **economic** nature of the venture undertaken by the Member States in setting up the Community.

(d) approximation of laws (Article 100) - this grants the Community the competence to issue Directives for the approximation of such provisions as 'directly affect' the establishment or functioning of the common market. Thus the competence granted rests solely on economic considerations once again, for if the divergence in national

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<sup>92</sup> note Hoskyns (1985) who emphasises that the first 2 equality Directives were only adopted by Council because the men negotiating them thought their content to be insignificant.

<sup>93</sup> p.58 below.



provisions distorts or prevents trade between Member States by acting as a non-tariff barrier, then the Community is empowered to act. In this way Directives protecting workers' rights in the event of collective redundancies<sup>94</sup>, the transfer of undertakings<sup>95</sup> and employers' insolvency<sup>96</sup> were adopted as was the equal pay Directive<sup>97</sup> all primarily designed on their face to prevent distortions of competition. However these are Directives which form a significant body of the Community legislation in the field of employment rights and social policy and represent a clear statement that the Community does have a social dimension. The substantive protection and rights afforded by these Directives based on Article 100 (on occasions with Article 117 prayed in aid) refutes the argument, as was once thought, that the Community's competence in social matters was limited to the Commission's role of promoting co-operation under Article 118. Nevertheless the Article 100 power is primarily one designed to ensure the functioning of the common market and does not of itself guarantee the Community competence in matters of employment rights.

(e) residual power (Article 235) - this allows the Council to act on proposal of the Commission providing that four conditions are fulfilled i) that Community level action is necessary, ii) to achieve an objective of the Community, iii) in the course of the operation of the common market and iv) that the Treaty does not otherwise provide powers for the Community. These requirements are extremely difficult to satisfy and require a great deal of political will on the part of the Member States. Whilst historically it may not have been difficult to show the necessity of Community level action, in the present political climate with the much-vaunted talk of subsidiarity<sup>98</sup> this will be a requirement that effectively prevents the Article 235 competence being used to secure employment rights. Furthermore as with Article 100 the proposed Community action needs economic rationale to underpin it, in that it must be in the course of the common market. Nevertheless it has served as the Treaty

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<sup>94</sup> Directive 75/129: OJ 1975 L48/29.

<sup>95</sup> Directive 77/187: OJ 1977 L61/26.

<sup>96</sup> Directive 80/987: OJ 1980 L283/23.

<sup>97</sup> Directive 75/117: OJ 1975 L45/19.

<sup>98</sup> see p.55 below.



base for the equal treatment Directives which form a major plank of Community employment and social legislation. The use of Articles 100 and 235 in this way may have achieved substantive progress in the field of individual employment rights, but it did not strengthen the competence of the Community to act in social policy matters where such action could not be justified on economic grounds. Thus prior to the introduction of the Single European Act the competence of the Community to legislate as regards employment rights rested not on express Treaty provisions, but upon political will and precedent which over a fifteen year period established the Community role in the employment rights sphere.

## II - the Single European Act and the Internal Market project

The internal market project, a Europe without internal frontiers<sup>99</sup>, was the European response to the economic stagnation that was experienced in the early 1980s and represented an attempt to create an economic bloc that could compete effectively with Japan and the US (Streeck and Schmitter 1991: 144). The Single European Act embraced this substantive economic goal and provided the institutional changes to the Community structure to enable this to be effected (Schwarze 1989). The anticipated economic gains, as promised in the Cecchini Report, amount to 200 billion ECU<sup>100</sup> and were substantial enough to lure governments of all Member States into supporting the SEA in their own national interest (Keohane and Hoffman 1991: 17), in spite of initial opposition to the project from Denmark and the UK. It is questionable as to what extent it was intended by those formulating the SEA to specifically extend the competence of the Community as regards the creation of employment rights. Nevertheless certain Treaty articles were added which both directly and indirectly do affect the ability of the Community to legislate for employment rights. The most important institutional change inserted by the SEA was the introduction of the tool of qualified majority voting ('qmv') in the Council as a means of adopting Directives in certain circumstances. The use of the qmv procedure

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<sup>99</sup> as defined in Article 8A of the Treaty as amended.

<sup>100</sup> see the doubt cast on these rosy predictions questioning the logic of the internal market: Grahl and Teague (1989: 40).



allows the Council to adopt Directives without obtaining unanimity amongst the Member States; thus the ability of a Member State to block proposed legislation is substantially reduced.

In terms of the general status of employment rights and social policy within the sphere of Community policy-making Vogel-Polsky discerns a distinct improvement through the addition of Article 8B which empowers the Council to take measures to '*ensure balanced progress in the sectors concerned*'. This provision, it is said, prevents economic progress being achieved at the expense of the 'social dimension', i.e. adequate measures must be taken to cushion the restructuring effect on the labour force of the completion of the internal market (Vogel-Polsky 1991). Thus the potential to develop policy which directly relates to employment rights and as a function of this, the phenomenon of atypical working, is greatly increased.

(a) health and safety of workers (Article 118A) - this Article gives the Community the competence to adopt Directives by means of qmv to improve the working environment, particularly with regard to the health and safety of workers. As Birk points out, this is the only Article in the Treaty the primary purpose of which is to legislate at the Community level in an area of employment law (Birk 1992: 70). There is no formal restriction on the competence requiring an underlying economic motive for legislation to be adopted under it i.e. it does not have to be in the furtherance of the common market. Nevertheless three limitations on the extent of the Article 118A competence can be discerned in that measures adopted must be i) *minimum requirements*, ii) their implementation is to be *gradual* and iii) must *avoid imposing a burden on small and medium-sized undertakings*. More significantly there is wide divergence of opinion as to how widely 'the health and safety of workers' can be construed (Addison and Siebert 1991: 615). The UK government adopts a very narrow and literalistic interpretation of the words, hence their opposition to the use of Article 118A for the Maternity Rights Directive (Employment Department 1991: 10). In the extreme case, all labour law measures which generally improve a worker's position could be said to contribute to health and safety. Thus a minimum wage would reduce the need of many workers to work such long hours to earn sufficient on which to



survive, so contributing to their general health and welfare. In the same way restrictions on the maximum number of hours worked per week could improve the health and safety of a worker<sup>101</sup>. Such a broad construction is favoured by the European Parliament and the Social Affairs Commissioner Vassa Papandreou.

(b) approximation of laws (Article 100A) - this permits the Community to adopt harmonisation measures by means of the qmv procedure which 'have as their object the establishment and functioning of the internal market.' This competence effectively overrides Article 100 of the Treaty as regards any measure which is necessary for the completion of the internal market. Whilst the internal market is due to be completed by 31st December 1992, the temporal scope of Article 100A does not seem to have been delimited. Therefore if in certain policy areas harmonisation measures are necessary after the deadline it seems that Article 100A will continue to be operative and that there will be no automatic reversion to Article 100 procedures.

As regards the adoption of measures in labour law, the most important feature of Article 100A is paragraph 2 which excludes the operation of the Article to approximation provisions '*relating to the rights and interests of employed persons*'. The scope of this paragraph is highly contested and is open to a range of interpretations (Bercusson 1991: 206). In its widest possible interpretation it could effectively prevent the use of Article 100A in almost all circumstances thus rendering the competence illusory. Any measure necessary for the completion of the internal market addresses the factors of production, of which labour (employed persons) is a significant one, and the adaptation required by the removal of non-tariff barriers will be invariably be felt within the labour force. Furthermore measures concerned with the regulation of an industry will have an indirect effect on those working within it. Critically that which is at question is whether the measures *relate to* the rights and interests of employed persons. The Court has never been called upon to interpret this Article, but as a matter of practice the exemption has not been invoked to block measures under Article 100A the primary purpose of which is purely economic regulation. There is

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<sup>101</sup> the link between hours worked and health and safety of a worker was tacitly admitted by the English courts in *Johnstone v Bloomsbury Health Authority* [1991] IRLR 118 (CA).



a strong argument in the light of this practice to conclude that the paragraph 2 exemption is to be very narrowly construed and that it concerns measures which *exclusively* relate to the rights and interests of employed persons<sup>102</sup>. This is reinforced by the general rule of Treaty interpretation that exemptions or derogations are to be narrowly construed (Vogel-Polsky 1991: 125). Furthermore such a construction is necessary to give any meaning to paragraph 3 of Article 100A which refers to measures concerning health and safety adopted under the Article. If all measures which in any way touched upon the rights and interests of employed persons e.g. concerning health and safety of workers were excluded from the Article 100A competence by paragraph 2, then paragraph 3 would be rendered redundant. However there is an alternative argument, not backed up by practice, which does, it must be conceded, give effect to the natural meaning of paragraphs 2 and 3. This suggests that Article 100A should not be used for any employment rights measures, except for those which deal with health and safety, but this explanation seems to ignore the Article 118A competence which deals with health and safety. The very existence of these conflicting arguments vividly illustrates the extent to which Community social policy competences are contested. It has to be concluded that even the best possible interpretation of the paragraph 2 exemption limits the potential of Article 100A as founding an additional competence for the Community to legislate for employment rights.

It is appropriate at this stage to reach some preliminary conclusion as to the legal competence of the Community as regards employment rights which can then be qualified by the context in which it operates. The exposition above has revealed that the primary power to legislate for employment rights without the need to demonstrate economic rationale for the measures is contained in Article 118A. However the competences which have been carved out of other Treaty Articles (in particular Articles 100, 100A, 235), especially outside the chapter on social policy, have a significant role in demonstrating the ability of the Community to legislate for employment rights. They show the need within an economic community,



notwithstanding explicit social policy provisions, to legislate for the welfare of workers, acknowledging their input into the economic process. Their function is less that of a back-up to the primary power in Article 118A, but is more a constant reminder that employment rights are an integral part of Community policy and development, firmly rooted in the path of European integration. This summary of the Community's competence has taken a very positive approach as regards the scope of the competence. It must of course be remembered that an alternative argument could be constructed to the effect that the ingenuity of the Commission and the need to carve out competence in social policy does in fact illustrate the inherent narrowness and limitation of the competence. However the teleological approach of the Court shaping Community policy in line with what it perceives to be the aims of the Treaty<sup>103</sup> suggests that competences will be found to the extent that the social policy is included within the aims of the Treaty.

