Joint Employers Status in Triangular Employment Relationships

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Abstract: The article focuses on the question of who should be considered the legal employer in triangular employment relationships. It is argued that outsourcing of employer responsibilities to temporary work agencies is illegitimate with regard to long-term employees and must be curtailed. It is further argued that even in the case of short-term ("traditional") employment through agencies, there is reason to place some employer responsibilities with the user firm, since the characteristics of employment that put workers in need of protection can be found, to some extent, in both of the worker's relationships. The suggested solution, which draws from European as well as North-American models (with some modifications), supports regulations directed at preventing agency employment abuse, but at the same time would place employer responsibilities with both agency and user firm, jointly and severally, from the first day of employment.

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I. Introduction

The flexibility of businesses is crucial in the age of the new economy. But can it be justified when achieved on the back of the weakest workers? Should we allow it regardless of distributive justice implications, not only as between employers and workers, but particularly between different groups of workers themselves? This general theme is discussed in this article through the lens of a specific problem: the "outsourcing" of employer responsibilities towards *long-term* employees to temporary help agencies. This widespread practice is used to achieve flexibility, but often has grave implications for the "temporary" workers involved (see, e.g., Nollen, 1996).

The article discusses the legal regulation of this phenomenon. It should be clear that law and industrial relations are inseparable in this context. The use of temporary help agencies to create dual internal labour markets has been triggered, to a large extent, by the law: by the "burdens" created by labour and employment

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regulations. But such regulations exist for a reason. While the benefits of flexibility must be acknowledged, attempts by employers to avoid the application of labour laws must be carefully monitored and in some cases curtailed. The law must react to changes in industrial practices, just as industry reacts to changes in the law. My aim is to examine attempts that have been made in different parts of the globe to address abuse of the temporary help system – with very limited success – and to suggest another approach.

Temporary help is a rapidly growing industry (see, e.g., Estavao & Lach, 2000). The basic, traditional role of temporary work agencies has been – as their name suggests – to supply workers to clients who require *temporary* help, whether to replace an employee who is sick or on maternity leave, or otherwise to perform a task which is needed for a short duration. The workers ("temps") perform work for the same "user" only for a few days or weeks, or sometimes months, then moving from one placement to another. The only relatively stable relationship that they have (work-wise) is with the agency. Such intermediary in the selling of labour has been illegal in some countries in the past, but its legitimacy is hardly contested anymore (ILO, 1997; Vosko, 1997, 1998).

In the last two decades temporary work agencies have begun offering a number of *additional* services (see, e.g., Magnum et al., 1985; Carre, 1992; Vosko, 2000). This can be seen as a direct response to the new needs of businesses (see generally Golden, 1996). In particular, heightened global competition puts pressure on firms to continuously look for new ways to cut costs; flexible specialization and "just in time" industries have increased the need for "numerical flexibility," that is, flexibility with regard to the number of workers at any given time; and new ideas supporting the focus on core competencies have prompted massive outsourcing. In

some countries, the temporary help industry now offers it all; agencies take over many of the "burdens" of being an employer by accepting the title of a legal "employer" even with regard to employees that work for the same firm for long or indefinite periods of time. Since the agencies are able to pay the workers significantly less and are not bound by job security agreements, firms can cut costs and gain flexibility. They also let go of some of the "headache" associated with dealing with employees, whether it is hiring, firing, payroll, unemployment insurance and workers' compensation payments, and so on (Vosko, 2000, chapter 4). In some cases it amounts to nothing less than complete "outsourcing" of employers' responsibilities. Obviously such services have little to do with the assignment of "temps" anymore, but they are often offered by the same agencies.[1]

The relationship between the agency, the client and the worker is the most common form of what is known as "triangular" or "tripartite" employment relationships. A basic problem raised in such relationships is who should be considered the legal "employer" of the worker in question. This is the "flip side" of the age-old legal problem of identifying whether one is an "employee" (as opposed to an "independent contractor"). While there is no doubt, in triangular employment relationships, that the worker is an "employee" (with the exception of Britain, discussed below), the question is who should assume the legal responsibilities of the employer, whether the agency or the user firm. The answer is crucial for everybody involved. Workers enjoy a different salary, and a vastly different package of rights and benefits, if they are employees of the user firm. They are also less at risk of losing some of their entitlements as a result of the employer's insolvency, since the agencies, especially smaller ones, can be expected to be at a higher risk of becoming insolvent.

[1] See, e.g., the U.S. National Association of Professional Employer Organizations web site (www.napeo.org), and the American Staffing Association web site (www.natss.org).

The firms themselves, on the other hand, tend to assume that the agency is the employer, and rely on this assumption when choosing triangular relationships. The agencies similarly rely on the same assumption when offering their new services, which now make a significant part of their businesses. Yet it is not at all clear that this is, or should be, the case. The identification of the employer in the context of protective labour and employment laws is the subject of this article. It begins by distinguishing between two different roles played by temporary work agencies: the traditional role of supplying work services for short periods of time versus the more recent role of supplying "payrolling" services. Section III then provides a brief overview of the current state of the law in different countries. We then move to discuss who *should* be considered the employer in both situations. Section IV argues that when the part of the agency is limited to "payrolling," any attempt by the user to avoid the legal responsibilities of the employer should be nullified. Section V deals with the more complicated cases in which the relationship is truly triangular, in the sense that both the user firm and the agency play significant parts. I will offer a solution for determining who should be the employer in such cases, based on a purposive interpretation of labour and employment regulations.

