Institution: University of Oxford

Unit of Assessment: 20 - Law

Title of case study:

Reducing the risk of enforcing 'sham' contracts of employment through a new interpretive approach to the law.

1. Summary of the impact

Research by Professors Alan Bogg and Anne Davies was influential in reforming the judicial approach to the interpretation of contracts of employment. For many years, English courts construed contracts of employment primarily by reference to the written agreement between the parties. This permitted a form of abuse called 'sham self-employment', in which employers draft contracts in such a way as to create the false impression that individuals are self-employed, rather than employees or workers, so that they are not entitled to statutory employment rights. Work by Bogg and Davies was heavily relied upon by the Supreme Court, which, in a key decision in *Autoclenz*, acknowledged the problem, and held that courts and tribunals should henceforth be more alert to situations in which the written agreement between the parties does not reflect the true nature of their relationship. The ruling affects working people throughout the jurisdiction and in all sectors of the economy. Bogg and Davies' research thus made it more difficult for employers to use these unfair, 'sham', arrangements to abuse workers.

2. Underpinning research

Alan Bogg, Professor of Labour Law, (Oxford, 2003-present) works on various aspects of labour and employment law and has published a number of important recent articles in peer-reviewed journals on issues relating to the contractual dimensions of employment **[Section 3: R1, R2 and R3]**. Anne Davies, Professor of Law and Public Policy (Oxford, 2001-present) works on various aspects of labour and employment law and has published a number of important articles in peer-reviewed journals, and a book chapter, on issues relating to the personal scope of employment law **[R4, R5 and R6].** Their research, though mutually supporting, was carried out independently.

The courts' traditional approach to the interpretation of contracts in the employment setting was to focus on the written agreement between the parties, just as they would if interpreting a commercial contract. A difficulty with this approach is that the employment setting – as highlighted in the research noted above – is often marked by significant inequality of bargaining power between the parties. The employer is generally in a strong position and, with legal advice, can draft the written contract and present it to the individual on a 'take-it-or-leave-it' basis. This means that, under the traditional approach, the *employer's* presentation of the relationship was treated by the courts as the *agreement* between both parties.

In studying these contracts and their interpretation, Bogg and Davies's research identifies these problems, shows how they arise out of the interpretative posture of the traditional approach, and suggests how the attendant risk of abuse can be reduced. Their method is to offer a detailed analysis of the case law informed by the social context in which the law applies. They show that contractual relationships in the employment setting are marked by significant inequality of bargaining power and, in this respect, diverge considerably from commercial contracts, and therefore should be interpreted and enforced differently. Over a period of many years, the standard interpretive posture of the courts looked solely at the contract documents, giving scope for the possibility of 'sham self-employment', in which employers draft contracts, or use 'off the peg' standard form contracts, to create the impression that individuals are self-employed, not employees or workers, so that they do not qualify for statutory employment rights The courts' approach to sham transactions is appropriate for settings such as taxation in which the two parties to an agreement work together to deceive a third party (usually the Revenue) as to the nature of

their transaction. However, this approach is not relevant to employment settings, in which the employer proposes a contract and the individual may not fully understand its significance. English courts have adopted a nuanced and contextual approach to sham transactions in other fields of law, notably the landlord and tenant cases in which landlords purported to grant licences instead of leases in order to avoid statutory rent control**.** Bogg and Davies show that this technique could also be applied in the employment context, and that to do so would improve the fairness and justice of these transactions. The courts' new friendliness to this approach results in part from their reliance on this research.

3. References to the research

The key outputs from the research were academic articles published in leading general and specialist peer-reviewed journals, and a book chapter:

[R1] Alan Bogg, 'Sham self-employment in the Court of Appeal' (2010) 126 *Law Quarterly Review* 166.
[R2] Alan Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve?' (2011) 32 *Comparative Labor Law and Policy Journal* 729.
[R3] Alan Bogg, 'Bournemouth University v Buckland: Re-establishing Orthodoxy at the Expense of Coherence?' (2010) 39 *Industrial Law Journal* 408.
[R4] ACL Davies, 'Sensible Thinking About Sham Transactions' (2009) 38 *Industrial Law Journal* 318.
[R5] ACL Davies, 'The contract for intermittent employment' (2007) 36 *Industrial Law Journal* 102.
[R6] ACL Davies, *Perspectives on Labour Law* (2nd edn, CUP, 2009), chapter 5.