The existence of a competence must not be assumed to necessarily imply the success of any measure proposed pursuant to that competence. The history of Community social policy contains many instances of proposals for Directives which failed to be adopted by Council because of the opposition of one or more Member States. Thus Directives on worker participation and on the consultation and information of workers were never adopted. Likewise proposals relating to voluntary part-time work and temporary work<sup>104</sup>, essentially atypical working, were rejected in the early 1980s. Even following the expansion of Community competence as a result of the SEA, there is no evidence that greater success in social policy has been achieved. Therefore analysis of the legislative proposals of the Commission must always bear in mind that a real possibility exists that the legislation will not be adopted.

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<sup>103</sup> as seen in *Germany v Commission* n.85 above.

<sup>104</sup> see n.133 below.



## (2) Constraints on the EC competence

The existence and scope of the Community competence with regard to employment rights does not of itself provide the necessary background to assess Community proposals which create employment rights as to their implications for atypical working. Two important factors which influence the Community ability to act to be considered here are the notion of subsidiarity and the principle of equality between men and women which gives rise to the concept of indirect discrimination. These two factors are of course not the only constraints on the ability to act: the decision-making process is a complex equation strongly affected by the consideration of the national interest, finite financial resources and not least the personalities of the actors involved. Nevertheless the two factors to be addressed can be framed in legal terms, which makes them appropriate to discuss in this piece of work and will prove to be important reference points when Community proposals are considered in Chapter 3.

### I Subsidiarity: should the Community intervene?

Subsidiarity is a term of art in political thought which despite its new-found popularity in the EC has deep roots in the political systems of the Netherlands and Germany. The most classic formulation of the concept is that of Pope Pius XI in his encyclical letter who argued that it is:

'...an injustice, a great evil and a disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.' (Pius XI 1931).

This formulation voices concern with respect to the over-powerful state, clearly relevant against a background of increasing fascism in the 1930s. However the nature of the EC, being a voluntary creation of sovereign nation-states and hence endowed with legal personality, powers and competence only by virtue of a Treaty and not otherwise, renders it arguably *less* liable to an over-assumption of power than within a nation-state itself. Nevertheless there is a political concern that the Community is overreaching itself and is usurping the function of the Member States. The domain of employment rights created by the Community is often cited as an example of this overreaching and hence for our purposes it is important to consider carefully what



the implications, if any, of subsidiarity are for future Community legislation on employment rights. It should be pointed out at this stage that there are, as the Padoa-Schioppa report highlighted, negative cost implications associated with the application of the subsidiarity principle (Padoa-Schioppa 1987), thus strengthening the argument that the Community should at least lay down frameworks and minimum standards. However this downside to the subsidiarity argument rarely gets aired when employment rights are on the agenda.

As regards the EC, a common formulation of subsidiarity is that 'the Community should act only where objectives can be attained better at Community level than at the level of the individual Member States' (House of Commons 1990: 68). This definition indeed paraphrases the wording agreed upon by the Heads of Government at Maastricht<sup>105</sup>. Thus subsidiarity as understood within the EC context can be seen as an approach to power-sharing (Wilke and Wallace 1990). It purports to offer a principle by which disputes can be resolved as to whether the Community or the Member States should act on any particular issue. In the majority of cases the Member States and the Commission will be agreed as to where the appropriate action should be taken. However where there is disagreement the principle of subsidiarity offers little guidance because it does not indicate who should decide whether Community level action is appropriate. If the Community adopts legislation and the Member State is aggrieved and has not been able to prevent this (perhaps because the legislation was adopted in Council by the qmv procedure), the doctrine of subsidiarity offers no solace. The Member State which seeks to challenge the legislation before the ECJ will discover that the Court cannot determine whether or not Community level action was desirable because the issue is non-justiciable. It is not practical to ask the ECJ or any court as to whether legislation is appropriate, it cannot make such value judgments. The most that the Court can do is review the legislation under the Article 173 procedure to establish whether the Council acted *ultra vires* in adopting the legislation<sup>106</sup>. It would seem therefore that as a *legal*



principle, subsidiarity has a negligible actual or potential impact on the ability of the Commission to propose legislation. Nevertheless as a matter of practice the Commission does take seriously the political force of the subsidiarity argument in that it seeks to justify the need to take the proposed Community action.

This concern of the Commission may arise as a result of the current message that the term subsidiarity, as it has come to be used in the EC context, conveys, in that it may perhaps be little more than a euphemism for sovereignty (Spicker 1991). This may be explained in the following way: it is politically expedient, in domestic terms, for the opposition of a Member State to proposed Community legislation to be expressed in terms of subsidiarity (superficially a pro-Communitarian stance) rather than framing it as a question of national sovereignty which is openly an anti-Communitarian stance. Thus social policy and thereby the ability to create employment rights - a policy area where Member States, rightly or wrongly, wish to exercise their own sovereignty - may have become the target of much of the subsidiarity debate. If, as has been suggested, subsidiarity is viewed as an attempt to exercise national sovereignty, it can be seen that it is as much a direct challenge to the ability of the Community to develop employment rights as is the controversy over the scope of Treaty Articles 100A and 118A. It is questionable as to whether the employment rights Directives of the 1970s would have been adopted and social policy have evolved, if the subsidiarity argument been articulated and developed at that time.

Thus subsidiarity, despite its doubtful legal significance, because of its inherent threat to the future of social policy is likely to affect the proposals of the Commission as regards employment rights. This influence of the spectre of subsidiarity it will be later argued can be clearly discerned when analysing proposals of the Commission (Chapter 3).

## **II Indirect discrimination: how far will the ECJ go?**

Any proposed Community legislation which affects employment rights must be compatible with the existing law of the Community which prohibits discrimination between men and women on grounds of sex. Equality between the sexes has been



described as a general principle of Community law, a fundamental right (Docksey 1991) and thus as such the ECJ will go to great lengths to uphold it. This is not to suggest that the principle of equality is a superior rule of Community law of some abstract, unwritten nature but rather that the principle is essential to the economic and social order created by the Community. It is generally thought that the principle derives from Article 119 on equal pay as can be inferred from the judgment in *Defrenne (No 3)*<sup>107</sup> and extends through the Equal Treatment Directives to the right of equal treatment in employment and training, and in some aspects of social security. As an examination of the case law will show, the principle of non-discrimination on grounds of sex extends so far that any measure affecting employment rights must be critically assessed for its potential to infringe the equality principle<sup>108</sup>.

As a matter of Community law the principle of equality has been held to cover both direct and indirect discrimination. Thus not only provisions which on their face discriminate (direct) but also those which are formulated in a gender-neutral manner and yet have a disproportionate effect on one sex (indirect) are capable of infringing the important principle of equality. This principle applies to legislation<sup>109</sup> as much as to terms and conditions of employment<sup>110</sup>. However unlike direct discrimination which cannot be justified by reason of economic or social policy considerations<sup>111</sup>, it seems that indirect discrimination despite its equally pernicious effect can be justified in this way, thus casting doubt on the nature of equality as a fundamental right (Fredman 1992: 125). However as will be seen, this apparent drawback to the law on indirect discrimination is tempered by a very rigorous application by the Court of the concept of objective justification.

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<sup>107</sup> case 149/77 [1978] ECR 1365; [1978] 3 CMLR 212.

<sup>108</sup> this is particularly true in the light of the Community law construction of the term 'pay'.

<sup>109</sup> *Rinner-Kühn* case 171/88 [1989] ECR 2743; [1991] IRLR 493 at paragraph 12.

<sup>110</sup> *Bilka-Kaufhaus* case 170/84 [1986] ECR 1607; [1986] 2 CMLR 701 at paragraph 31.

<sup>111</sup> though even direct discrimination is permitted by reason of the derogations in the Equal Treatment Directive 76/207: where sex is a determining factor - Article 2(2), to protect women - Article 2(3) and positive action measures - Article 2(4).



In *Bilka* the ECJ, expanding on its decision in *Jenkins v Kingsgate*<sup>112</sup>, held at paragraph [36], that a gender-neutral measure which affected a far greater number of women than men would not be discriminatory if the employer could show that the measures taken (1) corresponded to a real need on the part of the undertaking (2) were appropriate with a view to achieving the objectives pursued and (3) were necessary for that purpose. This test effectively means that where the difference in treatment between men and women can be objectively justified by reasons unrelated to discrimination on grounds of sex the provision in question is lawful<sup>113</sup>. In particular with regard to national legislation, which it seems must be seen in the light of the whole policy palette of which it forms but a part, (in contrast with collective agreements or employer schemes) there are indications that the Court is applying a lower standard of objective justification<sup>114</sup> and is allowing the overall social policy of a Member State to constitute objective justification for discrimination<sup>115</sup>. It is nevertheless to be doubted as to what extent the ECJ would allow Community legislation to discriminate indirectly if it was sought to be argued that such discrimination was objectively justified with reference to the overall social policy of the Community. To permit the objective justification of any discrimination is in effect to allow a derogation from the basic rule of non-discrimination and should therefore as with all derogations<sup>116</sup> be construed as narrowly as possible. A further argument in favour of a restrictive interpretation of the scope of objective justification derives from the fact that the substantive injustice done to a group of workers is the same whether they are discriminated against because of their gender or because they are part-time workers (the overwhelming majority of whom are invariably women). Discrimination against part-timers is for practical purposes in the vast majority of cases synonymous with direct discrimination against women (Kirsten 1990: 285) and yet because of the ostensibly gender-neutral formulation of the discrimination against part-timers the discrimination in such a case may be justified.

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<sup>112</sup> case 96/80 [1981] ECR 911; [1981] 2 CMLR 24.

<sup>113</sup> *Ruzius-Wilbrink* case C-102/88 [1991] 2 CMLR 202 at paragraph 15.