II. The Two Faces of Temporary Work Agencies

It has been argued that the temporary employment relationship is being developed as an alternative to the standard employment relationship (Vosko, 2000, chapter 4). Temporary work relations, however, and in particular employment through temporary work agencies, come in very different forms and shapes that cannot be grouped together. For our purposes here it is important to distinguish between two different scenarios (Galin, 2001). In real life there are numerous other situations in

between – some of them will be considered below as well – but the dichotomy is useful to understanding the very different roles played by temporary work agencies. At one end, there are the traditional services supplied by the agencies: workers who perform short-term temporary work for a client, then moving to do the same for another client. The only longer-term and stable relationship that these workers have (work-wise) is with the agency. At the other end of the spectrum, there are cases in which the only service provided by the agency is "payrolling" (Magnum et al., 1985, at 604; Carlson, 1996). The worker is engaged for a long term, usually indefinitely, and performs her work just like any employee of the firm. The only difference from other employees is that this worker gets her paycheck from the agency. The agency is not involved in decisions on hiring, wage-setting or firing, and certainly not in the allocation of tasks and supervision of the worker. The agency plays a very minor role. It gets a payment from the user firm every month that includes the salary, the employer's mandatory contributions to unemployment insurance etc., and commission. It then makes the necessary tax deductions, sends the paycheck to the employee, the taxes and other employer contributions to the relevant governmental agencies, and keeps the commission.

Perhaps the most puzzling part of this "payrolling" model is how the agencies are able to give inferior wages and terms, so much so that even after adding the agencies' profit firms are still able to cut costs. This is most obvious in a unionized setting, where by using another "employer," firms can take workers out of the bargaining unit – assuming that the law allows it – and avoid payment of all the gains achieved by the union. They are thus able to carve out a non-unionized "sector" within the unionized workplace.

More generally, even in non-unionized settings, firms face pressure to give all

comparable "employees" the same terms and conditions. To some extent such pressures are legal, based on anti-discrimination legislation. It is illegal in most countries to pay less on the basis of gender or race, for example. When firms create a lower class of employees, there is a good chance that it will be consisted of a high percentage of women and minorities. Moreover, in some contexts legislatures have made additional limitations on the ability of employers to treat employees unequally.[2] This means that even in non-unionized firms, there are limitations on the ability to pay some workers less than others or to give inferior benefits. There are also non-legal difficulties with such practices. If some get less than others, this can be expected to damage their motivation and productivity, and also to create fear among the better paid employees that they might soon be replaced by their cheaper-to-employ colleagues. This may cause problems such as refusal to cooperate with those colleagues (see generally Lindbeck & Snower, 1988). By attaching some workers to a formally different employer (the agency), the firm will still face a problem of lower motivation among them, but presumably will be able to lessen the problem of other employees, who can be expected to feel less threatened by workers who are so obviously inferior to them in their status. Hence, by using the temporary work agency for "payrolling" purposes, the user firm hopes to create a lower class of employees, with reduced wages and lesser terms, without facing legal limitations and with lesser problems of motivation and cooperation among workers.

An additional cost-cutting potential is the ability to escape inclusion within the scope of regulations that apply only to employers with more than a specified number of employees. By using employees of another employer (the agency), firms with small

[2] See, e.g., Employee Retirement Income Security Act (U.S), 1974.

numbers of employees are able to stay below the threshold (Dennard & Northup, 1994).

Lastly, there is also the issue of compliance with employment laws and other legal requirements. This is more relevant to the small and less established agencies, who sometimes offer cost-cutting simply by illegally ignoring some legal requirements. In such cases, firms that comply with all the legal requirements themselves may be willing to turn a blind eye to violations by the temporary work agency. This is yet another explanation for the possibility of cutting costs by using the "payrolling" services.

III. The Current State of the Law: A Comparative Overview

There are four possible answers to the question of who should be considered the "employer" of workers through temporary work agencies. Two obvious possibilities are the agency and the user firm, but the answer could also be neither or both. As we shall see, in Britain the answer is usually neither, in most European countries the answer is the agency, in Canada it is usually the user firm and in the U.S. it is quite often both. So a full range of possible answers is represented in different parts of the globe.

Another way to describe the differences between different jurisdictions is by comparing their regulatory approaches. Here too there seem to be four different approaches. The two main methods to prevent abuse of the temporary work agency system and to protect those who work through such agencies are by detailed specific regulations (as in many European countries) or simply by defining the user firm as an employer (as in North America). There are also those who do nothing (e.g. Britain) and those who attempt to combine both approaches (e.g. Israel).

Let us begin with Britain, which is unique in the absence of any systematic measures to prevent attempts by employers to avoid their responsibilities simply by using temporary work agencies. Based on a formalistic contractual analysis, British courts maintain that the user firm cannot be the employer.[3] As for the agency, in principle it is acknowledged that both the general engagement and specific engagements (work for a particular client) can create an employment relationship between the agency and its workers.[4] In practice, however, based on the dubious "mutuality of obligations" doctrine, and the lack of significant control, in virtually all cases British courts deny the existence of such a relationship.[5] Workers through temporary work agencies in Britain are thus neither employees of the agency nor employees of the user firm. This failing has been corrected in some specific instances by the legislature, to ensure minimal protection for those workers.[6] But leaving aside

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3 See recently *Montgomery v. O & K Orenstein & Kopple Ltd and Johnson Underwood Ltd*, 2000 WL 491412 (ETA). It should be noted, however, that anti-discrimination laws have specific provisions to protect "contract workers" (see Sex Discrimination Act 1975, s. 9; Race Relations Act 1976, s. 9; Disability Discrimination Act 1997, s. 12) and these provisions have been interpreted to allow agency workers to bring suits against user firms (see, respectively, *BP Chemicals Ltd. v. Gillick*, [1995] IRLR 128 (EAT); *Harrods Ltd. v. Remick*, [1997] IRLR 583 (C.A.); *Abbey Life Assurance Co. Ltd. v. Tansell*, [2000] IRLR 387 (C.A.)).