4. Details of the impact

The entitlement to statutory employment rights such as the national minimum wage or the right to claim a redundancy payment depends upon being classified as a 'worker' (for the minimum wage) or an 'employee' (for redundancy). An individual's status as an employee or worker depends upon the terms of the contract they have with their employer. But the employer's ability to draft the contract may be, and sometimes has been, used by unscrupulous employers to create the impression that the individual is self-employed, not an employee or a worker, and therefore not entitled to such employment rights. This enables some employers to evade the protections afforded to workers by legislation, and there is a danger that even employers acting in good faith will be led by their legal advisors to think that this evasion is a legitimate business practice.

This unsatisfactory situation caused unfairness and gave rise to a large volume of litigation over many years. Claimants tried to persuade the courts that they counted as employees or workers despite appearances to the contrary in written contract documents: see, for example, *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *Firthglow Ltd (trading as Protectacoat) v Szilagyi* [2009] EWCA Civ 98, [2009] ICR 835; *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430, [2008] IRLR 505. These cases demonstrate sharp divisions in the Court of Appeal, divisions that could only be resolved by a definitive ruling by the Supreme Court. It was on these Court of Appeal cases that the research of Bogg and Davies focused, providing a timely and relevant analysis of the problem, and arguing for a particular solution should an appropriate case reach the Supreme Court. It did in the case of *Autoclenz Ltd v Belcher* **[C1].** Because their work was well regarded and known to counsel, the Bogg and Davies analysis informed the Supreme Court, which relied on their work in deciding to reverse the traditional approach.

The claimants in the case worked as car valeters for Autoclenz on a piecework basis, as self-employed contractors paying their own insurance, tax, and National Insurance. Autoclenz then required the valeters to sign contracts containing a substitution clause, allowing them to engage others to work on their behalf, and a 'right to refuse work' clause. This contract expressly stated that they were independent contractors. However, Autoclenz expected a valeter not coming into work to give adequate notice of his absence (though it was accepted that none had ever done so and that the valeters were unaware of this provision.) The valeters claimed they were in reality employees or, in the alternative, workers entitled to at least some statutory rights. The claimants won at first instance, but in an ascending series of appeals the various tribunals vacillated, being pulled sometimes by the traditional approach, sometimes by considerations of fairness and a wish to give effect to protective legislation. Finally, in an important and unanimous decision, the Supreme Court reversed the traditional approach, recognising that it produced unjust results. Lord Clarke summed up the decision as follows:

'So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.' [35] Paragraph 28 of Lord Clarke JSC's judgment (written for the Court) cites the research identified in Section 3, describing the article by Bogg **[R1]** as 'valuable' and the article by Davies **[R4]** as 'illuminating'. This work by Bogg and Davies is the only academic research cited in this pivotal decision, which relies on its analysis and adopts the interpretative policy recommended therein.

As a result of this ruling, all courts and tribunals *must* now look beyond the written contract between the parties whenever it is alleged that this does not reflect the true nature of the individual's employment arrangements. Tribunals and lower courts are bound to follow the decision as a matter of precedent, and a new line of case-law is already beginning to develop: see, for example, *Weight Watchers (UK) Ltd v Revenue and Customs Commissioners* [2011] UKUT 433 (TCC); [2012] STC 265 **[C2].** The ruling must therefore also influence the legal advice offered to employers on the drafting of contracts.

The Supreme Court's decision is highly significant in both law and policy. It has reversed a longstanding line of case-law applying the traditional, contractual approach in the employment setting, thus changing a body of law that applies throughout the jurisdiction and in all sectors of the economy. The judgment will be of particular significance to those who occupy what has been described as a 'grey area' in the labour market, where there is a degree of uncertainty over their employment status (neither clearly employees nor clearly self-employed). This group has been estimated to stand at 30% of the national labour force in Burchell, Deakin and Honey, *The Employment Status of Individuals in Non-Standard Employment* EMAR Research Series no. 6 (London: DTI 1999). The overriding effect of the Supreme Court's decision will be that individuals in that 'grey area' are now much more likely to be characterised as workers or employees. The decision increases the availability of employment rights to individuals who are in reality workers or employees even though their written contracts suggest otherwise. This has increased the reach and effectiveness of protective employment legislation **[C3]**. In coming to this conclusion the Supreme Court had recourse to the work of Boggs and Davies in both its critical and affirmative aspects. The Supreme Court does not often make such recourse. One of the leading current textbooks **[C3]** on labour law describes the Court's ruling as 'notable' for its reliance on Bogg and

Davies's research.

5. Sources to corroborate the impact

[C1] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157, especially paragraph 28. (UK Supreme Court) The leading judgment.

[C2] *Weight Watchers (UK) Ltd v Revenue and Customs Commissioners* [2011] UKUT 433 (TCC); [2012] STC 265: the new approach applied.

[C3] S Deakin and GS Morris, Labour Law (sixth edition, Hart Publishing 2012), page 154, fn 124: on the significance of the decision and the research it cites.