<sup>114</sup> as was hinted at by Advocate-General Darmon in his opinion in *Ruzius-Wilbrink* (supra note 113) at p.202.

<sup>115</sup> *Commission v Belgium* case C-222/89 [1991] IRLR 393.

<sup>116</sup> see the similar argument with regard to Article 100A(2) at p.53 above.



It would seem therefore that Community legislation which proposes different treatment of groups of workers runs the risk, of constituting *prima facie* indirect discrimination wherever one of the groups of workers affected is made up of a disproportionately high percentage of women or men<sup>117</sup>. This 'gender dimension' frequently occurs within the matrix of employment patterns in the Community and thus it is of fundamental importance for the Commission in proposing employment rights to appreciate the scope and limitations of objective justification.

The Court has always been clear as to what it accepts as objective justification, whilst nevertheless, as is the case with preliminary rulings (Article 177 procedure), leaving the final determination as to the legality of the measure to the national court. It has rejected arguments which it perceives as being mere generalisations<sup>118</sup> without any supporting evidence and thus refuses to admit the contention that part-time workers are less integrated in or less dependent on the undertaking employing them than other workers<sup>119</sup>. As regards part-time workers the Court has also implicitly rejected the argument that the income of a part-time worker is an additional or secondary income and therefore this cannot constitute objective justification for denying a part-time worker any protection on leaving employment by means of a transitional payment<sup>120</sup>. A further argument rejected as a mere generalisation was that part-time workers did not acquire skills as quickly as other workers<sup>121</sup>. On this occasion the employer was seeking to justify a scheme of automatic pay increments based on length of service which discriminated against those who worked less than three-quarters of the hours of a full-time employee.

Even legislation which on its face does not appear to treat separate groups of workers differently, which does not distinguish between one group of workers and another,

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<sup>117</sup> see the discussion regarding the atypical work Directives at p.68 below.

<sup>118</sup> *Rinner-Kühn* supra note 109 at paragraph [10].

<sup>119</sup> *ibid* paragraph [9].

<sup>120</sup> *Kowalska v Freie- und Hansestadt Hamburg* case C-33/89 [1990] ECR I-2591; [1990] IRLR 447. The ECJ did not explicitly reject any objective justification raised by the employer, because it was evident from the Report for the Hearing that the national court considered there to be no objective justification for the conduct if it was held to be within the scope of Article 119.

<sup>121</sup> *Nimz v Freie- und Hansestadt Hamburg* case C-184/89 [1991] I-ECR 297; [1991] IRLR 222.



may nevertheless operate in a manner which constitutes indirect discrimination. This important extension of the scope of the principle of equality came about in June 1992 when the Court considered German legislation which provided for compensation for workers attending training courses necessary for their participation on the staff committee of the enterprise<sup>122</sup>. This compensation was paid according to the number of hours normally worked by the employee and thus provided for benefit on a pro-rata basis. However when a course lasted for more hours during the standard working week than a part-time worker would normally work, that worker would have to give up leisure time to attend the course and would receive no compensation for this leisure time given up. Hence as a matter of practice the part-time worker received less compensation than a full-time worker attending the same course. This was in spite of the fact that the part-time worker put as much time and effort into the course as a full-time worker and the enterprise derived as much benefit from having on the staff committee well trained part-time workers as it did from the full-time workers<sup>123</sup>. As the proportion of women who were part-time workers was very high, this discrimination against part-time workers constituted indirect sex discrimination. The Court took the view that the legislation produced a serious disincentive effect on the likelihood of part-time workers (and thereby women) from participating in staff committees or acquiring the knowledge necessary for that purpose. This legislation contributed to the situation whereby (according to the German government in *Rinner-Kühn*<sup>124</sup>) part-timers (women) are less integrated in the enterprise and would therefore seem to run completely contrary to social policy. The Court impliedly suggested in these circumstances that there could be no objective justification for this legislation. The important principle to be derived from this case is that a scheme of benefits or compensation provided on a pro-rata basis in proportion to hours normally worked, which does not necessarily exclude groups of workers, may nevertheless constitute indirect discrimination.

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<sup>122</sup> *Bötel v Arbeiterwohlfahrt der Stadt Berlin* case C-360/90 [1992] 3 CMLR 446.

<sup>123</sup> *ibid* at paragraph [24].

<sup>124</sup> *above* note 109.



If the Council were to adopt an employment rights Directive which produced prima facie indirect discrimination, an argument might be raised that the intention was to amend Community law, thus in some way restricting the application of the law on indirect discrimination (the doctrine of implied repeal). However it is likely that the Court with its teleological approach would have regard to the importance of the equality principle and if necessary disregard the Directive to the extent this was required to uphold the equality principle. This strategy has been employed by the Court before, particularly noticeably in the *Barber* case<sup>125</sup> where the essential nature of the equality principle effectively circumvented the provisions of the equal treatment directive on occupational pensions<sup>126</sup>. However following *Barber* an attempt was made at Maastricht by the heads of government to restrict the effect of the ECJ decision, to an extent overruling it, thus illustrating the delicate power balance between the Court and the Council, in that the Council sought to regain the initiative which it believed had been lost to the Court.

As a policy constraint the equality principle, particularly as applied through the law on indirect discrimination represents (certainly to the extent of the existing case-law) a major influence on the scope of the Community to develop employment rights legislation. It is of a qualitatively different nature to the constraint of subsidiarity. Whereas subsidiarity affects the very legislative competence of the Community and is a challenge to the *existence* and articulation of Community social policy, the constraint of the principle of equality is as to the *content* of any Community legislation. Thus if the Commission were to propose a Directive relating to worker participation in the enterprise as is hinted at in paragraphs 17 and 18 of the Social Charter, the effect of subsidiarity is to pose the question as to whether, if at all, the Community should be taking any action in this sphere. On the other hand the equality principle demands that any measures taken do not as a matter of practice give rise to discriminatory treatment of men or women which cannot (where this arises) be objectively justified.

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<sup>125</sup> *Barber v Guardian Royal Exchange Assurance Group Ltd* case C-262/88 [1990] I-ECR 1889; [1990] ICR 616; [1990] IRLR 240.

<sup>126</sup> Directive 86/378: OJ 1986 L225/40.



Thus overall the legislative competence to create employment rights as discussed above has to be viewed in the context of these constraints outlined here. As was mentioned earlier, this treatment of the policy constraints is not meant to be exhaustive but hopefully offers a good indication of the type of issues that the Commission has to be mindful of when drawing up employment rights.

The next chapter proposes to draw together the themes of the first two chapters - the construction of atypical working - and - the EC dimension - to consider and evaluate Community policy and legislative initiatives in differing subject areas. The aim of this analysis is to be able to draw some tentative conclusions as to whether Community policy contributes to or alleviates the phenomenon of atypical working as we have defined it in terms of legal disadvantage and to offer some possible explanations for the nature of Community policy.



### Chapter 3 - The response of the Community

The analysis of the previous chapters has shown how legal rules create the phenomenon of atypical working in the sense that they render certain workers at a legal disadvantage. These workers because of the circumstances in which they work e.g. on part-time basis, or at home, or through the conduit of a temporary employment business do not always enjoy the same rights and benefits as their fellow workers. It was discussed earlier<sup>127</sup> how the rules of law contributing to atypical working existed at the levels of the contract of employment, the collective agreement and where there was legislative intervention. In this chapter it is proposed to consider specific proposals for action at this third level: legislative intervention, by analysing draft Directives which create or affect existing employment rights. Two sets of drafts will in turn be evaluated: firstly the proposals of the Commission designed to address the very issue of atypical working and secondly the proposed Directive on the posting of workers arising out of the ECJ judgment in *Rush Portuguesa*<sup>128</sup>.

The analysis of the Commission's proposals for Directives will look closely as to whether the effect of the measures is to exacerbate or reduce the phenomenon of legal disadvantage which produces patterns of atypical working. It will be argued that measures which take a selective approach as regards the workers who are to benefit, directly contribute to the strengthening of the model of typical working, which in turn necessarily implies a greater legal disadvantage for those who fail to attain the criteria of typical working. Thus to identify proposed measures of Community law which are likely to reduce the phenomenon of atypical working, we will be looking at each measure to determine to what extent it embraces a universalist approach. Such an approach embodies a concept of 'worker' irrespective of contractual status, nationality, hours worked, gender, etc. to whom protection can be afforded and therefore represents the antithesis of typical working, which is constructed by rules which have a selective and exclusionary effect. In the analysis of each legislative

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<sup>127</sup> at p.15 above.

<sup>128</sup> case C-113/89 [1990] I-ECR 1417; [1991] 2 CMLR 818.



proposal, attention will be paid to the Treaty base (i.e. which Article of the Treaty) and the stated aims of the proposal, with the objective of considering what impact, if any at all, this has on its likely effect vis-à-vis atypical working. Furthermore this critique will at all times bear in mind the constraints of subsidiarity and of the law on sex equality as between workers, as evaluated in Chapter 2. Thus these constraints will be considered both in terms of the impact they have already had on the proposals and secondly whether in light of their strength and influence the proposals in their current form need further modifying to respond to them.

An additional objective of the analysis relates specifically to the proposals of the Commission which are designed to respond to the issue of atypical working. It is hoped to detect what concept of typical or atypical working underlies the proposals and to deduce whether any normative function is attached to the concept. It must be remembered that in the development and exposition of typical working in chapter 1 that no normative function is ascribed to 'typical'. There is no assertion, implied or otherwise, on the part of the author, that typical can in any way be equated with normal or that patterns of atypical working are abnormal. To this end therefore, it is argued, that wherever rights of workers are dependent on or fixed with reference to the rights of other workers ('the comparators'), a comparison is being made, a standard is fixed whereby a norm attaches to the pattern of working rights of these comparators. To hold out that a pattern of working is normal, i.e. *typical* in the normative sense, because the rights of others are fixed with reference to this, grants superiority and legitimacy to the pattern of working deemed to be normal. However if rights of individual workers are constructed on a self-contained basis without reference to the rights of those other workers who enjoy a different pattern of working, then the risk of imputing a normative function to any particular work arrangement is diminished. Conclusions can therefore be drawn as to the attitude of the Commission to what it treats as atypical working, by the extent that it allows a normative role to be imputed to certain patterns of working.