4 See *McMeechan v. Secretary of State for Employment* (1997) IRLR 353 (C.A.).

5 See, e.g., *Wickens v. Champion Employment* (1984) I.C.R. 365 (EAT); *Costain Building & Civil Engineering Ltd. v. Smith*, [2000] I.C.R. 215 (EAT); *Montgomery v. Johnson Underwood Ltd.*, [2001] I.C.R. 819 (C.A.). The case of *McMeechan, supra*, note 2, is a rare exception, but should be understood in light of the particular context (an application to the Secretary of State for payment when the agency became insolvent). The potential of this case was significantly narrowed by the decision in *Montgomery, ibid.* This last case is illustrative of the British courts' approach. Ms. Montgomery was assigned by an agency to work for a company for an indefinite duration, then worked for more than two years until being fired for using the phone for personal calls. She was unable to bring suit for unjust dismissal because, according to the Court, she was neither an "employee" of the company nor of the agency. A more formalistic and illogical conclusion, with complete ignorance of the purpose of the legislation in question, is hard to find. Most of the judges at the different instances seemed to be aware of this problem, but satisfied themselves by calling for legislative action. For another recent example of a formalistic contractual analysis see *Hewlett Packard Ltd. v. O'Murphy*, EAT judgement of Sep. 26, 2001 (a computer specialist working 6 years solely for HP, together with its employees and doing the same work, was ruled not to be an employee because formally HP only contracted with a temporary work agency, which contracted with a one-man company formed by the worker, which contracted with the worker himself).

6 Agency workers are explicitly included within the scope of the following pieces of legislation: protection for "whistle-blowers" (Employment Rights Act 1996, s. 43K, added by the Public Interest Disclosure Act 1998, s. 1; the employer for this purpose is the person who substantially determines the terms on which the worker is engaged); the right to be accompanied at a disciplinary or grievance hearing (Employment Relations Act 1999, s. 13; both the agency and the

these minimal, pointed corrections, nothing has been done to prevent the use of the agency system by employers to escape responsibility. Draft regulations concerning employment agencies, which were recently laid before Parliament, make no attempt to change this.[7]

While in Britain those who work through agencies are usually not "employees," elsewhere the "employee" status is undoubted, and the question is who should bear the responsibilities of the employer. Generally speaking, courts and legislatures in most countries have traditionally considered the temporary work agencies to be the legal employers of workers in triangular relationships. As long as the agencies performed only their traditional role, this made sense from the point of view of maintaining some stability for the workers in question. Within the triangle, only the agency could offer the workers a relationship with some level of stability, even if minimal. Indeed, it was only as an employee of the agency that the worker could be employed long enough to become eligible for some basic rights and benefits. And it was only with the agency that the truly "temps" could bargain collectively – if they could overcome the inherent barriers to unionization – concerning the unique terms of their engagement, particularly with regard to security, in the sense of some right to be offered work or otherwise get paid between engagements.

The categorical view of the agency as the employer, however, opens the gates for abuse. The "payrolling" system – an attempt by employers to avoid their responsibilities simply by paying the employee through an agency – is an extreme

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user firm are considered employers for this purpose); minimum wage and working hours rights (National Minimum Wage Act 1998, s. 34, and Working Time Regulations 1998, s. 36; for these purposes, the one responsible for paying the worker is considered to be the employer).

[7] See the draft Conduct of Employment Agencies and Employment Businesses Regulations 2002 (available at http://www.dti.gov.uk/er/agency/newregs.htm), especially section 15(a), which reiterates the meager requirement included in the current regulations that an employment business shall specify to the worker in advance whether he will be employed as an employee or as an independent contractor (Conduct of Employment Agencies and Employment Businesses Regulations 1976, s. 9(6)).

example. But while in some countries (as in Britain) there are no general measures to prevent such abuses, most countries have put significant barriers in place (Storrie, 2002). Many European countries now have detailed regulations to prevent abuse in the use of temporary work agencies. Interestingly, the European legislatures have opted for preserving the role of the agency as the legal employer.[8] But they have put in place three main forms of protections (whether all or part of them, depending on the country) – in effect, three lines of defense against abuse by employers.

First, there are regulations that directly attempt to restrict the use of agencies to their traditional role. Within this category, there are restrictions on the *length* of employment through agencies; in Germany, for example, the use of such workers is limited to 12 months (Weiss, 1999). There are also restrictions on the *reasons* for employing workers through an agency; in Belgium, for example, the use of such workers is allowed only when needed to replace a permanent employee, respond to a temporary increase in activity, or perform an exceptional work (Vanachter, 1999).

The second group of regulations is designed more directly to protect the affected workers, and at the same time to minimize the *incentive* for abuse. This includes in particular the right of workers through agencies to parity of wages, and sometimes parity with regard to other working conditions, with the user firm's employees (Storrie, 2002, at 21-23; European Commission, 2002, Article 5). There are also some guarantees for the ability of agency workers to participate in unions' and works councils' activities in the user firm, although these tend to be rather minimal; for the most part, they are expected to exercise their collective bargaining rights vis-a-vis the agency (Storrie, 2002). Sometimes the law places specific employer responsibilities on the user firm, even though it is not formally considered

[8] A draft EU Directive on this subject similarly maintains, or at least assumes, that the agency should be regarded as the employer (European Commission, 2002).

the employer. This is common with regard to health and safety, but in some countries goes further to include overall responsibility for working conditions (including working hours, rests, holidays etc.) (e.g. Smith-Vidal, 1999). More generally, in most countries the agencies must have a license, which often involves the deposit of financial guarantees (e.g. Smith-Vidal, 1999); this is expected to minimize occurrences of insolvency and fraudulent operations. In addition, many legal systems have restrictions designed to protect the regular employees of the user firm. Thus, for example, it is commonly prohibited to use agency workers as replacements for striking employees (e.g. Biagi, 1999; Smith-Vidal, 1999). There are also restrictions on the employment of agency workers instead of employees who have been collectively dismissed (Biagi, 1999). In some countries the representatives of the firm's employees even have a right to veto the use of temporary work agencies (Nystrom, 1999; Weiss, 1999).

