

Legal Concept of “Worker” under Trade Union Law in Britain and Japan

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I Introduction

1. The object of this paper is to consider legal concept of "worker" under trade union laws in Britain and Japan. In so doing I use the method of comparative and historical perspective. Through this consideration I argue that the difference of statutory definition of "worker" under trade union law and of interpretations of it between Britain and Japan stems from the different models of the form of trade unions and the histories of formation of legal concept of "worker" under trade union law between in Britain and Japan.

II Statutory definition of "worker" under trade union laws

A. Definition of "worker" under the Trade Union and Labour Relations (Consolidation) Act 1992 in Britain

(i) I am grateful to Professor K. D. Ewing for extremely helpful comments at the study meeting held in Tokyo (Senshu University) on 9th November 2012, and to Professor Lucy Vickers for extremely helpful comments on an earlier draft of this paper. All errors remain my responsibility. This paper is one of the results of study which is given a grant from the Japan Society for the Promotion of Science (Basic Study (B) No.22330022).

2. The “worker” is one of the constituent elements of trade union definition (the Trade Union and Labour Relations (Consolidation) Act 1992 (hereinafter TULRCA 1992), s.1). The TULRCA 1992 s.1 provides as follows.

S.1 Meaning of “trade union”

In this Act a “trade union” means an organisation (whether temporary or permanent)—

- (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers’ associations; or
- (b) which consists wholly or mainly of—
 - (i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or
 - (ii) representatives of such constituent or affiliated organisations, and whose principal purposes include the regulation of relations between workers and employers or between workers and employers’ associations, or the regulation of relations between its constituent or affiliated organisations.

And the TULRCA 1992 s.296 (1) provides the definition of “worker” as follows.

S.296 Meaning of “worker” and related expressions

- (1) In this Act “worker” means an individual who works, or normally works or seeks to work—
- (a) under a contract of employment, or
 - (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who

is not a professional client of his, or

- (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

- (2) In this Act employer, in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work.

This definition of “worker” goes beyond those who work under a contract of employment to include any other contract whereby an individual ‘undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his’. Thus, independent contractors (self-employed) are included in the definition of “worker” provided that they are under a contractual duty personally to perform the work they have undertaken to do.

3. It seems that s.296 (1) (b) can be seen to have three elements.¹⁾ The first element is that the individual must work or seek work under a contract. The second element is that the individual undertakes by the contract to do or perform personally any work or services for another party to the contract. The third element is that the individual will not be a “worker” if he is undertaking to do or perform the work or services for a professional client of his.²⁾ Among these elements the second element appears to me to be the core

(1) James v Redcats (Brands) Ltd [2007] ICR 1006 (EAT), p.1009, per Elias J. J.Bowers Q.C. et al., *The Law of Industrial Action and Trade Union Recognition* 2nd ed. (2011, Oxford University Press), pp.223-225 adds one more element which relates to the worker’s relationship with the employer who is the subject of the recognition application.

(2) An individual, like a solicitor, who works for ‘professional client’ is excluded from the definition of “worker”. *Carter v Law Society* [1973] ICR 113.

of the elements. Relating to that element, it is pointed out that if there is an agreement in the contract allowing the individual to provide a substitute to perform the work or services, it should be considered whether such agreement may be ‘sham’ and not truly reflect the intended working arrangement of parties.³⁾ Some academic commentators, however, point out that it is less clear that a right on the part of individual to supply a substitute necessarily prevents the contract from being one to perform work personally.⁴⁾ Anyway, as stated above, the legal concept of “worker” under British trade union law is wide.⁵⁾

4. It is pointed out that the type of independent contractors to be included as “workers” should be self-employed individuals who for the most part only enter contracts to perform work personally for a single employer, and whose degree of dependence or subordination is broadly similar to that of employee.⁶⁾ It should, however, be noted that this view is derived from an analysis of cases concerning legislation on individual employment relationship, for example the National Minimum Wage Act 1998⁷⁾, the Working Time Regulations 1998⁸⁾ etc.