## ATYPICAL WORK DIRECTIVES

The Commission published its proposals for Directives on 'certain employment relationships' (atypical working) in August 1990<sup>129</sup>. The proposals were split between three draft Directives with different Treaty bases because of uncertainty concerning the Community's competence in the social sphere and particularly regarding the scope of Article 118A<sup>130</sup>. The least controversial of three on health and safety was adopted by Council in June 1991<sup>131</sup>. However discussion will be restricted to the two as yet unadopted Directives since they reveal much more of the Commission's construction of workers. Firstly the scope of the provisions will be examined to determine which workers are being afforded rights. This will quickly establish whether a universalist approach is adopted which grants rights to all workers irrespective of hours worked, contractual status, etc. Secondly the content of these rights will be considered to reveal the perceived status of the workers who are the subject of the Directives. It will be shown through an analysis of this emerging status how multi-faceted this issue of atypical working is and the extent to which the proposals exhibit a degree of overall consistency.

### A. SCOPE

The workers addressed by the two draft Directives based on Articles 100 and 100A are (i) part-time workers (ii) workers on a fixed term contract and (iii) workers employed by temporary employment businesses (agency workers). All workers who do not fit into these categories would not benefit from the terms of the Directives. To benefit from any of the measures in either Directive the worker would have to be an employee. Thus it can be noted immediately that the approach is selective and therefore does not necessarily include homeworkers, the fake self-employed or franchisees. Hence the critical factor determining the scope of the measures is the contractual status of the worker. By way of contrast, in its own proposal to tackle the

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<sup>129</sup> COM(90) 228 final: OJ 1990 C224/6.

<sup>130</sup> for differing views on this see above at p.7 and especially Bercusson (1991) and Vogel-Polsky (1990).

<sup>131</sup> Directive 91/383: OJ 1991 L206/19.



same issue the European Parliament offered a draft Directive which took a much wider approach<sup>132</sup>. It was directed at all workers whose contract or terms of employment were not permanent and full-time and which offered reduced protection (Article 2). An objective standard of paid employment was to be adopted which would have allowed national courts to redefine an employment relationship so as to bring it within the scope of the Directive (Article 4). Such a strategy is more flexible and responsive to any attempt that might be made to avoid the material provisions of the measure, because the objective standard is maintained irrespective of the legal form of the employment relationship. Doubtless problems might arise in the national case-law as to the interpretation of such a provision, but to adopt a definition which considers content and not form would nevertheless represent a step forward. This is particularly crucial because of the high degree of substitutability of forms of atypical working, as is partially conceded by the Commission in its explanatory memorandum. In the UK the overlap between the various forms of atypical working is very high (Casey 1988) which is due to the lack of legal regulation of these forms. Hence the need to adopt a measure which casts its net as wide as possible and which through the case-law can remain dynamic, if the measure is not to be circumvented. In this way a broad construction of worker could develop which would move away from the employee/self-employed distinction of many national systems. However the Commission only takes in those with employee status, thus replicating the cleavage in national law between those who have employee status and those who do not. This in turn exacerbates the legal disadvantage of workers who by reason of national case-law are denied the label employee, in that there is an improvement in the position of certain workers who qualify to be recognised as employees.

Furthermore only those who work more than eight hours per week are considered worthy of being accorded rights. It is stated in the explanatory memorandum that this is to prevent disproportionate administrative costs arising (paragraph 4). This represents a major dent in the concept of non-discrimination against those who do not work full-time on an open-ended contract. It substantially debases the value of

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<sup>132</sup> EP document A 3-134/90.



the proposal and calls into question the whole motivation behind the project, particularly when the precursors of these proposals<sup>133</sup> did not contain any such general qualifying threshold (Mückenberger 1991). There is an inherent contradiction in holding out that a specific aim of the Directives (paragraph 4(i)) is to prevent the spread of insecurity and labour market segmentation and yet creating an arbitrary threshold which will do precisely this. It is of extreme concern that the Commission proposes to enshrine in Community law a rule dividing the labour market into two groups: one protected, the other unprotected. Although there are no clear statistics as to the number of workers who would be under this threshold, it can be assumed, in the light of the general pattern for part-time working, that the overwhelming majority of them are women, thus opening up the 'gender dimension'. In this way it can be questioned whether the constraint imposed by the law on indirect discrimination<sup>134</sup> could not be invoked to challenge the proposed legislation. If the ECJ is given the opportunity to make a preliminary ruling (under Article 177) in the judicial review case brought by the EOC currently before the British courts<sup>135</sup> such a threshold (already existing in British law) which indirectly discriminates against women will be subjected to the rigorous test of objective justification<sup>136</sup>. Notwithstanding the possibility of the ECJ to intervene in the matter as a consequence of an Article 177 reference from the UK, the matter could also come before the Court if a Member State sought to challenge either of these two Directives if ever adopted. Under Article 173 a Member State can apply for judicial review of any Community act and so would be able to claim that the Directive was contrary to the general principles of Community law. It is much more doubtful whether a private individual would have locus standi to challenge a Directive in judicial review

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<sup>133</sup> proposals for Directives on temporary work OJ 1982 C128/2 and OJ 1984 C133/1 and on part-time work OJ 1982 C62/7 and OJ 1983 C18/5 were all withdrawn by the Commission as part of its current plan.

<sup>134</sup> see p.57 above.

<sup>135</sup> *R v Secretary of State for Employment ex parte Equal Opportunities Commission (EOC)* Divisional Court: [1991] IRLR 493, Court of Appeal: [1993] IRLR 10. The Court of Appeal has now rejected the application of the EOC on a procedural issue as to locus standi and they have refused leave to appeal to the House of Lords. It is doubtful whether the House of Lords would now grant leave to appeal. Nevertheless the substantive issue could still be referred to the ECJ on the hearing of Patricia Day's case, whose application has been severed from the judicial review proceedings and remitted to the Industrial Tribunal.

<sup>136</sup> see p.60



proceedings<sup>137</sup>. Thus the Court may well have the opportunity to consider this issue and so develop its wide construction of workers. Notwithstanding the principle of equality between men and women, the Court might also be addressed as to the possibility of developing a basic principle of equality between workers unrelated to gender issues. If as a result of Article 177 proceedings an 8 hour threshold is held not be objectively justified the Commission would be forced to reconsider its proposals on atypical work.

In its judgment of October 1991 (at paragraphs 87-88) one of the factors that persuaded the Divisional Court that the British threshold was justified was the very existence of this Commission proposal advocating a general threshold before workers become worthy of protection as a matter of Community law. This reliance on the unadopted Directive was highlighted in the Court of Appeal by Dillon LJ<sup>138</sup> who did not disagree with the finding of the lower court on this issue of whether an 8-hour threshold was justified<sup>139</sup>. This indicates the persuasive value even of unadopted instruments of Community law and therefore highlights the need always to analyse carefully the Commission's proposals also in circumstances where they stand little chance of being adopted by Council.

The narrow ambit of objective justification has already been discussed above (p.60) and it will be recalled that generalised assertions as to the aims of social policy or the nature of part-time working have not succeeded in justifying legislation which excludes or discriminates against part-timers. Hence a threshold in the German law on sick pay (*Lohnfortzahlungsgesetz* 1969) which excluded those who worked less than 10 hours per week or 45 hours per month could not be justified by an argument that such workers were not as integrated in or dependent on the undertaking employing them as other workers might be<sup>140</sup>. In Dutch social security law the

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<sup>137</sup> It would be necessary to show that the Directive was in substance a decision and that it was of direct and individual concern to the applicant.

<sup>138</sup> above n.134 at paragraph 60.

<sup>139</sup> the comments of the other judges in relation to the substantive issue can be treated as obiter, in that they held that as a matter of procedure, the EOC did not have locus standi to challenge the legislation in the UK courts.

<sup>140</sup> above n.109 at paragraphs 13-14 of the judgment.



Court also rejected an argument by which the government sought to pay part-timers disability benefit related to their previous income, whereas all other beneficiaries received rates unrelated to their previous income. It was argued that this policy was to prevent any beneficiary being made financially better off if they became disabled. However it could be shown that several other groups of persons including students and carers were granted benefit unrelated to their previous income which made them better off financially, thus confounding the government's argument<sup>141</sup>.

In the light of these decisions the economic arguments advanced by the Commission (as regards the atypical work directives) or the UK government (as regards its employment protection legislation) might not succeed as objective justification of this discriminatory conduct. Implicit in these arguments is that abolition of the threshold would increase employers costs, thus reducing the attractiveness of part-time work to employers and ultimately leading to unemployment. However, as Dillon LJ recently put it:

'Extra cost to the employer, from having to pay higher benefits to women so as to bring their benefits in line with the benefits paid to men, is so inherent in the concepts of equal pay and equal treatment, and so cannot, per se, justify failure to accord a class which is predominantly female with a class which is predominantly male<sup>142</sup>.'

Nevertheless no evidence, other than merely anecdotal, has ever been offered to support the view that abolition of the thresholds would lead to increased unemployment and hence the ECJ may not be persuaded that it constitutes objective justification. The case for those arguing that the discrimination is unjustified might also be strengthened if it could be shown that there is no causal link between the cost to the employer of employment protection rights and the number of part-timers employed, i.e. that they not simply employed because they are cheap. Alternatively if a group of persons could be found who were already included within employment protection where this nevertheless imposed a relatively high cost burden on

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<sup>141</sup> above n.7 at paragraph 16.