The third and final line of defense in many European countries is to declare the user firm the legal employer when the employment of agency workers has deviated from the legislation's requirements. Thus, for example, according to the French Labour Code, a worker is deemed to be working for the user firm under an indefinite employment contract, from the first day of her assignment, if she was employed through an agency for longer than the maximum period allowed or for reasons other than those stipulated in the Code.[9]

These measures, especially when used together, attempt to ensure that temporary work agencies are used only in their traditional role and not to evade employer responsibilities. A vastly different route towards the same goal is found in North America. In Canada, there are no clear guidelines regarding temporary work

[9] Section L.124-7 of the Labour Code.

agencies, neither in legislation nor in case law. Courts and labour boards determine the identity of the employer on a case-by-case basis. In the context of collective bargaining, labour boards are using a list of indicia somewhat similar to the one used to determine if one is an employee rather than an independent contractor.[10] The central issue is considered to be who exercises "fundamental control" over the employee,[11] and in most cases this was found to be the user firm.[12] This seems to be true even when the engagement is for a relatively short term; the courts in Canada seem to believe that given the difficulties inherent in any attempt by the "temps" to bargain collectively with the agency, the workers are better off being part of the same bargaining unit as the user firm's permanent employees.[13]

While the issue has been extensively litigated in the context of collective bargaining, surprisingly it is yet to be decided in the context of employment standards (England & Wood, 1998). In addition, however, both labour relations acts and employment standards acts in most Canadian jurisdictions include "related employer" provisions, according to which two or more related employers can be treated as one for the purpose of these acts.[14] These provisions are usually used to "pierce the corporate veil" so as to prevent the shirking of employer responsibilities by using a

[10] An often-quoted list of factors includes: who exercises direction and control over the employees; who bears the burden of remuneration; who imposes the discipline; who hired the employees; who has the authority to dismiss them; who is perceived to be the employer by the employees; and whether there was an intention to create an employment relationship (*Labourers' International Union of North America, Local 183 v. York Condominium Corp*., [1977] O.L.R.B. Rep. 645, 648).

[11] See, e.g., *Hotel and Club Employees' Union, Local 299 v. Sutton Place Hotel*, [1980] O.L.R.B. Rep. 1538, 1552.

[12] See, e.g., *KMart Canada Limited v. Teamsters, Local 419*, 3 CLRBR (NS) 224 (1983); *United Electrical, Radio and Machine Workers of Canada v. Sylvania Lighting* Services, [1985] O.L.R.B. Rep. 1173; *National Automobile, Aerospace and Agricultural Implement Union of Canada v. Nichirin Inc.*, [1991] O.L.R.B. Rep. 1173; International *Brotherhood of Electrical Workers, Local 586 v. Dare Personnel Inc.*, [1995] O.L.R.B. Rep. 935; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015.

[13] See *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, where the user was found to be the employer with regard to two consecutive but different "temp" assignments of 6 and 18 weeks.

[14] See, e.g., Ontario Labour Relations Act, S.O. 1995, c. 1, Sched. A, s. 1(4); Ontario Employment Standards Act, R.S.O. 1990, c. E.14, s. 12(1). In the latter, two firms performing related activities will be treated as one employer only if "the intent or effect of the arrangement is to defeat, either directly or indirectly, the true intent and purpose of this Act."

number of different entities under the same control. But common control of the different entities is not a necessary requirement.[15] Hence, even if the user firm is not found to be the true employer according to the applicable tests, arguably it can still be considered as one employer together with the agency for the purpose of such acts.

This last technique appears to be the preferred one in the United States. The American jurisprudence has a concept of "single employer" as well as a concept of "joint employers." The former is used to treat as one employer different entities that are nominally independent but in reality constitute only one integrated enterprise; the latter is used to treat as "co-employers" separate entities that "share or co-determine those matters governing the essential terms and conditions of employment."[16] In order to be considered an employer, one must "meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction,"[17] but when these are shared between two entities, labour boards and courts have been willing to consider them "joint employers." Using this doctrine, they have often found temporary work agencies and user firms to be "joint employers" for purposes of the National Labor Relations Act,[18] although apparently not consistently (duRivage et al., 1998). Until recently, this did not help agency workers to enjoy the

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15 The Ontario Employment Standards Act has no reference to common control. In the Ontario Labour Relations Act the provision is as follows: "Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may… treat the corporations [etc.] as constituting one employer for the purposes of this Act…." However, the requirement of "common control or direction" has been interpreted as referring to the *activities* rather than the corporations, and accordingly, labour boards have used this provision to treat as "one employer" two entities in a subcontracting relationship, even when they were otherwise unrelated (see *Service Employees International Union, Local 204 v. Kennedy Lodge Inc.*, 7 CLRBR (NS) 157, 198 (1984); *Brantwood Manor Nursing Homes Limited v. Canadian Union of Public Employees*, 12 CLRBR (NS) 332, 396 (1986)). Incidentally, in the U.K. there is a similar concept of "associated employers," but it is limited explicitly to companies under common control (Employment Rights Act 1996, s. 231).

16 *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3rd Cir. 1982).

17 *TLI Inc.*, 271 NLRB 798, at 798 (1984); *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995).