(3) J.Bowers Q.C. et al., supra note 1, p.223. For example, in *James v Redcats (Brands) Ltd* [2007] ICR 1006, where the contract provided that a courier had a right to find an alternative courier if she was ‘unable to work’, the Employment Appeal Tribunal held that, since the right to provide a substitute only arose when she was unable to work, perhaps through sickness, rather than leaving the matter to her discretion according to whether or not she wished to do the job personally, this arrangement meant that the claimant was obliged to do the work personally.

(4) H.Collins, K.D.Ewing and A.McColgan, *Labour Law* (2012, Cambridge University Press), p.203.

(5) It is pointed that the width of the definition of “worker” may incidentally cause problems for the union. The union may have difficulty in establishing the necessary membership of the bargaining unit, or fear that if a ballot eventually takes place on the question of recognition; it may be refused by the wider constituency. See J.Bowers Q.C. et al., supra note 1, p.224

(6) H.Collins, K.D.Ewing and A.McColgan, supra note 4, p.204.

(7) *James v Redcats (Brands) Ltd* [2007] I.C.R. 1006.

(8) *Byrne Bros (Formwork) Ltd v Baird and Others* [2002] I.C.R. 667.

5. Since these pieces of legislation have almost the same definition of “worker” as those provided in the TULRCA 1992 s.296 (1), the discussion about the interpretation of the “worker” definition appears to make no distinction among them. As S.Deakin and G.Morris indicate, the reason for using this extended definition of dependent status is to be found in the purpose of the particular statutory provisions to which it applies.⁹⁾ And, as I discuss later, the definition of “worker” provided in the TULRCA 1992 s.296(1) which can be traced back, in almost the same form, to the Industrial Relations Act 1971, but, before that, to the Trade Disputes Act 1906 itself, which used a particularly broad definition of the term ‘workman’.¹⁰⁾ For these reasons, I think that the above view which points out that that the type of independent contractors to be included as “workers” should be self-employed individuals who for the most part only enter contracts to perform work personally for a single employer, and whose degree of dependence or subordination is broadly similar to that of employee, is inappropriate in the interpretation of the TULRCA 1992 s.296 (1).

B. Definition of "worker" under the Trade Union Law of 1949 in Japan

6. The Trade Union Law of 1949 (hereinafter TUL 1949) defines “trade union” as organisation, or federations thereof, ‘composed mainly of the workers’ (Article 2)¹¹⁾. The TUL 1949 Article 3 provides the definition of “worker” as follows.

(9) S.Deakin & G.Morris, *Labour Law* 6th ed. (2012, Hart Publishing), p.174.

(10) See S.Deakin, ‘Does the “Personal Employment Contract” Provide a Basis for the Reunification of Employment Law?’ (2007) 36 *ILJ* 68, p.78 footnote 35.

Article 3 “Workers” under this Law shall be those persons who live on their wages, salaries or other remuneration assimilable thereto, regardless of the kind of occupation.

In this definition, the phrase ‘those who live by their’ means only those who earn a living or those who, even though temporarily not doing so, work for the purpose of earning a living¹²⁾. So, academic labour lawyers and judicial decisions have attempted to interpret its meaning as a “subordinate relationship to employers”.¹³⁾ Some academic labour lawyers argue that it means economic subordinations to employers, or unequal position of bargaining.¹⁴⁾

(11) Article 2 “Trade Union” under this Law shall be those organisations, or federations thereof, formed autonomously and composed of mainly of workers for the main purposes of maintaining and improving working conditions and raising the economic status of the workers, provided, however, that this shall not apply to those—

(1) which admit to membership officers; workers in supervisory positions having direct authority with respect to hiring, firing, promotions or transfers; workers in supervisory positions having access to confidential information relating to the employer’s labour relations plans and policies so that their official duties and responsibilities directly conflict with their loyalty and responsibilities as members of trade union concerned; and other persons who represent the interests of the employer:

(2) which receive the employer’s financial support in defraying the organisations’ operational expenditures, provided, however, that this shall not prevent the employer from permitting workers to confer or negotiate with the employer during working hours without loss of time or pay and this shall not apply to the employer’s contributions for public welfare funds or welfare and other funds which are actually used for payments to prevent or relief economic misfortunes or accidents, nor to the furnishing of minimum office space;

(3) whose objects are confined to mutual aid work or other welfare work;

(4) whose objects are principally political or social movements.

(12) K.Sugeno, *Japanese Employment and Labor Law* (translated by L.Kanowitz) (2002, Carolina Academic Press, University of Tokyo Press), p.505.

(13) *Ibid.*, pp.505-506.

(14) S.Nishitani, *Rodo Ho (Labour Law)* (2008, Nihon Hyoronsha, Tokyo), p.459.

7. However, the Supreme Court has held that in cases raising specific questions about whether an individual is a “worker”, the following circumstances should be comprehensively taken into consideration.¹⁵⁾ These circumstances are (i) whether or not the individual is integrated into the organisation of the enterprise; (ii) whether or not the enterprise decides the detail of the contract unilaterally; (iii) whether or not the remuneration for the individual has the nature of compensation for his/her provision of labour, in light of the method of calculation, etc.; (iv) whether or not the individual is basically obligated to accept separate offers of work from the enterprise; and (v) whether or not the individual provides labour under the control and supervision of the enterprise or under some constraints on time or place of work.

8. It should be emphasised that in examining the third circumstance, the Supreme Court of Japan decided whether there was the third circumstance or not, from a point of reality of the relationship of the parties, not from a point of literal interpretation of a contract. It is the same approach as those of British courts when they consider whether such agreement may be ‘sham’ and not truly reflect the intended working arrangement of parties, if there is an agreement in the contract allowing the individual to provide a substitute to perform the work or services.¹⁶⁾

9. The background of the two cases recently decided by the Supreme Court of Japan is the circumstance that it has become more popular for enterprises to adopt a scheme wherein work that was conventionally performed by workers

(15) Shin-Kokuritsu Gekijyo Unei Zaidan case, 1026 Rodo Hanrei 6 (Supreme Court, April 12, 2011); INAX Maintenance case, 1026 Rodo Hanrei 27 (Supreme Court, April 12, 2011); Victor Service Engineering case, 1043 Rodo Hanrei 5 (Supreme Court, February 21, 2012).

(16) James v Redcats (Brands) Ltd [2007] ICR 1006.

under contracts of employment is, at least as a matter of form, assigned to self-employed individuals under contracts for services.¹⁷⁾ Against this background, in the three Supreme Court's cases, self-employed individuals joined a general union or a community union to collectively bargain with the enterprise for better terms and conditions of their work, but the enterprises refused to bargain collectively with the representatives of the unions, arguing that they are not "workers".¹⁸⁾ It should be noticed that the other party with whom the general union or community union which self-employed individuals belong to, requests to collectively bargain, is not an organisation of employers but a single individual enterprise.

III History of the formation of legal concept of "worker"

A. History of the formation of legal concept of "worker" in Britain

10. As G.Davidov pointed out, the term "worker" and the phrase used to define it ('a contract ...[to] perform personally any work...') go back as far as 1875.¹⁹⁾ Under the Employers and Workmen Act 1875 s.10, the expression "workman" meant any person who 'has entered into or works under a contract with an employer, whether the contract be express or implied, oral or in writing, and be a contract of service or a contract personally execute any work or labour'.

(17) H.Takeuchi-Okuno, 'General Unions and Community Unions, and Japanese Labor Law' 9 Japan Labor Review 1 (2012) 86, p.89. The two Supreme Court's cases are the INAX Maintenance case and the Victor Service Engineering case mentioned above.