<sup>142</sup> above n.134 at paragraph 60 of the Court of Appeal judgment.



employers then the policy which excluded part-timers could be shown to be unjustified on the same basis as the Dutch law in *Ruzius-Wilbrink*. If the Court were nevertheless to accept the arguments of the Commission or the UK government and permit a situation to evolve whereby a threshold of this nature was held to be compatible with Community law it would represent a major weakening of the Community's stand on equality between men and women. Furthermore this would raise additional doubts on the ability or motivation of the Community to grant employment rights to all workers. However the Commission may have felt it necessary to propose this 8-hour threshold, because of the limitations of the competences<sup>143</sup> afforded by Articles 100 and 100A under which the draft Directives were put forward.

## B. CONTENT

Notwithstanding the serious shortcomings of the proposals, in particular their possible incompatibility with existing Community law, it nevertheless remains to be examined what construction of atypical working emerges and what this reveals of the approach of the Commission. It will be shown that whilst as a general rule, atypical working is constructed as a secondary, inferior pattern of working, there emerge distinctions within this overall configuration. To illustrate this, an attempt is made to contrast those proposed rights which are 'employer dependent' within labour law with those which fall outside labour law in its narrow sense. Furthermore it is suggested that even within the general secondary construction, a hierarchy of forms of working can be detected which may highlight the Commission's perception of them.

### (1) SECONDARY STATUS

The Commission refuses to challenge the need for atypical working patterns, stating that,

"... in no circumstances can the need for these specific forms of employment relationship be called into question" (paragraph 4)

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<sup>143</sup> particularly as regards the need to provide economic justification for the measures.



however this should not necessarily imply their acceptance of the legal disadvantage that attaches to these forms. One might expect a neutral approach which neither encourages nor discourages specific types of employment relationship, but which rather seeks to reduce the legal disadvantage for workers in certain forms of employment relationship. Such an approach would be directed towards improving the position of workers so that their individual status was not affected by the formal type or nature of the employment relationship. Yet it very quickly emerges how in many respects patterns of atypical working are constructed at a secondary level, inferior to open-ended full-time relationships. In Article 2(3) of the proposed Article 100 Directive there is an obligation on the employer to consult workers' representative bodies within the undertaking before resorting to workers with atypical working patterns. This implies that these workers are different to those with typical working patterns, threaten the jobs of the latter and that the already established workers should be given every opportunity to protect themselves against the introduction of patterns of atypical working. This inferior status of atypical working is implicitly reinforced by Article 5 which entitles those working in these sort of relationships to be informed whenever the employer is recruiting on a permanent full-time basis, which will enable them to 'convert' to the position with the superior status. Whereas typical working is always presented in a positive light, atypical working is a necessary evil to be tolerated, but in the long run to be avoided if at all possible. It is as if the Commission wants all forms of employment relationship other than open-ended full-time ones to be perceived by the employer as a reserve army of labour, a secondary class of labour, all to be assimilated into their constructed norm of typicality as soon as economic conditions permit. Such a policy also seems to protect those already working from the encroachment of atypical patterns of working. As Mückenberger (1991) writes, the proposals offer those already working more protection *against* other (atypical) patterns of working than the actual protection *of* those engaged in atypical patterns which is meant to be one of the main aims of the Directives<sup>144</sup>.

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<sup>144</sup> This is very clear in the German where he contrasts 'Schutz vor' with 'Schutz der'.



## (2) INDIVIDUAL SOCIAL RIGHTS AND BENEFITS OUTSIDE LABOUR LAW

At a macro-level from an employer perspective these proposals signal an construction by the Commission of a labour market divided into primary and secondary workers, whereas at a micro-level looking at individual workers' rights, particularly those outside labour law, a different pattern emerges. At this level, in certain respects, all workers are to be treated equally, irrespective of their working hours or type of contract. All workers are to have the same access to 'social services' normally made available within the undertaking (Article 4 of the Article 100 Directive). This seemingly grants all workers the same access to catering, sports, leisure and medical facilities provided by the undertaking. These issues are rarely the subject-matter of the contract of employment and hence are traditionally matters outside the scope of labour law.

Article 3 of the same draft Directive provides for atypical workers covered by the Directive to enjoy the 'same treatment' as workers on full-time open-ended contracts as regards benefits from social assistance schemes and non-contributory social security schemes. This is an obligation directed at the Member States, who will be required to reform their social security law in respect of all benefits (in cash or in kind) which are non-contributory. This would seem to include, depending on the national system, items such as maternity pay, sick pay, and welfare benefits for the low paid. The Commission is not explicit as to what the 'same treatment' might involve. It would seem to suggest that any qualifying threshold expressed in terms of a minimum number of hours worked would have to be abolished, as would any rules requiring a minimum period of continuous employment. A minimum earnings threshold required to qualify for benefits would also have to be abolished because it serves functionally to exclude mainly those working part-time or on an intermittent basis, even though it is expressed in terms seemingly neutral with respect to the nature of the employment relationship. This interpretation which takes the Article as a whole is essential to prevent its aim and purpose being circumvented by Member States amending their social security law to replace minimum thresholds expressed in terms of hours worked by thresholds expressed in terms of weekly or monthly earnings. It is these types of threshold which currently interact negatively with



patterns of atypical employment and thereby keep many workers so employed outside the scope of social security. The wording of the proposed Article 3, in contrast to draft provisions to be found in the Article 100A Directive, does not seek to restrict atypical workers to benefits in proportion to their pay or hours worked. Thus it can be argued that the intention of the draft Article implicit in the phrase 'same treatment' is to give those workers covered by the Directive the same level of benefits in both quantitative and qualitative terms as workers on full-time open-ended contracts. This is particularly important in respect of illness, disability or industrial injury benefit, since the loss of earnings potential of a person is independent of the number of hours previously worked or previous pay. Hence it is important that all such workers should receive the same compensation.

This provision of the draft Article 100 Directive it can be argued seeks to decouple entitlement to certain social security benefits from the status of the individual employee within the labour market. But it is important to remember that this limited decoupling would nevertheless have to operate within the constraints of labour law which determines whether a worker has employee status: only the rights of employees are addressed by the Directive. Whereas previously, work-related rules (continuity, hours worked, earnings) in social security law could deny employees benefits they would otherwise be entitled to on objective grounds (factual disability, sickness, low income), these rules would now be outlawed by the Directive. Ironically therefore the labour law status of a worker i.e. whether an employee or not, would acquire a greater significance as it would become the only work-related determining factor regarding benefit entitlement. As regards certain work-related benefits (generally those wholly financed out of general taxation and not through specific employer or employee contributions) a wider construction of worker can therefore be discerned than that which is developed in the sphere of worker/employer relationships. This wider construction of worker also holds in respect of those workers' benefits within the undertaking where it is difficult to quantify the cost to the employer of including atypical workers i.e. social facilities which the employer would nevertheless provide for its 'typical' workers on full-time open-ended contracts. Thus in this sphere outside labour law, Community policy, law and



practice tend towards a universalist all-embracing standpoint. This wider construction of worker holds subject of course to its interaction with labour law<sup>145</sup>.

### (3) EMPLOYER DEPENDENT SOCIAL RIGHTS

A distinction clearly emerges when other provisions of the draft Directives are considered which more specifically relate to the worker/employer relationship: those provisions which impose a cost on an employer. Thus according to the Article 100 Directive<sup>146</sup> a worker not on an open-ended full-time contract shall have access to vocational training provided by the employer under conditions *comparable* to those of 'typical' workers and account shall be taken of the hours worked. This right given to workers with atypical patterns of working here is not as clear-cut or unconditional as their right to the *same* treatment in matters of non-contributory social security benefits and social assistance. Likewise in the Article 100A Directive, access to social protection under statutory and occupational social security schemes (pensions, unemployment insurance) is afforded to these workers, but not on the same terms as the workers already protected. Thus those workers within the scope of the Directive are offered protection which is, vis-à-vis 'typical' workers,

'... rooted in the same foundations and the same criteria, account being taken of the duration of work and/or pay<sup>147</sup>.'

This provision does not seem to preclude the use of thresholds which will operate to exclude certain workers, although it does at least raise the presumption that all workers are *prima facie* entitled to participate in social security schemes. More importantly, this provision may be interpreted as suggesting that the workers subject to this Directive will not as a matter of Community law have the right to receive the same level of benefit as 'typical' workers, for had this been the case they would have been entitled to the 'same treatment' as is proposed in the field of social assistance and non-contributory benefits. These provisions as regards social benefits however must be considered in light of the developing case-law of the Community. Where

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<sup>145</sup> the employee/self-employed distinction: see p.? above.

<sup>146</sup> Article 2(1).

<sup>147</sup> Article 2 of the Article 100A Directive.



social benefits can be construed as remuneration<sup>148</sup>, as part of the consideration for employment, whether by virtue of the contract, legislative provisions or voluntary arrangements, then, as most recently restated by the ECJ in *Bötel*<sup>149</sup>, these social benefits are subject to the requirement of equal pay laid down by Article 119. Thus a provision for *comparable* treatment will only be lawful to the extent that this does not infringe the equal pay principle.

It must be remembered that this provision relating to occupational and statutory social security schemes is contained in a Directive aimed at preventing distortions of competition. It is proposed under Treaty Article 100A which provides for the adoption of measures for the approximation of laws which have as their object the establishment and functioning of the internal market. This choice of Treaty base, it is suggested, stems from the lack of undisputed competence for the Community in matters of labour law<sup>150</sup>. There is no Article within the social policy title which could be relied upon to found a dependable base for the proposed measures. Thus the measure is couched in economic terms as can be seen from the example given in the explanatory memorandum<sup>151</sup> which compares the cost of employers' social security contributions in Germany and the Netherlands. It is argued by the Commission that these cost differences affect an employer's propensity to take on part-time or temporary workers which threatens therefore, particularly in frontier regions, workers' freedom of movement. As ever it seems that the proposal can be reduced to the touchstone of one of the four freedoms. Whilst this is of course necessary to give political legitimacy to the project it does nevertheless reveal that in reality the Commission is not addressing the issue of workers' rights or equality. The influence of the doctrine of subsidiarity may be detected here in that the case for Community intervention is carefully stated in such a way that cross-frontier issues are to the fore<sup>152</sup>, thereby (in effect) presenting the issue as one which would be

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<sup>148</sup> see p.80 below.