18 See, e.g., *Holyoke Visiting Nurses Association v. NLRB*, 11 F.3d 302 (1st Cir. 1993); *M.B. Sturgis Inc.*, 331 NLRB No. 173 (2000).

benefits of collective agreements in their workplace, since the labour boards required agreement of *both* employers (both the agency and the user firm) for such a move. This policy was recently reversed, opening the gate for inclusion of agency workers within the same bargaining unit as permanent employees.[19] However, both groups of workers must still have a "community of interest,"[20] and given the way this concept has been interpreted so far, only the *long-term* agency workers are expected to be included.

The "joint employer" doctrine has also been used in the context of the Fair Labor Standards Act[21] and other protective regulations (Dennard & Northup, 1994; Moberly & Grammig, 1999). Both the agency and the user firm are considered jointly and severally liable for such purposes. As in Canada, however, the determination is generally made on a case-by-case basis. User firms commonly attempt to avoid a "joint employer" status by minimizing their control over agency workers, or at least creating the appearance that these workers are being solely controlled by the agency. This is attempted, for example, by placing a representative of the agency as an "on-site manager" (Vosko, 2000, at 150). In some states the joint responsibility is prescribed in legislation, as part of licensing requirements for "employee leasing companies"; but such regulations are defined to include only on-going, indefinite arrangements, explicitly excluding temporary ones.[22] More than providing protection for "temps," then, these laws serve to legitimize (although with some minimal protections) the "payrolling" arrangements.

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19 *M.B. Sturgis Inc.*, 331 NLRB No. 173 (2000) (reversing previous precedents in which the board analyzed such situations as multi-employer cases).

20 See *Kalamazoo Paper Box*, 136 NLRB 134 (1962); *NLRB v. Sunnyland Refining Comonay*, 474 F.2d 407 (5th Cir.1973).

21 See Joint Employment Relationship Under Fair Labor Standards Act of 1938, 29 C.F.R. § 791.2(a).

22 See, e.g., Fla. Stat. § 468.520; N.H. Rev. Stat. Ann. § 277-B.

An interesting combination of the European and North American approaches is currently being developed in Israel, where the use of temporary work agencies is especially extensive.[23] According to legislation in force since July 2001, the wages and conditions of agency workers must be equal to the wages and conditions of the user firm's employees; and according to another section, currently on hold, after nine months of work for the same user firm, the latter becomes the legal employer.[24] At the same time, there are signs that the labour courts are changing their previous tune and starting to consider the user firms as the true employers, at least with regard to long-term engagements (of many years) with the same user firm.[25]

However, the new Israeli legislation leaves one significant route for derogation from the parity principle – collective bargaining with the agencies. The idea of bargaining collectively to *detract* from the rights provided by legislation, while not original (Jacobs, 1999), is quite unusual. The rational seems to be that workers who are truly moving from one brief assignment to the other would be better served by securing their rights vis-a-vis the agency. The parity of wages and conditions with the user firm's employees makes the use of long-term "temps" inefficient, thus giving the agencies a strong incentive to conclude collective agreements with their workers. It is highly unlikely, however, that these workers will be able to improve their lot with such agreements, compared with their legislated right

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23 The Ministry of Labour estimated that in 2000, 5.2% of Israeli workers were employed through temporary work agencies (as cited in Haaretz, Aug. 27, 2001). Compare with 4% in the Netherlands, 3.5% in Luxembourg, 2.9% in the U.S., 2.7% in France, 1.6% in Belgium, between 0.9% and 2.1% in the UK, and less than 1% in other European countries (Storrie, 2002, at 27-8).

24 Employment of Employees by Labour-Only Contractors Law, 1996, as amended 2000.

25 See, e.g., *Levinger v. The State of Israel*, National Labour Court judgement of Oct. 2, 2000 (a secretary working for the State for 20 years, 11 of which as an "independent contractor" and 9 as a "temp" through different agencies, should be considered a state employee for the whole period); *Avni-Cohen v. The State of Israel*, Tel-Aviv Labour Court judgement of July 29, 2001 (Court typists who have worked for long periods of time through agencies should be considered state employees). The Israeli legislation, while assuming that the agency is the employer (and changing this after nine months), is arguably not determinative on this issue.

to parity with user firm's employees. It is more likely that they will be forced to concessions under the threat of losing their jobs altogether (Raday, 1999).

In theory, both the European and the North American solutions surveyed above may seem capable of coping with the problem of long-term temps. In practice, however, abuse by employers – the avoidance of employer responsibilities – is reportedly still high in both continents. At least by themselves, the detailed regulations in Europe do not appear to offer sufficient solutions (Weiss, 1999). The North American method of placing employer responsibilities on the user firm is far from being sufficient either, especially with its over-reliance on examining the existence of "control." It remains to be seen whether a combined approach can solve the "holes" in the other ones; but the model that is currently being developed in Israel is far from complete in this sense. Most significantly, there are no limitations on the *reasons* for using "temps"; there is the potential for derogation by collective bargaining; and so far courts have recognized user firms as employers only after many years of service.