(18) In Shin-Kokuritsu Gekijyo Unei Zaidan case and INAX Maintenance case, the Supreme Court of Japan found that the self-employed individuals concerned are "workers" within the meaning of Article 3 of T U L of 1949. In Victor Service Engineering case, it ordered the case to be returned to the court of original jurisdiction for examining a case fully.

(19) G.Davidov, 'What is a Worker?' (2005) 34 ILJ 57, p.58.

It included independent contractors who gave their personal labour.²⁰⁾ And it should be noticed that this Act ended the criminal liability of workers for breach of contract and provided a more stable basis for union growth.²¹⁾

11. Then the Trade Dispute Act 1906 provided the definition of “workmen” in the field of trade union law. The Trade Dispute Act 1906 s.5 (3) defined “workmen” as 'all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises'. It was suggested, from the practice of the Registrars of Friendly Societies, that the word 'employed' here did not confine the definition to persons employed under a contract of service, and that persons, such as professional workers, performing contracts for services were included.²²⁾ The associations which were registered or certified as a trade union by the Registrars of Friendly Societies included craft unions composed of self-employed, for examples, National Union of Journalists, Musicians' Union, and British Actors' Equity Association etc. And it was suggested, from the decisions (Dallimore v Williams and Jesso²³⁾ and *Brimelow v Casson*²⁴⁾) which did not directly decide the matter of the definition of "workmen", that a similarly wide interpretation of the definition of "workmen" would be adopted by the courts.²⁵⁾

(20) *Grainger v Aynsley* (1880-81) LR QBD 182 (HC), which held that a potter's printer, under a contract with his employers to do work in which he was assisted by “transferrers” whom he himself engaged and paid, was a “workman” within the Act, and liable in proceedings before a magistrate to pay damages for a breach of his contract with his employers, caused by his transferrers' refusal to do the work, although he was ready and willing to do it ; F.Tylyard, *Industrial Law* (1916, A & C Black), p.3.

(21) S.Deakin and F.Wilkinson, *The Law of the Labour Market* (2005, Oxford University Press), pp.206-208.

(22) N.A.Citrine, *Trade Union Law* 2nd ed. (1960, Stevens & Sons Co. Ltd.), p.312; C.Grunfeld, *Modern Trade Union Law* (1966, Sweet & Maxwell),p.11.

12. Then in 1971, the Industrial Relations Act 1971 provided the definition of "worker" (s.167 (1)). It was almost the same definition of "worker" as the current one (TULRCA 1992 s.296 (1)). It was pointed out that the provision of definition in the s.167 (1) (b) was intended to include a contract for service (under the term 'any other contract') as well as a contract of service.²⁶⁾ It seems that the widened definition of "worker" recognizes that there may be a lawful trade dispute (a prerequisite of immunity for the organisation of industrial action) in defence of the interests of self-employed 'workers' in the collective rights field.²⁷⁾ The legislature seems to me to have used the legal concept of "workman" in the Employers and Workmen Act 1875 with the changed name of "worker", to extend the coverage of law to self-employed who works under a contract for service in trade union law field.

(23) *Dallimore v Williams and Jesso* (1913) 29 TLR 67 (CA). In this case the plaintiff, bandmaster engaged a number of performers for a concert at varying rates agreed upon by them individually. The majority of the performers were members of the Amalgamated Musicians' Union. The defendant, the official of the union and acting on its behalf, procured breaches of contracts by members of the union, by threatening them that if they took part in the concert they would be penalised by the union, to force the plaintiff (bandmaster) to pay the agreed rate of Sunday performance. The Court of Appeal held that the defendant (union official) had acted in contemplation or furtherance of trade dispute.