<sup>149</sup> see n.122 above at paragraph 12.

<sup>150</sup> see p.53 above.

<sup>151</sup> at paragraphs 32-33.

<sup>152</sup> especially paragraphs 18 - 20 of the explanatory memorandum.



inappropriate for national regulation. As a result it may appear that the agenda is an economic one set by employers where the interests of workers are in all senses subordinated. This then raises the political dilemma, outside the scope of this work, as to whether it is better to improve the rights of some workers through this economic agenda or to hold out for the (less feasible) improvement of the rights of all workers.

#### (4) SEGMENTATION OF ATYPICAL WORKERS

The proposed Article 100A Directive further segments the labour market by making an arbitrary distinction between workers with a temporary employment relationship and part-time workers. If one dare write of a hierarchy within atypical employment patterns, as addressed by the Commission<sup>153</sup>, then it appears that part-time workers have a 'higher' or perhaps not quite such a low status as temporary employees. Whereas Article 4a of the proposed Article 100A Directive (as amended) provides that the constitution of a temporary employment relationship shall not be allowed to replace any existing permanent job, no similar provision is applied with respect to part-time working. This clearly can be interpreted as showing that the Commission has made a value judgment to the effect that any permanent job even part-time is somehow 'better' than any temporary employment relationship unless the temporary job is a 'new' one and is creating employment. The proposal continues further restricting the use of temporary employment by imposing a maximum limit of 36 months total employment where individual contracts of less than 12 months are renewed<sup>154</sup>, thus the implication arises that temporary work is to be used sparingly. No attempt is made to raise the perceived value of temporary workers é.g. which could be achieved with a 'precariousness premium', instead limits are imposed on their use perhaps in the hope that employers will in fact create 'better' jobs (at least open-ended ones, though not necessarily full-time).

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<sup>153</sup> there is clearly a hierarchy in the sense that some atypical workers, especially the fake self-employed, are not even considered by the Commission.

<sup>154</sup> Article 4b.



It is acknowledged that rules which treat more favourably those with longer periods of continuous employment discriminate against those with short, interrupted periods of employment (essentially temporary workers). In many Member States such rules which take into account the length of service (seniority) determine dismissal and redundancy compensation, the length of the notice period<sup>155</sup>, and annual holiday entitlement. Thus the seniority rule is of considerable importance as regards many rights of workers. It is to be noted with caution therefore, that this seniority rule, which discriminates against those with shorter or interrupted periods of employment, is apparently legitimised by the draft A100 Directive.

This legitimisation of the seniority rule arises both i) directly, by entitling part-timers to seniority allowances and ii) indirectly by providing for part-time workers to be afforded dismissal compensation and annual holidays according to the same regime as full-time workers i.e. in the majority of cases according to a seniority based system<sup>156</sup>. This approach has a two-fold significance: on the one hand, it is yet another indication of the secondary role given to temporary workers. These workers are not even included within the provisions and their right to paid holiday is not considered. On the other hand, it notably strengthens the normative function of the pattern of typical working because it signals an acceptance at a Community level of the principle of length of service (one of the criteria used in the model above<sup>157</sup>) as a rule of labour law.

Nevertheless it is by no means certain that the seniority rule is wholly compatible with Community law. It is clearly a rule which discriminates against temporary workers, and yet such conduct is not contrary to Community law, unless it also constitutes unlawful sex discrimination. Hence if a sex discrimination argument can be constructed, the issue can be brought within the ambit of Community law and the jurisdiction of the Court. Sex discrimination cases have in fact already come before

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<sup>155</sup> for a Community survey see the Commission working paper SEC (89) 1137.

<sup>156</sup> Article 3 of the Article 100A Directive.

<sup>157</sup> see p.11 above.



the ECJ which has enabled it to consider the issue of seniority pay<sup>158</sup>, which given the broad construction of 'pay' should also shed light on the legality of the general seniority rule to the extent that either men or women are disproportionately disadvantaged by it. In *Danfoss* the Court was asked to determine to what extent pay supplements, rewarding inter alia seniority, which systematically worked to the disadvantage of female employees could be justified by an employer. The Court held that,

"... since length of service goes hand in hand with experience and since experience generally enables an employee to perform his duties better, the employer is free to reward it without having to establish the importance it has in the performance of specific tasks entrusted to the employee<sup>159</sup>."

Thus on the basis of *Danfoss* an employer does not have to justify a pay supplement which rewards length of service, since this is equated with experience, even though the effect of such a policy is to discriminate against workers on fixed term contracts, agency workers and those with discontinuous labour market participation, the majority of whom may well be women. However the Court seemed to retreat from this line somewhat in *Nimz* holding (without reference to its previous judgment in *Danfoss*) that,

"... although seniority goes with experience which, in principle, should allow the employee to carry out his [sic] tasks all the better, the objectivity of such criterion depends on all the circumstances of in each case and notably on the relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of hours have been worked<sup>160</sup>."

Thus the extent to which seniority can objectively justify indirect sex discrimination is severely qualified, in that the burden is now placed on the employer to show that there is a causal link between the time served in the enterprise and the qualities that the employer is seeking to reward which justify the inequalities in 'pay'.

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<sup>158</sup> *Danfoss* case 109/88 [1989] ECR 3199 and *Nimz* see n.121 above.

<sup>159</sup> at count [24].

<sup>160</sup> at count [14].



At this point it must be recalled that Community law on equal pay as provided for by Article 119 of the Treaty has developed a very broad notion of 'pay'. As a result of which, redundancy compensation<sup>161</sup> and statutory payments for attending training courses for serving on the works' council<sup>162</sup> which are paid by the employer and occupational pensions<sup>163</sup> have been held to fall within the concept of 'pay'. In the light of these ECJ rulings, the English Divisional Court has applied Community law and also treated compensation for unfair dismissal as 'pay' for the purposes of equal pay legislation<sup>164</sup>. On the wording of Article 119, annual paid holidays would also fall within the concept of pay, in that they constitute consideration in respect of employment.

Thus all the elements of the proposed Article 3 of the Article 100A Directive, to which part-timers are to be entitled on the same basis as full-time employees, *in proportion to the hours worked*: seniority allowances, paid holiday and dismissal compensation, constitute pay for the purposes of Community law. However since these benefits are pay and in light of *Nimz*, it is conceivable that this provision entitling the part-time workers only to benefits in proportion to the hours worked could be challenged in an equal pay action, thus illustrating again the constraint that equality law imposes on any legislation for employment rights.

An equal pay claim might be brought if it could be shown that on average women had fewer days paid holiday (in proportion to the hours worked) or received lower levels of compensation for dismissal than their male counterparts. An argument that dismissal payments or days of paid holiday are reward for experience acquired through longer service is unlikely to succeed. The total remuneration package of an employee serves many different functions and for this reason it is paid both in cash and in kind. Paid holiday, it is argued, provides for rest and relaxation, whilst dismissal compensation acts in theory as transitional relief for the worker who has

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<sup>161</sup> *Kowalska* see n.120 above.

<sup>162</sup> *Bötel* see n.122 above.

<sup>163</sup> *Barber* see n.125 above.

<sup>164</sup> *ex.p. EOC* see n.134 above at paragraphs [65] - [67], a finding not overturned by the Court of Appeal.



to search for a new job. In neither case is it obvious why these elements of remuneration should be related to length of service. Furthermore *Danfoss* demands 'transparency' in pay structures<sup>165</sup>, increasing the obligation on an employer to justify pay systems which operate to the detriment of either men or, more usually, women. Overall therefore there is considerable doubt as to the extent to which Article 3 of the Article 100A Directive in requiring treatment in proportion to the hours worked does conform with the developing code of equal pay in Community law where this disproportionately affects more women than men.

Despite the ability to challenge certain applications of the seniority rule through the use of the law on equal pay which may improve the position of some groups of women, where the 'gender dimension'<sup>166</sup> does not apply, the seniority rule will continue to penalise those with short and discontinuous periods of service. It is perhaps to be regretted that the proposals for the draft Directives and the existing techniques of Community equality law offer few opportunities for developing the rights of temporary workers, particularly when contrasted with the agenda for part-time workers. In addition when it is remembered that many patterns of atypical working are excluded from the proposals, it is, as suggested earlier, not unreasonable to conclude that a segmentation is taking place, with differing priorities accorded to the respective patterns of atypical working. Furthermore the approach of the Commission permits the model of typical working to strengthen its normative function, in that not only are comparisons constantly being drawn with the standard of workers on a full-time open-ended contract, but also as suggested earlier<sup>167</sup>, the inference can be drawn that these are perceived as 'better' forms of employment and are to be preferred.

It would seem therefore that operating within the constraints of the limited competence of the Community and bearing in mind the role of subsidiarity and the

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<sup>165</sup> at paragraph 15.

<sup>166</sup> i.e. where a rule disproportionately affects either men or women, thus raising a prima facie case of indirect discrimination.

<sup>167</sup> at p.7 above.



law on indirect discrimination, the approach of the Commission appears rather piecemeal. It is argued that this is nevertheless a pragmatic strategy, which may have more chance of being transposed into law than the more ambitious strategy which would seek to improve the rights of as many workers as possible by granting free-standing individual employment rights which are not dependent on the form of the employment relationship.

### POSTING OF WORKERS AND RUSH PORTUGUESA

The above analysis has addressed measures proposed by the Commission which explicitly tackle the issue of atypical working. However it is arguably an issue that can be also approached by the Community in a more indirect fashion. An example of this can be seen in the more recent proposal of the Commission (August 1991) in its draft Directive concerning the posting of workers in the provision of services<sup>168</sup>. It is intended to take this draft Directive and the circumstances surrounding its adoption by the Commission as a means of examining another approach to issues of atypical working and the construction of typical working.

This draft Directive is ostensibly concerned with removing legal uncertainties regarding the conflict of law rules applicable to employment relationships in each Member State. It seeks to override national rules on the conflict of laws and the 1980 Rome Convention<sup>169</sup>, by laying down that in respect of certain core obligations within an employment relationship, the law of the Member State in which the work is carried out is to be applied, irrespective of the law otherwise governing the relationship. The explanatory memorandum attached to this proposal goes to great lengths to assure the reader that the proposed Directive has nothing to do with labour law, but is merely a measure designed to facilitate the provision of services.