IV. "Outsourcing" Employer Responsibilities

Let us now turn to discuss who should, as a normative matter, be regarded as the employer. Obviously we will have to take in mind the different approaches that were surveyed above. Consider first the situations in which the role of the agency is limited to "payrolling." It can hardly be contested that the user firm should be considered the employer in such cases. The temporary work agency is only a funnel to the transfer of payments. This is not to deny the legitimacy and possible efficiency gains resulting from outsourcing payroll maintenance activities. But this has nothing to do with the definition of the legal employer. Firms that genuinely look for payroll

maintenance services to do use temporary work agencies for such purposes. The single reason for the use of the agency is to avoid the "employer" status by creating the rather superficial impression that another entity is the employer. Usually this is done in order to avoid employer responsibilities and reduce the wage and the rights enjoyed by the employee. In some cases it is also done as a way of concealing new hiring, for example when this is forbidden by a controlling organization. The law must not allow such false impressions to prevail. Indeed, when examining whether a worker is an "employee" or an "independent contractor," the most basic rule, accepted by virtually all courts throughout the world, is that one must look beyond the *form* of the relationship and into its *substance*. In other words, an employer cannot escape responsibilities simply by calling the worker "independent contractor" or by having her sign a contract stipulating that she is an independent contractor. There are courts that give some weight to such a contract while others completely ignore it. But all of them look beyond it as well. If the contract is nothing but a legal fiction, and the worker has all the characteristics of an employee, no court will accept it. And rightly so; as I have argued elsewhere, the term "employee" should include, in the context of protective labour and employment regulations, all workers who are in need of protection in light of the purposes of such regulations (Davidov, 2002). The *form* given to the relationship by the parties is often dictated by the employer who enjoys superior bargaining power, and thus says very little about the worker's need of protection. When these basic rules are brought into the new legal arena of identifying the employer, the conclusions with regard to the "payrolling" model are quite obvious. When all the agency does is to handle the payroll, there is no reason to consider it the employer. There is every reason to ignore the user firm's attempt to avoid its responsibilities – to "call the bluff" (Raday, 1999, at 424) – and consider it to

be the worker's legal employer.

The situation is not much different when the agency assumes additional personnel (or "human resources") tasks. These can be related to recruitment: advertising, interviewing, screening and testing potential employees, and even making the actual selection (Vosko, 2000, at 140-148). Such services are commonly done by recruitment/placement agencies, which are never considered the employers, and there is no reason to interpret these services differently when performed by the temporary work agency. Even if the agency is taking over additional responsibilities, whether it is communicating dismissal decisions to the employees or handling other personnel issues, this should not make a difference for determining who is the employer. The firm can outsource some of the bureaucracy attached to employment relationships to another firm. But this hardly makes a real difference for the employees, their relationship with the user firm or their need of protection. The outsourcing of such services should not be construed as changing the identity of the employer. One cannot "outsource" the status of being an employer. It is the real-life situation of the workers that matters, and this is not changed by the outsourcing of some personnel department work.

It has already been noted that to strengthen the impression that the agency is the legal employer, North American firms sometimes add an agency employee as an on-site manager (usually alongside the "real" supervisor). This is especially popular in the U.S., probably because of the strong reliance of the courts there on the "control" test, which is too often applied mechanically and formalistically. Apparently the user firms believe that when a worker is supervised by an agency employee, the agency will be considered the employer. Whether they are able to fool the courts or not, it is clear that these are merely additional attempts to avoid employer responsibilities. As a

normative matter, then, there is not much difference between this scenario and the basic "payrolling" scenario discussed above.

One additional situation that should be considered here is the employment of workers through temporary work agencies for screening or "trial" purposes (Vosko, 2000, at 152; Smith-Vidal, 1999, at 245, 247). Employers would argue that once the worker proves to be suitable she will be accepted as a regular employee, but for a trial period at the beginning it is useful to leave the worker as an employee of the agency. The idea is to be able to dismiss the worker quickly and without costs in the event that she proves unsuitable for the job. Indeed, in a recent study a significant percentage of American employers (21.3%) cited "screening job candidates for regular jobs" as an important reason for using agency temporaries (Houseman, 2000). However, laws that limit the ability to dismiss employees to a provable "just cause," and laws that establish rights to notice before dismissals or to severance pay, all become applicable only after some minimal period of work for the same employer. The law thus already recognizes the need for a "trial period" and sets the appropriate maximum for it in the context of each regulation. In such cases as well, then, the use of temporary work agencies is only designed to circumvent the law and lengthen the permissible trial period.

V. Truly Triangular Employment Relationships

The analysis is more difficult when moving to the other end of the pole, to the traditional services provided by temporary work agencies. When the work for any specific user is truly temporary, and the relationship of the worker with the agency is more than just a legal fiction, we must probe the nature of this triangular relationship in order to determine who should be considered the employer. This inquiry will also

assist us in making the determination in middle ground cases that lie somewhere in between the "traditional" and the illegitimate poles.

Like with the concept of "employee" (discussed in Davidov, 2002), the concept of the "employer" can have different meanings in different contexts, depending on the purpose of the specific regulation in question. Our inquiry here is limited to protective labour and employment regulations. In this context, just like the term "employee" is designed to cover workers that are in need of protection, the term "employer" describes the entity that should take responsibility for such protection. I have argued elsewhere that an "employee" is characterized by *democratic deficits* in the relationship vis-a-vis a specific employer, and by *dependency* on this particular employer, both economically and for the fulfillment of certain social and psychological needs (Davidov, 2002). The employer is the other side of the same story. It is not material, for the purpose of providing protection, who issues the paycheck to the employee, nor who carries the title of the "employer" as a result of contractual stipulations. The important questions are who controls the employee and subjects her to a somewhat non-democratic regime, and on whom does the employee depend, economically and for social/psychological needs. Protective labour and employment regulations are generally designed to limit the extent of democratic deficits and dependency and to correct undesired results of these phenomena (Davidov, 2002). The responsibility for protection should therefore fall on those who stand on the other side of these social problems and are able to profit from them.[26]

[26] Some judges, faced with the difficulty of transforming the tests for determining whether one is an employee into the context of who is the employer, have argued that completely different tests must be developed to the latter problem, although in essence they remained focused more or less on the same criteria (See, e.g., *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, 1073 ff. (per L'Heureux-Dube, dissenting); DBA 3-129/82 *Hershkovitz v. The State of Israel*, 12 PDA 255 (Israeli National Labour Court)). This approach, by insisting that the questions of who is an employee and who is the employer are separate and unrelated, ignores the fact that protective labour and employment regulations always place responsibility *on the employer* vis-à-vis the employee. There is no employee without an employer and no employer without employees.