(24) *Brimelow v Casson* [1924] 1 Ch 302 (CA). In this case it was urged that actors were not workmen because acting was neither a trade nor industry. On this, Russell J. said; "This appears to me a narrow view of the section. There is no definition of 'trade or industry' in the Act, but it seems to me that the business of presenting histrionic performances to the public for profit may fairly be described as a trade or industry in which many persons, including actors, are employed." (at p.313.)

(25) H.H.Slessor and C.Baker, *Trade Union Law* (1921, Nisbet & Co.Ltd.), p.230; N.A.Citrine, *supra* note 22, pp.312-313.

(26) A.C.Campbell, *Industrial Relations Act: An Introduction* (1971, Longman), p.198.

(27) S.Deakin & G.Morris, *supra* note 9, p.175.

B. History of the formation of legal concept of “worker” in Japan

13. Japan did not have trade union law until the World War II ended in 1945. The Trade Union Law of 1945 which was the first trade union law in Japan, was influenced by UK (on provision for immunity from criminal and civil liabilities of trade unions), by Germany (on those for the effects of collective bargaining agreement), and by USA (on the Labour Relations Commission).²⁸⁾ In 1949, amendments to the Trade Union Law of 1945 were enacted, and then totally changed into the Trade Union Law of 1949.²⁹⁾ One of the most important points of amendment was a complete revision of the unfair labour practice system. Employers’ refusal of collective bargaining and their control of unions were added to the list of unfair labour practices, and the procedures for obtaining remedies were changed from criminal penalties to forms of administrative relief. Furthermore, the main aim of the Trade Union Law as stated in Article 1 was amended ‘to elevate the status of workers by promoting their equal standing with their employers in bargaining’. However, the definition of “worker” as stated in Article 3 was not amended.

14. The interpretation of the definition of “worker” (Article 3) which was given by the key person who took part in the enactment of the Trade Union Law of 1945 was that the “worker” means ‘salary earners’, including civil servants.³⁰⁾ However, in the House of Representatives at the 89th Imperial Diet when the Bill of Trade Union Law of 1945 was discussed, the then Minister of Public Welfare replied that the “worker” include piece rate independent contractors who work at home.³¹⁾ Thus, the then predominant interpretation of

(28) T.Hanami and F.Komiya, *Labour Law in Japan* (2011, Wolters Kluwer), p.41.

(29) See K.Sugeno, *supra* note 12, p.9.

(30) I.Suehiro, *Rodo Kumiai Ho Kaisetsu (A Commentary on Trade Union Law)* (1946, Nihon Hyoronsha), pp.21-22.

the definition of “worker” was that the “worker” means a person who was normally recognised as ‘salary earners’ and piece rate independent contractors who work at home.³²⁾

15. After the enactment of the Trade Union Law of 1949, the Labour Commissions decided on the definition of “worker” taking into consideration of the following circumstances. These circumstances are (i) the remuneration for the individual has the nature of compensation for his/her provision of labour; (ii) whether or not the individual provides labour under the control and supervision of the enterprise or under some constraints on time or place of work; and (iii) the individual is not an person conducting a business on his/her personal account.³³⁾ And in 1976, the Supreme Court held that the orchestra members, who were under free-lance performance contracts, were “workers”, taking into consideration the following circumstances. These circumstances were (i) the company insured a complement of musicians who were indispensable to the company’s broadcasts under the contract; (ii) even if this was a ‘free-lance contract’, it was premised on an obligation to abide by the company’s requisition of players; (iii) the company could be said to have a basic right to oversee the musicians’ performance; (iv) the performance fee could be said to be compensation for work.³⁴⁾ And then recently, the Supreme

(31) The House of Representatives at 89th Imperial Diet, 13 December 1946, per Minister of Public Welfare H.Ashida.

(32) K.Kamata, ‘Rodo Kumiai Ho jyono Rodosha Gainen no Rekishiteki Keisei’ (Historical Formation of the Concept of Worker under Trade Union Law) in F.Komiya et.al., ed., *Shakai Ho no Saikochiku (Reconstruction of Social Law)* (2011, Junposha, Tokyo), p.20.