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<sup>168</sup> COM(91) 230 final.

<sup>169</sup> OJ 1980 L266.



The choice of one of the 'four freedoms' (here: freedom to provide services) as the underlying issue to be tackled by the Directive locates it clearly in the economic sphere. It aims to improve intra-Community trade, by removing the *cost* of legal uncertainty. Arguably a more simple way to do this would be to provide that in all cases the employment relationship is to be governed by the law of the state in which the employer is legally established. The employer is most likely to be familiar with the law of the Member State of establishment and would not have to undergo the additional cost of discovering what the legal regime of other Member States prescribes for an employment relationship.

However this course of action is not open to the Commission because of the ECJ decision in *Rush Portuguesa v ONI*<sup>170</sup>. Here the Court holds (at count [18]) that nothing precludes a Member State from applying its legislation and collective agreements to any person employed even temporarily within the territory. Thus a contradiction emerges between the stated aim of removing the costs incurred through legal uncertainty and the Commission's solution which may well impose increased costs on undertakings engaged in the transfrontier supply of labour. Whereas the ruling in *Rush* is of a *permissive* nature, allowing Member States to apply their own rules to workers in their territory, the proposed Directive is of a *mandatory* nature and so in this sense goes even further than the jurisprudence of the Court. The proposed Directive requires the application of certain 'hard core' rules of the host Member State to workers temporarily posted to its territory, nevertheless this does not seem to prevent a Member State from also applying rules which fall outside this hard core to temporarily posted workers.

The Commission's reasoning also throws up contradictions at the point where it tries to address the issue of distortion of competition, a stated concern of the Directive. At paragraph 9bis it is asserted that pay, although an element of a firm's costs, is not normally considered as affecting fair competition. Only a few lines later though, lower wages and other working conditions applied to posted workers in the place

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<sup>170</sup> see n.128 above.



where the work is carried out are said to potentially distort competition, where undertakings from different Member States cannot compete on the same terms. This distortion could occur it is said wherever an undertaking operating in a Member State is obliged to pay the national minimum wage but which is undercut by an undertaking from another Member State supplying services which is not subject to this minimum wage obligation. The politically difficult question here is to what extent competition within the Community which is based on cheap labour is to be permitted. Generally, the issue can be avoided because higher productivity and technology levels in the high wage states compensate undertakings for the high wages to be paid there and therefore do not put them at a disadvantage when competing with undertakings from other Member States where the level of wages is lower. However in some of the very sectors which are opened up by the internal market especially construction, pay is the major element which gives an undertaking from one Member State a comparative advantage over another. Thus the issue of cheap labour cannot be avoided, because the evidence is clear that undertakings such as Rush Portuguesa will undercut other undertakings of another Member State by paying less than the minimum wage of the state in which the work is actually carried out.

It is clear from the case-law of the Community that any restriction on the 'four freedoms' is to be narrowly defined and construed. Thus as regards the free movement of goods the principle of mutual recognition was developed<sup>171</sup>, which means that goods lawfully produced and marketed in one Member State, can be put on the market in another, thus side-stepping the differing consumer protection regimes in each Member State. It would represent a serious limitation on the freedom to provide services, if this freedom even only as regards the temporary posting of workers were to be restricted by a notion that only fair competition is to be allowed, because this restriction as a matter of fact would take away most of the comparative advantage enjoyed by an undertaking from another Member State. Yet nevertheless the Commission sees the existence of a national minimum wage as a legitimate tool

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<sup>171</sup> in the case universally known as *Cassis de Dijon: Rewe v Bundesmonopolverwaltung für Branntwein* case 120/78 [1979] ECR 649.



of domestic social policy and is wary of undermining this by allowing unfettered freedom to provide services. The political dilemma is heightened by the fact that the Commission cannot be seen to be addressing social issues e.g. improving workers' rights in a measure dealing with the freedom to provide services. Nevertheless the principle articulated by the Court in *Rush* cannot be ignored.

This principle is derived from the 1982 case *Seco v EVI*<sup>172</sup> where the Court begins with the phrase

"It is well-established that Community law does not preclude Member States from extending their legislation..."

In this former case no authority is cited for this principle and the decision can therefore be viewed as another example of the teleological approach favoured by the Court, in that the principle is formulated to suit the facts of the case, in accordance with the aims of the Treaty. Furthermore it must not be overlooked that in *Rush* the Court acknowledges that it is specifically responding to concern expressed by the French government when it holds that Community law does not preclude the application of national legislation to foreign workers temporarily employed on its territory<sup>173</sup>. It is arguable therefore that this passage in the judgment is *obiter*, the case turns on other grounds, and therefore that the Commission need not follow this principle.

Thus the Commission is confronted with this principle in *Rush* which will make it more difficult to exercise the freedom to provide services by reducing the opportunity for competition which makes use of low wages, and on one interpretation it could choose to ignore the principle. Yet notwithstanding the capacity of the principle to effectively reduce competition, especially within the scope of a European-wide public procurement market, the Commission seizes upon it, within the framework of a measure to facilitate the freedom to provide services, in an attempt to prevent competition which regards as 'socially unacceptable' (paragraph 12). This is strong language which perhaps implies that the Commission has a conception of a worker

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<sup>172</sup> [1982] ECR 223.

<sup>173</sup> at paragraph [18].



which goes further than that of merely a factor of production, a cost to a firm. It acknowledges that there is a human dimension and that there are good economic arguments for measures which guarantee a minimum standard of living for workers. In many ways the essential problem faced by the Commission is as stated in paragraph 10 that the completion of the internal market does not bring with it a unification of national social laws. Therefore competition within the internal market cannot take place on a 'fair' basis, but must do so against the background of divergent national systems of social law.

It can be argued that the proposal is in effect responding to one of the concerns of trade unions prior to the internal market in that it prevents one aspect of 'regime shopping', also described as a manifestation of 'social dumping' (Commission 1988: 65; Teague 1989: 321; Rhodes 1991: 251). This is a phenomenon whereby an undertaking, thanks to the high mobility of capital, relocates to the Member State which has the most advantageous regime as regards labour market regulation and indeed back in 1988 the Commission specifically identified the construction sector as having the potential for this social dumping to take place. In this scenario a construction undertaking could choose to locate in the Member State which offers the least control over wages and terms and conditions for workers and then supply labour to any project within the Community according to the labour market conditions of that Member State where the undertaking is based. It is this competition of regulatory regimes that the Commission is seeking to prevent by this draft Directive. That the national regimes are so diverse, thus posing this problem, it is argued, is a consequence of the inability<sup>174</sup> of the Community to develop a coherent social policy and framework for labour regulation<sup>175</sup>. The effect of the proposal, thus reducing the attractiveness of regime shopping, is that all work carried out in a Member State, irrespective of the national labour law regime chosen by the undertaking concerned will be subject to the minimum wage and core working

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<sup>174</sup> owing to lack of Community competence and to political opposition to the concept.

<sup>175</sup> the fear of social dumping it is contended is not without foundation, particularly in the light of the relocation of Hoover from Dijon to Scotland (*Guardian* 30.01.93 p.37; *Times* 02.02.93 p.25).



conditions of that Member State. However this will only apply where these core regulations are laid down by law or binding sectoral collective agreements.

### Personal scope of the posting of workers draft Directive

The draft Directive does address in an indirect manner the rights of workers. For the purpose of our analysis, attention will be paid to whether this indirect approach to workers' rights does permit a different construction of worker to emerge and particularly whether this reinforces or is neutral towards the model of typical working. A starting point is to look at the scope of workers who potentially will benefit from the Directive.

In the light of its complicated standpoint in *Rush* as to the workers that could benefit from an undertaking's freedom to provide services and thereby have rights under Community law<sup>176</sup>, it is interesting that the Commission uses the broad principle of non-discrimination between workers on grounds of nationality (paragraph 18), taken from a measure regarding the rights of migrant workers<sup>177</sup>, as justifying the draft Directive. Initially it might be thought that Regulation 1612/68 already provided a sufficient legal basis from which to assert equality of treatment between posted workers and those of the Member State where the work is being carried out. Article 7(1) of the Regulation provides for non-discrimination on grounds of nationality in respect of '... any conditions of employment and work, in particular as regards remuneration ...'. However the main drawback in using Regulation 1612/68 to apply national laws and collective agreements to posted workers is that it addresses itself to a completely different freedom, that of free movement of workers and is not concerned with the freedom to provide services.

It is precisely the interaction between the freedom to provide services and the free movement of workers that the judgment in *Rush* seeks to explore. At count [15] the Court holds that workers temporarily posted to another Member State to carry out

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<sup>176</sup> see the opinion of the Advocate-General at [16].

<sup>177</sup> Article 7 of Regulation 1612/68: OJ Special Edition 1968 (II) 475.



work as part of a provision of services by their employer do not gain access to the labour market of the host Member State and that therefore this is not the free movement of workers as understood by Community law. However the Court goes on to explain, at count [16], that a temporary employment agency, although a provider of services, specifically enables workers to gain access to the labour market of the host Member State. In such circumstances it would seem that the workers would be exercising their rights of free movement and hence would have to be Community nationals, but as a consequence would also benefit from the provisions of Regulation 1612/68. It is only by way of analogy therefore that the Commission can refer to Regulation 1612/68 in its proposal for a Directive. The developing case-law clearly indicates that the freedom to provide services and the free movement of workers are conceptually separate issues. Within the framework of free movement of workers the individual right to non-discrimination on grounds of nationality is established and well-developed in the case law<sup>178</sup>. The Court has also for the purpose of free movement of workers developed in its case law a broad Community concept of worker<sup>179</sup>. However within the freedom to provide services, even the notion of a worker is less clearly defined, let alone the rights such a worker may enjoy. The Commission proposal for a Directive drawing on the case-law does nevertheless reveal the most important characteristic of a worker whose employer is exercising the freedom to provide services: this worker does not have to be a national of a Member State. Thus migrant workers (extra-Communitarians) are to a very limited extent brought within the scope of Community law. It has already been established that the Community has the competence to make provision for non-Community workers in specific respects, despite certain Member States' arguments to the contrary<sup>180</sup>. Nevertheless the case-law does not as yet give rights to the individual extra-Community workers, whereas the draft Directive would grant certain enforceable rights under Community law<sup>181</sup> to extra-Communitarians.