As a general rule, then, in order to identify the party that should be considered the employer, we have to examine, first, who has a relationship with the employee that features democratic deficits, and second, on what relationship does the employee depend, in economic as well as in social/psychological terms, in the sense of inability to spread risks (Davidov, 2002). This is based on the general purposes of protective labour and employment laws, subject to variations that may be dictated by more particular purposes of specific regulations.

How do these general conclusions apply to the circumstances of a truly triangular relationship? Democratic deficits obviously exist in the relationship with the user firm, which determines what the worker should do and supervises her. But there are also some democratic deficits in the relationship with the agency, which controls when and where the worker will be placed. The latter becomes more pronounced when the worker is moved from one job to another more frequently. As for economic dependency, the worker depends mostly on the agency, not because it is the one that delivers the paycheck, but rather because it is the agency that determines whether the worker will have additional work whenever a particular assignment is completed. Social and psychological ties are rather minimal in temporary employment relationships, assuming the placements are for short periods of time; but to some extent workers rely on the agency for the continued supply of work as a precondition for the fulfillment of social/psychological needs.

The tangled web of relationships faced by the worker explains why the law has difficulties in tackling such cases. The most sensible conclusion that follows from the above description is that when the work is truly temporary, and the worker frequently moves from one user firm to another, *both the agency and the user firm*

Therefore, the same considerations that warrant inclusion of a worker within the scope of protective regulations – always vis-a-vis a specific employer – warrant the placing of responsibility on the said employer.

should be considered the employers. The temporary work agency should take responsibility as an employer, since the relationship of the worker with the agency is characterized by both dependency and democratic deficits. At the same time, democratic deficits in the relationship with the user firm justify the placing of responsibility on this firm as well. This invites one of two solutions: dividing the responsibilities between the agency and the user firm or placing all responsibilities on both of them jointly and severally.

The European model can be seen as a division of responsibilities, although for the most part it is the agency that has to bear the burdens of an employer. A general framework for making such a division was recently put forward by Simon Deakin (2001). Deakin argues that employers in bilateral relationships are characterized by two functions, coordination ("managerial control") and risk ("a mechanism for absorbing and spreading certain economic and social risks"). Once an agency gets into the picture, these functions are split: "coordination" vests with the user firm, while the "risk" function is left with the agency or with the worker. Accordingly, Deakin suggests that the user firm should assume obligations that attach to "coordination," like the maintenance of health and safety, while the agency should be under an obligation to provide continuing employment to the worker and to provide access to pension and occupational employment benefits, as is the case in some European systems.

While there are obvious similarities, I believe that democratic deficits and dependency better capture the characteristics of employment relationships in light of the general goals of protective labour and employment laws. And given the existence of democratic deficits vis-a-vis *both* the user firm and the agency, a division of responsibilities is bound to be more complicated and might fail to ensure that workers

are protected. To be sure, in some contexts – such as tax or unemployment insurance payments – legislatures must explicitly assign the role of the employer to one specific entity (as many of them have done) to avoid confusion. But in the more specific context of employment standards and collective bargaining laws, the best solution seems to be the placing of *joint* responsibility. This seems justified in light of the unique vulnerability of temporary agency workers and the need to ensure that the most vulnerable employees are protected. To demonstrate the workability of this solution, consider the examples of minimum wage, working hours and collective bargaining regulations.

Take the minimum wage first. Once they are considered joint employers, the agency and the user firm will have to coordinate in order to ensure compliance with minimum wage laws. The agency is the one that actually pays the wage, and must do so in accordance with minimum wage laws. But the user firm, which uses the worker, must be held responsible for that as well. It will therefore have to take steps to ensure that the agency pays the minimum wage (for example, stipulate it in its contract with the agency, and refuse to accept offers from agencies that are "too good to be true," thus implying non-compliance with legal requirements). And if the agency becomes insolvent, or for any other reason does not pay the worker a minimum wage, the user firm should be required to do so for the particular work that it enjoyed. The right of the worker to be paid a minimum wage for a particular assignment would be vis-a-vis both the agency and the user firm. There would therefore be some risk for the user firm involved in using a temporary work agency. But it is indeed the user firm, not the temporary worker, that should assume this risk, both because the firm profits from the temporary nature of the employment, and because the firm is in a better position to evaluate the financial stability of the agency and its attitude towards compliance with

legal requirements.

Consider working hours' regulations next. As long as the worker stays with the same user firm, the user firm should bear the primary responsibility for the compliance with such laws. If the worker is asked to work overtime on a given day, it will usually be by the immediate supervisor. The agency cannot be expected to be directly involved. At the same time, when there are limits on the hours to be worked over a week, or a month, and the worker moves from one user firm to another during that time, the agency must be the one responsible for compliance. So the user firm should be the employer while it uses the employee, and the agency should have overall responsibility as the employer throughout and in between her different assignments. It can be seen that even with regard to such specific regulations there is no sensible way of dividing the responsibility. The best solution is to place joint responsibility on both the agency and the user firm during the period of work for this user firm.