(33) For example, the Tokyo Hepp Sandal-ko Kumiai case, the Central Labour Commission in 1960.8.17, Chuo Rodo Jiho, No.357; Nihon professional Yakyu Soshiki case, the Tokyo Metropolitan Labour Commission in 1985.11.14. See K.Sugeno, *supra* note 12, pp.506-507.

(34) CBC Kangengakudan Rodo Kumiai case, 30 Civil Cases 437 (Supreme Court, April 6, 1976). See K.Sugeno, *supra* note 12, pp.506-507.

Court decided three cases and in those cases indicated the five circumstances to be taken into consideration as the above mentioned at para.7.

16. In the development of the interpretations of the definition of “worker”, the two circumstances of (a) whether or not the individual is integrated into the organisation of the enterprise, and (b) whether or not the individual provides labour under the control and supervision of the enterprise or under some constraints on time or place of work, have been granted a great deal of importance among the circumstances to be taken into consideration.³⁵⁾ This appears to me to stem from the following. Most of the cases dealt by the Labour Commissions and the courts were on unfair labour practice of refusal of collective bargaining without just reason (Article 7 No.2 of TUL of 1949). In those cases, the other party with whom the general union or community union which self-employed individuals belong to, requests to collectively bargain, was not an organisation of employers but the individual enterprise, like an enterprise union case. The two circumstances to be taken into consideration are in conformity with the above situations.

IV Difference between British and Japanese legal concepts of “worker” —A tentative Conclusion

17. Considering the above stated, I think that the difference between British legal concept of “worker” and Japanese one stems from the model of trade unions on which trade union law is premised. In Britain, craft unions composed of self-employed who worked under contracts for services were originally common. Workers who belong to craft unions do not necessarily work for a single employer. It seems to me that for these reasons, the

(35) K.Kamata, supra note 32, pp.32-33.

British legal concept of “worker” under trade union law takes the form of the provision of the TULRCA 1992 s.296 (1) which is interpreted as a broad concept.

18. Compared with this, I think that the Trade Union Law of 1949 is based on the model of industrial relations which are composed of enterprise unions in Japan. Thus as stated above, in interpreting of the definition of “worker” the two circumstances of (a) whether or not the individual is integrated into the organisation of the enterprise, and (b) whether or not the individual provides labour under the control and supervision of the enterprise or under some constraints on time or place of work, have been granted a great deal of importance among the circumstances to be taken into consideration.

19. Considered in this way, if the Labour Commissions or the courts of Japan deal with a case of a craft union which is composed of self-employed people who work under a contract for service, for example a trade union of professional sportspeople, of musicians, and of actors/actresses etc., and which collectively bargain with an employers’ association, those two circumstances should not be taken into consideration, since these circumstances are in conformity with the enterprise union and single employer model industrial relations, but inappropriate for the craft union and employers’ association model industrial relations.

【付記】

本稿は、2012年11月9日・10日に専修大学神田校舎を会場に開催した、ミニ・シンポジウム「労働組合法の歴史的展開—イギリスと日本」において、第1日目に報告した際の報告原稿に加筆・修正を行ったものである。このミニ・シンポジウムは、平成24年度科学研究費補助金基盤研究(B)「雇用関係の『契

約化』と労使関係法制の歴史的展開に関する法理論的・比較法的研究」(研究代表者:有田謙司・課題番号:22330022)の交付を受けて行われたものである。なお、第2日目には、K. D. Ewing教授(King’s College)が、“The Rise and fall of Collective Bargaining in Britain, 1912-2012: The Role of the State and the Role of Law” と題する報告をされたが、この報告原稿を本科研費の研究分担者である古川陽二教授(大東文化大学)と翻訳したものが、季刊労働法240号(2013年3月)に掲載されているので、あわせて参照されたい。

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