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<sup>178</sup> e.g. *Sotgiu v Deutsche Bundespost* [1974] ECR 153.

<sup>179</sup> see generally Steiner (1990) chapter 18.

<sup>180</sup> *Germany v Commission* (Article 173 proceedings) [1988] 1 CMLR 11.

<sup>181</sup> assuming that the Directive were properly transposed into national law and therefore ignoring problems of vertical direct effect.



Imagine a Polish worker (extra-Communitarian) working legally in Germany for a German employer. The employer wins a construction contract in France and posts the worker temporarily to France. The employer's right of freedom to provide services seems to imply that the worker cannot ordinarily be refused entry to France, any more than a Community national can be refused entry. This is supported by the dictum in *Rush* at count [17] that the freedom to provide services cannot be rendered illusory nor may its exercise be made subject to the discretion of the authorities. As a matter of Community law under the Directive as proposed, the employer would have to observe the French laws and national collective agreements on working time and the minimum wage vis-à-vis the Polish worker. Whereas the employer might lawfully discriminate as a matter of national law against the non-Communitarian on grounds of nationality, this would not be possible under Community law to the extent that the employer were exercising a Community right of freedom to provide services.

### Material scope

The personal scope of the term 'worker' as revealed in the proposed Directive appears to be very wide because of its inclusion of extra-Communitarians. The material scope of the protection granted to the worker however crucially depends on national law. Thus a posted worker can never be better off than a worker of the host Member State in similar circumstances. By relying on national law (probably as a matter of political expediency) the Commission's proposal allows Community law to reproduce the division between those who are protected by national legislation and collective agreements and those who remain unprotected. It is well documented how national systems of legislation and collective bargaining coincide in allowing certain groups of workers to fall through the net of protection<sup>182</sup>. The draft Directive will allow this pattern to be replicated as regards posted workers.

Of particular concern is that national differences in collective bargaining structures will mean that the material impact of the Directive varies considerably from one

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<sup>182</sup> for the UK see Dickens (1988).



Member State to the next. Where for example working hours or the minimum wage are not determined by legislation, reference must be had to the collective agreement. Unless the collective agreement (i) covers the whole of the occupation and industry concerned and (ii) has an erga omnes effect or is made legally binding in the occupation and industry concerned, its provisions relating to working hours, etc. do not have to be applied to posted workers (Article 3(1)(a)). A Member State may presumably rely on *Rush* to apply local collective agreements to posted workers, if it so wishes, but this does not empower the worker to claim the same conditions as those applying in the host Member State. The inclusion of only industry or occupational collective agreements does not seem to accord with the European trend towards decentralised collective bargaining arrangements i.e. away from the industry or occupation in favour of the level of the enterprise (Streeck and Schmitter 1991). A further weakness in the proposal is that two of the crucial 'hard core' provisions of the host Member State relating to the minimum wage and minimum paid holidays only are to be applied to posted workers, where their posting is for more than three months (Article 3(2)). The Commission justifies this exclusion because of the marginal nature and number of such postings (paragraph 26). The memorandum offers however no data as to the volume of postings within the Community, nor the median duration of the postings. Therefore it is not possible to judge the accuracy of the Commission's contention as to the marginality of such postings.

As a matter of Community law a worker even within the provision of services is widely constructed. The posted worker is constructed independently of other workers: the rights granted are without reference or comparison to those granted to the workers in the host state. There is no implicit allusion to a standard of typical working. The proposal of the Commission nevertheless fails to achieve equality between workers. The requirement that a collective agreement must be binding (or of erga omnes nature) and cover the whole industry or occupation means that a posted worker who is sent to the UK could find themselves in a worse position than their British counterpart. Whilst working hours in the UK may well be regulated by industry level collective bargaining, it would be difficult to say that these have an erga omnes effect and the presumption is certainly that they are not legally binding



as between employers and trade unions. In such circumstances therefore there would be no duty on an employer to apply the same working time arrangements to a posted worker as those which would apply to a British worker. Thus as a matter of practice the principle of equality is easily offended. Furthermore the rule of Community law which permits reverse discrimination<sup>183</sup> means that the principle of equality is not affected if a Member State chooses to impose higher standards on its own national undertakings than those which will have to be applied to undertakings employing posted workers. This principle of reverse discrimination is probably due to the Court's desire to protect the primacy of the so-called 'four freedoms' and to restrict the impact of national measures which would otherwise amount to de facto protectionism. Thus any rule laid down by law or binding collective agreement which does not fall within the scope of Article 3(1)(b) of the draft Directive does not have to be applied to the posted worker whilst nevertheless still applying to a worker of the host state. Seemingly equality between workers is subordinate to the freedom to provide services.

A further drawback to the proposed legislation, clearly indicating its location within the realm of the freedom to provide services becomes apparent when agency workers (i.e. those workers placed with a user undertaking by a temporary employment business) are considered. Agency workers posted to a user undertaking in another Member State would be covered by the Directive (Article 2(b)) and so terms of binding collective agreements would have to be applied to them insofar as they related to the 'hard core' of rights. Alternatively on the basis of dicta in *Rush* they could argue that by gaining access to the labour market they were in fact exercising rights of free movement and thereby covered by Regulation 1612/68. However where an employer undertaking places one of its agency workers with a user undertaking in the same Member State there has clearly been no exercise of a freedom to provide services as a matter of Community law. The Court has repeatedly held that in such situations, which are wholly internal to one Member State, Community law has no

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<sup>183</sup> in the field of free movement of persons see e.g. *Knoors* [1979] 2 CMLR 357.



application<sup>184</sup>. Thus an agency worker in such a situation would not be able to invoke the Directive to get an occupational collective agreement extended in the same way that an agency worker would be able to if their employer were enjoying the freedom to provide services. This further illustrates the extent to which factual equality between workers would not be achieved through the Directive.

The approach to this draft Directive which starts from a standpoint aiming towards equality between workers, is significantly different to that which can be detected in the Commission proposals on atypical working. A fundamental difference between the two proposals is that a worker does not have to be able to demonstrate that the label employee applies to her/him in order to fall within the scope of the posting of workers Directive, thus shifting the emphasis from form to substance. Following on from this point, it can also be stated that there is no allusion to a preferred form of contractual working arrangement in the posting of workers Directive, no impression is created of a hierarchy of forms of working pattern, again in contrast to the atypical working Directives. Whilst the rights of posted workers cannot be defined in abstract and without any reference to any other workers, it is argued that their rights are constructed in a manner which is fundamentally based on a premise of equality. This premise of equality is lacking from the atypical working proposals, the theme which in contrast runs through these proposals is one of assimilation and which thereby gives a normative impetus to the model of typical working.

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<sup>184</sup> recently restated in *Steen v Deutsche Bundespost* case C-332/90 [1992] I-ECR 341.



## Conclusion

The major conclusion to be drawn from this work relates to the powerful nature of the model of typical working. It was shown in the first chapter that similar rules of law can be found in conceptually different national legal systems which when taken together reveal very clearly a legal picture of typical working. This model or picture of typical working is established by searching for the criteria in law which determine whether a worker is within the scope of legal protection and which determine the nature of the worker's rights. At all times atypical represents that which is divergent from typical.

The historical analysis serves to highlight the different levels of legal regulation of employment and seeks to offer an explanation, wherever this is possible, of how the legal rules at each level of regulation developed. An awareness of how rules develop which contribute to the model of typical working is vital in order to be able to scrutinise new proposals for legal regulation so as to detect what their true impact will be on the model of typical working. The obvious conclusion here is that the Commission's proposal designed to address issues of atypical working, when stripped to its essential elements would if implemented contribute heavily to the model of typical working and do little to alleviate legal disadvantage, which is the substance of atypical working. Furthermore, the divergence between typical and atypical would become even more apparent, in that homeworkers, the fake self-employed and, were the proposal to be implemented unamended, those who work less than 8 hours per week<sup>185</sup> would be at a greater legal disadvantage in relative terms in that their legal position would have not been improved whereas the rights of other workers in patterns of atypical working would have been improved.

A further conclusion that can be drawn from the work relates to the difficulty of extending Community social policy. The sum total of the various competences of the Community have, it must be argued, been used creatively to carve out a role for the

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<sup>185</sup> but note the challenge of the law on indirect discrimination p.68 above.



Community in matters of labour law. In one respect the Community is the victim of its own success: the law on sex discrimination is a major achievement of Community policy and owes a lot to the politics of the ECJ, yet its influence is so great that subsequent social policy legislation requires close scrutiny to ensure that does comply with equality code. It has been shown here that aspects of the proposed atypical work Directives are on one possible interpretation, clearly not in line with the dynamic law on sex discrimination.

An issue also touched upon and of practical significance is that the Community competence is subject to the doctrine and concept of subsidiarity. It must be noted that the proposals discussed in this work remain as yet unadopted and it seems likely that their own chance of adoption now is under the protocol which allows eleven Member States to develop social policy without the participation of the UK. The need for the Community to justify its actions in the face of increasingly hostile national reaction means that the Commission has to act very shrewdly in the way it presents legislation for workers' rights. This almost certainly must account for what appear to be shortcomings in the proposals. Many would like to see bolder proposals, but the Commission has to be sensitive to political reality. Nevertheless it is still valid to point out the consequences for typical and atypical working of the proposed Directives.

Overall it is hoped that this rather different approach to the issue of atypical working will have contributed to the debate as to the nature of *atypical* and as to the possible ways that law can accommodate different patterns of working.



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