The issue of collective bargaining is more complicated. Since we deal here only with the traditional services of agencies, the idea of collective bargaining vis-a-vis the agencies makes a lot of sense. Those who are truly "temps" have some concerns that are different than the concerns of permanent employees of the user firms, in particular their rights between assignments. These matters can only be discussed with the agency. At the same time, it is the user firm that ultimately bears the burden of their remuneration for any given assignment, so their best chance of improving their wages is by bargaining vis-a-vis that firm. Similarly, it is the user firm that controls working conditions in the workplace, so any attempt to bargain with the agency with regard to such conditions is likely to be fruitless. Moreover, both the "temps" and the permanent workers of the user firm have an interest in bargaining

together vis-a-vis the user firm. For the "temps", this is a chance to achieve parity of terms and conditions (to the extent this is not dictated by law). For the permanent employees, this is a way to make sure that their interests are not undermined by competition from the "temps." And since the basic goal of collective bargaining is to prevent competition between workers, such joint bargaining can certainly be justified.

Nonetheless, as a matter of practice, if the workers work for a given user firm only for brief periods it would be unrealistic to consider them part of the collective that bargains with that firm. The true "temps" can only bargain, as a matter of fact, vis-a-vis the agency, which presumably has a longer relationship with them. This should be allowed and encouraged. Importantly, this does not preclude the possibility of applying collective agreements that cover employees of the user firm, by legislation, to comparable agency workers as well (*mutatis mutandis*), as is the case in many European countries. Still, as far as the true "temps" are concerned, for the purpose of *actual* collective bargaining it appears that the agency alone should be considered the employer.[27]

Having said that, it must be acknowledged that the line between the true "temps" and those workers that should be considered employees of the user firm for all purposes is often far from clear. A worker can start working on a short-term assignment, then stay with the same user firm for an additional assignment, eventually working long-term for the same firm. At first it appears that only the agency should be the employer for purposes of collective bargaining, but as time goes by this is less and less clear. The worker may be part to a collective agreement with the agency (if she and her peers where able to overcome the barriers to unionization), but after a year or

[27] On the practical problems of a different solution see the passionate dissent of L'Heureux-Dube J. in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015. The majority in this case approved a Quebec Labour Court decision to consider the user firm as the employer of a short-term "temp." See also Trudeau, 1997.

two with the same user firm it becomes for the most part irrelevant. At this stage the worker will be less interested in her theoretical rights between assignments, and more interested in parity with her colleagues at the user firm and the conditions of work there. From the point of view of the user firm's employees, as well, this worker should be part of their bargaining unit at this stage. So a "community of interest" may build over time. Workers through agencies have their own interests as long as they frequently switch assignments, but the longer they stay with the same user firm the more their interests converge with those of the permanent employees.

If they stay with the same user firm for what is, in practice, an indefinite period, workers should be considered employees of that firm. But often it is not clear when exactly that point has been reached. A useful solution could be to allow the workers to choose where they want to exercise their collective bargaining rights at any given time. In other words, workers should be able to move from one bargaining unit to another as their situation changes. Once again, then, according to this suggestion, both the agency and the user firm would be considered "employers." In this context, there is not much room for coordination between them, and they should not be considered as one employer, but rather both should be considered (separately) employers for purposes of deciding against whom does the worker have a right to bargain collectively.

VI. Conclusions

In analyzing triangular employment relationships, one must differentiate between the "traditional" services supplied by temporary work agencies – those involving truly *temporary* work – and attempts by employers to avoid their responsibilities simply by formally naming an agency the "employer."

Situations in which the work is truly temporary, and the worker frequently moves from one assignment to another, are now considered legitimate around the world. In most countries, the agency is considered to be the employer in such cases. However, as our inquiry revealed, both the temporary work agency and the user firm have some of the characteristics of an employer. While economic and social/psychological dependency will usually be on the agency, democratic deficits are found in both of the worker's relationships, with the agency as well as the user firm. In order to ensure that this vulnerable group of workers is protected, then, both the agency and the user firm should be considered the legal employers.

As for the other group of cases, those involving attempts by employers to avoid responsibilities, there is no justification for their existence. When employers try to avoid the "employer" status, they do so on the backs of the weakest and most vulnerable workers. They not only create a lower class of employees – as they do with other contingent workers – but also dodge any responsibility for them. And this does not refer only to moral responsibilities, but to the basic rights that employees have, according to the law, vis-a-vis their employers.

There are two main methods to prevent, or at least minimize, such occurrences. The first method, common in Europe, is based on specific regulations that (a) list the situations in which employment of workers through agencies is permitted, i.e. define the truly temporary engagements; (b) provide protection to the workers, e.g. parity of wages and conditions between agency workers and permanent employees, thus also minimizing incentives to the undesired use of agencies; and (c) place responsibility on the user firm when the agency cannot or does not perform the role of the employer adequately, or when the engagement does not conform with the previous requirements. The second method, which can be found in North America,

albeit not consistently, is to "call the bluff" and name the user firm as the true employer, whether by itself or jointly and severally with the agency.

Both methods are helpful, but not sufficient. To best tackle the spread of this troubling phenomenon, it is suggested that legislatures combine restrictive regulations (of the (a) and (b) kinds) with joint employer status *from the first day of each assignment*. Regulations of the kind found in Europe should be the first and most significant line of defense, but they cannot completely eliminate the illegitimate avoidance of responsibility. The placing of responsibility on both the agency and the user firm is a great supplementary measure, since it takes away any incentive that the user firm may had for illegitimate arrangements. And since, as we have seen, this solution is appropriate even when the work is (and remains) truly temporary, it can be implemented from the first day of each assignment. This relieves the courts from some of the need to tangle with blurry lines, and minimizes the extent to which employers can use such blurry lines to escape responsibilities. If an arrangement is clearly an illegitimate "outsourcing" of responsibilities, the user firm should be considered the sole employer. But in any case of doubts the simple solution is to place responsibility on both the agency and the user firm. This fits both the "traditional" arrangements and those arrangements that are closer to the "payrolling" pole.

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